

**IN THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA**

Case No.: 7586/2007

In the matter between:

STEPHEN RICHARD BOSHOFF

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

Delivered on: 23 September 2010

SISHI J

INTRODUCTION

[1] The plaintiff instituted this action against the defendant for damages arising out of the bodily injuries he sustained as a result of the motor-vehicle accident which occurred on 1 October 2005.

[2] When the matter initially came before court on 21 September 2009, the Court granted an order in terms of section 33(4) of

the Uniform Rules of Court, directing that the issues of liability and quantum of damages be determined separately and for the trial to proceed on the question of liability only, with the issue of the quantum of damages to be stayed until the issue of liability has been disposed of.

Background

[3] It is common cause between the parties that a collision occurred between 16h00 and 17h00 at the intersection of Edwin Swales Drive and Wakesleigh Road, between the motor vehicle bearing registration letters and numbers ND 363-928 (“the insured vehicle”) and the motor cycle bearing registration letters and numbers ND 569-776 which was being driven by the plaintiff at the time of the collision. Mr K Govender was the driver of the insured vehicle at the time of collision.

[4] The grounds of negligence of Mr K Govender are set out in the particulars of claim as follows:

(a) He failed to keep a proper lookout;

- b) He drove at a speed which was excessive in the circumstances;
- c) He failed to apply the brakes of his vehicle either timeously or at all when he could and should have done so;
- d) He failed to keep the vehicle under proper control;
- e) He failed to avoid the collision when by the exercise of reasonable care and skill he could and should have done so by either slowing down or turning aside;
- f) He failed to give the motor cycle a wide berth and/or yield for it;
- g) He cut across the path of travel of the motor cycle at a time when it was unsafe to do so.

[5] The defendant on the other hand, denied any negligence on his part and contends that the plaintiff was negligent in one or more or all of the following respects:

- a) He failed to keep a proper look out;
- b) He drove at a speed which was excessive in the circumstances;
- c) He failed to keep his motorcycle under adequate or any control;
- d) He failed to apply the brakes of his motorcycle either timeously or at all;
- e) He failed to stop, turn aside or take any action to avoid the collision when by the exercise of reasonable care (*sic*) and skill he could and should have done so.

[6] The plaintiff testified and also called two independent eye witnesses, Mr Hoosen Khan, and Mrs Michelle Hannan. The defendant on the other hand relied of the evidence of the insured driver, Mr K Govender.

[7] Mr Hoosen Khan testified that he was travelling on Edwin

Swales Drive, going towards the Pavillion, travelling from east towards the west. On reaching the intersection, his intention was to turn right and he was in the extreme right hand lane. There were two other vehicles in front of him and a bakkie was in front of these motor vehicles. He stopped at the intersection because the robot was green for both sides but there was no arrow indicating for vehicles in his lane to turn right. Whilst he was waiting for the green arrow, the insured driver took off, and did not wait for the green arrow and the next thing he heard a bang and looked up and saw the plaintiff lying on the floor. He was right at the intersection when he observed all this. The insured driver turned towards the right which was the same direction that Mr Hoosen intended to turn.

- [8] After the collision, the insured driver stopped his vehicle in Wakesleigh Road, just below the glide off from Edwin Swales Drive. He then left the scene of the collision and **Mr Hoosen Khan** followed him and forced him off the road. **Mr Hoosen Khan** then removed the key from the ignition and gave it to a tow truck driver that was going past. The insured driver stopped at about between 450 and 500 metres away from

the scene of the collision. He then went straight to him and asked him why he never stopped at the accident scene and then took his car keys off.

[9] In cross examination, he denied that there was any passenger at the back of the van. He also denied that he was not there when the accident took place, when it was put to him that he would have seen the passenger at the back of the van of the insured vehicle, he also denied that that motor vehicle had a cage or a canopy at the time of the collision with the motor cycle.

[10] The plaintiff testified that he is familiar with intersection in question and the phasing of the robots at that intersection as he used it on a daily basis. The plaintiff explained that the phasing of the traffic lights are as follows:

10.1 Should one approach the intersection from the same side as the insured driver and in the event that that robot is red, the sequence of the traffic lights would be as follows:

a) The red robots would change to a green arrow

that would come on before the green lights which would allow vehicles to proceed into Wakesleigh Road (the direction that the insured driver turned).

b) Vehicles heading in the opposite direction to the insured driver would also be able to turn right as a green arrow would appear from them simultaneously and they could proceed into Bellair Road.

c) After that, the arrow would turn and then after the orange arrow goes off, the lights become green on both sides of the road so that traffic travelling west and east may travel in a straight direction (the direction that the plaintiff was travelling). Traffic turning (such as the insured driver) must yield to oncoming traffic.

10.2 After that, the light would change to red for the traffic travelling west and east and then arrows would come on for cars to turn from

Wakesleigh road heading west on Edwin Swales Drive and for cars heading to the Bluff in easterly direction on Edwin Swales Drive.

- [11] Counsel for the plaintiff submitted that this evidence on the phasing of the robot was not challenged in the cross examination and that such evidence should be accepted. Counsel for the defendant submitted that the evidence of the plaintiff on the functioning of the robots should not be admissible as he is not an expert on this aspect. He submitted, correctly in my view, that there is a conflict between the evidence of the plaintiff and that of the insured driver in this regard. The plaintiff alleges that after the robots had been red, they initially show a green arrow, and then thereafter they become green for all vehicles proceeding in one direction. On the other hand, the evidence of the insured driver is that when he approached the robots, the robots were on caution. Mr Tembe submitted that the Court can take judicial notice of the fact that if the robots have turned caution, it means that they were green before. If they turn to caution thereafter, they turn red. The insured driver

testified that only when the robots had turned red did he see a flicking arrow allowing him to turn. Counsel for the defendant then submitted that the Court cannot rely on the evidence of the plaintiff as to how those robots function.

The Collision

[12] The version of the plaintiff and his witnesses in this regard is as follows:

12.1 On 1 October 2005, a clear sunny day, the plaintiff was driving his motorcycle on Edwin Swales Drive in a easterly direction heading towards Brighton Beach. He had a passenger, namely Scott Lausbach, on the back of his motorcycle who was also injured in the collision but has no recollection of the collision himself.

12.2 The plaintiff was wearing a white helmet and his passenger, Scott Lausbach, was wearing a black and blue helmet.

12.3 The plaintiff's lights on his motorcycle were in working order and were on at the time of the collision. The lights of his motorcycle function in such a way that when the ignition is turned on the motorcycle, the lights automatically go on.

12.4 At the time of the collision the plaintiff testified that he was travelling at approximately 60 kilometres per hour.

12.5 He approached the intersection of Edwin Swales and Wakesleigh Road, which is a robot-controlled intersection and observed that the robots were green in his favour.

12.6 During the plaintiff's approach to the intersection, he observed a white bakkie which was intending to turn from heading in a westerly direction into a northerly direction. It was intending to turn from Edwin Swales Drive into Bellair Road. In order to do so, it would cross the path of travel of the

plaintiff. The first time the plaintiff saw the insured driver was 50-60 metres away from the intersection.

12.7 The insured driver was approximately 20 metres away from the plaintiff when the insured driver became stationary and obstructed the turning only lane.

12.8 At that stage the plaintiff proceeded in his lane which was not obstructed by the bakkie, but then the bakkie started to obstruct the lane in which the plaintiff was travelling and so he moved over towards the centre lane, one lane left from where he was previously travelling on.

12.9 At that stage the insured vehicle was obstructing the right hand lane that allows traffic to proceed directly through the intersection. This was one lane to the right of the centre lane in which the plaintiff was travelling. It was approximately 10 metres away from the plaintiff.

12.10 The insured driver then moved forward and obstructed the centre lane in which the plaintiff was now travelling.

12.11 The insured vehicle then continued to move forward and that is when the plaintiff swerved to the right and applied his brakes. The insured vehicle then became stationary whilst the plaintiff was trying to manoeuvre out of the way.

12.12 At the time of the collision, the insured driver was stationary, there was traffic travelling towards the north.

12.13 The plaintiff testified that since the robot was green for him, then he went through the intersection, the robots for the insured driver would have been green to proceed but without a green arrow.

12.14 As the plaintiff approached the intersection, there

was nothing that would have prevented the insured driver from seeing his approach.

