

**IN THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA**

Case No: 10110/09

In the matter between

Devshen Kanniah

Plaintiff

and

Road Accident Fund

Defendant

JUDGMENT

25 November 2011

Steyn J

- [1] The cause of action alleged in the particulars of claim is that on 9 August 2007 at approximately 4h45 at the intersection of Stanger and Pine Streets, Durban, a collision occurred between two motor vehicles. The accident gave rise to the action for damages on the part of the plaintiff who had been seriously injured in the collision. The aforesaid intersection is controlled by traffic lights. The insured driver was the driver of the vehicle travelling along Pine Street and the plaintiff was a

passenger in the vehicle travelling along Stanger Street. The plaintiff was a passenger in a white Golf with registration number ND 240306. The insured driver was driving a silver Odyssey with registration number NU 2974. It is alleged by the plaintiff that the accident was caused by the negligence of the insured driver. The particulars of negligence are set out in the pleadings.

[2] At the commencement of the trial there was an application in terms of Rule 33(4) to have the issues separated, which was not opposed. An order was subsequently granted to separate the issues, and the trial proceeded on liability only.

[3] Mr Padayachee SC, acting on behalf of the defendant, applied for an amendment to the defendant's plea at para 5(j) to read:

"The driver of ND 240306 drove through a red robot."

The application to amend was not opposed and the defendant's plea was accordingly amended.

[4] Mr Mukadam, acted on behalf of the plaintiff, and led the

evidence of two witnesses and the defendant led the evidence of the insured driver, a passenger in the insured vehicle and a security guard who observed the accident.

[5] At the outset the following appear to be common cause between the parties, i.e. that an accident occurred between the vehicles ND 240306 and NU 2974 on the said date at the intersection of Pine and Stanger Street, Durban.¹ It appears further to be common cause that the accident occurred in the early hours of the morning at approximately 04h45. It also appears to be common cause that the plaintiff was a passenger in vehicle ND 240306 and that the insured driver was the driver of motor vehicle NU 2974. It is also common cause that the aforesaid intersection is controlled by traffic lights.

[6] What remained in dispute is who caused the collision, the dispute being either:

1. that the defendant's insured driver caused the collision by

¹ The parties preferred to use the old names of the streets but were aware that 'Stanger' is now 'Stalwart Simelane Street', and 'Pine' is 'Dr Monty Naicker Street'.

failing to stop, alternatively by failing to stop at a red robot and entered the intersection when the robot was red and failed to stop, swerve, turn or take any other evasive action to avoid the collision; or

2. that the plaintiff's driver failed to stop at the red robot and proceeded against the signal into the intersection at high speed across the insured driver's path of travel.

[7] The driver of the plaintiff's vehicle was coming from Stanger Street, driving north when the collision occurred at the intersection of Stanger and Pine Street. Stanger Street is divided into 6 lanes and Pine Street into 5 lanes. Plaintiff claimed that the robot gave right of way to their car and the insured driver claimed that the traffic light was green in his favour and gave him right of way. Given the evidence there is no basis to doubt that the traffic lights were in a good working order. Which means that if the light was green for one, then it would have been red for the other.

[8] Plaintiff's evidence:

8.1 Avash Jaganath

He was a passenger in the white Golf, travelling on Stanger street proceeding forwards to the intersection of Pine and Stanger. On their approach to the intersection the robot was red but as they got near the intersection, the light changed to green and they proceeded. According to him the driver initially applied brakes but when the light changed to green the driver proceeded into the intersection. It had been his evidence that they were travelling in the second lane from the left in Stanger Street. When their vehicle was one and a half car lengths into the intersection the collision occurred. The Golf was hit on the right-hand side. His evidence was that the insured vehicle hit their vehicle almost dead centre and their vehicle spun around, hit the pavement and bounced back.

There were 5 occupants in the Golf: The driver, Raven Naicker and next to him in the front passenger seat was Zahir and behind him the witness was seated and, next to the witness was a female, Nazima, and next to her was Devshan, the plaintiff in this matter. Both the driver as well as the female were killed in the accident. The

plaintiff, Devshan, suffered serious injuries so much so that he lost his eye and had undergone facial reconstruction. Zahir and the witness were not too seriously injured.

In his opinion the insured vehicle was driving fast because it hit them within seconds. They were all coming from a nightclub, where everyone had consumed alcohol except the driver, Raven. It had been his testimony that they had shooters and ciders, not beer. He acknowledged that his attention was not totally dedicated to the method and manner in which the driver of their vehicle was driving.

Mr Jaganath was confronted in cross-examination with the statement that he had made to the police, which indicated that their vehicle was travelling on Pine Street and also that the driver stopped the vehicle at the robot instead of just slowing down. He was challenged on the issue that at the time when the statement was made to the police, he had been in a far better position to recollect the events since everything was fresh in his

mind. Mr Jagannath after this line of questioning blamed the police officer who took the statement for the incorrect information contained in the statement. According to him he merely signed the statement without having had the opportunity to read it. Upon further probing by counsel for the defendant he conceded that the officer had read it back to him but suggested that it must have been incorrectly read back to him by the police officer. During the cross-examination it turned out that Mr Jaganath is a reasonable intelligent person, who knows what it means to take an oath and the importance of the oath in any trial process.

8.2 Inspector Patrick Herron also testified on behalf of the plaintiff. He is assigned to the SAPS's Accident Response Unit. He attended the said accident scene on 9 August 2007, at the corner of Pine and Stanger Streets. When he arrived at the scene, he found two vehicles, a Golf and a Honda Odyssey. When he was at the scene a witness Mr Shabalala approached him. He made a note in his statement that the driver of the Golf

entered the intersection before the Odyssey. He got distracted before he could interview the witness and when he turned around to speak to Mr Shabalala, the witness was gone. There was a large crowd on the scene and he was working under pressure. Mr Shabalala said to him that he observed that the Golf had disregarded the traffic light at Stanger and West Street and also the red traffic light at Pine and Stanger. In cross-examination he admitted that he regarded Mr Shabalala as an independent witness. He also agreed that he placed reliance on the version given by Mr Shabalala as well as the driver of the Odyssey, Mr Joshi. He found no reason to fault their version. He conceded that the momentum of the Golf was so much that even after it was hit by the Odyssey it was able to travel almost twice the distance that the Odyssey had travelled before it came to a standstill.

In his view the robots were in a good working order. He also described the phasing of a traffic light which means that at one point both traffic lights will be red for three seconds, but it would never be green at the same time.

Inspector Herron founds the areas of impact ahead of the second lane in Pine Street and ahead of the third lane in Stanger Street. In fact inspector Herron determined area of impact as 15,6 on from the stop line in Pine Street and 13 metres from the stop line in Stanger Street.

This concluded the evidence of the plaintiff.

[9] The defendant called:

9.1 Charles Joshi, the driver of the insured vehicle. He is a Malawian citizen who now permanently resides in South African. He is married to Yolisa Joshi, who was a passenger in his vehicle on the morning of 9 August 2007. He is a businessman and on the day he drove a silver Honda Odyssey which collided with the white Golf GTI. That morning of the accident he went to pick up his wife, who worked night shift at Scalas Restaurant. They were travelling home, when they first stopped at the intersection of Pine and Prince Alfred Street. In front of their vehicle was a Mercedes-Benz. His evidence was

that when he reached the intersection of Stanger and Pine, the robot was green for him. His vehicle is a big SUV automatic and he travelled at a speed of less than 60km per hour. When he was about eight to 10 metres in the intersection he heard his wife screaming his name and he braked but the next thing that happened was the accident.

Apart from braking there was no time to do anything else to avoid the accident. Everything happened very quickly. He sustained serious injuries in the accident and his wife was also injured.

