

NOT REPORTABLE

REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 2009/12892

DATE: 05/11/2010

In the matter between:

LAMBERT, GLENN ARTHUR

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

J U D G M E N T

MBHA, J:

[1] The plaintiff has instituted an action against the defendant in terms of the Road Accident Fund Act 56 of 1996, for damages arising from injuries sustained in a motor vehicle collision which occurred on 27 June 2007 at approximately 17H30. The collision occurred at the intersection of River Street (“*River*”) and Riviera Road (“*Riviera*”), Killarney, between motor vehicles with

registrations FVZ 660 GP then being driven by Mr D Makwela (“*the insured driver*”), and SHT 848 GP (“*the Mercedes*”) then being driven by the plaintiff.

[2] The plaintiff’s action against the defendant is based on the negligence of the insured driver. The defendant denies that the insured driver was negligent at all or that he contributed to the cause of the collision, and avers that it was the plaintiff who was the sole cause of the collision. The defendant avers further that should the court find that the insured driver was negligent, then the plaintiff also negligently contributed to the cause of the collision.

[3] By agreement between the parties the matter proceeded only on the question of liability. The issue of quantum was held over for later determination.

[4] The plaintiff led the evidence of two witnesses. The defendant led the evidence of the insured driver and a passenger in the insured vehicle.

[5] From the evidence it became common cause that:

5.1 the collision occurred at the intersection of Riviera Road and River Street, Killarney.

5.2 Riviera Road proceeds east towards the onramp to the M1 Highway, with the Killarney Mall on the right and the former US Consulate on the left. The former US Consulate has an approximately 10 meter high security wall around it.

5.3 River Road proceeds in a north-southerly direction towards the River-Riviera intersection.

ISSUE IN DISPUTE

[6] It is in dispute as to who caused the collision, the dispute being either:

6.1 that the defendant's insured driver caused the collision by failing to stop, alternatively by failing to take notice of the robot which was red against him; or

6.2 that the plaintiff failed to take notice of the robot-controlled intersection, the robot being red against him at the time he proceeded to execute a left turn into Riviera.

[7] The plaintiff's case is that the robot was green in his favour, that he proceeded to execute a left turn from River into Riviera when the insured driver's failed to stop, alternatively failed to take notice of the red robot against him and proceeded through the intersection, thus colliding with the plaintiff's Mercedes.

THE PLAINTIFF'S EVIDENCE

[8] The plaintiff described the collision as follows:

- 8.1 he was heading south in River to the robot controlled intersection at Riveira and River, where he intended executing a left turn and head east along Riveira;
- 8.2 when he was approximately fifty meters from the above intersection, the robot turned green in his favour, by the time he entered the intersection, the pedestrian signal had started flashing red signalling that the traffic light was going to change to amber at any time;
- 8.3 there were two cars stationary at the robot heading east on the right-hand lane on Riviera;
- 8.4 having assessed the situation he proceeded to turn left;
- 8.5 the insured driver jumped the red robot and collided with the Mercedes on its right fender/bonnet, finally stopping some 10 to 15 meters further east along Riviera.

[9] The plaintiff testified that when he executed a left turn into Riviera, he was travelling at a speed of not more than 15 km per hour. He said he only saw the insured truck a mere milli-seconds before impact. He did not see the insured truck approaching from his right hand side before the collision. He conceded that the security wall at the former US Embassy could have obstructed his view of the traffic approaching from his right along Riviera.

[10] The plaintiff's witness Mrs Nel testified:

10.1 she was a passenger in a Landrover Discovery driven by her husband, which was stationary at the intersection on Riviera heading east;

10.2 the robot was red against the Landrover Discovery and remained so for a couple of seconds;

10.3 initially she testified that she saw the insured truck pass the Landrover on the left at high speed. Later she changed and stated that she only saw the insured truck as it entered the intersection. She could not recall when she first saw the plaintiff's vehicle but was aware that she saw it just before the impact. She was adamant that the insured driver entered the intersection when the robot was red but conceded that as she was not driving, she was not watching the robot that closely.

[11] Mr Nel who was the driver of the Landrover Discovery testified:

11.1 he was stationary for a few seconds at the robot-controlled intersection, facing east along Riviera;

- 11.2 he saw the insured truck approaching through his rear-view mirror travelling at a speed which he considered high in the circumstances;
- 11.3 he feared for his own safety and that of his passengers in the probable event that the insured would have to immediately swerve right, his vehicle being first and stationary at the robot in the right-hand lane heading east;
- 11.4 he saw the plaintiff's Mercedes approaching from his left along River and stop just before entering the intersection. After stopping briefly, the Mercedes proceeded slowly into the intersection and executed a left turn into Riviera;
- 11.5 he saw as the insured truck collided with the plaintiff's Mercedes inside the intersection.

THE DEFENDANT'S EVIDENCE

[12] The insured driver Mr Makwela, testified as follows:

- 12.1 on the day of the accident he was in the company of six co-workers who were passengers in the truck, they were driving back from work;

- 12.2 they were driving in a 1989 truck which was also carrying some working tools and cables;
- 12.3 they were not in a hurry, traffic was not that heavy. He stopped at the preceding intersection, being the Killarney/Riviera intersection where the robot was red. From that intersection the truck picked up speed until it was travelling at approximately 60 km per hour, by the time he reached the next intersection at Riviera/River which is approximately 200 meters away, the robot was green in his favour;
- 12.4 before he entered the intersection he satisfied himself that it was safe to traverse it whereafter he proceeded through it;
- 12.5 he was adamant that he did not observe any stationary motor vehicle on the right-hand lane;
- 12.6 whilst he was in the middle of the intersection he suddenly saw the plaintiff's vehicle veering into the intersection and collide with the middle left-hand side of the truck next to the petrol tank;
- 12.7 the front part of the truck had already crossed the intersection when the impact occurred. He did not see the plaintiff's vehicle until it was right on top of him.