[13] Michell Hannan testified that at the time of the collision, she was stationary at the intersection where the collision occurred. She was in Bellair Road intending to travel straight but the robot was red against her. She did not see the collision as she was adjusting her car radio at the time but heard the vehicles collide and then looked up and saw the plaintiff and his passenger in the air. Although she did not observe the robots controlling traffic from an easterly or westerly direction, the lights controlling the travel of vehicles in her lane were still red. She did, however, observe a car travelling through the intersection seconds after the collision in the same direction as that of the plaintiff. Michelle Hannan's evidence strongly corroborated the plaintiff's version that the robots were green for the plaintiff at the time of the accident.

[14] Mr Govender, the insured driver testified that he was travelling along Edwin Swales Drive from an easterly direction and intended to turn right at the intersection as he

was going to Cato Manor. In order to turn right he would have to cross the path of the travel of the plaintiff. When he was approximately 30 metres from the intersection, he observed the traffic lights were amber. The vehicle in front of him stopped and then he got closer to the robot, the flashing arrow for the right turners appeared. At that stage the robot was red for traffic travelling straight but was flashing in his favour. The vehicle in front of him crossed the intersection comfortably, he then entered the intersection cautiously and he yielded at a point referred to as Y in the sketched plan. At this stage he looked but he did not see any vehicles. He then proceeded to his right turn, and the front of his motor vehicle reached point X on A18, he observed the motor-bike for the first time. It was approximately 50 metres away at this stage, he then accelerated to get out of its way but was unable to do so. He described the point of impact as being at point X on A18 when the back of his vehicle was at this point. Under cross examination he conceded that he was not in a position to see the robot controlling the flow of traffic from the plaintiff's direction of travel and that he never observed this robot at the critical time.

[15] It is clear from the evidence tendered on behalf of both parties that the court is faced with two mutually destructive and irreconcilable versions as to how the collision occurred.

[16] Counsel for the plaintiff referred to the case of ***National Employers General Insurance Company Ltd v Jagers 1984 (4) SA 437 E at 440 B-G***, where ***Eksteen, AJP*** stated as follows:

“In these circumstances it seems to me that I must decide the matter solely on probabilities. If the probabilities satisfy me one way or the other, the finding to that effect is justified.”

*He also referred to the case of ***Stellenbosch Farmers Winery Group Ltd & Another v Martell et cie & Others 2003 (1) SA 11 SCA at 14H-15E and paragraph 5***, where ***Nienaber JA*** stated as follows:*

“[5] On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So, too, on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this

nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness J will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witnesses' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a) (ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the

probability or improbability of each party's version on each of the disputed issues. In the light of the assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

- [17] There is no doubt that the plaintiff himself was a good witness, who impressed the court, he did not contradict himself in any material respects, he gave reliable and credible evidence. His version was corroborated by both Hoosen Khan and Michelle Hannan as to the state of the robots at the time of the collision. Counsel for the plaintiff submitted that Hoosen Khan was a witness who, although was out of his comfort zone, came across as a reliable witness who was there to tell the truth. He at times had difficulties with conveying the message he was attempting to communicate, but he cannot be criticized as being dishonest

for this reason. He submitted that it was clear that there was this difficulties because he did not have a particularly a well developed verbal ability. These submissions appear to be correct in my view. Michelle Hannan too was a good witness, she was truthful and reliable. It was submitted correctly in my view that the inference to be drawn from their evidence supports both the plaintiff and Hoosen Khan that the robot was green for both sides at the time of the collision.

[18] In so far as the insured driver was concerned, it was submitted correctly in view that he was a poor witness whose testimony was full of contradictions. His testimony was riddled with confusing testimony such as when he indicated the spot where his vehicle was when the collision occurred, which was at different spot to where he testified the collision occurred. He compounded his confusing testimony by then marking the point of impact in the photograph as lying just before the intersection while at the same time testifying that the collision occurred at the place within the intersection.

[19] The two witnesses, Hoosen Khan and Michelle Hannan had no relationship with the plaintiff, they are independent eye

witnesses. They have nothing to gain in testifying as to what occurred on the day of the accident.

