IN THE HIGH COURT OF SOUTH AFRICA
(WITWATERSRAND LOCAL DIVISION)

Johannesburg

CASE NO: A3186/02

DATE:03/06/2003

In the matter between:

THE ROAD ACCIDENT FUND Appellant

and

MGWEBA: WILLIAM ZOLILE Respondent

JUDGMENT

WILLIS J

This is an appeal against the judgment of my brother Mlambo J. The plaintiff's claim arose from an accident which, it is common cause, occurred at the intersection of Columbine Avenue and Rifle Range Road, in Southgate, Johannesburg on 17th December, 1998. The plaintiff was a pedestrian. The claim arises in terms of the provisions of the Road Accident Fund Act No. 56 of 1996.

At the commencement of the trial an order was granted in terms of Rule 33(4) separating the merits of the claim from the quantum of damages, if any.

Mlambo J found that the accident was occasioned solely through the negligence of the insured driver and ordered the defendant to pay the plaintiff's costs.

The appellant, who was the defendant in the court *a quo*, sought leave to appeal. This was granted by Mlambo J with the direction that the appeal was to be heard by the full bench of this division.

The intersection is massive. There are dual carriageways in both roads. The eastbound lane of Columbine Avenue has three lanes with a fourth lane on the extreme right for vehicles turning right into Rifle Range Road. Columbine Avenue has a paved island in the middle. Unfortunately the actual distances between a number of key points at the intersection were not measured. Nevertheless, it is clear from the photographs as well as the *viva voce* evidence of various witness that the distance between the traffic lights on one side of the road and the pedestrian crossings on the other side were, in the case of each of Columbine Avenue and Rifle Range Road, considerable. This particular intersection is very busy with both pedestrians and vehicles, especially at peak times. The accident took place at peak time. The plaintiff was a newspaper vendor. It is common cause that the plaintiff was knocked down in Columbine Avenue while attempting to cross the road to reach the island in the middle where he had newspapers for sale.

Three witnesses testified in the plaintiff's case:

(i) Melinda Alison Van Rooyen;

(ii) The plaintiff himself; and

(iii) Regan Olivier Jacobs.

One Gregory Frederick Madocks and Cheryl Rene Bailey, the insured driver testified for the defendant.

In my opinion, the Court *a quo* was correct in not relying on the evidence of Van Rooyen. Her evidence contradicted a written statement which she had made earlier and her evidence that the insured driver turned right into Columbine Avenue from Rifle Range does not accord with the objective evidence as to the skid marks etc given by Jacobs, the traffic officer who arrived on the scene very shortly after the accident. Jacobs' evidence was not seriously challenged. He said that the skid marks of some 16 paces showed that the insured driver was travelling from west to east in Columbine Avenue and that the plaintiff was lying some 22 paces from the point of impact . The plaintiff said he was crossing Columbine Avenue from north to south at the pedestrian crossing when the light was green for him. He was going to the island in the middle and had almost reached it when the vehicle driven by the insured driver collided with him.

Madocks is an inspector in the dog unit in Durban. At the time of the accident he was stationed in Braamfontein. He was on his way to Soweto, driving a state vehicle. He was stationary in Rifle Range Road, waiting for the traffic light to change. It was red for him when he heard the screeching of brakes. He then saw the vehicle driven by the insured driver collide with the plaintiff.

Before he heard the screech of the brakes, he noticed nothing relevant to the accident other than that the traffic light was red for him. He said: “I always watch the robots when I am parked, when I am waiting to actually proceed, so I always watch and wait for the robot to turn amber and then red and then I always like to get ready to take off.” He was certain that the insured driver had been travelling along Columbine Avenue immediately before the accident and had not entered it from Rifle Range Road. In my opinion the Court *a quo* cannot be faulted for accepting the correctness of his testimony.

The insured driver said that the light was green for her. She said that the collision took place between 7h30 and 7h45. She was adamant that she had been travelling at between 50 and 60 kilometres per hour. She said that there was no vehicle in her lane behind her. Her version is also to the effect that she saw two pedestrians crossing the road from her left to the island in the centre. The plaintiff was the second pedestrian walking approximately one to two paces behind the first pedestrian. She missed colliding with the first pedestrian.

The unchallenged evidence of Jacobs was that the accident took place at approximately 8h15. The insured driver also said this was the approximate time in her written statement which she had made shortly after the accident. The insured driver would not only have been late for work had she been travelling along Columbine Avenue at that time but so would her passenger, Tanya Kok. Furthermore, she would still have had to drop off her other passenger, Stan Morris (who was then her boyfriend) at Brackendowns some

10 kilometres away and then return to Southgate where she worked as a manager at the Russells store. The insured driver's version as to the time of the accident cannot be accepted as being true.

