

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: A 661/2015

27/3/2018

In the matter between:

DANNY PILLAY Appellant

and

ROAD ACCIDENT FUND Respondent

JUDGMENT

MAAKANE AJ

INTRODUCTION:

1. This matter came before my brothers and I as an appeal to the Full Bench of this division.
2. The Appellant, who was the Plaintiff in the Court *a quo* instituted a claim for delictual damages against the Respondent in the Pretoria Regional Court. The claim emanates from bodily injuries he sustained in a motor vehicle accident that occurred on 11th of March 2012 in Pretoria West.
3. The matter went on trial and having heard evidence, the Regional Court Magistrate granted an order of absolution from the instances with costs.
4. It is against the Magistrate's judgment and order that the Appellant now

appeals. Initially the matter served before my sisters, Moseamo J and Nobanda AJ on 1 April 2016. They ordered that the matter be referred to and considered by the Full Bench of this Court.

PLEADINGS:

5. In his particulars of claim, Appellant alleges that the insured driver was negligent and that her negligence was the sole cause of the collision to which I have referred. In this regard, Appellant makes the following allegations of negligence on the part of the insured driver:

" 4.

The aforesaid collision was caused solely by the negligence of the driver of the said insured vehicle, she being negligent in one or more or all of the following respects:

- 5.1 *She travelled at an excessive speed;*
- 5.2 *She failed to reduce speed when she ought to and could have done so;*
- 5.3 *She failed to keep a proper lookout;*
- 5.4 *She failed to have due consideration to the other users of the road;*
- 5.5 *She failed to keep the said vehicle under proper or any control;*
- 5.6 *She failed to take any or adequate steps to avoid the collision when, by the exercise of reasonable and diligence, she could and should have done so;*
- 5.7 *She failed to apply the brakes of her vehicle either timeously, adequate or at all and drove into the Plaintiff's motor vehicle;*
- 5.8 *She moved into the oncoming lane of traffic at a dangerous*

and inappropriate time."

6. In its plea, Respondent denies negligence on the part of the insured driver. It instead alleges that the cause of the accident was negligence on the part of the Appellant and goes on to set out the respects upon which it relies for this allegation. I find it unnecessary to deal any further with alternative pleas raised, at this stage.

MAIN ISSUES FOR DETERMINATION:

7. The main issues between the parties and for the determination by this Court are whether:
 - 7.1 The evidence on record and adduced by the Appellant in the Court *a quo* is sufficient enough for a reasonable Court to give judgment in favour of the Appellant.
 - 7.2 The Regional Court Magistrate in the light of all evidence led in the Court *a quo*, was correct in granting an order of absolution from the instances as she did.
 - 7.3 The Regional Court Magistrate was correct in finding that at the close of the Respondent's case, she was faced with two (2) uncorroborated versions of the parties which versions according to her, were mutually destructive.

BACKGROUND AND EVIDENCE LED:

8. It was common cause at the commencement of the trial that the Appellant bore the *onus* of proof as well as the duty to begin. The parties also agreed that the trial will proceed on determination of liability only, issues of merits and liability having been separated in terms of Rule 33(4) of the Uniform Rules of this Court.
9. In his endeavour to discharge the *onus* that rests on him, Appellant was the first to give evidence. According to the record, his evidence was in a nutshell to the following effect:

- 9.1 On 11 March 2012, he was the driver of a Go NOW Double Cab van, with registration letters and numbers [....]. He was in the company of his wife who was seated on the front left passenger seat.
 - 9.2 He was travelling from West to East along W F Nkomo Street, formerly known as Church Street, west of Pretoria. It was around 16H00 and the road was fairly busy due to afternoon traffic. They were driving to the Spar in Pretoria West.
 - 9.3 While driving as he did, he saw a green Volvo Sedan driving in the opposite direction. The Volvo swerved and encroached onto his side of the road. In other words, the Volvo was driven against oncoming traffic.
 - 9.4 When he saw the Volvo, he tried to avoid the collision by applying the brakes of his vehicle and also swerving towards the left of the road. However, because the Volvo came at a high speed he was unable to avoid the collision. This resulted in a head on collision between the two (2) vehicles.
 - 9.5 Both motor vehicles were damaged on their front parts. After this collision, he and his wife were and remained trapped in their vehicle and could not get out. They were ultimately rescued by emergency services personnel.
 - 9.6 He disputed the Respondent's version that he was maneuvering a u-turn. He adds that it was not possible for him to have tried to execute a u-turn maneuver. The reason is that the road was narrow and also busy as this was during the usual afternoon rush hour.
10. After his testimony, he was cross-examined. However, he stuck to his version and the cross-examination did not yield anything material.
 11. The next witness was the Appellant's wife. She corroborated his version in all material respects. She was also cross-examined, but also stuck to

her version with regard to the manner in which the accident occurred.

