IN THE HIGH COURT OF SOURTH AFRICA

(EASTERN CAPE LOCAL DIVISION, EAST LONDON)

CASE NO. EL 99/2016

ECD : 399/2016

Heard on : 10 February 2020

Date delivered: 08 May 2020

In the matter between:

ELLIOT MARAFANE Plaintiff

And

ROAD ACCIDENT FUND Defendant

JUDGMENT

MAJIKI J

[1] The plaintiff, in 2012 worked as an executive director, destination tourism, for Eastern Cape parks board. On 21 December that year around 04h05 he was involved in a motor vehicle accident in East London on the N2 freeway, near Beacon bay off ramp. He alleges that he suffered bodily injuries and now sues the defendant for general damages, past and future loss of earnings in the sum of R9 879 510.00. The action is defended by the defendant. The time and place of the accident are not in dispute. According to the defendant the time was between 04h05 and 04h20.

[2] The defendant in the pre-trial minute admits that the plaintiff collided with the rear of the silver cap star truck, insured motor vehicle (the truck).

[3] In the particulars of claim the plaintiff alleges the negligence of the insured driver as follows:

" 5. The said accident was occasioned solely by the negligence of the insured driver, he/she being negligent in one or more or all of the following respects:

5.1 He/she failed to obey the rules of the road by changing lanes without indicating his/her intention to do so.

5.2 He/she changed lanes when it was inopportune and dangerous to do so.

5.3 He/she failed to keep a proper lookout.

5.4 He/she drove without due regard to other road users."

[4] In its plea and pre-trial minute the defendant denies that the accident was caused by the sole negligence of the insured driver. In the plea it pleaded as follows:

" 4 AD PARAGRAPH 5

The defendant denies that the collision was caused by the sole negligence of the insured driver but further pleads that the plaintiff was negligent in one or more of the following respects:

5.1.1 He failed to keep a proper lookout;

5.1.2 He entered the road without consideration of the presence of the insured vehicle on the road;

5.1.3 He failed to avoid a collision when by the reasonable exercise of care he could and should have done so.

Alternatively to the above, and in the event of it being held by the above Honourable Court that the unknown insured driver of the insured motor vehicle was negligent in relation to the collision (which negligence is denied), and that the plaintiff suffered damages (which damages are denied), then the defendant pleads that the collision was due partly by the negligence of the plaintiff, particulars whereof have been set out in sub-paragraph 5.1.1-5.1.3 above and that the plaintiff damages shall be reduced in terms of section 1(1)(a) of the Apportionment of Damages Act 34 of 1956 to the extent that the above Honourable Court may deem just and equitable having regard that the plaintiff was at fault in relation thereto."

[5] At the commencement of trial the parties, consistent with the pre-trial minute of 15 August 2019, made a joint application in terms of rule 33 of the Uniform Rules for separation of issues, that only negligence and apportionment, if any, against the plaintiff or insured driver be determined at this stage. The application was granted accordingly.

[6] It is common cause that the road surface where the accident occurred was an unmarked tar road. The road was being resurfaced. It was wide enough for two cars to drive parallel to each other, which would have been two lanes had the road been demarcated.

[7] The plaintiff testified first in support of his claim. The insured driver testified for the defendant.

[8] The plaintiff testified that he woke up at 03h30 and left his house at Dorchester Heights, East London to set out on a journey to Idutywa, some 145 km away which would take 1h20 at 100 to 120 km per hour, in order to attend his brother's son's circumcision ceremony (Phila). He was not rushing, he needed to be in Idutywa by 06h00 to take the initiates to the river. He later specified that he was driving at 80 km

per hour. He was driving with a passenger, one Nandipa Mfunda, in a Mercedes Benz motor vehicle.

[9] He joined the N2 road from Sasol garage towards the freeway. Within few seconds, he saw a truck on an uphill, travelling on the far right of the road.

[10] He flickered his lights for the driver of the truck to move to the left, so that he could pass on the right. There was no response from the insured driver. He then reduced his speed and drove towards the left. The truck moved to the left without indicating. He indicated to the right, wanting to pass on the right, when he started to overtake, the driver of the truck then moved to the right. The right rear wheel of the truck collided with his vehicle. After impact the insured vehicle fell on the right side. His motor vehicle spinned, the windscreen broke on his face and he was hit by airbags in his face. He thought the behaviour of the insured driver was perpetrated by road rage.