12.8 He later testified during cross-examination that he saw the plaintiff's vehicle but his intention was to proceed straight, he believed that the plaintiff would not proceed into the intersection.

[13] The defendant's other witness Mr Sithole, testified:

13.1 he was a passenger in the insured truck and was sitting in the driver's cab next to the insured driver. The robot at the Riviera/River intersection was green in favour of the insured truck;

13.2 he did not see the plaintiff's vehicle approaching from the left, he only heard it bumping against the truck on its left-hand side next to the petrol tank;

13.3 he conceded that he was not concentrating nor paying any particular attention to anything at the time when the collision occurred.

THE TEST TO BE APPLIED WHERE THERE ARE MUTUALLY DESTRUCTIVE VERSIONS

[14]

14.1 It is trite that the plaintiff always bears the *onus* of proving negligence on a balance of probabilities. See *Arthur v Bezuidenhout and Mieny* 1962 (2) SA 560 (A) at 576G; *Sardi and Others v Standard and General Insurance Co Ltd* 1977 (3)

SA 776 (A) at 780C-H and *Madyosi and Another v S A Eagle Insurance Co Ltd* 1990 (3) SA 442 (E) at 444D-F.

14.2 It is also trite that in arriving at a decision, the court has to view the evidence which was led during the trial *in toto*.

[15] As can be seen from the evidence, the versions testified to by the plaintiff's witnesses on the one hand, and the defendant's witnesses on the other, are entirely different and are indeed mutually destructive with regard specifically to how the accident occurred. All the plaintiff's witnesses were adamant that the insured driver entered the Riviera/River intersection when the robot was red against him. On the other hand the insured driver and his witness testified that the robot directing the path of the insured driver as he approached the said intersection was green.

[16] A further point of difference is that whilst the plaintiff asserted that the insured truck collided with the Mercedes with its front part, the defendant's witnesses said that it was the Mercedes which in fact collided with the left-hand side of the truck towards its rear.

[17] It cannot be disputed that the Nels were at the scene and that they both witnessed the collision. Neither can it be disputed that the Nels' motor vehicle was stationary. The probabilities are, accordingly, that the robot controlling traffic along Riviera was at some point red. Sight however must

not be lost of the fact that Mrs Nel said that the robot was red for a mere seconds.

[18] Mr Nel's testimony that he saw the plaintiff's vehicle approaching from the left along River, that he saw it stop before entering the intersection contradicts that of the plaintiff. The plaintiff testified that he did not stop at the said intersection but that he merely executed a turn to the left at a speed of approximately 15 km per hour. It will be recalled that the plaintiff testified that the robot directing his path of travel turned green when he was approximately fifty meters away. He stated that by the time he entered the intersection, the pedestrian red light was flickering and that the traffic light had become static meaning that it was going to change to amber at any time.

[19] If Mr Nel's version that the plaintiff's vehicle stopped before proceeding into the intersection is correct, this raises the obvious question whether the plaintiff first ensured whether it was safe to proceed into the intersection before he actually did so. However, based on the testimony of the Nels, I have no hesitation in accepting that the robot directing traffic along Riviera in an easterly direction was red when the insured truck approached the River/Riviera intersection. I accordingly find that the insured driver negligently caused the collision.

[20] Although the insured driver was substantially to be blame for the collision, on the evidence the plaintiff cannot be absolved of any blame. I say so for the following reasons:

20.1 He testified that he entered the intersection and executed a turn to the left without seeing the truck which was approaching from his right on the left lane along Riviera. According to his evidence, he saw the truck a mere milli-seconds before the impact. Accepting that the robot must have been green in his favour, he nonetheless appeared to have entered the intersection without ensuring there was no vehicle approaching from his right side along the left-hand lane in Riviera. It is somewhat surprising that although he saw the two stationary vehicles on the right lane in Riviera, he could not see a heavy truck loaded with tools and cables and with passengers approaching from his right.

20.2 It is trite law that every road-user owes a duty of care and consideration for any other road-user. This duty includes a duty to keep a proper lookout. The duty of care requires of every driver to drive like a reasonable man who would be able to reasonably foresee the possibility of unforeseen consequences and act in accordance with such appreciation.

20.3 Failure to act in accordance to the above is tantamount, in law to negligence. See *Minister of Safety and Security v Van Duivenboden* [2002] 3 All SA 741 (SCA).

20.4 It is trite law that a driver of a vehicle entering an intersection with a robot green in his favour has a duty to look out for any traffic which might not yet be clear of the intersection and which might be about to cross his or her path of travel. Such driver has a duty to look out for any traffic approaching from his right and to take necessary precautions to avoid a collision.

[21] On the facts, I find that the plaintiff is liable for contributory negligence resulting in the collision.

[22] The insured driver proportionally contributed substantially more to the negligence which caused the collision by entering the intersection when the robot was red.

[23] In the circumstances I am of the view that an apportionment of 70/30 in favour of the plaintiff is appropriate.

[24] I accordingly make an order as follows:

1. The defendant is liable for 70% of the plaintiff's proven or agreed damages.
2. The defendant is ordered to pay the plaintiff's costs of suit.

**B H MBHA
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG**