IN THE HIGH COURT OF SOUTH AFRICA
NORTH GAUTENG HIGH COURT, PRETORIA

CASE NO: 21631/08
DATE: 2009-05-19

In the matter between

MKHOMOLA FLORENCE LESHALABE **Plaintiff**

versus

ROAD ACCIDENT FUND **Defendant**

JUDGMENT

PRELLER. J: The plaintiff was a pedestrian. She approached the Jane Furse public road from the direction of certain RDP houses that were on the one side of the road. According to her there is an open space of some 50 metres between the houses and the road. There are also houses on the other side of the road.

The incident happened on 4 June 2007 at about five o'clock in the afternoon. She says that there were many pedestrians in the area but not in the immediate area where she was. She intended to cross the road to the other side in order to catch a taxi to take her home. The direction in which she intended to go was to her right. While she was waiting at the road she says that two taxis passed from her left to her right, in other words going into the direction that she wanted to go herself. I do not know why she mentioned these two taxis unless she had the intention of catching one of them.

The road itself is a single lane carriage in either direction and according to the plaintiff, and this was common cause, there is also a yellow line on either side of the road with an emergency lane which is about a metre wide. The road is straight and level except that approximately a 100 metres to the plaintiff’s right, that is in the direction in which she proposed to travel home, there is a hill which I must infer is a blind rise.

The plaintiff testified that she had stopped before she reached the tar, looked to her right for oncoming traffic and that there was none. She then looked to the left and initially she said that whilst still looking to her left she was struck by a motor vehicle. Later on she said that had she looked to her right first, then to the left and when she turned her eyes forward she was struck by the vehicle. She said that this vehicle was travelling at a high speed and she only saw it at the moment that it hit her. It must be an inference that she draws that the vehicle was travelling at speed and that inference can only be drawn from the fact that the vehicle was not there when she looked to her right and covered the distance between the crest of the hill and the point of impact in a very short time.

I have tried to establish but, of course, it is not possible to do so with any degree of certainty, how long it takes one if one is looking to the right to turn one's eyes to the left and to the front again. There is no doubt that if one does this in the normal way it takes a second or two.

The plaintiff says that the vehicle struck her with its left front part near the headlight. She suffered a fracture of the right tibia and fibula and sustained what Dr Lekalakala called a segmented fracture. That means that the tibia was fractured in two places, the first being about a third of the way up and the second being about two thirds of the way up from the ankle. It was an open fracture with the bone protruding through the skin. The doctor says, and this is actually a matter for general knowledge or common sense, that there must have been a considerable amount of force exerted on the leg in order to cause this fracture. What is a considerable amount of force of course a relative concept and it is impossible to infer the speed of the vehicle that had struck the plaintiff from the fact of the fracture. I say that because everybody knows that the mass of a motorcar is far more than that of a person and even when travelling at as little as 20 or 30 kilometres an hour a vehicle with its substantial mass must exert substantial force on a person's leg if it were to hit a person.

The insured driver on the other hand testifies that he came over the crest of the hill and saw nothing. He never noticed the plaintiff, not even when he passed her and only became aware of her presence when he heard an impact on the left rear of his car. He suggests, therefore, that the plaintiff walked into his car. He says that the only damage to his car was a few minor dents in the vicinity of the cap to the petrol tank of his car which is situated somewhere near the left rear wheel. He says there was no other damage to his vehicle and he was not challenged on that. He is corroborated to some extent by the police Inspector Phalamohlaka who says that he saw the insured vehicle shortly after the collision. He says that he inspected it for damage and the only damage to the car was the dent or two about which the insured driver testified and which was on the left rear part of the car. He says that he did inspect the car for other damage and that there was none and he was also prepared to say that there was no blood anywhere on the car because he would have noticed it if it had been there.

The onus in a case of this nature is, of course, on the plaintiff to persuade the Court, on a balance of probabilities, that her version of the collision is the correct one. I just interpose here to add that according to the evidence of the insured driver he was travelling at a speed of between 50 and 60 kilometres per hour. He was not challenged on this and I find no reason to reject this version.

On the plaintiff's version and if the speed of the insured vehicle as given by the insured driver is correct it would have taken approximately six seconds for the car to recover the 100 metres from the top of the hill to where the collision occurred. It is simply just not probable that the plaintiff could have spent that amount of time just to look to her left before she turned her eyes to the front again. I think the simple fact is that she did not look to her right or if she did look she did not take proper notice of what was going on. In any event if the distance to the top of the hill is relatively short and one would have expected her to look to her right again before commencing to cross the road. It seems to me probable that the plaintiff was intent on catching one of the two taxis that she had mentioned, that she was in a hurry and that she had simply started to cross the road without looking. I do not see any reason why the insured driver would have actually swerved out of his line of travel to hit the plaintiff who was standing next to the road on her version.

The problem that I have with both versions is that it is difficult to understand how the collision could have occurred in the way that it did and how the plaintiff could have suffered the injuries that she did indeed suffer. I say that, because if the front of the car had collided with her, particularly at a relatively high speed one would have expected her to have been thrown onto the bonnet or the windscreerf of the car and one would have expected more damage to the car and also more injuries to the plaintiff and perhaps, some open wounds perhaps to her head and some blood on the car.

On the other hand if the insured driver's version is the correct one it is difficult to understand why she would have sustained this kind of fracture to her right leg simply from walking into the side of the moving car. The only explanation that occurred to me of how the accident could have happened was that as the plaintiff had put her right-foot down and started to put some weight onto it, the corner of the left side of the car's bumper hit her lower leg and that she then fell forward as a result of the support of her leg being taken under her and that she fell against the left rear side of the car causing the dents that were noticeable there. That is, of course, pure speculation and there is no basis in the evidence for coming to the conclusion that this was indeed the way that the collision had occurred apart from the factors that I have mentioned regarding the damage to the car etcetera. It is no more than a possible way in which the collision could have occurred.

I think the probabilities favour the version that the plaintiff had indeed walked into the road without looking. If the probabilities do not actually favour that version I think it can be said that the plaintiff did not persuade me that the version of the defendant is not the correct one and I can consequently not accept her version.

I therefore, have to adjudicate the case on the version given by the insured driver.

On his version it is quite clear that he did not pay proper attention to the pedestrians that were not only on the road but also next to it as is the duty of the driver. He should have noticed the plaintiff approaching the road if on his version she was walking all the time or standing next to the road if her version is to be accepted. He did neither of these. If he had seen her approaching in time he could have warned her of his presence by sounding his hooter or he could have swerved to avoid the collision with her or perhaps even have stopped. I find that he was negligent in not keeping a proper look out and I would apportion 30% of the blame for the collision occurring to the insured driver.

In the result the order that I would make is the following:

1. It is declared that the defendant is liable for 30% of the damage suffered by the plaintiff and
2. The defendant is ordered to pay the plaintiffs costs.