[20] There were no material contradictions in the evidence tendered on behalf of the plaintiff. There were, however, minor inconsistencies in the evidence of Hoosen on the critical issue of the colour of the robot at the critical time but he did not contradict himself despite vigorous cross examination. He remained adamant that there was no flashing arrow in favour of the insured driver and that the driver of the motorbike had a right of way.

[21] Counsel for the defendant on the other hand criticised the witnesses who gave evidence on behalf of the plaintiff and that plaintiff's evidence. He referred to the inconsistencies in the evidence of the plaintiff and that of Hoosen, and submitted that their version as to how the accident occurred is improbable.

[22] The contradictions and inconsistencies in the evidence of the insured driver have been highlighted earlier on in this judgment. The insured driver's version as put to the

witnesses by his legal representative that at the time the traffic lights for the vehicles coming from the west to the east (the direction where the plaintiff was coming from) were red at time of the impact, is different to his testimony that he was not in a position/ did not observe the state of this robot. It was submitted correctly in my view that, in contradistinction, the insured driver did not state in the affidavit he deposed to the police shortly after the accident that there was a flicking arrow in his favour. This information one would expect to have been set out clearly in such an important document. Counsel for the plaintiff submitted that, the insured driver's evidence that the robots were orange as he approached the intersection and thereafter turned red, and a green arrow came on for him to turn right is contradictory to the unchallenged evidence of the plaintiff as to the phasing of the robots. The defendant's Counsel has raised a valid point that the plaintiff cannot testify on the phasing of the robots at this intersection as he is not an expert in this field. However, the law places a high duty of care to a driver who proceed to turn across the path of travel of oncoming traffic. The driver should only turn across the path of travel of oncoming cars if it is safe to do so.

[23] The insured driver's evidence that the whole intersection came to a stand still after the collision because the people who were on the motorbike had been lying on the road, so the vehicles could not pass through from the north to the south and from south to the north, is contradictory to the evidence of Mrs Hannan who saw the vehicle pass through the intersection seconds after the collision and in the same direction as the motorbike. Mr Khan also testified that he travelled through the intersection shortly after the collision. The plaintiff and his witnesses, Mr Hoosen Khan and Michelle Hannan were reliable, credible and truthful witnesses. I have no reason to doubt the reliability of their evidence as to how the collision occurred. The same cannot be said of the insured driver.

[24] On the issue of probabilities it has been submitted correctly in my view that there is nothing improbable about the plaintiff's version as to how the collision occurred. On the contrary, it is improbable that the accident occurred as alleged by the insured driver.

[25] It is highly improbable that if he was in motion in the middle

of the intersection when he first saw the plaintiff, and that if the plaintiff was 50 metres away when he saw him, and that he accelerated at that time, he would have only been able to drive two metres in the same time that the plaintiff travelled 50 metres.

[26] It is submitted, correctly in view that, it is improbable that the insured driver would not have seen the plaintiff approach if he had been keeping a proper lookout when he yielded at the point he indicated at A 18 as he alleged.

[27] In the result, I am satisfied that the version of the plaintiff is more probable than that of the defendant as to how the accident occurred in this case.

[28] On the issue of negligence, Counsel for the plaintiff referred to the case of **Norwich Union Fire Insurance Society Ltd v Chiduku 171(1) SA 599 (RA)** wherein the Honourable Chief Justice Beadle dealt with the question of a high duty of care that rests on the motorists who turn across the path of oncoming traffic in an intersection as follows:

“It is as well to point out first the high duty of care that rests

upon a motorists who turns across the path of oncoming traffic in an intersection. 1971(1) SA p 601.

BEADLE CJ

This high duty of care has been stressed in a number of cases referred to by the learned trial Judge, one of the more recent of which is the case of R v Clarke (Judgment No. AD 174/68). The general principle laid down in the cases is that a motorist should not proceed to turn across the path of oncoming traffic unless and until he is quite satisfied it is safe to do so. That duty of care, I think, is greater at an intersection which is controlled by traffic lights, where the motorist commences to execute his right-hand turn while the traffic lights are still on green in the road from which he is turning, because if he executes his turn while the lights are still on green he is turning, because if he executes his turn while the lights are still on green he is turning at a time when the traffic in the road from which is turning still has the special right of way, given by the green light, to proceed across the intersection. It is otherwise if he waits until the lights turn to red, because he then knows that the through traffic has been stopped and that there is less danger of collision with such traffic. It must be remembered that while

