IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN

CASE NO: 16547/2009

In the matter between:

GASPARD NDAYIRAGIJE	Plaintiff
and	
THE ROAD ACCIDENT FUND	Defendant

JUDGMENT : 13 FEBRUARY 2013

GAMBLE, J:

INTRODUCTION

[1] The lot of cyclists on our roads has been much in the news of late. There have been a number of reported incidents of cyclists being knocked down (some fatally) in and around the Cape Peninsula, and when a well-known South African champion cyclist was recently killed while out on a training ride in KwaZulu Natal, there was a national outpouring of grief on the one hand, and profound anger towards motorists on the other.

[2] Cycling has become a major sporting and leisure time activity in South Africa and motorists are confronted on a daily basis with cyclists on our roads – some out riding on their own and others in groups. Many motorists express anger and outrage at the way in which some cyclists pay scant regard to traffic lights and road signs. The concern on the part of the cycling community regarding their safety on our roads, on the other hand, has led to a national campaign in which motorists are urged, through advertising campaigns and the like, to give cyclists a wide berth when passing them – 1,5m is suggested.

[3] The Plaintiff in this matter, Gaspard Ndayiragije, a Rwandan asylum-seeker lawfully in South Africa, was badly injured in a collision while cycling on Prince George Drive in Retreat on 6 May 2008. The Plaintiff was not out cycling for fun: he was riding his bicycle along a major thoroughfare in the Cape Peninsula on his way to earn his keep as a car-guard at a nearby shopping centre.

[4] The conditions in which the Plaintiff found himself on that day were not conducive to cycling. It was 08h00 in the morning on an autumn day, there were rain-showers about, and a strong north westerly gale was buffeting him from behind as he drove in a southerly direction along the double carriage way which makes up the M5 motorway. But the Plaintiff had a job of work to do, and he had to get there using his preferred means of transport.

[5] The area in which the collision occurred was just to the south of the intersection of Prince George Drive and Military Road. This is a busy intersection controlled by traffic lights, as the photographs placed before the Court by the parties

suggest. Just to the south of the intersection, Prince George Drive runs almost due south. The south-bound carriageway consists of two lanes, of which, it is common cause, the width of the left lane is 3,7m. The right lane is of a similar width and is bounded on the west by a centre island. Across the centre island is the north-bound carriageway which is not relevant to this case.

[6] To the east (i.e. left) of the left-hand lane of the south-bound carriageway is a yellow line indicating the commencement of the shoulder of the road. That shoulder is bounded on the east by a regulation cement kerb. In the vicinity of the traffic lights, the shoulder is a fair width. Although no evidence was led in that regard, one can see from the photographs that it is of the order of 2m or more. [1]

THE EVIDENCE OF THE PLAINTIFF

[7] The uncontested evidence of the Plaintiff was that as he crossed the intersection he was riding his bicycle within the shoulder between the yellow line and the kerb. As the Plaintiff moved further south the shoulder became narrower. This was because there is a false kerb which runs at quite a sharp angle away from the kerb towards the yellow line, where it eventually stops. The purpose of this obstruction is evidently to prevent motor vehicles from proceeding further along the shoulder.

[8] The false kerb does not actually abut the main kerb – there is a gap of perhaps half a metre or so – and it would be possible for a bicycle to pass through

[1] Photograph 6 depicts a Toyota Hi-Ace minibus taxi with its right wheels on the yellow line and a gap between the left wheels of the taxi and the kerb which is almost the width of the taxi.

that gap. However, further along the shoulder, to the south past the false kerb, the shoulder is completely blocked off by another kerb which runs perpendicular to the yellow line. Accordingly, as the Plaintiff proceeded south along the shoulder, he had two options: either to hug the kerb and eventually join the left lane of the road further down the shoulder where the perpendicular kerb intersected the yellow line, or he could continue to ride between the angled false kerb and the yellow line.

[9] The Plaintiff chose the latter route. In so doing he took a course of travel which would necessarily have caused him to join the south-bound carriage-way at the apex of a triangular area bounded by the false kerb and the yellow line. As he proceeded along this narrowing space the Plaintiff collided with the side of an eight ton Nissan truck driven by Mr. Sindile Mavuma. Mr. Mavuma was on his way from the Cape Town Fresh Produce Market with a full load of fruit and vegetables destined for delivery in Fish Hoek and he was driving in the same direction as the Plaintiff.

