

IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

Case No: 9619/2009

In the matter between:

VIKASH LUCKEN

Plaintiff

and

BOY DOMINIC NDLOVU

Defendant

JUDGMENT

Delivered: 28 June 2013

MBATHA J

[1] This is a claim for damages arising from a collision of the Plaintiff's motor vehicle and the Defendant's motor vehicle. The trial proceeded on liability only, as per agreement between the parties.

[2] It is common cause that a collision occurred between motor vehicle registration number N[...] driven by the Plaintiff and motor vehicle registration number N[...] driven by the Defendant. The collision occurred on the 8th of October 2008 at the

intersection of Argyle Road and NMR Avenue, in Durban. The collision occurred at about 7h00. It is also common cause that both motor vehicles were damaged in the collision.

[3]The only issue in dispute is whether it was the Defendant who caused the collision or not.

[4]Plaintiff's evidence is that he was driving down Argyle Road towards the intersection at NMR Avenue. He was on the farthest left lane of Argyle Road driving at about 50-55 km per hour. As he entered the intersection, the Defendant without warning turned right across his path of travel. A collision occurred between his motor vehicle and the Defendant's motor vehicle. His motor vehicle was damaged in the front and the Defendant's motor vehicle was damaged on the left hand side. Plaintiff further stated that as result on the collision he sustained damages in the sum of R139 362.37 being the reasonable and necessary costs of repairing his motor vehicle, which had to be towed from the scene of the collision at the cost of R2 250.00. The Plaintiff is therefore seeking judgment in his favour against the Defendant.

[5]The Defendant disputes that he was the cause of the collision. His version is that on that morning he was travelling in the opposite direction of Argyle Road and approached the NMR intersection. He was travelling on the extreme right lane. He stopped at the robot and awaited the green arrow to allow him to enter the intersection. He observed that there were two (2) motor vehicles in the first and second lanes opposite him, where he was crossing the intersection. They were in a stationary position, as the robot had closed for them. He then proceeded to enter the intersection, turned right as the arrow had turned green to allow him to move

forward. He drove past opposite the first stationary motor vehicle. As he was opposite the second lane he saw a motor vehicle coming at a high speed towards him. He accelerated forward to avoid being hit by it. He also tried to turn and swerve in trying to avoid the collision but his motor vehicle was still hit on the left hand side by the motor vehicle driven by the Plaintiff. The Defendant suffered damages in the sum of R108 700.00.

[7]Prior to the commencement of the trial, the Defendant withdrew his counterclaim as he had been compensated by his insurers.

[8]An inspection *in loco* was held by the Court to ascertain how the robots operate at the intersection of Argyle Road and NMR Avenue. It is important to record that the inspection *in loco* took place between 14h30 and 15h20 and not at 7h00. The Court observed that the robots turn to green and red simultaneously on each side of Argyle Road where there is an intersection to NMR Avenue. It was further observed that at intervals of 10 to 15 minutes a green arrow would appear on the robot to allow traffic to cross the intersection to the right hand of the road. Whilst the arrow reflect green, the traffic coming from the opposite direction to the line travel of the turning motor vehicles remain waiting at the robot until the arrow turns to amber, then the robot changes to a green light to allow them to move forward.

The Court observed that this is a major road, which is very busy even at that the time of the day. The road has three (3) lanes on each side to indicate how busy it is and that it is designed to deal with volumes of traffic.

[9]The Plaintiff's evidence is that the robots were green as he approached the intersection and he had a right of way. The Defendant entered the intersection at an inopportune moment and tried to cross before the Plaintiff moved past the

intersection. The Plaintiff applied the brakes but still collided with the Defendant's motor vehicle on the left hand side.

[10]In analysing the evidence of the Plaintiff, the following left an impression on the Court:

10.1The Plaintiff's evidence is that he is always cautious when he drives with his seven (7) year old son. One wonders then what the child was doing in the front passenger seat.

10.2The Plaintiff admitted that he was not aware of the presence of the other two (2) drivers in lane one and two parallel to the lane where he was driving.

10.3The Plaintiff informed the Court that he drove at a speed of about 50 to 55 km per hour but, according to him, the Defendant's motor vehicle was hit by his motor vehicle and pushed to a distance of about six (6) metres away from the point impact.

