



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

CASE NO: CA215/2022

Reportable	Yes / No
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In the matter between:

ARTHUR EGON ALLISON

Appellant

and

LINDA JAWULA

Respondent

Coram: Pakati J et Bands J

JUDGMENT ON APPEAL

PAKATI J

Introduction

[1] This matter concerns an appeal against the whole of the judgment of the court *a quo* dated, 14 September 2022, dismissing the appellant's claim for damages

allegedly suffered in the amount of R14 662.50 with interest calculated at the legal rate from a date 14 days after the judgment to date of payment, plus costs. The respondent, Ms Linda Jawula, did not oppose the appeal. On 12 July 2023, she filed a notice to abide by the decision of the court.

[2] The *quantum* and merits were separated. The only issue that had to be determined by the court *a quo* was whether the damage to the appellant's boundary wall was caused by the negligence of the respondent when she collided with it.

[3] The appellant, Mr Arthur Allison, owned a house whose address was [...] Road, Gelvandale in Gqeberha. On 20 June 2018, he was informed that the boundary wall had been damaged by the respondent, who collided with it while she was driving a Toyota Fortuner with registration number [...] EC.

The pleadings

[4] On 27 November 2019, the appellant issued a summons against the respondent for allegedly driving her motor vehicle negligently thereby hitting the appellant's boundary wall and damaging it.

[5] The appellant asserted that the collision was due to the sole negligence of the respondent in one or more of the following respects: (i) she failed to keep a proper lookout; (ii) she drove at an excessive speed; (iii) she failed to apply brakes of her vehicle timeously, or at all; (iv) she failed to keep her vehicle under control; and (v)

she failed to take adequate steps to avoid the collision when, by the exercise of care and skill, she could and should have done so.

[6] The appellant alleged that reasonable and necessary repair costs to the boundary wall amounted to R14 662.50. A quotation issued by HJD Deysel t/a Hein's Renovations & Contractors, dated 08 November 2018, was attached to the summons as Annexure "A". The appellant asserted further that the respondent is liable to him for the payment of the repairs. However, he has failed or neglected to settle the said amount or any portion thereof.

[7] The respondent defended the action and filed a plea dated 16 February 2021. In her plea, the respondent admitted having collided with the appellant's boundary wall but denied that she was negligent and contended that the collision was caused by the sole negligence of an unknown third-party driver in one or more of the following respects, in that he failed to (a) keep a proper look out; (b) apply breaks timeously or at all; (c) keep his vehicle under control; (d) take adequate or any steps to avoid the collision when by the exercise of reasonable care and skill, he could have done so; (e) he failed to stop at a stop sign; (f) he drove at an excessive speed and entered the path of travel of the respondent causing her vehicle to collide with the plaintiff's boundary wall; and (g) alternatively, that the respondent was not negligent in any of the allegations mentioned by the appellant in that she acted out of sudden emergency because of the third-party driver who collided with her vehicle causing her to lose control of it and collided with the boundary wall.

Brief Synopsis

[8] The appellant was not at home on the day the incident took place. He received a message that his boundary wall was damaged by the respondent's vehicle. Ms Sharnay Allison occupied his property but did not witness the incident. Her evidence demonstrated that before the incident took place the boundary wall was intact. She was inside the house when she heard a sound and went out to investigate.

[9] Mr Schoeman, the appellant's neighbour, testified about the damage that he observed after the incident. He also did not witness the incident. He stated that at the spot where the boundary wall was, there was a single lane carrying traffic in each direction. He testified that the width of [...] Road is between 20 to 30 metres. He estimated the distance from the pavement to where the boundary wall is to be between 8 to 10 metres. He stated that traffic driving up and down [...] Road has the right of way over any vehicle coming from the side streets, the one being an ordinary side street and the other, a closed side street. According to him, there is sufficient space for a vehicle to fit in the portion of the closed street. Mr Schoeman took photos of the scene.