12. The third and final witness was a certain Mr Toney Pather (*" Mr Pather"*). He also corroborated the version of the Appellant in every material respect, and in particular with regard to the manner in which the accident occurred. His evidence may be summarised as follows:
 - a. On the day of the accident, he was driving behind the Appellant's double cab vehicle, along W F Nkomo Street.
 - b. He then saw a Volvo sedan driving in the opposite direction trying to overtake another car in front of it.
 - c. The driver of the Volvo lost control of the car in the sense that she failed to return to her left half of the road.
 - d. As a result of this, a head-on-head collision occurred between the Volvo and the Appellant's vehicle.
 - e. After the collision he went to the Appellant's vehicle to try and help them. They were both trapped and he could not assist them. They had to remain trapped until the emergency medical personnel arrived.
 - f. He then went to the Volvo to try and assist the driver. He found her in the car, also covered or protected by the airbags of her car.
13. Under cross-examination he confirmed that he does not know the Appellant or his wife and does not have an interest in the case. He is a completely independent witness, who just happened to have been at the scene of and witnessed the accident.
14. After this third witness, the Appellant closed his case.
15. The driver of the Volvo (*" the insured driver"*) was then called as a witness for the Defendant. It emerged that her name was Bridget Makgomo Letsoalo. Her evidence was briefly to the following effect:
 - a. She was on the day in question the driver of the green Volvo Sedan.

- b. She was driving from east to west along W F Nkomo Street, on her way home to Atteridgeville.
- c. As she was driving she saw the Appellant's vehicle, driving in the opposite direction. The Appellant tried to execute a u-turn maneuver.
- d. As a result of this, there was a collision between their respective vehicles.

16. She was the only witness and the Respondent 's case was thereafter closed.

THE MAGISTRATE'S APPROACH:

17. Having analysed the evidence, the Magistrate granted an order of absolution from the instances with costs. In coming to this conclusion, the magistrate gave the following reasons:
- a. The court was faced with two mutually destructive versions - that of the Plaintiff on the one hand and that of the Defendant on the other.
 - b. Placing reliance on National Employers General Insurance Co. Ltd v Jagers 1984 (4) SA 437 (E), she found that on the evidence before her, probabilities were evenly balanced in the sense that they do not favour the version of the plaintiff or that of the defendant.
 - c. There were material contradictions in the evidence and versions of both parties.
 - d. Relying on Koster Ko-operatiewe Landboumaatskappij Bpk v S A Spoorwee en Hawens 1974 (4) SA 420 (W) she held that because of the mutually destructive versions, the party that bears the onus, namely the Plaintiff failed to discharge such onus.

GROUND OF APPEAL:

18. In her notice of appeal, the Appellant relies among others on the following grounds:

- a. The Learned Magistrate erred in failing to pay any, *alternatively* due consideration to the fact that absolution from the instance ought not to be granted at the end of a trial, when there is sufficient evidence upon which a reasonable court ought to give judgment in favour of a Plaintiff.
- b. The Learned Magistrate erred in failing to find that the Appellant has placed sufficient evidence before the Court a *quo* to discharge the burden of proof which rested upon him;
- c. The Learned Magistrate erred in failing to find that the insured driver was the sole negligent party and furthermore that her negligence caused the collision;
- d. The Learned Magistrate erred in failing to pay any, *alternatively* sufficient consideration to the fact that the Appellant's version regarding the manner in which the collision occurred, was corroborated by two witnesses;
- e. The Learned Magistrate erred in failing to pay any, *alternatively* sufficient consideration to the fact that two witnesses corroborated the Appellant's version that the insured driver veered over onto the incorrect side of the road (i.e. in the appellant's lane of travel) shortly before occurrence of the collision;
- f. The Learned Magistrate erred in failing to pay any, *alternatively* sufficient consideration to the fact that the insured driver contradicted herself materially with regards to the manner in which the collision occurred:
- g. The Magistrate erred in finding that the court a *quo* was faced with mutually destructive versions regard being had to the fact that the insured driver contradicted herself with regards to the manner in which the collision occurred;

- h. The Learned Magistrate erred in finding that the probabilities on both sides were evenly balanced; and
- i. The Learned Magistrate erred in not upholding the Appellant's claim, with costs.