APPLICATION OF THE LAW

[11]The Plaintiff bears the onus of proof in this case. The Court must determine on the evidence before this Court if he has discharged the required onus on the balance of probabilities.

[12]It is clear that there are two (2) contradictory versions before this Court. No independent evidence has been led by the Plaintiff to corroborate his version. It is his word against the Defendant's word.

[13]It is clear from the evidence of the Plaintiff and the photos indicating the damage to the Plaintiff's motor vehicle presented before this Court as evidence, that this was a serious collision. The Plaintiff has failed to lead any independent evidence either by way of the police accident report and sketch plans thereto, which would have assisted in proving his case. The Court is left in the dark, even with regard to issues which are often determined by the police or other experts, like the determination of point of impact. It is trite that Courts are often assisted by such evidence where there are mutually destructive versions. It is also important that where there are witnesses, that such witnesses are called to give evidence in Court. Some kind of physical evidence, like broken glass, skid marks, brake marks found on the collision scene assist the Plaintiff in proving his case. No such evidence was adduced in this trial. It is very unlikely in this case that there was no such evidence, due to the magnitude of the damages suffered by the Plaintiff and the Defendant. The Plaintiff bears the onus of proof to prove negligence on the part of the Defendant. No explanation was given by the Plaintiff for the failure to present such important evidence.

[14]The Defendant's denies being the cause of the collision. The Defendant's evidence is that the Plaintiff failed to keep a proper lookout, was not driving at the reasonable speed in the circumstances and he entered the Defendant's path of way, when he should have stopped at the robot.

It is an established duty of the driver to keep a proper lookout when approaching an intersection, as stated in **Matindale v Woltraadt** 1940 AD 235 at 242 to 245. The duty to keep a proper lookout means awareness of what is happening in your immediate vicinity on the entire road, including the pavements. The standard is high on the road user, in keeping a proper lookout, where there is an intersection. He

must take all reasonable steps not to collide with other motor vehicles coming from the other side of the road.

[15]Even though the intersection is controlled by traffic lights and the traffic lights are in your favour it does not relieve you from a duty to appreciate the reasonable possibility of, and to keep a proper lookout for traffic which had entered the intersection lawfully, but may still be in the intersection. The driver is required to regulate the speed and his entry so as not to endanger the safety of such traffic. **Santan Insurance Co. LTD v Gouws** 1985 (2) SA 629 (A) at 634.

[16]The probabilities in this case indicate that the Defendant entered the intersection lawfully as he went past the two (2) stationary motor vehicles at the intersection. He would not have been able to go past the first two (2) lanes at all if the robots were closed for him. The Plaintiff admitted that he was not even aware of the presence of the other motor vehicles in his own path of travel. I take this to mean that he was not keeping a proper lookout at all. He did not dispute the presence of the other two (2) motor vehicles in his line of travel, save to say that he was not aware of them.

[17]The Plaintiff was approaching an intersection of a busy road. I find that the he should have reduced his speed, should have been more aware of the presence of other road users and should have been more cautious of the presence of other road users.

[18]Counsel for the Plaintiff submitted that since the Defendant withdrew his counterclaim on the trial day, the Defendant was left with a bare denial plea only. The reason for the withdrawal of the counterclaim was that the Defendant's claim had been settled by his insurance company. I find that a bare denial is sufficient in this case, more so as the withdrawn counterclaim fully substantiated it. The Plaintiff

bears the onus of proof and not the Defendant. A bare denial is a valid defence in law. I was referred to **Nyandeni v Natal Motor industries LTD** 1974 SA (2) 274 (D), where counsel submitted that there must have been an amendment to the pleadings by the Defendant. At the same time, at the inception of the trial, there was no application by the Plaintiff to strike off the Defendant's defence. The counterclaim formed part of the pleadings up to the day of the trial and nothing prejudiced the Plaintiff in this case. The basis of the Defendant's defence has not changed at all and he fully gave evidence in Court in line with what was in the withdrawn counterclaim.

[19] Having considered and evaluated all the evidence before this Court I find that no negligence can be attributed to the Defendant. The Plaintiff has failed to discharge the onus placed upon him to prove that the Defendant was the cause of the collision through his negligent driving.

[20] I therefore made the following order:

(a) The Plaintiff's claim is dismissed with costs

MBATHA J

Date of hearing: 25 June 2013

Date of Judgment: 28 June 2013

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