



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case Number: 1233/2023

In the matter between:

ETTIENNE SIMONS STEYN

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT BY: REINDERS, J

HEARD ON: 8 MARCH 2024

DELIVERED ON: 8 AUGUST 2024

This judgment was handed down in open court and distributed to the parties via electronic mail communication.

- [1] On 24 July 2020 the plaintiff was working at a road construction site ("the site") at Fort Hare Street in Bloemfontein when he was struck by an eight ton SAKAI Tandem Vibrating Steel Drum Roller ("the roller"), operated by Mr Pieter Mpempe ("the insured driver"). On that fateful day the plaintiff sustained serious multiple fractures to his left lower leg as well as multiple fractures of his right foot and upper right forearm. The injuries sustained on his leg sadly resulted in an amputation above his knee.
- [2] In his particulars of claim it is alleged by the plaintiff that the mentioned injuries were caused by the negligence of the insured driver who was negligent (in one

or more ways) in that he omitted to keep a proper lookout, keep his motor vehicle under proper control, avoid the accident when by exercising reasonable care he should and could have done so and to adequately apply the controls and other mechanisms of the motor vehicle in such a way that it does not pose a threat to other road users. The plaintiff alleges that as a result of these injuries, he suffered special and general damages to the amount of R 9 215 300.00.

- [3] The defendant in its plea denied liability towards the plaintiff, alleging that the plaintiff was the sole cause of the collision as he was negligent (in one or more ways) in failing to keep a proper lookout, to take cognizance of the prevailing traffic/traffic conditions and/or the rights of the insured driver, to avoid the collision when by exercise of reasonable care and consideration he could have done so. It was pleaded in the alternative that the plaintiff was contributory negligent in one or more of the grounds set out in the plea and that any claim which the plaintiff may have, should be reduced in accordance with the provisions of the Apportionment of Damages Act ("the Apportionment Act")¹.
- [4] During the trial and through settlement negotiations the parties reached an agreement that the plaintiff abandons his claim for past medical and hospital expenses, with future claims of this nature to be addressed by means of an undertaking by the defendant in terms of Section 17(4)(a) of the Road Accident Fund Act². In respect of plaintiff's claims in his particulars for past and future loss of income (R 5 215 300-00) and general damages (R 1 500 000-00), the amounts prayed for were accepted by the defendant (but for the apportionment as contemplated in the Apportionment Act).
- [5] The only aspect for adjudication by me accordingly entails the apportionment of damages to wit the percentage of negligence in respect of the insured driver vis-a-vis the plaintiff.
- [6] To proof his case the plaintiff testified and called Mr Jacob Verkes (Mr Verkes).

¹ 34 of 1956, as amended.

² 56 of 1996.

- 6.1 The documentary evidence accepted into evidence include a google map and handwritten sketch plan ("the plan") wherein the site, positions of road construction machinery and the physical positioning of the plaintiff and Mr Verkes at the time of the incident, are indicated. Fort Hare Street is indicated as a dual carriageway having two lanes in each direction, divided by an island, with resurfacing work taking place in the right lane of the carriageway. All the road construction machinery, which included the roller, a water tanker machine and an asphalt tanker machine, are depicted on the plan as having been positioned on the right lane of the carriageway.
- 6.2 The expert reports for the plaintiff (an orthopaedic surgeon, occupational therapist, industrial psychologist, orthoptist, prosthetist, actuary and a physiotherapist) were admitted into evidence without objection thereto by the defendant.
- 6.3 The defendant did not file any expert reports nor did it call any witnesses. More specifically, the insured driver was not called to testify, with no explanation tendered therefore.
- [7] It is common cause that the plaintiff had at the time been employed for a period of four years by Global Surfacing (tasked with the resurfacing of the road). During the project he was the worker/site foreman of the team, whilst Mr Verkes was the site supervisor responsible for the safety at the construction site.
- 7.1 A brief synopsis of the evidence of plaintiff and Mr Verkes entailed that on the day of the incident plaintiff was filling the roller with water from a water tanker truck positioned behind the roller, just moments prior to the collision. Mr Verkes at the same time was in close proximity to an asphalt paving machine.
- 7.2 Following the injection of water into the roller, it started moving in the direction of Harvey Road. During this phase, the roller performed forward and reverse manoeuvres in order to lubricate the steel roller

drums with water prior to compacting the asphalt truck's heated asphalt deposit. At this point, the plaintiff was positioned behind the roller.

7.3 Whilst the roller was moving forward and backward, the plaintiff was called by Mr Verkes, intending to give him certain instructions regarding the water tanker. The plaintiff approached Mr Verkes as he was unable to hear him due to the noises at the site. Following this, Mr Verkes also approached the plaintiff, and when they were within hearing distance of each other, Mr Verkes directed the plaintiff to notify the water tanker operator to vacate the area.

7.4 While turning to notify the operator of the water tanker, the plaintiff was knocked to the ground by the roller which had moved backward, causing plaintiff's right foot to be caught under it. The driver however got bewildered and moved the roller forward, thereby driving over plaintiff's right leg, resulting in the injuries sustained as described above.

[8] The case law applicable to the adjudication of this matter is trite. The test for negligence as stated in *Kruger v Coetzee*³ has as a yard stick the conduct of the reasonable man (hereafter the reasonable 'person'). It is trite that the onus rests on the plaintiff to prove the defendant's negligence which caused the damages suffered, on a balance of probabilities. To avoid liability, the defendant must produce evidence to disprove the inference of negligence on his part, failing which the defendant risks the possibility of being found to be liable for damages suffered by the plaintiff. On the other hand, where the defendant had in the alternative pleaded contributory negligence and seeks a finding of an apportionment, the defendant would have to establish negligence on the part of the plaintiff on a balance of probabilities.

[9] The law of delict is clear on the principle that a person should bear the loss she/he suffers where she/he contributes to her/his damages by her/his own

³ 1966 (2) SA 428 (A) at 430 E-G

negligent conduct which should be taken into account in reducing such damages accordingly. In terms of the Apportionment Act, damage shall be regarded as having been caused by a person's fault notwithstanding the fact that another person had an opportunity of avoiding the consequences thereof and negligently failed to do so. In pleading contributory negligence, it is incumbent to prove that there was a causal connection between the collision and the conduct of the plaintiff, being a deviation from the standard of the *diligence paterfamilias*. Section 1(1)(a) of the Apportionment Act affords a discretion to the trial court to reduce a plaintiff's claim for damages suffered, on a just and equitable basis and to apportion the degree of liability.

- [10] Counsel for the defendant submitted that the version of the plaintiff on the exact circumstances which led to him being injured, cannot be correct. He alluded to discrepancies in affidavits attested to by the plaintiff and Mr Verkes shortly after the incident, and their testimonies in court. More specifically, he submitted that if the roller struck the plaintiff whilst Mr Verkes was at the water tanker as testified, Mr Verkes could have warned the plaintiff of the roller as the plaintiff was struck in close proximity of the water tanker, which renders the positioning of Mr Verkes at the time, improbable. Counsel for the defendant ultimately submitted that the circumstances surrounding the collision are inconsistent and, on that basis, the insured driver's negligence, save for his failure to properly observe when he turned the roller into reverse mode, has not been proven on a balance of probabilities.
- [11] In my observation of the plaintiff testifying, it is my view that he was honest to the extent that he did not shy away from making concessions when cross-examined, even if to his possible or ultimate detriment.

11.1 These admissions included that he was not only aware of the safety protocols and measures applicable to road construction sites and the inherent hazardous nature of the roller, but also that pedestrian movement was extremely limited in close proximity of the roller. He conceded that by the time Mr Verkes had called him, the roller had already started its forward and backward manoeuvres. Despite this awareness, he turned his back towards this potentially dangerous

reverse manoeuvres of an eight-ton machine. He conceded that this was negligent of him.

11.2 Plaintiff conceded that the roller is equipped with a buzzing siren that alerts those in the rear that it is in reverse mode and warns them to yield to this dangerous circumstances. The roller was consistently moving back and forth, with its siren activated each time it is in reverse mode. The plaintiff did however not pay attention to this. Insofar he failed to pay attention, he admitted to having been negligent.

11.3 Plaintiff could not deny that he deposed to an affidavit in support of his claim against the Workmen's Compensation Commissioner in 2022, stating that when the roller was following him as he was heading toward the tanker: "... *ek het nie daarop gemerk nie*" and later "... *ek het nie ag geslaan op roller voertuig*" and "*ek het met my rugkant na die roller voertuig weggestap in die rigting van Mnr. Verkes*".

[12] Counsel on behalf of the plaintiff took an opposite view of the submission that the only negligence on the part of the insured driver related to him not heading to the safety protocol that he had known due to his uncontested training. Counsel pressed on me to take into account that there were in fact two separate incidents causing the plaintiff's injuries. Firstly, the plaintiff's foot only was initially caught when he was struck by the roller in its reversing manoeuvre, whilst the second incident occurred when the insured driver became bewildered and drove the roller forward. This last movement of the roller, so it was submitted, was the real cause of the seriousness of the injuries sustained by the plaintiff. Accordingly, so the argument went, the insured driver's degree of negligence by far outweighs that of the plaintiff under the prevailing circumstances.

[13] In making a finding in respect of the apportionment, I considered the evidence as adduced. The plaintiff was injured at a construction site and conceded that

due to the potentially hazardous nature of the roller, pedestrian movement should be restricted to the greatest extent feasible. The aforementioned roller is equipped with a buzzing siren that alerts those in the rear that it is in reverse mode and warns them to yield, making forward and backward movements whilst the siren was in reverse mode. Counsel for the defendant submitted that the only negligence that can be attributed to the insured driver is that he did not keep a proper lookout when he reversed. He submitted that common sense dictates that because the reverse mode of the roller is equipped with a siren, and because the roller continuously moves back and forward, a reasonable person may rely on the beeping sound and would not consistently look back and forward each time the roller moves. According to him a reasonable person also accepts that a person with the vast experience of the plaintiff as a site foreman would heed the warning of such reverse siren, would not turn his back towards it knowing that it consistently moves forward and backward and he would stay clear of the roller's path when in conversation with others.

[14] Counsel for the plaintiff pleaded with me to take into account that the plaintiff is judged, even by himself, in hindsight and it should be accepted that the reasonable person is not perfect. He urged me to make a finding in favour of the plaintiff that the collision was occasioned through 95 - 90% of the defendant's (and thus 5-10% of the plaintiff's) negligence, whilst counsel for the defendant submitted that the plaintiff's negligence amounted to 60%, with only 40% negligence on the side of the defendant.

[15] On a conspectus of the evidence as a whole I am satisfied that both plaintiff and defendant were negligent.

15.1 Both knew that they were in a secured area where members of the public were excluded due to the operation of heavy machinery and the inherent danger of the work undertaken. Both knew or should have known that as a result they at all times had to keep a proper lookout. The defendant was well qualified to operate the roller and should have known that a failure to keep a proper lookout could result in serious injuries to others and in particular the plaintiff who was in the immediate vicinity of the

roller. The plaintiff was neither an ordinary pedestrian nor a less qualified, inexperienced construction worker. Likewise, the plaintiff knew or should have known that he is in the immediate vicinity of the roller which moved forth and back, and that he could be injured should he not keep a proper lookout for the movements of the roller.

15.2 Having considered these factors, I am not convinced that one of the parties was more negligent than the other, except for the uncontested evidence that the driver ostensibly became bewildered and drove over the plaintiff again. In this respect, the plaintiff was on the ground and could not prevent any further injury. Had it not been for the last mentioned fact, I would have concluded that each of the parties was 50% negligent.

15.3 The fact that the defendant did not testify does not entitle me to conclude more negligence on his side than the facts proven. In my view, his failure to testify at best allows me to conclude that he could not explain certain of his negligent behaviour as there is simply no explanation for such prima facie negligent behaviour. I therefore conclude on a conspectus of all the above that it would be just and equitable to make a finding that defendant was negligent for 60% and plaintiff for 40% of the damages sustained by plaintiff.

[16] What happened to the plaintiff on 24 July 2020 was a tragedy. It still remains as such. The plaintiff testified on the pain and suffering that he had to endure, the medical interventions that followed and other negative consequences. The accident left him wheelchair-bound, unable to do anything by himself without assistance. It is understandable that as a consequence he suffered from severe depression as indicated by expert reports. The unthinkable happened on that fateful day and the clock cannot ever be turned back. I do not have any hesitation in finding that the claimed amount for general damages is warranted.

[17] I was provided with a draft order (the content of which will be reflected in the order that I intend granting with some aesthetical amendments) and requested

by the parties to grant same with the inclusion of the percentages of apportionment which I deem just and equitable.

[18] In view of the conclusion which I have reached in paragraph [15] herein above, the following order shall issue:

1. An apportionment of 60% / 40% is awarded in favour of the plaintiff in respect of the merits of the claims against the defendant.
2. The defendant shall pay to the plaintiff a capital amount of **R 4 029 180-00** (Four million, twenty-nine thousand and one hundred and eighty rand) constituted as follows:

2.1	Past and future loss of income	R 5 215 300-00
2.2	General damages	R1 500 000-00
	Sub Total	R 6 715 300-00
	Less 40% apportionment	(R 2 686 120-00)
	TOTAL:	R 4 029 180-00

3. The Defendant to pay interest on the sum of **R 4 029 180-00** calculated at 11.25% per annum from fourteen (14) days following the date of 180 days from this order of court to date of payment.
4. The defendant shall furnish the plaintiff with an undertaking in terms of Section 17(4)(a) of Act 56 of 1996 in respect of future accommodation of the plaintiff in a hospital or nursing home or treatment of or the rendering of a service or supplying of goods of a medical and non-medical nature to the plaintiff (and after the costs have been incurred and upon submission of proof thereof) arising out of the injuries sustained in the collision which occurred on 24 July 2020 (limited to 60% thereto).

5. The defendant shall pay Plaintiff's agreed or taxed party and party cost within fourteen (14) days of taxation or an agreement of such fees reached, including the reservation fees of the following expert witnesses:

- 5.1 Dr J F Ziervogel;
- 5.2 Juané Raats;
- 5.3 Susan van Jaarsveld;
- 5.4 Munro Forensic Actuaries;
- 5.5 F A Kleynhans;
- 5.6 Nelleke Krog.

6. The Plaintiff waives his claim against the Workmen's Compensation Commissioner (WCC).



C REINDERS, J

On behalf of the Plaintiff:
Instructed by:

Adv. PJ Greyling
Bokwa Law Inc.
BLOEMFONTEIN

On behalf of the Defendant:
Instructed by:

Adv. LBJ Moeng
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