In cross-examination Mr Joshi stated that Pine Street is a familiar road to him, since he uses Pine Street regularly to go to work and going home. He confirmed that the hotel on the corner of Pine and Stanger streets obstructs the view of vehicles coming down Stanger Street. He indicated that in order to see vehicles coming down Stanger one has to be passed the stop line of Pine Street. He was asked to explain whether he did anything else than braking to avoid the collision. He

responded by explaining how fast the accident occurred and that when he tried to brake he had to focus on keeping the car under control. He denied that he drove at a high speed. In fact he reminded counsel that he had stopped at the previous robot, which was not even 100 metres away from the said intersection, and henceforth it would have been impossible to be driving at high speed shortly after taking off from the robot at Pine and Alfred Streets.

- 9.2 The next witness was Mrs Joshi. She confirmed that her husband had picked her up from work and that they were on their way home. Her evidence was that when they were almost eight to ten metres in the intersection she saw car lights and the next moment they hit this vehicle, a Golf. She observed that the other vehicle was travelling at a high speed and that she had shouted to her husband to watch out, but it was too late.

In cross-examination she was asked whether she and Mr Joshi had discussed the accident and she admitted that they have discussed how they could have died if

they had been two or three seconds earlier at the intersection. She explained that she only saw the lights of the other vehicle when they were already in the intersection. She did not notice the vehicle earlier since the view was obscured.

9.3 Mr Smiso Shabalala, a security guard who worked at the Olwandle Hotel, on 9 August 2007, was also called. According to him at approximately half past 4 on the said morning he was at the corner of Stanger and Pine Street doing duty. They were two guards doing duty at the hotel, the other one was working inside and he was posted outside. He was standing near a pole on the said corner. His attention was caught by the noise of a speeding vehicle that was driving in Stanger Street. He kept this vehicle under observation and noticed that vehicles at Stanger and West Streets came to a standstill and then he saw how the Golf bypassed the stationery vehicles and disobeyed the red robot at the said intersection. The vehicle then reached the following intersection at Stanger and Pine Street which was also red. The vehicle was travelling at a high speed

and it disobeyed the second red traffic light and went into the intersection and collided with a car in the intersection. He noticed that the passenger in the Odyssey was thrown out of the vehicle. A lady passenger in the white Golf had died in the collision.

In cross-examination he explained how he came to the conclusion that the Golf went through a red robot before it reached the intersection of Pine and Stanger. He was questioned about his observation that the Golf was travelling in the second lane nearest to the Hotel. Despite these questions he remained adamant that the vehicle was in the second and not the third or fourth lane. During this line of questioning he made the statement that he would be surprised if one of the passengers remembered what had happened, since the occupants of the Golf were drunk. After the accident he went to the Golf to go and assist the occupants in the vehicle. On his arrival he noticed beer bottles in the car. He denied that inspector Herron spoke to him and that he had made any statement to inspector Herron. He was asked whether he ever consulted with a legal

representative in the presence of Mr and Mrs Joshi and he denied that he ever did.

This concluded all the evidence on behalf of the defendant.

[10] Both counsel in their address had consensus about one thing and that is that there are two mutually destructive versions as to how the accident occurred. Mr Mukadam argued that the evidence of inspector Herron supports the plaintiff's case and that reliance could be placed on the evidence adduced on behalf of the plaintiff.

According to Mukadam inspector Herron was an objective witness. He argued that there is a general duty of care on all drivers on all roads to take extra care and precaution. Since Mr Joshi made use of the specific road on a daily basis he should have been aware that his view would be obscured and that there is a probability that some cars do not stop at robots that time of the morning.

Mr Padayachee asked that the Court takes into account what

had been stated by Swain J in *Naicker v Moodley*,² especially that a driver that enters an intersection on the invitation of a green traffic light need not do more than obeying the signal. He urged the Court not to place a burden beyond that of a reasonable man on the defendant. He asked that the claim be dismissed as opposed to an order for absolution from the instance being granted.

