



IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT) PRETORIA

CASE NO: 6108/07
NOT REPORTABLE
DATE: 23 AUGUST 2009

In the matter between:

JOHANNA JACOBA VAN BLOMMESTEIN
HELENA FRANCINA JOCINA COLESKE

1st Plaintiff
2nd Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

JUDGMENT

Judgment reserved: 18/09/09

Judgment handed down: 23 /09/09

LEGODI J,

INTRODUCTION

- [1] In this action, the two plaintiffs are claiming damages against The Road Accident Fund (hereinafter referred to as the defendant) arising from a motorvehicle collision which occurred on the 23

August 2002, at a robot intersection of corner Voortrekker and Kruger Streets in Vereeniging.

- [2] The collision was between a motorvehicle driven by the first plaintiff and another motorvehicle driven by one Inspector Joubert (hereinafter referred to as the insured driver).
- [3] At the start of the hearing of this matter, counsel for the plaintiff applied for separation of merits from quantum. The application was duly granted by this court and therefore the matter proceeded only on merits.

PLEADINGS

- [4] In their particulars of claim, the plaintiffs aver that the collision was due to the negligent driving of Inspector Joubert, who is alleged to have been negligent amongst others in one or more of the following respects: that he failed to keep a proper look out, that he failed to avoid the collision whilst through reasonable care he could have done so, that he failed to apply brakes at all or timeously in order to avoid the collision and that he made an unexpected turn in front of the first plaintiffs motorvehicle.
- [5] The alleged grounds of negligent were denied in the defendant's plea as follows:
" 3.1 *The allegations contained in this paragraph are denied as if specifically traversed and the Plaintiffs are placed to the proof thereof*

3.2 **Alternatively** in the event of it being held by the above Honourable Court, that a collision occurred as alleged by the plaintiffs and that the driver of the insured vehicle was negligent (which is denied), the Defendant pleads that such negligence was not the cause of the collision. The Defendant pleads that the collision was caused by the sole negligence of the 1st Plaintiff, she being negligent in one or more or all of the following respects:

3.2.1 she failed to keep a proper look-out;

3.2.2 she failed to avoid the collision when, by taking reasonable or proper care, she both could and should have done so;

3.2.3 she failed to take sufficient account of the presence and/or **alternatively** visibly intended actions of the insured vehicle;

3.2.4 she failed to take due regard of other road users, in particular the insured vehicle;

3.2.5 she failed to exercise proper or adequate control over his vehicle;

3.2.6 she failed to apply the brakes of his vehicle timeously, or at all;

3.2.7 she drove at an excessive speed under the prevailing traffic conditions

3.3 Further **alternatively** and in the event of the above Honourable Court finding that the driver of the insured vehicle acted negligently, as alleged (which is denied) and that such negligence contributed to the cause of the collision (which is also denied) the, and in that event, the Defendant avers that the 1st Plaintiff was also negligent and that her negligence contributed to the cause of the collision. Particulars of the 1st Plaintiffs negligence are set out in the preceding sub-paragraph.

PLAINTIFFS' EVIDENCE

[6] Two witnesses testified on behalf of the plaintiffs. These were the plaintiffs themselves. Their evidence in nutshell was to the following effect:

6.1 On the evening of the 23 August 2002, they were traveling along Vortrekker road, coming from the south direction towards the north. The second plaintiff was the only passenger in the first plaintiff's vehicle.

6.2 About 20 meters towards a robot controlled intersection of Voortrekker and Kruger streets, they noticed that the robot was red for them. At that this stage, the first plaintiff also saw three motorvehicles stationery parallel to each other at the intersection. The three vehicles were coming from the north

direction towards south. They were waiting for the robot to turn green. The insured vehicle was one of these vehicles.