[11] He was tired the previous night and opted to drive in the morning. He had not consumed alcohol. His vehicle could not have collided with the insured vehicle in the middle, at the rear, otherwise it would have moved and capsized. The point of impact shown on the accident report as being in the middle, is incorrect, it was pointed by the insured driver in his absence. He had been unconscious for about 24 hours and remained in hospital for a week.

[12] There are two accident reports that were completed in the matter. The insured driver made a report immediately after the accident. Subsequently, the plaintiff made another report to the same official whose name appears in both reports as D Ramncwana. It is stamped 13 June 2016. It was admitted as exhibit 2. It reads:

“the truck was driving on the slow lane and changed lanes to the fast lane without indicating and he bumped the truck from behind. Driver B alleges that the truck caused the accident ".

The original of this report was handed up in court, for the benefit of the court, and was admitted as exhibit 4. Indeed it is more clearer. He said he could not have made the measurements because he was injured.

[13] He also deposed to two affidavits, one day apart, one dated 23 February 2015 and the second one is dated 24 February 2015. They were handed up as exhibits 1 and 3 respectively. Both affidavits are part of the plaintiff's bundle marked "A". In his testimony he referred to the latter affidavit. I will quote his description of the accident from both affidavits.

[14] Exhibit 1 states:

“ 2.

The truck was driving on the right lane. I observed that there was no car on the left lane (see sketch A). I flicked my lights to indicate that it must move to the left, as it was driving slowly, so that I can pass on the right lane. I waited for a moment for it to change lanes. I did not change lanes. I indicated to the left with intention to pass on the left lane. When I started to accelerate to the left lane it moved to the left lane without indication.

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3.

I immediately indicated to the right with the intention to pass right. As I was accelerating to pas; the truck again moved to the right. Because I was already very close to passing it, my car collided with the truck, hitting it on the right rear wheel side. The truck was deliberate (sic) blocking my car, which I believe I (sic) was a road rage, as it did not move on my earlier indication and second attempt to move to the left and it also moved to the left. When I was moving to the right it was also moving to the right.”

[15] Exhibit 3 states:

“Whilst I was next to the off ramp to Beacon Bay the said truck was travelling on the left lane. When I started to pass on its right lane as the lane was clear and without traffic, the truck suddenly moved to the right lane, without indicating its intention to do so.

As a consequence thereof my motor vehicle collided with the said truck and it lost control. I was injured and thereafter hospitalised. "

[16] In cross examination he explained that he went to supplement exhibit 1 with exhibit 3 on the advice of his attorney to state what was most important. He said paragraph 2 of exhibit 1 was important but he shortened it in exhibit 3. However, the two affidavits were still consistent. He said the insured driver would be lying to say he was driving uphill on the left side of the road and that the plaintiff bumped him more to the centre left back.

[17] He said when he said his motor vehicle collided with the truck, he meant that a collision occurred between two vehicles, without saying which vehicle drove into the

other. Despite the fact that he appreciated that there was a difference between the two statements, he would not change his statement but leave that issue to the court for decision.

[18] He said he rejected that it was highly improbable that his motor vehicle driving at 80 km per hour would bump a 3 - 4 ton truck at the back so as to cause it to capsize.

[19] He said when he attended to officer Ramncwana to make exhibit 4, Ramncwana showed him exhibit 2, which according to him was an incorrect version of how the accident occurred. He said he overlooked stating his version on certain ticked blocks in exhibit 4. For example, in exhibit 4 the ticked blocks indicate, as follows:

- both vehicles were travelling straight and not that his vehicle was passing right. - vehicle A (the truck) was damaged at back centre and not at right rear wheel. He said he only gave details of damages to his vehicle and not the truck.

[20] In re-examination he said Ramncwana did explain exhibit 4 but not in detail. He would state his version and Ramncwana would tick the form based on his version. Ramncwana specifically asked him to explain what happened, whilst also copying from exhibit 2. The plaintiff said for example, he would not know the weight of the truck, indicated therein as greater than 3500kg. He was also not asked the time of the accident, it occurred at 04h10, it was still dark, the lights of his motor vehicle would have been automatically off if it was not dark. Exhibit 4 indicated the light condition as morning.