Much of the argument in the parties' heads was focused on whether or not the traffic light was green for the insured driver. The judgment of the Court a quo similarly dealt at length with this issue. In my respectful opinion the evidence does not permit the conclusion of the Court *a quo* that "probabilities point to the robot having changed from green to amber before Bailey entered the intersection." I am also respectfully of the opinion that the Court *a quo* erred in finding that: "When the robot changed from green to amber for Bailey at the same time the plaintiff must have seen the robot change to green for him and started crossing the intersection from north to south." This is a logical impossibility. It has to be accepted that the traffic light was green for the insured driver and, therefore, that it was red for the plaintiff. The plaintiff was negligent in crossing the road when the traffic light was not yet green for him.

Nevertheless, the cumulative weight of the following factors:

(i) The distance from the traffic lights (which were green for the insured driver) to the pedestrian crossing used by the plaintiff at the other end of the intersection;

(ii) The length of the skid marks of the insured vehicle;

(iii) The distance between the point of impact with the pedestrian and the point where he fell;

(iv) The insured driver's untruthful testimony about the time of the accident; and

(v) The insured driver would have been seriously late for work

compel the conclusion that the insured driver was travelling at an excessive speed in the circumstances. Put differently, had she been travelling at between 50 and 60 kilometres per hour, as she said she had, she would easily have been able to stop before hitting the plaintiff. As mentioned earlier, her own version is to the effect that she saw two pedestrians crossing the road from her left to the island in the centre. The plaintiff was the second pedestrian walking approximately one to two paces behind the first pedestrian. She missed colliding with the first pedestrian. Had she travelled more slowly she would also have avoided colliding with the plaintiff. Therein lies her negligence. An examination of her evidence also reveals that there were aspects of the failure to keep a proper look out and the failure to take reasonable steps to avoid the collision in her negligence as well. It should be borne in mind that she herself said that there was no vehicle in her lane behind her. Accordingly she could have applied her brakes sooner than she did.

In **SA Mutual Fire and General Insurance Co Ltd v Mhlawuli** 1977 (1) SA 891 (A) the Court had to consider a not dissimilar case in which a motor vehicle collided with a pedestrian. In that case the negligence of the insured driver had consisted of failing to keep a proper look out. The Court *a quo* had apportioned blame two thirds to the insured driver and one third to the pedestrian. This was confirmed on appeal. The negligence of the insured

driver *in casu* is worse: she was travelling at an excessive speed. In my opinion the appropriate apportionment of negligence is 80% on the part of the insured driver and 20% on the part of the pedestrian. *Mr Ress,* who appeared for the respondent, indicated that if an apportionment of blame were to be made, he would agree with this ratio.

I am aware of cases such as **Norwich Union Fire Insurance Society Ltd v Tutt** 1960 (4) SA (A) and **Rondalia Versekeringskorporasie van S.A. v Pretorius** 1967 (2) SA 649 (A) from which it appears clear that an apportionment (or a further apportionment) of damages on appeal does not necessarily entail that the costs of appeal should be apportioned *pro rata*. In the **Norwich Union v Tutt** case the Appellate Division reduced the award of the Court *a quo* from £2 896 18s to £2 317 10s 5d and ordered the respondent to pay the costs of appeal. See also **Protea Assurance Co Ltd v Casey** 1970 (2) SA 643 (A) where an 80/20 apportionment of damages was reduced to 50/50 in appellant's favour. The respondent was ordered to pay the costs of appeal. In two full bench decisions, **Stolph v Du Plessis** 1960 920 Sa 661 (T) and **Bhayat's Store v Van Rooyen** 1961 (4) SA 59 (T), the costs of the appeal were awarded according to the pattern of the above decisions in the Appellate Division. It is, however, trite that partial success on appeal may result in an appellant not being awarded the full costs of the appeal (see, for example, **Union Share Agency & Investment Ltd** 1926 CPA 129 at 141;**Gentiruco A.G. v Firestone SA (Pty) Ltd** 1972 (1) SA 589 (A) at p668 et seq.; **Cine Film (Pty) Ltd v Commissioner of Police** 1972 (2) Sa 254 (A) at pp268-9; **Minister van die Suid-Afrikaanse Polisie en 'n Ander v**