- 6.3 The road in question has double lanes from all four directions. At the direction from the north the third vehicle which was stationery at the robot, was on the side as if it was going to turn to its left towards the east into Kruger Street.
- 6.4 The first plaintiff was traveling at about 60 kilometers per hour at the time she realized that the robot ahead of her was red. She reduced the speed to about 40 km per hour by applying brakes. When she was about 15 meters towards the robots, the lights turned green for her. Just when she entered the intersection, the insured vehicle, which was on the extreme right when one comes from the north unexpectedly moved into the intersection in the face of the plaintiff's vehicle. It was just too late for the first plaintiff to do anything to avoid the collision despite the fact that she tried to swerve. As a result a collision took place, like almost in the middle of the intersection more or less at a point marked by the first plaintiff as point X on the sketch plan marked Exhibit E. The insured vehicle came to a standstill after the collision at a point marked C indicated on Exhibit E, which is just almost in front of point X. The plaintiff's vehicle on the other side, came to a standstill across the intersection, west northerly direction at a point marked D. In short this was the evidence of the plaintiffs.

DEFENDANT'S EVIDENCE

[7] Two witnesses also testified on behalf of the defendant. These were the insured driver and one Mr Viviers. The insured driver entered the intersection from East to West along Kruger road. The robots were green for him. As he entered the intersection, at a point marked by him as BI, he saw the first plaintiff's vehicle. He realized that the first plaintiff's vehicle was not going to stop. At point XI marked by him, his vehicle and that of the first plaintiff collided. He could not have avoided the collision. The collision took place as he was trying to swerve in order to avoid the collision. The robots were red for the plaintiffs when the collision took place. This in short was the evidence on behalf of the defendant.

ISSUES RAISED

[8] At the start of the submission, I enquired from the parties as to whether the followings were not issues raised by the pleadings and evidence:

8.1 Whether or not the plaintiffs have succeeded in showing that the insured driver was coming from the north to south before the collision and not from East as alleged by the witnesses on behalf of the defendant? And if so,

8.2 Whether on the defendant's evidence, and in particular the insured driver's evidence negligence has not been established against the defendant?

[9] Counsel for the plaintiffs agreed that, indeed these were the issues to be determined in this case. In my view, added to the

issues raised in 8.1 and 8.2, the other issue is, whether or not there is contributory negligence? And if so, what is the extent of such contributory negligence?

- [10] Before I deal with these issues, I find it necessary to refer to some few principles that might be of relevant to the issues.

APPLICABLE PRINCIPLES

- [11] As rightly pointed out by counsel on behalf of the plaintiffs in paragraphs 22 to 24 of his written heads of argument, where there are two mutually destructive stories, a party bearing the onus like the plaintiffs in the present case, can only succeed if the court on a preponderance of probabilities is satisfied that the version of a party bearing the onus, is accurate and acceptable and that the other version advanced by the other party is false, mistaken and that it falls to be rejected as such. In doing so, the court will weigh up and test the allegations of a party bearing the onus against that of general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with consideration of the probabilities of the case. If the balance of probabilities favours the plaintiff, then the court will accept such a version as being probably true. If however, the probabilities are evenly balanced in the sense that they do not favour the plaintiffs case, anymore than they do, the defendant's case, the plaintiff can therefore only succeed if the court nevertheless believes the plaintiff and is satisfied that his or her evidence is true, and that of the defendant's version is false. **(See National Employees General Insurance Company Ltd v Jagers 1984 (4) SA 437**

E at 440).

[12] A driver who enters an intersection whilst the robot is green should look for the traffic that is already at the intersection, for example, the traffic that had already entered the intersection before the traffic light had changed. He or she must also not ignore which he or she is aware of, which clearly moving in a negligent manner. **(See Netherlands Insurance Co of SA Ltd V Brummer 1978 94) 824 (A) at 833 E-F).** However, it is not expected of him to look at the traffic that might unlawfully go against a red robot at an intersection from left or right.

[13] The duty of a motorist who approaches an intersection and enters it with the green light in his favour, is to have regard to the reasonable possibility that traffic which entered the intersection lawfully, may still be in the intersection. He should therefore, regulate his speed and his entry into the intersection in such a manner as not to endanger the safety of such other traffic. The motorist is to the intersection when the traffic lights turns green in his favour, the more likely it is that the intersection may not be completely clear of traffic. (My own emphasis).