[21] He explained that, despite of how he stated his understanding of the word collision, in the present case, the truck came to his side of the road and collided with him. He also stated that when he deposed to exhibit 1, meant for the defendant, he had no attorney, he was only assisted by his attorney in deposing to exhibit 3.

[22] The insured driver testified that at the time of the collision he was driving his employer's truck in order to deliver Nestle products in Kentani and Idutywa in Transkei, which route he was used to travelling almost every day. It was towards sunrise, in summer, it was necessary to have dim lights on. He was travelling at about 40km per hour.

[23] He said he was travelling on the left side of the road. He never saw anything behind him on his mirror, no lights, no indicators before the impact. He heard a bang, the impact was very hard, the truck pulled to the left. He tried to pull it to the right and it tipped over to the right. He got out through the passenger's door, he saw the plaintiff's vehicle in the road badly damaged.

[24] He said when he went closer to the plaintiff’s motor vehicle there was a lady next to it. Inside the vehicle there was liquor, he saw empty and half empty bottles of hunters dry cider and half bottle of Johny Walker whiskey. He reported that to the police as part of what he had seen. He also told the police that he did not know if the plaintiff was drunk or not.

[25] He disputed that he drove on the right side and had changed lanes. The truck was heavy loaded and the right lane was for motor vehicles to pass. He said the reason for him not to see the plaintiff's vehicle's lights was probably that it was driven at a high speed. The truck was hit more to the rear middle left. The damage and the fact that he was driving on an uphill could not be consistent with an impact of being bumped by a vehicle driven at 80 km per hour.

[26] In cross examination he said the collision was sudden, he did not see the plaintiff’s vehicle despite the fact that in all his driving life he checks his mirrors every 2 to 3 seconds. The traffic was not heavy, it was a Saturday morning. As for the plaintiff, he ought to have seen him and should have avoided the collision.

[27] He was not sure why in his plea it was said, he was not the sole cause of the accident, according to him, he was not negligent. In re-examination he said there was wide space on the right lane for the plaintiff to pass. The plea was probable like that because that was how that allegation was framed in the particulars of claim. He said he did not know why the speed was not pleaded in his plea, he could not remember when he consulted with the defendant's legal representatives, but it was more or less 4 years before the day of his testimony.

[28] He said he was certain that he was not driving on the right. He was always on the left, even if he had been on the right, he would have moved over when there was a vehicle that required to pass. He never blocked the plaintiff's way.

[29] He said he was the one who gave the actual weight of the load of greater than 3500kg that was on the truck to the police. Its capacity was to carry up to 4 tons. The impact of the collision caused the truck to veer, it was when he corrected it that it overturned, and not because it was bumped on the right wheel. He agreed that there was no reason for the plaintiff to just bump him, however, he disputed that the plaintiff's version was more probable.

[30] In argument Mr Nyangiwe, counsel for the plaintiff, submitted that the version of the plaintiff was more probable and that of the defendant had to be rejected. The plaintiff was on time, he only had to be in Idutywa at 06h00 and had left his home at

03h30. The insured driver was not driving on the left, otherwise the plaintiff would have simply passed on the right. The court should accept that the truck was hit on its rear right wheel. The wheel could have been exposed when the insured driver changed sides from right, left and then right again. He ought to have seen the flickering lights when he checked his mirrors every 2 to 3 seconds. He probably got irritated and hence his movements. It was difficult to fathom that an impact on the back would cause the truck to move to the left but land on the right.

[31] In the alternative, the court should find that the insured driver was negligent. The court should consider that even if the words sole negligence came from particulars of claim, they would not be pleaded in the plea without implying negligence. The plea was not amended even after consultation with the insured driver, which ought to have revealed his version that he said he was not negligent.

[32] Consequently, the court has to assume that the insured driver was more negligent, he could not have been less than 80 percent negligent the basis for that would be the failure of the insured driver to see plaintiff's vehicle when there was no

traffic, he probably was not concentrating enough on the road. Had he seen the vehicle, he would have moved to the far left.

[33] The submission on behalf of the defendant was that the plaintiff had not proved his own version. He did not call an expert witness to testify as to with which parts of the vehicles they collided with each other, the speed they were travelling at, and the photos showing the impact on the vehicles, especially the plaintiff's. This was more necessary in circumstances where he said he was not happy with the police report.