[10] Although his mother tongue is Ikinyarwanda, the Plaintiff testified in English and demonstrated a usefully functional command of the language. He said that he was wearing a hooded top that day to keep out the elements and that the hood was pulled over his head. The wind was strong and he swayed to and fro as he rode along to work. The Plaintiff was aware of the false kerb ahead of him and rode towards the apex of the triangle to which I have referred above, all the while moving closer to the yellow line.

[11] The Plaintiff testified that he collided with the load-bed of the truck somewhere between the front and rear wheels. He fell off his bicycle and was run

over by the left rear wheel of the truck. Needless to say, the Plaintiff suffered devastating injuries to his pelvic area. He said that he was still on the shoulder when the collision took place and had not yet crossed the yellow line into the left-hand lane. In Court the Plaintiff pointed out on photograph 1 the point of impact (point "X") as perhaps 20-30 cm to the left of the yellow line. This suggests that the truck's left wheels may have been very close to the yellow line but not necessarily over it, given the fact that the load-bed may have protruded beyond the tyres.

[12] The cross-examination of the Plaintiff was unnecessarily aggressive and it seemed at times that counsel for the Defendant may have forgotten that this was a civil trial rather than a criminal prosecution. In any event, the Plaintiff's evidence was clear and coherent, notwithstanding his language problem, and he did not digress from his evidence-in-chief in any material respects. His claim throughout then was that the truck hit him before he had crossed over the yellow line. The Plaintiff maintained that the truck driver had erred in driving to close to him.

THE DRIVER'S EVIDENCE

[13] Mr. Mavuma said that he was travelling along Prince George Drive in the left hand lane at about 40 kph. It was raining at the time and he had his windscreen wipers on. He said he saw the Plaintiff on his bicycle ahead of him from a distance. The Plaintiff was evidently battling in the wind and rain, and his cycle was wobbling in the wind. Mr. Mavuma was adamant that at all material times the Plaintiff was in the left-hand lane itself, and not on the shoulder to the left of the yellow line as claimed by the Plaintiff.

[14] Mr. Mavuma said that, having seen the cyclist, he moved his truck over towards the broken white line that separates the left and right lanes. He could, however, not cross that line as there were other cars coming up from behind. With reference to photograph 7, Mr. Mavuma said that his truck was in a similar position to the white Golf depicted in that photograph i.e. that his right wheels were, to all intents and purposes, almost on the broken line.

[15] Mr. Mavuma testified that as he approached him, he had hooted at the cyclist and moved to the right, but that he did not reduce speed because of the full load on the truck. He said that he saw the Plaintiff to his left as the truck passed him, suggesting that he thought he had given the Plaintiff a sufficiently wide berth. He could not explain how the Plaintiff came to collide with the truck other than to suggest that the Plaintiff had swerved sharply into the truck.

OPINION EVIDENCE

[16] Both parties presented opinion evidence in the form of two respected accident reconstruction experts – Mr. J.O. Craig for the Plaintiff and Prof. T.P. Dreyer for the Defendant. This evidence was regretably only of limited assistance to the Court given the general uncertainty as to where on the road surface the point of collision was.

[17] Mr. Craig usefully set the scene with factual evidence regarding the width of the road and the like, as also evidence regarding the weather conditions. His research showed that at the time the north westerly wind was blowing at about 60

kph. He also testified that the width of an 8 ton Nissan truck was between 2,2m and 2,5m, the latter being the maximum permissible width of a truck on our roads.

[18] Accordingly, if the truck's right wheels were on the broken line, there would have been some 1,2 to 1,5m between the left of the truck and the yellow line. Prof. Dreyer concurred in this. Mr. Craig also said that the truck was about 8m long and that the distance between the front and rear axles was of the order of 5m. Mr. Craig held the view that it would have been impossible, in the prevailing circumstances, for the Plaintiff to have moved his bicycle 1½ to 2m to the right and land under the rear wheels of the truck in the time that it took the truck to travel past him.