(See Doorsha and others v Parity Insurance Co. Ltd 1963 (3) SA 365 D at 367 F - 368 and Santam Insurance Co. Ltd v Gouws 1985 (2) 629 AD at 634 I-J)

DISCUSSIONS, SUBMISSIONS AND FINDINGS

[14] I must immediately deal with the first issue raised in

paragraph 8.1 of this judgment.

Whether or not the plaintiffs have succeeded in showing that the insured vehicle was coming from north to south and not from east to west as alleged by the defendant's witnesses?

[15] Here one is confronted with two contradictory versions by two witnesses from both sides. Therefore, the principle set out in paragraph 11 of this judgment is applicable and preponderance of probabilities plays a major role in assessing and evaluating the two versions. Credibility is also a relevant consideration.

15.1 The three vehicles as explained by the first plaintiff was not specifically corroborated by the second plaintiff. The second plaintiff was only alerted to the insured vehicle by the first plaintiff. For example, during her evidence, the second plaintiff indicated that the light changed to green. The first plaintiff increased the speed. The next moment the first plaintiff said, to the second plaintiff that a car was driving in front of them. The first plaintiff then indicated that she was going to knock the other car. The second plaintiff then saw the insured vehicle moving in front of them, then there was a collision. Now till up to this stage, did the second plaintiff see the three cars coming from the northerly direction as testified by the first plaintiff. On the second plaintiff's version, it looks like she only became aware of the insured vehicle when she was alerted thereto by the first plaintiff. Very difficult therefore to rely on her version regarding the direction of the insured vehicle just before the collision. One can only rely on the first plaintiff's evidence regarding the north to south direction of the

insured vehicle.

15.2 However, against the first plaintiffs evidence in this regard, it is the insured driver's evidence and that of Mr Viviers. According to Mr Viviers, he also came from the same direction as the plaintiff's vehicle. He stopped at the intersection on the left lane because the robot was red for him. The insured vehicle approached from the east direction. The robot was green for the insured driver.

1 5.3 Whist counsel for the plaintiff sought to criticize the evidence of Mr Viviers as being evasive or unreliable, I must immediately say I did not share the same view. Mr Viviers was a neutral witness. Unlike the other three witnesses, he has nothing to gain from the collision or to protect himself. Secondly, he impressed me as a good witness. For example, he readily conceded that it is possible that at the time of the actual collision the robot might have been green for the plaintiffs.

15.4 His evidence, that is, Mr Viviers' evidence materially corroborated the evidence of the insured driver that the latter approached the intersection from the east. Counsel for the plaintiff also sought to criticize the insured driver's evidence as having been wanting. For example, in a statement or affidavit deposed by him on the 27 August 2002, he indicated that he was traveling from south to north in Votrekker street. If one was to go by this, it means he was driving in the same direction as the plaintiffs. However, this was corrected by hand on the 2 October 2002. The statement was corrected to

read *vanaf oos na wes*".

15.5 In his evidence before me, he indicated that indeed it was a mistake to state in his statement of 27 August 2002 "*vanaf suid na noord*". I am prepared to accept that it was a mistake and not much a cover up or corroboration of the plaintiffs' evidence. His evidence in any event is corroborated by the evidence of a neutral witness, Mr Viviers. I therefore find that the evidence of the defendant's witnesses is more probable than that of the plaintiffs. Put it differently, the plaintiffs have failed in showing on the balance of probabilities that the insured vehicle came from north to south. This must then bring me to another issue which was not specifically raised in paragraphs 8.1, 8.2 or 9.1 of this judgment

Whether at the time of the collision or impact the robots were green or red?