[10] Considering that no one witnessed the collision as indicated above, the respondent explained how the collision took place. She was travelling up [...] Road in a Fortuner taking it for service and dropping her 9-year-old daughter at Curo Westbrook School. Just before the collision took place, she had been driving behind a red Citi Golf that entered the roadway and observed that it did not stop at a stop

sign, a few streets back. It also did not use its indicators to show the direction it was to take. In anticipation that it was trying to make a U-turn or stop, the respondent swerved to the right side of her lane but not over the lane of the oncoming traffic. Before the Citi Golf turned left into [...] Street towards a small, tarred circle and stopped next to the road, the respondent was travelling less than a car length behind it. When she was asked whether she applied breaks when the Citi Golf turned into [...] Street, she said that she did not do so timeously to avoid a collision with the Citi Golf. Instead, she tried to control her vehicle and at the same time grabbed her daughter who was sitting in the passenger seat. She explained that she did not have 100% control over the steering wheel *“because I was not using both my hands.”* That is because when she heard a bang, her daughter screamed, and she held her with one hand and the steering wheel with the other, to reassure her that she was safe. However, she confirmed that her daughter was properly restrained and safe as she was wearing a safety belt, and the airbag did not deploy during the collision. When she was again asked what she did to avoid the collision, she said: *“I tried to swerve but it was too late for me to do that.”* She also did not sound a hooter to announce her presence to the driver of the Citi Golf especially when it turned to the left side of the road and stopped next to the road.

[11] The respondent testified that the Citi Golf collided with the front passenger door of her vehicle in her correct lane of travel, as she was trying to manoeuvre her vehicle causing her to lose control of same. The respondent later testified that when the vehicle crossed over to the lane of the oncoming traffic, past the pavement and the streetlight, it was not because she swerved her vehicle.

Order by the court a quo

[12] In dismissing the appellant's claim, the trial court considered all the circumstances but could not find that '*the respondent was negligent at all in regard to the allegations that are set out in paragraphs 6.1 to 6.5 in the particulars of claim*' without mentioning what circumstances were considered. The magistrate's view was that the evidence of the appellant's witnesses did '*not contribute much to the plaintiff's case.*' The third-party driver, namely Elzano King of [...]Street, Gelvandale, Gqeberha, who drove the Citi Golf with registration number [...] EC was neither added as a defendant nor called as a witness.

Grounds of appeal

[13] On 11 October 2022, the appellant filed a notice of appeal wherein he encapsulated the grounds of appeal summarised thus:

13.1 The trial court failed to find that the respondent was negligent as alleged by the appellant in paragraph 6 of his particulars of claim.

13.2 The magistrate failed to find that the respondent was negligent despite the following undisputed factors which emerged from her testimony:

13.2.1 The driver of the Citi Golf displayed signs of reckless and/or careless driving even before he turned in front of the respondent;

13.2.2 The respondent grabbed her daughter after her vehicle was struck by the Citi Golf even though her daughter was in no

immediate danger thereby losing control of her vehicle and caused damage to the appellant's boundary wall and posed danger to the other road users; and

13.2.3 She did not apply breaks prior to colliding with the Citi Golf and the plaintiff's boundary wall.

13.3 The magistrate failed to find in favour of the appellant on the issue of liability and award him costs of the action, as well as costs of counsel at a rate not exceedingly thrice the rate contained in the magistrate's court tariff.

13.4 The trial court erred and misdirected itself in dismissing the plaintiff's claim with costs.

The principle of appeal

[14] A court of appeal is generally reluctant to upset the findings which depend on the credibility of a witness and will only do so where such findings are clearly wrong.

In *R v Dhlumayo and Another*¹ Greenberg JA, Schreiner JA and Davis AJA concurring held:

“(8) Where there has been no misdirection on fact by the trial Judge, the presumption is that his conclusion is correct; the appellate court will only reverse it where it is convinced that it is wrong.

(9) In such a case, if the appellate court is merely left in doubt as to the correctness of the conclusion, then it will uphold it.

(10) There may be a misdirection on fact by the trial Judge where the reasons are either on their face unsatisfactory or where the record shows them to be such; there may be such a misdirection also where, though the reasons as far as they go are satisfactory, he is shown to have overlooked other facts or probabilities.

(11) The appellate court is then at large to disregard his findings on fact, even though based on credibility, in whole or in part according to the nature of the misdirection and the circumstances of the particular case, and so come to its own conclusion on the matter.

(12) An appellate court should not seek anxiously to discover reasons adverse to the conclusions of the trial Judge. No judgment can ever be perfect and all-embracing, and it does not necessarily follow that, because something has not been mentioned, therefore it has not been considered.”

