

REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

CASE NO: 9734/2016
29/5/2019

In the matter between:

NIEMANN STEFAN

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

KUBUSHI

INTRODUCTION

[1] On the 19 June 2014 at Voortrekker Street (now Steve Biko Street) in Pretoria an accident occurred between a motor vehicle with registration number [...] ("the insured motor vehicle") driven by Teboho Mabotja ("the insured driver"), and a motor cycle with registration number [...] ("the motor cycle") driven by the plaintiff, Stefan Niemann. The plaintiff suffered serious injuries as a result of the said accident and is in this matter claiming compensation from the Road Accident Fund ("the Fund") for damages.

[2] At the commencement of trial, the plaintiff *per* agreement with the

defendant, applied for separation of the merits and *quantum*. The matter was to proceed on merits only and the *quantum* to be postponed *sine die*. An order for the separation of merits and *quantum* was granted in terms of uniform rule 33 (4).

[3] At the time when the action was instituted it appears as if the insured driver and/or insured motor vehicle were unknown to the plaintiff. But, when the matter served before me the insured driver had been located. As such, the parties were agreed that only the issue of negligence was in dispute, all the other issues having been admitted.

[4] Only two witnesses tendered evidence, namely the plaintiff who gave testimony in respect of the issue of negligence; and Sean Patrick Watson, a metro police officer who arrived on the scene of the accident immediately after the collision, who was called by the defendant to testify. I was informed that the defendant had two witnesses including the insured driver but the insured driver did not attend court though he was served with a subpoena. I shall deal, later in this judgment, with the failure of the insured driver to attend court.

THE EVIDENCE

The Plaintiff's Evidence

[5] The plaintiff was the first witness to give evidence. In summary, his evidence is that on the day of the accident at around 17h30, he was driving the motor cycle along Lavender Road ("Lavender") going into Steve Biko Street ("Steve Biko"). Where Lavender goes into Steve Biko there is a side street (slip way), Wonderboom Street ("Wonderboom"), also connecting into Steve Biko. Traffic from both Lavender and Wonderboom enter Steve Biko at the same intersection moving in the same direction.

[6] The plaintiff was driving on the right lane in Lavender which would enable him to easily turn right into Steve Biko. Before he came to the intersection where Lavender and Wonderboom meet to join Steve Biko, he stopped at a traffic light that was about 3 to 4 meters from the intersection.

[7] As he was approaching the intersection, he noticed a Quantum Bus ("the Quantum") travelling along Wonderboom towards Steve Biko. As the Quantum

was a little bit ahead of him he moved to the left lane to allow the Quantum to enter Steve Biko ahead of him. He went back into the right lane after the Quantum had entered Steve Biko and travelled behind the Quantum.

[8] As the two vehicles entered Steve Biko the road went up hill. He moved back to the right lane in order to overtake the Quantum that was by then travelling slowly because of the uphill. As he was about to pass the Quantum it (the Quantum) moved to the left lane as well. The Quantum hit the right side of the motor cycle's handle bar with its right rear light. The handle bar got stuck to the Quantum's light and dragged the motor cycle with it. As the two vehicles went downhill, the motor cycle disconnected from the Quantum which caused the plaintiff to lose control of the motor cycle. The motor cycle went off the road and the plaintiff was thrown off. He could not say where he fell after being thrown off because he lost consciousness and only came to his senses when he was already in the ambulance. He also did not know where the motor cycle landed after it went off the road.

[9] The accident happened about 15 meters from where Wonderboom enters Steve Biko. Where the accident occurred there is a broken line which allowed the plaintiff to move from the right lane to the left lane. He was travelling at about 60km *per* hour as he moved from a traffic light that had just turned green. According to him there was nothing that he could have done to avoid the accident. At the time of the accident he was already on the left lane and he could not go further off the road.

The Defendant's Evidence

[10] The evidence of the defendant was led by Sean Patrick Watson ("Sgt Watson"), a sergeant in the Metro Police Service with ten years' experience. He arrived on the scene of the accident immediately after it happened. His testimony is that on the day in question he was travelling to the office in his own motor vehicle along Steve Biko when he noticed motor vehicles stopping in the road. He also stopped. He noticed a motor cycle lying at the side of the road. He also noticed the driver of the said motor cycle lying on the side of the road down a slope. He went to assist the driver of the motor cycle. He also called emergency

services who took the injured motor cycle driver to hospital.

[11] After the ambulance left he called the police. He went and talked to the driver of the Quantum who told him that he was driving on the right lane of the road when he felt a bump at the rear of the motor vehicle. He thought that it was some of the equipment in the motor vehicle and ignored it. He only realised that something was wrong when he saw and heard people calling out to him to stop. This evidence was, after objection from the plaintiffs counsel, accepted provisionally due to its hearsay nature and was dismissed as hearsay evidence at the end of the trial.

ARGUMENT

[12] The plaintiff's counsel argued for the acceptance of the plaintiffs evidence as having established negligence on a balance of probabilities. The contention was that the driver of the Quantum did not keep a proper look out and moved to the left lane of the road without noting whether it was clear or not. There is no evidence that the plaintiff could have done anything else to avoid the accident.

[13] The defendant's counsel on the other hand argued for the dismissal of the plaintiffs claim on the ground that he did not keep a proper look out. The plaintiff was also moving fast in the circumstances in that he was driving moving between the right and left lane as a sign of impatience and the traffic was also heavy at the time of the accident.

