



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

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

Reportable: NO/YES

CASE NO.: 1175/2023

In the matter between:

GERT CAREL JACOBUS KRUGER

Plaintiff¹

and

THE ROAD ACCIDENT FUND

Defendant²

Coram: M Opperman J

Heard: 28 February 2024 & 2 April 2024

Delivered: 16 April 2024. This judgment was handed down in court and electronically by circulation to the parties' legal representatives *via* email and release to SAFLII on 16 April 2024. The date and time of hand-down is deemed to be 15h00 on 16 April 2024

Summary: Trial – merits

¹ "Plaintiff".

² "RAF/defendant".

ORDER

The plaintiffs' claim is dismissed on the merits with costs.

JUDGMENT

Opperman J

[1] The merits of the claim is the focus here. An order in terms of rule 33(4) on 16 October 2023 separated the merits from all other claims for trial.

The following order is issued:

1. A separation of issues is granted in accordance with rule 33(4) in terms whereof the merits only pertaining to the disputes contained in paragraphs 1, 3, 4, 5 and 10 of the particulars of claim, read with paragraphs 1, 3, 4, 5, 6, 7, 8, 9, 10 and 13 of the plea shall be adjudicated during the forthcoming hearing, and all other issues to stand over for later adjudication.
2. The matter is declared trial-ready and three days shall be allocated for the hearing

[2] The particulars of claim that brought the matter to trial sketch the incident that the plaintiff relies upon for his claim against the Road Accident Fund on the merits as follows:

4.

On or about the 11th of February 2021 at about 4:00 and on the R34-Road between Bloemfontein and Hoopstad, Free State province (sic), a motor vehicle accident occurred when the Plaintiff, then and there the driver of motor vehicle with registration number [...] NW, in an attempt to avoid an accident with another motor vehicle (hereinafter referred to as "the insured vehicle"), the identity of neither the driver (hereinafter referred to as "the insured driver") nor the owner of which is known, lost control over his motor vehicle subsequent to which the Plaintiff's vehicle veered of the road surface, capsized and rolled.

[3] The plaintiff claims that:

-3-

The collision occurred as a result of the sole negligence of the insured driver who was negligent in one or more or all of the following respects:

- 5.1³ He failed to take reasonable and/or timeous, if any, precautions to alert oncoming traffic, more particularly the Plaintiff, of the insured vehicle's presence on the road surface.
- 5.2 He left the insured vehicle in a stationary position on the road surface in such a position that it encroached on the path of oncoming traffic, more particularly the Plaintiff's oncoming vehicle;
- 5.3 He failed to adhere to the rules of the road;
- 5.4 He failed to avoid a collision which he could have avoided had he acted reasonably.

[4] The RAF disputes the above and maintains that:

6.

Should the Honourable Court find that that (sic) a collision occurred as alleged by the Plaintiff in Paragraph 4 and 5 of Plaintiff's Particulars of Claim, then the Defendant pleads as follows.

7.

³ Numbering as per the particulars of claim.

The Defendant denies that the **unknown** driver (further referred to as 'the insured driver') the driver of the motor vehicle with registration numbers and - letters **unknown** (further referred to as 'the insured vehicle') was negligent as alleged or otherwise.

8.

IN THE ALTERNATIVE to Paragraph 7 above, should the Honourable Court find that the insured driver was negligent as alleged, or otherwise, (which the Defendant denies), then the Defendant denies that such negligence was the cause of the collision and pleads that the sole cause of the collision was the negligence of the Plaintiff, who was negligent in one or more of the following respects:

- 8.1 He failed to keep a proper lookout.
- 8.2 He failed to take cognizance of the prevailing traffic and/or prevailing traffic conditions.
- 8.3 He failed to keep his vehicle under proper control.
- 8.4 He failed to apply the brakes of his vehicle timeously or at all.
- 8.5 He drove at a speed which was excessive in the prevailing circumstances.
- 8.6 He failed to avoid the collision, when by the exercise of reasonable care and consideration, he could and should have done so.
- 8.7 Or any other ground(s) which may be proven during the course of the trial.⁴

[5] The evidence consisted of the *viva voce* testimony of the plaintiff and also:

1. Exhibit A: The photo album consisting of four photos of the scene that was taken after the incident. The photos were taken after the incident the same morning by a friend of the plaintiff. The exhibit was handed in during the evidence of the plaintiff and not disputed by the RAF.

⁴ The alternative pleas of both parties are for findings of contributory negligence.

2. Exhibit B: A hand drafted sketch plan by the plaintiff and handed in through the evidence of the plaintiff.
3. Vital is the merits bundle that served as evidence for the plaintiff. It consists of the accident report to the police, the affidavit of the plaintiff dated the 17th of May 2022 and the photo album mentioned above.
4. The defendant did not adduce any evidence and closed their case summarily.

[6] The evidence of the plaintiff.

1. The plaintiff was not a good witness. He more often than not struggled with the depiction of distances and the incident itself, he did not answer questions and deflected from questions and he contradicted himself. The court in essence does not have any version of what happened on the 11th of February 2021 that gave rise to the claim. His counsel, admirably so, endeavoured to rescue the case for the plaintiff in her heads of argument but she was also professional enough to admit that:

78. In relation to the above the Plaintiffs demeanour was calm throughout, although very anx-ious (sic), he was an elderly gentleman whom (sic) was trying his best to recall the day of the incident to the best of his ability. He did become confused and misunderstood some of the questions but in essence he tried to assist the Court. He was clearly being honest and was unbias (sic) in his testimony. He did make several contradictions in his evidence but only relating to where he first started driving in lane 1 of the sketch, if, when and how he

applied his brakes and at what point he first saw the Grader,⁵ although this was later confirmed as 70 meters. The Plaintiff's testimony differed slightly from his Affidavit (sic) filed in that his affidavit indicates that he was travelling in lane 2 when he was confronted with the Grader, however it also states that the Grader was stationary in lane 2 as well. The testimony indicated that he was driving in lane 1 when he saw the grader ahead of him in lane 1. On the probabilities and having regard to the pictorial evidence before Court, it is submitted that it would in any event be unlikely if not impossible to somehow have parked the grader on any of the lanes of the tar road given the size and close proximity of the rock piles to each other.

81. With regards to reliability firstly it must be taken into account that the Plaintiff is 60 years of age and suffered several very serious injuries, as alluded to above the reaction time regarding the collision was also between 2/3 seconds. The Plaintiff thus had limited time to react and his version before Court was based upon what he could recall took place in 2021. His integrity was impeccable and he was a very truthful witness. The quality of the evidence may have been lacking since he made some contradictions, but one can forgive this having regard to a number of factors including considering Plaintiff's age and the fact that the accident took place almost 3 years ago. Although the matter served before Court in respect of the merits thereof exclusively (sic), and although no regard was subsequently given to the *sequelae* of Plaintiff's injuries and how this might have affected his cognition, comprehension, memory or speech etc, it was clearly noticeable that Plaintiff (sic) arms and hands were shaking uncontrollable (sic) prior to, through-out and even after the hearing for all to see. From the bench and to the extent that the Court would be inclined to

⁵ Also referred to as a "bulldozer".

accept my evidence in this regard, I can confirm that this was the case from the moment I met the Plaintiff during preparatory consultation the day before trial. The sketch of the scene as requested by the Defendant and admitted as evidence was also drawn prior to trial by Plaintiff's attorney as per Plaintiff's instructions since Plaintiff could simply not control his tremors, not to mention holding a pen or drawing anything.

2. The plaintiff started off by contradicting himself in the affidavit dated the 17th of May 2022 when he stated in paragraph 4 that: "I was earning a salary of R3000 per month from my fishing activities." At paragraph 13 he states that fishing is but a hobby. During his testimony in court, he denied that he earned an income from fishing.
3. Counsel for the defence is adamant that the evidence of the plaintiff cannot be regarded as prove on a balance of probabilities of what happened that caused the accident. This is what she had to say in her heads of argument:

5.

It is respectfully submitted that Plaintiff was not a good witness. His evidence was inconsistent, and he was unable to provide the Court with a single, coherent version of events. He contradicted⁶ himself in various respects. Such contradictions were not only in respect of his own evidence, but also contradicted objective evidence. Plaintiff was evasive at times, refraining from answering questions posed more than once, and providing answers which were not relevant to the questions posed to him. Where a question required a simple yes or no, he provided longwinded answers which did not relate to the question at hand. Plaintiff adapted and tailored his evidence during cross-examination. Plaintiff's evidence was riddled with improbabilities,

⁶ See paragraphs 3 to 9 of the heads of argument for the RAF that correctly pointed out the flaws in the evidence of the plaintiff.

some of which could not be reconciled with objective evidence before Court.

[7] The testimony of the plaintiff was of such poor quality that the court cannot place any reliance on it whatsoever. The court is at the mercy of inferences on the most probable objective reality of the case. The court must keep an eye on the test to be applied for a finding of negligence. It was ruled in *Pick 'n Pay Retailers (Pty) Ltd v Pillay* (900/2020) [2021] ZASCA 125 (29 September 2021) to be the following:

[13] In *Kruger v Coetzee*⁷ Holmes JA formulated the test for negligence as follows: 'For the purposes of liability *culpa* arises if:

(a) A *diligens paterfamilias* in the position of the defendant - *Kruger v Coetzee* at 430E-F –

(i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and

(ii) would take reasonable steps to guard against such occurrence; and

(b) the defendant failed to take such steps.

[14] In *Sea Harvest Corporation*⁸ Scott JA stated that dividing the issue of negligence into various stages, however useful, was no more than an aid or guideline in resolving the issue: in the final analysis the true criterion for determining negligence was whether in the particular circumstances the conduct complained of fell short of the standard of the reasonable person. There is no universally applicable formula which would prove to be appropriate in every case.

⁷ 1966 (2) SA 428 (A).

⁸ *Sea Harvest Corporation (Pty) Ltd and Another v Duncan Dock Cold Storage (Pty) Ltd and Another* 2000 (1) SA 827 (SCA); [2000] 1 All SA 128 (A) paragraph 21.

[15] In the light of recent authorities, J R Midgley and J C van der Walt in *Lawsa*⁹ have made the following observation: ‘When assessing negligence, the focus appears to have shifted from the foreseeability and preventability formulation of the test to the actual standard: conduct associated with a reasonable person. The *Kruger v Coetzee* test, or any modification thereof, has been relegated to a formula or guide that does not require strict adherence. It is merely a method for determining the reasonable person standard, which is why courts are free to assume foreseeability and focus on whether the defendant took the appropriate steps that were expected of him or her.’

[8] These are the issues of foreseeability and focus that direct that the plaintiff did not take “the appropriate steps that were expected of him or her.”:

1. There were extensive road works on the R34 road and it was clearly visible. No amount of warning signs would have made a difference.
2. The plaintiff was already driving inside the construction zone for a substantial distance when the incident occurred. He had to realise the situation.
3. The sun had not risen. The vehicle driven by the plaintiff’s lights were switched on; this indicates a more perilous situation that had to be realised by the plaintiff.
4. The vehicle struck the rocks that were on the surface of the road with such force that some of the tyres deflated and the vehicle capsized and rolled. This is an indication of excessive speed.

⁹ LAWSA 3rd edition at 284 paragraph 155.

5. The photos show that the piles of rocks on one lane of the road are colossal, a few meters apart and must have been clearly visible in the lights of the vehicle. The rocks lying in the road the same.
6. The condition of the road could clearly not have been favourable to either a speed of 100 kilometres per hour or a slacked down speed of 80 kilometres per hour¹⁰ at a distance of 70 meters from the obstacle. The plaintiff indicated that the speed and circumstances were such that if he braked, he would have slid into the bulldozer; he elected to swerve but that also proved to be catastrophic at the speed he was driving and the condition of the road that he was well aware of. He realised that the manner in which he drove might cause a danger if confronted by a necessity to brake.
7. The plaintiff admitted that there is also the danger of wild animals on the road and that he realised that sand blew onto the sides of the road.
8. The grader or bulldozer is mammoth and bright yellow. It is just not the truth that the plaintiff could only observe the vehicle when he was 70 meters away from it. It was a straight stretch of road and there were not any obstacles that could have obstructed his view. He did not keep a proper lookout and drove too fast.
9. There was, having regard to the photos and the *viva voce* evidence of the plaintiff, enough space to navigate around the bulldozer to the left.

¹⁰ Paragraph 25 of the heads of argument for the plaintiff.

10. The simple truth is that the plaintiff did not drive with the care that is expected; his driving was severely negligent.
11. The evidence does not indicate any negligence on the part of anybody else than the plaintiff. On the evidence of the plaintiff and the probabilities there was not anybody in the bulldozer and there was not any driver identified. As counsel for the defendant correctly pointed out; "...the Grader had no driver inside, Plaintiff's Particulars of Claim does not include any alternative plea of negligence by the owner thereof. *The only allegations of negligence are against the unknown driver.*"
12. There is not any case on the objective facts for sudden emergency and it was not pleaded.

[9] There is not a version before the court from the plaintiff on which any finding on a balance of probabilities can be made in his favour. Some calculations and submissions in the heads of argument for the plaintiff is tantamount to evidence from the bar because it was not adduced by experts or other evidence but mere calculations and speculation by counsel; the correctness whereof could also not be tested in trial.¹¹ The claim of the plaintiff on the merits fails and must be dismissed.

¹¹ For example, see paragraphs 59 to 60 of the heads of argument of the plaintiff.

[10] ORDER

The plaintiffs' claim is dismissed on the merits with costs.

M OPPERMAN J

Appearances

For plaintiff:

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