[19] Prof. Dreyer is a retired professor in the field of applied mathematics. He testified about the relative speeds between the truck (estimated at 40 kph) and the bicycle (estimated at 20 kph), and the potential distance the Plaintiff could have moved both forward and laterally as the truck drove past him. He also explained the potential effect of the displacement of air as the truck passed the Plaintiff, and the possibility that he may have been "*sucked*" towards the truck as he battled the wind coming over his right shoulder.

[20] Under cross-examination by counsel for the Plaintiff, Prof. Dreyer testified that the truck would probably have taken of the order of one second to pass the Plaintiff, and that in that short time neither the Plaintiff nor the truck driver would have had sufficient time or opportunity to avoid a collision.

[21] Expert evidence is useful in cases of this sort provided that it is based on reliable input data e.g. the area of collision, the point of impact and the relative speeds of the vehicles in relation to each other, all of which was lacking in this case. At the end of the day one must look at all of the available evidence, draw the necessary inferences and apply a good measure of common sense to establish where the probabilities lie. [2]

THE MOST PROBABLE POINT OF IMPACT

[22] I do not believe that the available evidence reliably establishes that the collision could have occurred where the Plaintiff says it did. If that was so then the truck was travelling with its left wheels on or over the yellow line. This would not make sense since, firstly, there was no reason for the truck to be hugging the yellow line as it proceeded through the intersection and on down the left lane at a constant speed of 40 kph. Secondly, the truck would ultimately have to move over to the right to avoid the encroaching false kerb. Given that this was clearly visible as Mr. Mavuma approached the intersection, it is improbable an observant driver would have taken such a route.

[23] But, I do not believe either, that the evidence establishes that the truck was 1½m away from the yellow line when it passed the Plaintiff. On the available evidence this would have required the Plaintiff to have effected a sharp and unanticipated darting movement to his right from the shoulder of the road towards the left lane to enable him to collide with the truck. There was simply no reason for him to

---

[2] Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another 2001 (3) SA 1188 (SCA) at 1201 G-H.

have done so. In coming to this conclusion, I accept that the Plaintiff may well have been weaving (even wobbling) along the shoulder in the windy conditions that prevailed.

[24] It seems to me that the collision most probably occurred close to the yellow line and possibly even into the left lane. After all, the Plaintiff's line of travel was not always going to be parallel to the yellow line since, ultimately, he would have had to cross it as the false kerb increasingly encroached on his line of travel. And, given that he would have had to eventually be in the left lane, it is not unlikely that the Plaintiff was starting to move towards his right, and therefore closer to the truck's line of travel, as the truck approached the bicycle from behind.

THE DUTY OF THE APPROACHING DRIVER

[25] Klopper [3] postulates the following general principles:

> *"(e) Making provision for lateral movement*
>
> *When overtaking, a driver must allow sufficient space between his/her vehicle and the vehicle being overtaken for foreseeable and normal lateral movement of the vehicle being overtaken. In order to prove negligence in a collision between an overtaking vehicle and the vehicle being overtaken, an overtaking driver must be able to show that:*
>
> - *the collision was occasioned by the sudden movement to the right by the driver of the vehicle being overtaken; and*

[3] Isaacs and Leveson: The Law of Collisions in South Africa (8th ed, 2012 by H.B. Klopper) p64

- *he/she had given the overtaking vehicle sufficient space to allow for foreseeable and normal lateral movement of the vehicle being overtaken.*

The duty to allow for lateral movement is particularly important in overtaking an inherently unstable vehicle such as a bicycle."

[26] And, in relation to cyclists, the learned author has the following to say [4]:

> *"A driver is expected to keep a proper lookout for cyclists. It is difficult to ride a bicycle in such a manner that it remains precisely and securely on a fixed course. There is always a degree of sideways movement – first to the one side and then to the other. If the cyclist is a young child and in addition there is a strong wind blowing, the possibility that a bicycle may deviate considerable more than normally from its course is greater. For the aforementioned reasons a driver in such a case is expected to give a cyclist timeous warning of his/her approach and in his/her judgment will, in addition, also leave sufficient space between him/her and the bicycle in order to be able to overtake with reasonable safety."*

While the Plaintiff is obviously not a young child, he is a slightly built person of about 1,6m in height and weighing only 55 kilogram. He certainly would have been pushed around by the following wind and would have been less stable on his bicycle than a taller and heavier person.