DETERMINATION OF NEGLIGENCE AND THE MAGISTRATE'S

REASONING:

- 19. It is trite law that the *onus* is on a Plaintiff, Appellant in this instance, to prove on a balance of probabilities that the insured driver was negligent and that the negligence was the cause of the collision from which he sustained the bodily injuries.
- 20. There is no *onus* on the Respondent to prove anything. Respondent however, has an evidentiary burden to rebut the *prima facie* case presented or made out by the Appellant in this case.
- 21. This legal position is confirmed by the provisions of Section 17(1) of the Road Accident Fund, No. 67 of 1996 as amended by Act 19 of 2005. Section 17(1) also stipulates and sets out the circumstances under which the Road Accident Fund (RAF) would be liable to compensate a Claimant for bodily injuries sustained in or arising out of motor vehicle collisions.
- 22. Section 17 of the Act stipulates:

"Liability of Fund and agents - (1) The fund or an agent shall -

- (a) Subject to this Act, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of the owner or the driver thereof has been established.*
- (b) Subject to the regulations made under Section 26, in the case of a claim for compensation under the section arising from the driving of a motor vehicle where the identity of neither the owner or the driver thereof has been established, be obliged to compensate any person (the*

third party) for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself or the death or any bodily injury to another person, caused by or arising from the driving of a motor vehicle by any person at any place in the Republic, if the injury or death is due to the negligence or other wrongful act of the driver or the owner of a motor vehicle or of his or her employee in the performance of the duties as employee: Provided that the obligation to the Fund to compensate a third party for non-pecuniary loss shall be limited to compensation for serious injury as contemplated in subsection (1A) and shall be paid by way of a lump sum."

23. It is clear from the evidence given by the Appellant that he was the driver of a vehicle involved in a collision wherein he sustained bodily injuries arising out of the collision. He also testified and set out the grounds or respects in which he alleged negligence on the part of the insured driver. He testified that it is the insured driver's negligence, which caused the collision.
24. The test for negligence is that of a reasonable man, namely that would be a reasonable man has foreseen the occurrence of the harm or damage? If so, would he have taken steps to prevent the occurrence of such harm. In the context of motor vehicle driving, it is generally expected of a driver to throughout exercise the care of a reasonable driver. He must be able to foresee possible damage or damages that may result if he or she were to deviate from such expected conduct. The driver is also expected to take reasonable steps to prevent such damage or harm from occurring. As soon as the driver deviates from the expected standard or degree of care of a reasonable man or driver, he will be negligent.

See: Kruger v Coetzee 1966 (2) SA 528 (A)

25. The foreseeability test in the determination of negligence was enunciated by the Appellate Division in this classical case, **Kruger v Coetzee** (*supra*). The Court held:

" For the purpose of liability, culpa arises if -

- (a) A diligens paterfamilias in the position of the defendant-*
 - (i) would reasonable possibility of his conduct injuring another in his person or property and*
 - (ii) would take reasonable steps to guard against such occurrence; and*
- (b) The defendant failed to take such steps."*

26. In **Arthur v Bezuidenhout & Mieny 1962 (2) SA 566 (A)** this principle was formulated as follows:

"There is in my opinion, only one enquiry, namely: has the Plaintiff having regard to all the evidence in the case, discharged the onus of proving on balance of probabilities the negligence he has averred against the Defendant?"

27. In determining the liability of an insurer such as the Defendant, the Court in **Wells and Another v Shield Insurance Co. Ltd and Others 1965 (2) SA 865 (C)** at 867 (Corbett J) said the following:

"The section lays down two prerequisites of liability upon the part of a registered insurance company for damages suffered by a third party as a result of bodily injury. These are (i) that the injury was caused by or arose out of the driving of the insured motor vehicle and (ii) that the injury was due to the negligence or other unlawful

act of the driver of the insured vehicle, or the owner or his servant."

28. In his evidence under oath, Appellant testified that while driving he noticed that the Respondent was driving at high speed, and had encroached on his side of the road. He tried to avoid the collision by applying his brakes and also, swerved towards the left. Notwithstanding all of these, the insured driver continued to drive in the negligent manner. She encroached onto the Appellant's left half of the road, and in this manner, caused a head-on collision between the two vehicles. This occurred on the Appellant's side of the road.
29. Regarding collisions which occur on the incorrect side of the road, which is the case in this matter, H B Klepper in his book: *The Law of Third-Party Compensation - Third Edition* states the position as follows:

"If there is irrefutable proof of a collision on the incorrect side of the road, such collision constitutes prima facie negligence on the part of the driver who was found to be on his incorrect side of the road at the time of the collision".

and

"Once the Plaintiff has established that the collision did in fact occur on his side of the road, the defendant has to explain his presence on the defendant's incorrect side of the road. If the explanation is insufficient to dispel the inference of negligence arising from his presence on the incorrect side of the road the Defendant will be held negligent".

(at page 91, paragraph 5.3.13.1)

30. Els J, confirming the same approach in **Ntsala v Mutual and Federal Insurance 1996 (2) SA 184 (T)** expressed himself as follows:

" In this particular case, it is common cause that no negligence can be attributed to the First Plaintiff and, purely by virtue of the fact that the collision occurred on the insured vehicle's incorrect side of the road, negligence is thus inferred against the driver of the insured vehicle. As said, there is no onus on the defendant to show that he was not negligent, but it is required of him to give an explanation which is sufficient to dispel the prima facie proof of negligence otherwise he runs the risk of judgment being given against him."