Legal Framework

[11] It is trite that the plaintiff bears the onus of proving negligence on the part of the insured driver on a balance of probabilities.³

[12] In the case of factual disputes that call for resolution by the courts, the technique generally employed requires a court to make findings on the credibility of various witnesses, their reliability and the probabilities in order to come to a conclusion on disputed facts.⁴

² 2011 (2) SA 502 (KZD).

³ See *Arthur v Bezuidenhout and Mieny* 1962 (2) SA 560 (A) at 576G. *Sardi and Others v Standard and General Insurance Co Ltd* 1977 (3) SA 776 (A) at 780C-H and *Madyosi and Another v SA Eagle Insurance Co Ltd* 1990 (3) SA 442 (E) at 444 D-F.

⁴ See *Stellenbosch Farmer's Winery Group Ltd and Another v Martell and Cie SA and Others* 2003 (1) SA 11 (SCA) at para 5; *National Employers and General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (E) at 440D-G; *Koster Kooperatiewe Landboumaatskappy Bpk v SA Spoorweë en Hawens* 1974 (4) SA 420 (W) AT 426-427.

[13] Having referred to the above *dicta*, I must now evaluate the evidence of all the witnesses keeping in mind that the plaintiff bears the *onus* as stated above. At the onset it has to be stated that the plaintiff's witness Mr Jaganath was not a good witness. His version was not corroborated by any other witness. He struggled to answer questions that were neither complicated nor difficult to answer. His evidence regarding the colour of the robot seems highly improbable when weighed against the evidence of all the other witnesses, including the evidence of inspector Herron. Instead of admitting an honest mistake in his statement to the police regarding the name of the street they travelled on, he preferred to blame the officer for noting the street as Pine Street, to such an extent that his claim became ridiculous and not trustworthy.

Mr Jagannath did not observe or identify any other vehicle on the road, for example the Mercedes-Benz observed by all the witnesses called by the defendant. His version of the point of impact is also not supported by any other evidence, not even the evidence of inspector Herron. His evidence was neither

consistent nor satisfactory. The objective evidence of inspector Herron in my view places a question mark on the evidence of Mr Jagannath.

The insured driver and his passenger and the security guard were all good witnesses. They certainly did not contradict each other and there were no inherent improbabilities in their testimonies. Plaintiff's counsel attacked the credibility of Mr Shabalala on the aspect of whether he noticed any brake lights coming on or not. I am not persuaded that this contradiction between his statement and his *viva voce* evidence impacts negatively on his credibility. He was cross-examined at length and remained consistent in his explanation of the accident. Mr Shabalala, in my view, is an unsophisticated and honest witness. He does not know any of the occupants of either of the two vehicles. His attention was focussed on the Golf GTI because of the speed it travelled at. He remained consistent in his explanation and his version of the events seems reasonable and probable.

In my view it has been established that when Mr Joshi, the insured driver entered the intersection on Pine Street, the

robot was green, this has been established by three witnesses, Mr Joshi, Mrs Joshi and Mr Shabalala. Inspector Heron's evidence was that there was no malfunctioning of the said traffic lights. In accepting the evidence of the three witnesses of the defendant, it has to be reasoned that the robot was red when plaintiff's vehicle entered the intersection.

[15] In the premises I am satisfied, on a balance of probabilities, that:

- (a) the insured driver had the right of way at the critical moment of the accident;
- (b) that the insured driver had no opportunity to avoid the collision; and
- (c) that the plaintiff failed to prove any degree of negligence or any causal negligence in any of the respects as alleged by plaintiff.

[16] For the foregoing reasons plaintiff's claim is dismissed with costs.

Steyn, J

Date of Hearing:	17- August 2011
Date of Judgment:	25 November 2011
Counsel for the Plaintiff:	Adv Mukadam
Instructed by:	Campbell Attorneys
Counsel for the Defendant:	Adv Padayachee SC
Instructed by:	SD Moloi & Associates