[27] In Henry v SANTAM Ins Co Ltd [5] Watermeyer J noted that:

---

[4] Op cit p72

> *"The legal principles are clear that a motorist overtaking a two-wheeled vehicle, such as a cycle or a scooter, must allow a sufficient clearance between the two vehicles making due allowance for some lateral movement on the part of the rider of the two-wheeled vehicle, and this would be especially so where the road surface is rough, as it was at the place of the collision."*

In the instant case the road surface was not rough but in the prevailing conditions (strong wind and rain) lateral movement on the part of the cyclist was foreseeable. And, this is exactly what the truck driver says he observed.

[28] In Oosthuizen v Standard General Versekeringsmaatskappy Beperk [6] the facts bear a striking resemblance to the present case. A young cyclist (aged about 10) was riding in a southerly direction down a major thoroughfare in Milnerton (a suburb at the other end of the Peninsula) which ran north to south, in a strong north westerly wind. As the insured driver was about to pass the cyclist, the latter suddenly swerved to the right (evidently to avoid a manhole cover) and collided with the car.

[29] Trengrove JA[7] pointed out what was expected of a reasonable approaching driver in those conditions:

> *"So 'n bestuurder sou gesien het dat die fietsryer heeltemal aan sy linkerkant van die pad ry en dat hy ten spyte van die sterk noordwestewind blykbaar tog daarin slaag om op koers te bly.*

---

[5] 1971 (1) SA 468 (C) at 472 G-H
[6] 1981 (1) SA 1032 (A)
[7] P1039 B-H

Hy sou egter ook opgelet het dat die fietsryer 'n jong kind is, en dit sou hom op sy hoede gestel het, en hom tot besondere versigtigheid gemaan het. Dit is 'n algemeen bekende feit dat dit moeilik is, selfs vir 'n volwassene, om 'n trapfiets so te bestuur dat dit presies en sekuur op 'n vaste koers bly – daar is uit die aard van die saak maar altyd 'n mate van sydelingse beweging, nou na die een kant, en dan na die ander. En, as die bestuurder van die trapfiets 'n jong kind is en daar boonop ook nog 'n sterk wind oor die pad waai, is die moontlikheid dat die trapfiets heelwat meer as normaalweg van sy koers mag afwyk, of selfs deur die wind van koers af gedwing mag word, des te groter."

[30] The *ratio* is fairly straightforward, yet fundamental when applied to the facts of this case: the passing driver must ensure that there is sufficient space between the cyclist and the passing vehicle, and regard must be had to the fact that the cyclist could be pushed off course by the prevailing wind. This general approach was earlier confirmed by the erstwhile Appellate Division in Pauley's case [8].

DEFENDANT'S LIABILITY

[31] I am satisfied that Mr. Mavuma did not allow, in the circumstances which prevailed, enough space between his truck and the Plaintiff's bicycle when he passed him. He knew that it was wet and blustery and, on his own version, he saw the Plaintiff swaying from side to side ahead of him. As an observant driver he would have seen that, given the effect of the false kerb, the Plaintiff would have to enter the left lane ahead of him. He did not brake, but trundled along at 40 kph heading

---

[8] Marine and Trade Insurance Company Limited v Pauley 1965 (2) SA 207 (A) at 212 A-D.

towards a potential disaster. It is doubtful, too, whether Mr. Mavuma sounded the truck's hooter. Although he gave evidence to this effect, no assertion in this regard was put by Defendant's counsel to the Plaintiff during cross-examination.

[32] In the circumstances, and having regard to the authorities cited above, I am satisfied that the Plaintiff has established that Mr. Mavuma was negligent and that the Defendant is liable to him for damages which are yet to be proved.

CONTRIBUTORY NEGLIGENCE

[33] Neither counsel made any submissions regarding the contributory negligence of the Plaintiff in relation to the damages suffered: each confidently predicted an outcome 100% in favour of his client. Nevertheless, the Defendant's plea does contain a claim that in the event of it being found that the driver of the truck was negligent, the Plaintiff's damages be reduced in terms of Section 1 of the Apportionment of Damages Act, 34 of 1956 ("the Act").

[34] In arguing that the Plaintiff was solely to blame for the collision, Defendant's counsel suggested that he had ridden his bicycle recklessly without having any regard to the rights of other road-users. He had pulled his hood over his head and, it was claimed, had ridden on quite oblivious of what was going on about him. The Plaintiff conceded that he had not looked around at any stage to see what was happening about him. It seems too that he thought that he had the right of way to proceed as he did.

[35] Most certainly, cyclists have every right to be on the roadway, whether they are cycling for pleasure or are on their way to work or school. But they too have an obligation to behave reasonably and observe the general rules of the road. They too are required to observe road signs and traffic signals, and to keep a proper lookout. They cannot simply put their heads down and ride hell for leather, as if approaching the notional finishing line in a race.

[36] I am of the view that the Plaintiff did not keep a proper lookout in the circumstances. He regularly rode on that road to work and he was aware of the presence of the false kerb. He knew that the false kerb would effectively funnel him into the left lane. And yet, on his own admission, he never once looked to his right or behind him while moving towards the yellow line, believing that he had the right of way.

[37] I am satisfied then that the Defendant has established that the Plaintiff too was negligent on the day in question. As to causation, there can be little doubt that if the Plaintiff had kept a watchful eye on the traffic approaching from behind (notwithstanding the foul weather) he would have seen the truck approaching. And, had he checked as he moved across the shoulder towards the yellow line, he would have seen that the tuck was not as far away from him as it should have been. Had he done so, the Plaintiff could have taken immediate steps to avoid a collision (or at least minimise the impact thereof) by stopping his bicycle, or by pulling it to the left.

[38] Since the passing of the Act effectively did away with the so-called "*last opportunity rule*" [9], I need only to consider whether the collision was caused in part by the Plaintiff's fault. This is sufficient to entitle the Defendant to a reduction in the amount of damages it must pay.

CONCLUSION

[39] Accordingly, I am satisfied that the Plaintiff's damages should be reduced in terms of the Act by the extent of his negligence. As to the calculation of that reduction, I am required by Section 1(1)(a) to exercise a discretion as to what is just and equitable in the circumstances.

[40] Given the "*all-or-nothing*" stance adopted by both counsel, I was not addressed by either party as to a suitable apportionment. The task is not an easy one and I must employ "*the best method in which [I] can gauge how the respective degrees of fault of each of the parties combined to bring about the damage claimed*"[10].

[41] Having conducted my own research into the case law[11], and considering that Mr. Mavuma's negligence was in my view more extensive than that of the Plaintiff, I have come to the view that the Plaintiff's damages fall to be adjusted by a reduction of 35%.

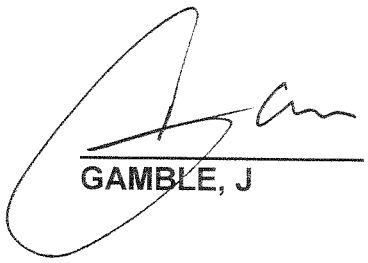
---

[9] See s1(1)(b); Schange v S.A. Railways and Harbours 1975 (4) SA 696 (N) at 698
[10] Jones v SANTAM 1965 (2) SA 542 (A) at 555 E-H
[11] AA Mutual Ins v Nomeka 1976 (3) SA 45 (A); Knoetze v Rondalia 1979 (1) SA 812 (A); Khwerana v SA Mutual Fire and General Ins 1972 (2) SA 947 (A); UNISWA v Humphreys 1979 (3) SA 1 (A); Rooi v SANTAM 1981 (3) SA 634 (C); SANTAM v Letlojane 1982 (3) SA 318 (A)

[42] **In the circumstances it is ordered that**:

A. The Defendant is liable to pay 65% of the proven damages incurred by the Plaintiff in the collision on Prince George Drive on 6 May 2008.

B. The Defendant is to pay the Plaintiff's costs of suit herein, such costs to include the qualifying expenses of Mr. J.O.Craig.



GAMBLE, J