(at page 191, paragraph G - H)

ABSOLUTION FROM THE INSTANCE

31. It is trite law that in determining whether or not an order for absolution from the instance is appropriate, the applicable test is *" Is there evidence upon which the court ought to give judgment in favour of the Plaintiff."*

See: Supreme Service Station (Pty) Ltd 1971 (4) SA 90 (R)

32. In **Gordon Lloyd Page & Associates v Rivera 2001 (1) SA 88 (SCA)** Harms JA States the correct approach as follows:

" The test for absolution to be applied by a trial court at the end of a plaintiff's case was formulated in Claude Neon Lights (SA) Ltd v Daniel 1976 (4) SA 403 (A) at 409 G - Hin these terms:

'When absolution from the instance is sought at the close of the plaintiff's case, the test to be applied is not whether the evidence led by the plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a court, applying its mind reasonably to such evidence could or might (not should or ought to) find for the plaintiff. "

(at pages 92 - 93

33. It is clear from the above authorities that the order of absolution from the

instance can only be considered and made by the trial court at the end of a Plaintiff's case. Such an order cannot be considered or made at the close of a Defendant's case.

34. Unfortunately this is exactly what the magistrate did in this case. She made an order of absolution from the instance after the close of the Respondent's case. This constitutes serious misdirection on her part. For this reason alone, the order must be set aside.

CORROBORATION

35. It is clear from the totality of the evidence led by the Appellant that the insured driver did encroach on his side of the road. He tried to avoid the collision by applying his brakes and swerving to the left. Unfortunately because the insured driver was driving at a high speed, a head on collision occurred. The collision occurred on his side of the road.
36. This version is corroborated in all material respects by other eye witnesses who were present at the scene and had witnessed the incident, namely Appellant's wife and also Mr Pather. The direct evidence of Mr Pather is particularly important for the reason that apart from being an eye witness who saw how the accident occurred, he is an independent witness who has no interest whatsoever in the case.
37. Appellant's version is further corroborated by circumstantial evidence and other facts that remain undisputed, namely that:
 - a. Both cars were damaged on their front portions.
 - b. After the collision both Appellant and his wife had remained trapped in their vehicle until rescued by emergency services.
38. On the other hand, the evidence of the insured driver is not satisfactory at all. She was a single witness and had given more than one contradictory version to the court. I do not find it necessary to deal with her evidence in any detail.

39. The corroborated evidence on record is that the collision occurred on the Appellant's side of the road. This is after the insured driver had encroached on the Appellant's side of the road. On the evidence, the insured driver has dismally failed to explain her presence on the Appellant's side of the road.

" purely by virtue of the fact that the collision occurred on the insured vehicle's incorrect side of the road, negligence is thus inferred against the driver of the insured vehicle."

See: Ntsala (*supra*).

40. I am of the view that on record, there is overwhelming corroborated evidence that the insured driver was negligent on the day, and that her negligence caused the collision from which the Appellant sustained bodily injuries.

41. This being the case, the Appellant has succeeded in discharging the *onus* that he bears, that is proving on a balance of probabilities that the insured driver was negligent in one or more of the respects relied on in his particulars of claim. He has also proved that the insured driver's negligence was the cause of the collision from which he sustained the bodily injuries.

42. On the totality of the evidence on record therefore, the finding by the Magistrate that she was faced with two (2) uncorroborated or mutually destructive versions, is completely wrong. The version of the Plaintiff is corroborated in every material respect by two (2) other eye witnesses.

43. In my view, the Magistrate has, for this reason, again, misdirected herself. This being the case, this court is entitled to interfere with the Magistrate's finding.

ORDER:

In the premises I propose the following order:

1. The appeal succeeds and the Magistrate's order is set aside.

2. The Respondent is liable to pay the Appellant 100% (One Hundred percent) of his proven or agreed damages;
3. The Respondent shall pay Appellant's costs of the action on merits, as well as costs of this appeal.

S S MAAKANE

Acting Judge of the
High Court of South Africa
Gauteng Division, Pretoria

I agree:

J RAULINGA

Judge of the High Court
of South Africa
Gauteng Division
Pretoria

I agree:

SP MOTHLE

Judge of the High Court
of South Africa
Gauteng Division
Pretoria

APPEARANCES:

Counsel for the Appellant : Advocate J A du Plessis

Instructed by : Riete Oosthuyzen Attorneys

Counsel for Respondent : Advocate B Matlhape

Instructed by : Mothle Jooma Sabdia Incorporated