[16] Probabilities play a role again here. Secondly, credibility is also relevant. This aspect is linked to the averment in paragraph 3.2.1 of the defendant's plea that the first plaintiff did not keep a proper look out. I have already made a finding that the insured driver was coming from east to west. This finding has the effect that the first plaintiff could not have seen the insured vehicle until at the time when it was in front of her. Her allegations of the three cars at the robot including the insured vehicle as I said, was not specifically corroborated by the second plaintiff. She is also not claiming to have seen any car coming from the east when in actual fact there was a car, the insured vehicle. In the light of all

these, her evidence and that of the second plaintiff as having observed the robot lights turning to green is terribly shaken and cannot be relied upon.

[17] Whilst Mr Viviers conceded that it is possible that at the time of the impact, the robots could have turned green for him, such a concession should be seen in context. Firstly, the insured driver had said. He said the robots were red for the plaintiffs. Secondly, Mr Viviers had been waiting for the robot to turn green. In a split of some seconds, whilst the robot was still red he saw through the mirror that the plaintiffs' car was going to drive through a red robot. At that stage, he spoke to his wife and suddenly there was a collision. The suggestion is that, within those few seconds when he spoke to his wife, the robots could have turned green. I find this to be unlikely and wanting to speculate on the concession made by Mr Viviers, unless if one was to find the plaintiffs' version to have been credible and more probable. I cannot make a finding in favour of the plaintiffs in this regard. I therefore find that the probability is that the robot was still green for the insured driver at impact.

[18] In any event, even if one was to be wrong in this regard, the first plaintiff would still be hit by the principle referred to earlier in paragraph 13 of this judgment. That is, the closer the motorist is, to the intersection when the traffic lights turns green in his favour the more likely it is that the intersection may not be completely clear of traffic. I now turn to deal with the issue raised in paragraph 8.2 of this judgment.

Whether on the defendant's evidence, negligence has not been established?

[19] The insured driver at point B1, as indicated by him, saw the first plaintiffs' car at a distance of about 50 meters. At that moment he was traveling at a speed of about 40 KM per hour. As he noticed the first plaintiffs' vehicle, he realized that the first plaintiffs' vehicle was going to hit against a red robot. The insured driver however, did not stop or apply brakes. Instead he proceeded until up to point XI. As I said earlier, point XI is almost in the middle of the intersection while B1 is just before entering the intersection across the two lanes that go towards the south. This would mean that instead of applying brakes as hard as possible, the insured driver crossed the two lanes towards the south with the result that in the middle of the intersection a collision took place. He said so under cross examination that, if he had applied brakes at B1, the collision would not have taken place. I do not think that this concession is a speculation as suggested by counsel on behalf of the defendant. Bearing in mind that the insured driver crossed two lanes without applying brakes after having seen the danger of the first plaintiff's car and bearing in mind that he was traveling at a speed of 40 KM per hour, his concession is not improbable or farfetched. He should therefore be found to have failed to avoid the collision whilst through reasonable care he could have done so. This does have a bearing on contributory negligence. I must immediately then turn to deal with the issue raised in paragraph 9 of this judgment.

Whether or not there is contributory negligence? And if so, what is the extent of contributory negligence?

[20] As I have just indicated in paragraph 19 above, the insured driver should be found to have been negligent as well. Or to put it differently, he did not act like a reasonable man in the circumstances. However, the issue is the extent of negligence. This is not an easy task. You cannot use any formula.

[21] I have already found that in all probabilities, the robot was still red for the first plaintiff at impact. Secondly, the first plaintiff failed to see the insured vehicle coming from the east until it was just too late to take any helpful evasive steps. She should therefore be found to have been more negligent than the insured driver. The apportionment should therefore be 70%/30% against the first plaintiff.

CONCLUSION

[22] I therefore make an order as follows:

22.1 Judgment in 30% of the first plaintiffs proven damages is hereby granted.

22.2 Judgment in 100% of the second plaintiffs proven damages is hereby granted.

22.3 The defendant to pay the costs of the action to date.

M FLEGODI

JUDGE OF THE NORTH GAUTENG HIGH COURT

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