it is permissible to turn across a green light, when the motorist turns across such a green, light he turns into a red light controlling traffic in the street into which he is to enter. Where there is a fair amount of traffic using such an intersection, the normal and reasonable practice for a motorist who wishes to turn to his right, is to enter the intersection when the lights are on green in his favour, then pause at the centre of the intersection and remain there until the lights change and the traffic using the road he is in is stopped by the red light. He then knows that the traffic which would normally cross his path is stopped by the red light from doing so and he can then safely proceed to execute his right-hand turn, and furthermore, in doing so, he turns into a green light and not into a red one. As I have said, though it is perfectly permissible for a motorist to execute this manoeuvre while the lights are still on a green in the road from which he is turning, he must remember that, when he is doing this, the green lights are giving the traffic, cross his path a special right-of-way, and it is his duty, in these circumstances, to be particularly careful that he does not impede this traffic”.

[29] Counsel for the plaintiff submitted that the facts of the ***Norwich Union case***, *supra*, substantially comparable with the facts in this case. According to the evidence of the plaintiff and his witnesses which all corroborated each other in respect of the status of the traffic lights at the time of the collision, the probability is that the traffic lights were in favour of both the plaintiff and the insured driver but that the insured driver had to wait until it was safe to execute his right turn. It is significant that the collision occurred some distance to the intersection and that the insured driver ought to have ensured that there were no vehicles in the vicinity when he executed a right turn.

[30] Counsel for the plaintiff also submitted that on a proper conspectus of all the evidence the collision was occasioned solely by the reason of the negligence of Govender in one or more of respects referred to in the particulars of claim as set out earlier on in this judgment. In the alternative, he submitted that on the defendant's version Govender, was clearly negligent in failing to keep a proper lookout or responding appropriately when he became aware for the first time of the plaintiff's approach to the intersection, and was

negligent in negotiating his vehicle into the lane of travel of the plaintiff's motorbike.

[31] In the alternative, the defendant pleaded contributory negligence on the part of the plaintiff. It is alleged that the plaintiff failed to keep a proper look out. The other forms of the plaintiff's alleged negligence have been referred to earlier on in this judgment. Evidence in this matter has established that at the time immediately prior to the collision, the plaintiff was driving his motorbike at a speed of 60 kilometres per hour. He first observed the insured driver's motor vehicle at the distance of 50 to 60 metres away from the intersection. If it is correct that the plaintiff was indeed driving at a speed of 60 kilometres per hour, and having observed the insured motor vehicle at the distance he alleged, then he would have been in a position to stop his motorbike and avoid the collision. It became clear under cross examination that he did not apply brakes and at the time of the collision, the insured vehicle was not moving. The Plaintiff's version was contradictory as to whether or not he applied brakes, immediately prior to the collision.

[32] In the circumstances, and in my view, the plaintiff also

contributed towards the accident. There is therefore contributory negligence on both parties. The degree of negligence therefore has to be apportioned between the plaintiff and the defendant. In the result, I assess the insured driver's blame at 80% and that of the plaintiff at 20%.

[32] There is no reason why the defendant should not be ordered to pay the costs of the action.

[32] **In the result, it is ordered that:**

- 1. The defendant is held liable to compensate the plaintiff for 80% of such damages as the plaintiff is able to prove which were suffered as a result of the motor-vehicle accident which occurred on 1 October 2005.**
- 2. The defendant is ordered to pay the costs of this action.**

SISHI J

JUDGE OF THE KWAZULU-NATAL
HIGH COURT - DURBAN

Representation

Plaintiff's Counsel : R. PILLEMER

Instructed by : FRIEDMAN AND ASSOCIATES
Plaintiff's Attorney
4th Floor, Salmon Grove

Chambers

407 Smith Street
DURBAN
Ref: AJE/AS/03/B405/00

Defendant's Counsel : T.A. TEMBE

Instructed by : NGUBANE & PARTNERS INC
Defendant's Attorneys
Suite 502, 5th Floor
Southern Life House
88 Field Street
DURBAN
Ref: TAT/gb/RAF 2991