¹ *R v Dhlumayo and Another* 1948 (2) SA 677 (A) at paras [8-12]; See also *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC) at paras [37] and [40] where the Court as per (Jafta J; Mogoeng CJ, Moseneke DCJ, Khampepe J, Matojane AJ, Nkabinde J and Zondo J concurring) held: “[37] Ordinarily, appeal courts in our law are reluctant to interfere with factual findings made by trial courts, more particularly if the factual findings depended upon the credibility of the witnesses who testified at the trial. In *Bitcoin Wessels* CJ said: “(T)he trial judge is not concerned with what is or is not probable when dealing with abstract businessmen or normal men, but is concerned with what is probable and what is not probable as regards the particular individuals situated in the particular circumstances in which they were.’ [40] But even in the appeal the deference afforded to a trial court’s credibility findings must not be overstated. If it emerges from the record that the trial court misdirected itself on the facts or that it came to a wrong conclusion, the appellate court is duty-bound to overrule factual findings of the trial court so as to do justice to the case. In *Bernert* this court affirmed: “What must be stressed here, is the point that has been repeatedly made. The principle that an appellate court will not ordinarily interfere with a factual finding by a trial court is not an inflexible rule. It is a recognition of the advantages that the trial court enjoys, which the appellate court does not. These advantages flow from observing and hearing witnesses as opposed to reading the cold printed word. The main advantage being the opportunity to observe the demeanor of the witnesses. But this rule of practice should not be used to tie the hands of appellate courts. It should be used to assist, and not to hamper, an appellate court to do justice to the case before it. Thus, where there is a misdirection on the facts by the trial court, the appellate court is entitled to disregard the findings on facts and come to its own conclusion on the facts as they appear on the record. Similarly, where the appellate court is convinced that the conclusion reached by the trial court is clearly wrong, it will reverse it”.

Analysis

[15] It is undisputed that the respondent had observed how reckless the driver of the Citi Golf conducted himself when he drove in front of her, but she did nothing about that. It is further undisputed that where the Citi Golf turned, there was a *cul de sac and*, there was nowhere for it to go. When asked what she did when the Citi Golf turned left, the respondent said that she swerved to give it space to drive past. When it was put to her that it looked like she stayed in her lane when the Citi Golf hit her vehicle, she answered in the positive. She said: "*I was trying to give him some space but within my lane.*" She stated that she did not think of driving over to the right lane of traffic. Mr Le Roux, for the appellant, asked:

"Q: And had you gone over to that lane you most likely would have given him a wide enough berth and you would have passed him safely, do you agree?..."

A: Because I am not sure when I should have – if me by moving to another lane I would have given him enough space because I was not in his head, so I do not know what he was trying to do. Because the accident could have happened either way, because he was like a minor that was driving the car.

Q: You did not hoot, blow your hooter when you did this reckless manoeuvre to make him aware of your presence?

A: The only time I hooted was before when he did not stop and then I hooted. And then when he did his manoeuvring I did not hoot."

[16] The respondent gave no reason why she did not drive on the right-hand lane thereby giving the Citi Golf enough space as she would have passed safely

considering that there was no oncoming traffic or sound a hooter making her presence known to the driver of the Citi Golf.

[17] The respondent confirmed that she did not put her foot on the brake and the reason she did not do so was because she was nervous and shocked as this was a scary situation for her. She said that she did not think about breaks at that stage. According to her, the crossing over of her vehicle to the lane of oncoming traffic past the pavement and the streetlight was caused by the impact when her vehicle was bumped by the Citi Golf. She said: *"The reason why I lost control, it was because of the impact so I had to for some reason, motherly instincts, I thought of my child and then there is a vehicle here, so I - it is given that I could not do both of them fully."*

[18] The respondent could not control the vehicle because it went down [...] Road, crossed over the lane of oncoming traffic, over the pedestrian walkway, past a streetlight and collided with the boundary wall. She confirmed that the vehicle travelled a substantial distance down the road and moved side to side before it collided with the boundary wall. When she was asked why she did not turn it towards the road if she had some control of it, she could not proffer an explanation.

[19] Regarding a reasonable driver, *Diemont AJA in Butt and Another v Van Den Camp*,² Trengove JA, Cillié JA, Viljoen JA, Holmes AJA and Diemont AJA remarked:

"The reasonable driver is expected to be alert and to have a certain nerve. He knows that in modern traffic conditions the unexpected may happen at any time...Difficult situations arise

² *Butt And Another v Van Den Camp 1982 (3) SA 819 (A)*.

suddenly; the reasonable driver must be able to cope with such situations. The competent driver who hears something strike the side of his vehicle is not, as a rule, faced with an emergency. He is dealing with the sort of eventuality which an experienced driver must expect or at least bear in mind and with which he must be able to cope. He may stop and investigate, but he will not suddenly swerve across the road.”

[20] The appellant was not the reasonable driver referred to above. I say so because she noticed for a while the way the driver of the Citi Golf drove recklessly in front of her, as indicated earlier, yet she followed him/her at a distance less than a motor vehicle. Again, holding her daughter with one hand and the steering wheel with the other, resulted in her losing control of the vehicle, and it veered across the lane of oncoming traffic, past the pavement and a streetlight and collided with the appellant’s boundary wall, as alluded. All this time, she did not put her foot on the brake, to avoid the collision either with the Citi Golf or the appellant’s boundary wall. Her conduct could have had more serious repercussions for herself, her daughter and other road users. The act of suddenly swerving without applying brakes as well as her reaction to the circumstances at the time, was not what could have been expected of a reasonable driver. She did not even stop to assess the damage to her vehicle.

[21] It was not the respondent’s case that she was unable to drive her vehicle after the impact with the Citi Golf and it was also not her evidence that her brakes were malfunctioning. She left the vehicle to move forward without applying brakes or steering it, unlike what a reasonable driver would have done in the circumstances. She relinquished the control of her vehicle over the concern of her daughter. She did

not even say that everything happened fast and did not have enough time to react to the situation she found herself in.

[22] The respondent also pleaded that she acted out of sudden emergency because of the third-party vehicle colliding with her vehicle causing her to lose control and colliding with the appellant's boundary wall. She was unable to claim that she was faced with an unexpected incident. I say that because of the reasons already mentioned herein above. She did not act reasonably prudent during the whole incident. I have already found that she had enough time to react to the situation but chose to attend to her child whereupon she lost control of the vehicle. In my view, she did not do what a reasonable driver in her position would have done for reasons already advanced. Her conduct fell short of what was expected of a reasonably careful and skilled driver in the circumstances. The respondent was therefore negligent and is liable for the damage caused to the appellant's boundary wall.

[23] In my view, the magistrate committed a misdirection when he found that the respondent was not negligent thereby dismissing the appellant's claim with costs without giving reasons for his decision.

Costs

[24] The remaining issue for determination is costs. Mr Le Roux submitted that the appellant should be entitled to costs for bringing the action before the court *a quo*.

That is because the court *a quo* was requested to award counsel's fees at a higher scale than the magistrate's court tariff. Mr Le Roux submitted further that subject to the discretion of the taxing master/mistress, counsel's fees should be allowed in all but the simplest of matters. He referred to *Edwin van Rooyen v Minister of Police case number CA332/2018*, unreported, Grahamstown High Court delivered on 26 March 2020 where a plaintiff was detained unlawfully during the night of 17 February 2016. The court *a quo*'s dismissal of the plaintiff's claim was overturned on appeal, and he was awarded costs of counsel in the magistrate's court at a rate higher than the normal magistrate's court tariff. This case is distinguishable from the instant case. In *Edwin Van Rooyen* the issue dealt with a constitutionally entrenched right regarding unlawful and wrongful detention, which is not the case here.

[25] It is a fundamental principle that a party who succeeds should be awarded costs and this rule should not be departed from except on good grounds.³ The award of costs is wholly within the discretion of the court, but this is a judicial discretion and must be exercised on the ground upon which a reasonable person could have come to the conclusion arrived at.⁴ As far as I am concerned, there is no reason why the costs of this appeal should not follow the result. This is applicable to the appeal and the judgment of the court *a quo*. It is undisputed that the appellant was represented by counsel before the court *a quo*. However, I am of the view that this matter had no complex issues. No basis was laid for the submission that it raised complex issues. Be that as it may, the appellant is entitled to costs of suit before the court *a quo* as well as costs of the appeal.

³ *South African Association of Personal Injury Lawyers v Heath 2001 (1) SA 883 (CC) at 912.*

⁴ *Beinash v Wixley [1997] 2 All SA 241; 1997 (3) SA 721 (A).*

[26] In the circumstances, I issue the following order: __

1. The appeal is upheld with costs.
2. The order of the court *a quo* dismissing the appellant's claim with costs is set aside and substituted with the following order:

“(a) The defendant is found to be negligent, such negligence being the sole cause of the damage to the plaintiff's boundary wall.

(b) The defendant is ordered to pay costs of suit.”

BM PAKATI

JUDGE OF THE HIGH COURT, EASTERN CAPE, GQEBERHA

I agree.

I BANDS

JUDGE OF THE HIGH COURT, EASTERN CAPE, GQEBERHA

APPEARANCES:

For Appellant	:	Adv JD Le Roux
Instructed by	:	McCallum Attorneys
For Respondent	:	No appearance
Date heard	:	21 July 2023
Judgment delivered	:	01 December 2023