

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No.: 4285/2004

In the case between:

JAN ANDRIES FERREIRA

1st Plaintiff

MARIA FERREIRA 2nd Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

JUDGEMENT:

MATHEBULA, AJ

HEARD ON:

2, 3, 5 and 9 MAY 2006

DELIVERED ON:

16 NOVEMBER 2006

[1] At the outset of the trial, the parties agreed that the merits and quantum be separated and that the trial proceed only on merits. I ruled that the two be separated.

[2] The city of Bloemfontein has a one-way three-lane street called Nelson Mandela Drive running across from the west to the east. The street is punctuated by a number of robots with

streets crossing from south to north and the other way around.

One of these is Markgraaff Street which is a two-way-lane from north to south and south to north.

[3] On the 17th February 2003 the Ferreira couple left their business at Hill Street in their white Mercedes Benz and entered Nelson Mandela Drive. Mrs. Ferreira was the driver and her husband was the passenger. The street is well-known to them as they traveled there on a daily basis. She was driving on the left lane of the street.

[4] The street is illuminated by street lamps and as it is a built-up area the speed limit is 60km/h. The robots are synchronized in a manner that they turn green one after the other as one progress along the street.

[5] About four blocks from their business is the intersection of Nelson Mandela Drive and Markgraaff Street. As they approached this intersection the robot turned green giving

them the right of way.

[6] They entered the intersection and saw the motor vehicle, namely a blue Ford Sapphire that was traveling from south to north. Mrs. Ferreira applied the brakes but it was too late. The two motor vehicles collided with damages to theirs on the left and the other on the right. This collision took place more or less in the middle of the road. There was nothing that Mrs. Ferreira could have done to avoid the collision.

[7] Mr. Ferreira alighted and went to the insured driver of the other motor vehicle and asked: “wat de donner dink jy doen jy?” The insured driver apologised and said: “sorry my brieke het gefail.” He was accompanied by his wife and three children. He was barefoot and without a shirt. Police were summoned to the scene and continued with their duties.

[8] Emile König who was on duty at the security company a few meters from the intersection also arrived at the scene after he

heard the sound of impact. It took him a few seconds to be there. He heard the initial conversation between Mr. Ferreira and the insured driver.

[9] The policeman on duty at the scene was Edward Mahlae who is attached to the commonly known flying squad. He compiled the accident report form according to what he was told and his observations. This form is part of the record as exhibit "C". The two motor vehicles were damaged on the right and the other on the left hand side. Under the heading, Officers on site account of accident and/or other relevant details, he wrote as follows:

"It is alleged that motor vehicle A, a white Benz was in Mandela Drive from east to west and motor vehicle B, a blue Ford Sapphire from south to north in Markgraaff Street and the robot light was green for motor vehicle A and also motor vehicle B alleges that the robot light amber for him and both motor vehicles crashed each other in the cross-or-box, motor vehicle A damaged on the left front corner, and motor vehicle B damaged on right side and two passengers from motor vehicle B injured."

[10] The other motor vehicle was occupied by the Blignaut family. Mr. Blignaut was the driver. That night he had gone to Star Bakery in Markgraaff Street to buy some items for a school

party for one of the children.

[11] After leaving Star Bakery, Mr. Blignaut entered Markgraaff Street and headed north. He was driving on the right-hand-side of the road. The intersection is almost 130m from the bakery. His motor vehicle was the only one in the road.

[12] About 12m – 13m from the intersection the robot turned green allowing him to proceed. He observed whether it was safe to cross the road and although his view was partly obstructed by a wall with flowers and shops on the right, nevertheless he entered the road. A motor vehicle approaching from the left went through the red robot and collided with him. It all happened in split seconds.

[13] He first assisted his family and was approached by Mr. Ferreira who was very aggressive. His words were: “Wat de donner doen jy?” He did not reply in order to avoid further confrontation.

[14] One of the by-standers came to him and said he saw

everything. He took him to the police and urged them to listen to him as he saw everything. He considered that it was safe before entering the intersection. It is not clear to him why the police officer wrote as he did in the collision report.

[15] Mr. Stefan Louw was a beggar on the intersection of Nelson Mandela Drive and Markgraaff Street. He was observing the robots in order to clearly decide which part of the robot he must go in order to ply his trade. His testimony is that the white Mercedes went through the red robot and collided with a blue Opel Cub sometime in May 2003. The Opel Cub was not at Star Bakery because he saw it passing the robot further down Markgraaff Street.