[14] According to counsel how the accident happened is improbable. Probabilities are if the plaintiff was driving at 60km *per* hour he would not have landed where he was found after the accident. The evidence does not establish negligence on a balance of probabilities. Should the negligence on the part of the insured driver have been established there should be contributory negligence due to lack of proper lookout by the plaintiff.

DISCUSSION

[15] The issues in this matter are common cause except negligence. In his particulars of claim the plaintiff alleges that the insured driver was negligent in

that he (insured driver) failed to keep a proper look out; he drove at a high speed under the circumstances; he failed to apply brakes *alternatively* in time further *alternatively* he drove a motor vehicle the brakes of which were not in order; he failed to control the motor vehicle; he failed to avoid the accident; and he drove into the lane in which the plaintiffs motor cycle was driving when it was not opportune to do so.

[16] In his evidence the plaintiff testified only as to the failure by the insured driver to keep a proper look out and that he drove into the lane in which the motor cycle was driving when it was not opportune to do so. There is only the evidence of the plaintiff that is before court to give the events of what happened at the time of the accident. The evidence of Sgt Watson does not assist in this regard. He arrived on the scene when the accident had already occurred. The only other witness who could have given better evidence is the insured driver who refused to come to court. It can, therefore, never be known whether there is any other version of events besides what is related by the plaintiff. I have to accept the plaintiffs testimony that when he moved for the second time into the left lane, the Quantum also moved into the same lane without noting whether it was opportune to do so.

[17] The defendant's counsel argues that the plaintiff was driving at a high speed but there is no such evidence tendered. The only evidence is that he was driving at a speed of 60km *per* hour. This to me is probable. Just before the accident the plaintiff had stopped at a traffic light in Lavender. He would have to slowly gather speed before it can be said that he was driving at a speed higher than 60km *per* hour. The evidence is also that he had to reduce speed to give way to the Quantum to join Steve Biko from Wonderboom. There is also evidence that at the point of impact the road was going uphill. There is, thus, no evidence that the plaintiff could have been driving at a high speed under the circumstances.

[18] The contention by the defendant's counsel that there was a lot of traffic at the time of the accident is untested. It was never put to the plaintiff who is the only person who gave evidence and was there when the accident occurred. That at that time of the day there is always a lot of traffic cannot be prove that at the

time the accident happened there was a lot of traffic in the area where the accident occurred. Conversely, if it can be accepted that there was a lot of traffic in the area at the time, this goes to establish that the plaintiff could not have been driving at a high speed.

[19] I am, thus, satisfied that the plaintiff has been able to establish negligence on the part of the insured driver and his claim must succeed.

[20] The defendant in his plea pleads contributory negligence in the event I find that the accident was caused by the negligence of the insured driver. The defendant's counsel also argued for contributory negligence to be attributed to the plaintiff. This, however, cannot be so. There is no evidence that indicate in what manner it can be said that the plaintiff contributed to the accident; this mainly because the defendant led no such evidence. Without any evidence I cannot find for the defendant in this regard.

SUBPOENA

[21] At the close of the plaintiffs case the defendant's counsel informed me that one of the defendant's witnesses, the insured driver, did not come to court. According to counsel, the matter was previously postponed in order to secure the insured driver's attendance as a witness. He had repeatedly refused to attend court and consequently a subpoena was issued and served on him in order to procure his attendance in court but he did not obey the subpoena. Counsel, as such, applied for the issue of a warrant of arrest against the insured driver.

[22] A copy of the subpoena together with proof of service of the subpoena was handed in court as exhibit "B" and "C" respectively. It appears from the return of service that the subpoena was in fact served on Mr Nhlanhla who is described as the brother of the insured driver. The question is whether I can authorise the issue of a warrant of arrest against the insured driver if the subpoena was not served personally on him.

[23] Section 35 of the Superior Courts Act 10 of 2013 ("the Act") provides for the manner of securing attendance of witnesses in proceedings and penalties for failure. In terms of section 35 (1) of the Act a party to proceedings before any

Superior Court in which the attendance of a witness is required, may procure the attendance of any witness in the manner provided for in the rules of that court. Subsection (2) thereof stipulates that whenever any person subpoenaed to attend any proceedings as a witness fails without any reasonable excuse to obey the subpoena and it appears from the return of service that the subpoena was served upon the person to whom it is directed and that his or her reasonable expenses have been paid or offered to him or her, the court concerned may issue a warrant directing that he or she be arrested and brought before the court.

[24] According to section 35 (2) (a) of the Act the subpoena must be served upon the person to whom it is directed. It, however, appears that in this instance the subpoena was not served upon the insured driver but on his brother. The subsection also provides that the witness' reasonable expenses must have been paid or offered to him or her. On perusal of the copy of subpoena handed in court it does not appear as if the witness (insured driver) was paid or offered his reasonable expenses.

[25] It is on this basis that I am of the view that the subpoena alleged to have been served on the insured driver does not warrant the issue of a warrant for the insured driver's arrest.

[26] I, therefore, make the following order

1. The plaintiffs claim succeeds 100%.
2. The defendant is ordered to pay the plaintiffs proven or agreed damages.
3. The defendant is ordered to pay costs of suit.
4. The claim for damages is postponed *sine die*.

E.M. KUBUSHI

JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for Applicant

: Adv. D.J Venter

Instructed by

: Martins Attorneys

Counsel Defendant

: Adv. J Matladi

Instructed by

: Borman Duma Zitha Attorneys

Date heard

: 06 MAY 2019

Date of judgment

: 29 May 2019