Kraatz en 'n Ander 1973 (3) SA 490 (A) at pp 513-514; **Rondalia Assurance Corporation of SA Ltd v Dassie** 1975 (3) SA 689 (A) at p693; **Protea Assurance Co. Ltd v Matinise** 1978 (1) SA 963 (A) at p978). In **Port Elizabeth Municipality v Uitenhage Municipality** 971 (1) SA 724 (A), although the appellant was partially successful on appeal, it was ordered to pay the respondent's costs of the appeal. In **Claude Neon Lights (S.A.) Ltd v Daniel** 1976 (4) SA 403 (A) the Court found that "the appellant has achieved substantial success in the sense that the trial Court's decision that the evidence could not support a finding that the respondent was liable at all, is to be set aside." Nevertheless, the Court decided that "the requirements of justice" would be met "by making no order as to the costs of appeal." Does a reduction from 100% negligence to 80% on appeal amount to substantial or merely partial success on appeal? Opinions may differ. In **Rondalia v Pretorius** (*supra*), the court held that an II% reduction in quantum amounted to "wesentlike welslae" which ordinarily would justify a costs order in favour of the appellant. The court, however took into account other factors to make an order that the respondent should pay only half of the appellant's costs of the appeal.

In **Mouton v Die Mynwerkersunie** 1977 (1) SA 119 (A) the Appellate Division reduced an award for damages from R239 499,21 to R219 499,21 and ordered the appellant to pay nine-tenths of the respondent's costs on appeal (including the costs of two counsel).

In its Notice of Appeal in terms of Rule 49 the appellant sought an order ”that the judgment of the Court *a quo* be set aside and that the respondent’s claim be dismissed with costs.” In its heads of argument, the appellant submitted that “the appropriate order in favour of the appellant would be one granting absolution with costs against the respondent.’ In other words, the appellant was “going for broke” or seeking an “all-or-nothing” result. Not remotely did the appellant indicate that it would be content with an apportionment. The respondent, however, did indicate in his heads of argument that, in the alternative to an order dismissing the appeal, he would seek an order apportioning blame. Had the appellant indicated that it might be content with an apportionment, this may have facilitated a settlement or the respondent may have been encouraged to make a tender. In my opinion these are relevant considerations.

It is trite that a Court of appeal has a discretion in awarding the costs of the appeal. I am in respectful agreement with the observation of Comrie AJ, as he then was, in **Llama Restaurant Franchising Co (Pty) ltd v Ivano (Pty) ltd** 1990 (1) SA 474 (C) at 478: “The aforegoing citations illustrate, I think graphically, the variety of costs order which may properly be made by a Court of appeal when an appellant enjoys partial success.”

I have derived much comfort and assistance from two learned articles appearing in the same edition of the South African Law Journal: “Costs and the Apportionment of Damages Act’ by P.Q.R Boberg *SALJ* 79 (1962) 141 and “Costs of Litigation in Actions Subject to the Apportionment of Damages

Act" by A.S Hoppenstein *SALJ* 79 (1962) 171. Both make impassioned appeals for costs orders that have equitable results in apportionment cases.

It seems to me that, depending upon the context, the concept of "the requirements of justice" may shift subtly over time. It seems to me that no Court in South Africa in 2003 would, in the circumstances of this particular case, be comfortable with an order that the respondent pays the appellant's costs of the appeal, despite the appellant's success in reducing the finding that the insured driver was 100% negligent to 80%.

In the final analysis it is, in my respectful opinion, difficult to improve upon what Lord Goddard had to say when giving the judgment of the Court in **Cinema Press Ltd v Pictures & Pleasures Ltd** [1945] 1 All ER 440; [1945] KB 356:

" We would add that the simplest way is to award costs in such proportions as the judge thinks fair."

The following order is made:

(1) The appeal is upheld;

(2) The order of the Court *a quo* that "The collision that occurred on 17th December 1998 at the intersection of Columbine Avenue and Rifle Range Road was occasioned solely through the negligence of the driver of the insured motor vehicle." is set aside.

(3) The following is substituted for that portion of the order of the Court *a quo* which has been set aside:

" The accident was occurred at the intersection of Columbine Avenue and Rifle Range Road on 17th December, 1998 when the plaintiff was hit by the motor vehicle having registration letters and number RXL 593T was occasioned through the negligence of both the insured driver of the aforesaid vehicle and the plaintiff, which negligence is apportioned 80% to the insured driver and 20% to the plaintiff."

(4) The costs order of the Court *a quo* is confirmed.

(5) The appellant is to pay 80% of the respondent's costs of the appeal.

DATED AT JOHANNESBURG THIS 3rd DAY OF JUNE, 2003

N.P. WILLIS

JUDGE OF THE HIGH COURT

I agree.

C. J. CLAASSEN

JUDGE OF THE HIGH COURT

I agree.

K. I. FOULKES-JONES

ACTING JUDGE OF THE HIGH COURT

Counsel for Appellant: *B. Joseph*

Attorneys for Appellant: Mayat, Nurick & Associates

Counsel for Respondent: *S.L. Ress*

Attorneys for Respondent: Rhulani Baloyi

Date of hearing: 23rd May, 2003

Date of Judgment: 3rd June, 2003