[16] One of the witnesses was Mr. Elias Mokgutle who was between Star Bakery and Shell garage in Markgraaff Street when the collision occurred. According to him the Ford Sapphire was stationery at the robot and he could only see it at the back. There were no other motor vehicles in the street.

[17] The robot turned green giving the Ford Sapphire the right of way. He also crossed Markgraaff Street and at that moment

he heard an impact. He realised that it was the Ford Sapphire and a white Mercedes Benz. According to him the Ford Sapphire was not from Star Bakery because he saw it driving up the street.

[18] I am indebted to both counsels for filing such detailed heads of argument. The central issue is who disregarded the red robot and caused the collision. The plaintiff bears onus on the balance of probabilities in order to succeed. I am faced with two mutually distractive versions about what happened on that particular day. The correct approach as accepted in **MACHEWANE v THE ROAD ACCIDENT FUND** 2005 (6) SA 72 (T) at page 75 paragraph 11 is the following:

“[11] When there are two mutually destructive versions decision of absolution from the instance will follow unless the plaintiff's version can demonstrate a higher probability value than the version of the defendant. This is particularly so since the plaintiff bears the overall onus of establishing his case on a

preponderance of probabilities. The correct approach for deciding whether a plaintiff has discharged his onus was aptly stated in the often quoted dictum of Wessels JA in *National Employers' Mutual General Insurance Association v Gany* 1931 AD 187 at 199:

'Where there are two stories mutually destructive before the onus is discharged, the Court must be satisfied upon adequate grounds that the story of the litigant upon whom the onus rests is true and the other false. Consequently it is essential in this case to determine which of the two versions is the more probable. The evidence of the independent witness, Ms Booysen, is a very critical factor and does lend more probability and weight to the plaintiff's version.'

As this case is no different, I intend to follow the same approach.

[19] The plaintiffs testified that the robot was green when they entered the intersection even though their view was partly obscured. This is consistent with the record made by Inspector Mahlae on that day at the scene of the collision. Further, Mr. König corroborates the first plaintiff about what they talked about with the insured driver on the day. The first plaintiff uttered some unprintable words and the insured driver admitted to his brakes having failed him. These witnesses were all reliable and honest witnesses. I find no reason these two independent witnesses will falsify their evidence. They

stand to gain nothing from that.

[20] On behalf of the defendant, several witnesses testified. One of them was Mr. Steven Louw, who according to him was a beggar on the intersection on that particular day. His testimony is extremely unhelpful as it does not seem to be about the collision of that day. He is testifying about what happened in May 2003 between different motor vehicles. I place no reliance at all on his testimony.

[21] Mr. Mokhutle was another witness whose evidence further diluted the defendant's version. According to him the Ford Sapphire was stationary at the robot and has stopped there for some time. It only entered the intersection when the robot turned green. Further he denied that the Ford Sapphire was from Star Bakery because he saw it for quite a distance when it crossed a robot before the intersection. This totally contradicts the testimony of the insured driver and his ex-wife that the robot turned green when they were a few meters from

the intersection.

[22] The insured driver painted a different picture from the one by Louw and Maguthle. He handed Louw to inspector Mahlae because he saw the collision but this aspect was denied by Louw. This aspect is not recorded by Mahlae. It is amazing that Mahlae recorded his version that the robot was amber which is not what he said. He entered the intersection even though he did not totally ensure that it was safe to do so. This go a long way for any careful driver.

[23] His ex-wife did not say much as most of the time she was not concentrating on what was happening. She had no reason to carefully watch her ex-husband because he was a good driver. Several times she answered questions before they were asked as if she was programmed.

[24] Evaluating the two mutually destructive versions, I am of the view that the plaintiffs' have discharged the necessary onus.

The evidence of the defendant is inherently improbable and therefore false. The plaintiff's version on the balance of probabilities is the more probable. I conclude for the reasons above that the plaintiffs' are entitled to the judgment as prayed. As far as the costs are concerned, I do not have any reason to depart from the ordinary rule. The costs follow the result.

[25] Accordingly, I make the following order:

25.1 Judgment in favour of the plaintiffs;

25.2 The defendant is ordered to pay the costs of the plaintiffs.

M. A. MATHABULA, AJ

On behalf of the plaintiffs:

Adv. S. J. Reinders
Instructed by:
Honey & Partners
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On behalf of the defendant:

Adv. P. J. Zietsman
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