[34] Furthermore, he failed to subpoena his passenger to corroborate his version. The court should make a negative inference about that. Mr Nyangiwe in reply said expert witnesses are costly and scarce. They exist in ideal world. Further, the calling of the passenger would have necessitated a postponement at the plaintiff's cost. He later conceded that the failure to call the said two witnesses was a shortcoming on the plaintiff’s part, however, that would be a consideration for apportionment. It was not a concession of plaintiff’s negligence.

[35] According to Mr Bester, counsel for the defendant the case had to be determined on the basis of credibility. The version of the plaintiff was the credible one. It is supported by both accident reports. The plaintiff said he collided with the truck, a fact he repeated in his affidavits. It was a significant change for him to say in court the insured driver collided with him. Also, both accident reports indicate the point of impact in the vehicles as testified to by the plaintiff.

[36] Furthermore, he did not put up a version in the accident report regarding the accident sketch in circumstances where he said he did not agree with the one in the first accident report, in a number of respects.

[37] Mr Bester submitted that in the totality of evidence, the plaintiff who had a duty

to prove the insured driver's negligence, failed to do so. The defendant owed no such duty.

[38] With regard to the pleading of sole negligence in the plea, he said that was following the wording that was pleaded in the particulars of claim. He said this argument was fortified also by the manner the plea in the alternative was phrased, it is specifically pleaded;

"in the event of it being held by the above Honourable Court that the unknown insured driver of the insured vehicle was negligent in relation to the collision (which negligence is denied), and that the Plaintiff suffered damages (which damages are denied), then the Defendant pleads that the collision was due partly by the negligence of the Plaintiff, ..." (emphasis mine).

[39] Mr Bester submitted further that if the court found that the insured driver was also negligent, the apportionment should be at 80 percent on the part of the insured driver.

[40] With regard to irreconcilable versions in **Stellenbosch Winery Group Another v Marvell Et Cie** Ltd and 2003 (1) SA 11 SCA at 14I - 151E the court summarized the technique generally employed in resolving dispute of facts. It stated that in order for the court to come to the conclusion on the disputed issues it must make findings on;

(a) the credibility of various factual witnesses;

(b) their reliability and

(c) the probabilities.

As regards to the credibility of a witness the finding will depend on the court's impression about the veracity of the witness. That in turn would depend on a number of subsidiary factors, not necessary in order of importance, such as the witness's candour and demeanour in the witness box, his bias, latent and blatant, internal

contradictions in his evidence, external contradictions with what was pleaded and put on his behalf, or with established fact or improbability of particular aspects of his version, the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events.

[41] As to reliability of a witness it would, apart from some of these, depend on the opportunities he had to experience or observe the event in question and the quality, integrity and independence of his recall thereof. As regards probabilities, that 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 assessment of what is in (a) to (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 doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.

[42] From the onset, the plaintiff's own version about what happened just before the collision is not consistent. In his oral testimony he said the insured driver was driving on the far right, he flickered, the insured driver did not move, the plaintiff drove towards left, insured driver moved to the left, when plaintiff indicated to the right wanting to pass right, the insured driver again moved to the right and the insured vehicle's rear right wheel collided with the plaintiff's vehicle. His first affidavit, exhibit 1 somewhat accords with this. Therein he stated, the insured driver was driving on the right, after he flickered he waited for a moment for the insured driver to change lanes. Insured driver did not. He indicated and accelerated to pass on the left, insured driver moved to the left. He indicated right, as accelerating to pass right, insured driver moved right and he collided with the truck right rear wheel.

[43] However, in his own account in exhibit 4, which is his accident report to Ramncwana he said, the truck was driving on the slow lane and changed lanes to the fast lane without indicating and he bumped the truck from behind. Two aspects herein

accord with plaintiff's version, in court and in the accident report, which I will revert to, that the insured driver was driving on the left lane and that the plaintiff collided with the

truck from behind. Exhibit 3 which is plaintiff's second affidavit supports exhibit 4, therein he says, the truck was travelling on the left lane. When he started to pass right the truck suddenly moved to the right lane. His motor vehicle collided with the truck and it lost control. This is the affidavit he said he deposed to with the guidance of his legal representative.

[44] With regard to exhibit 4, the report he went to make to Ramncwana, above saying the insured driver was driving on the slow lane, he did not correct crucial information to be in accordance with his version. He did not correct what was said that, both vehicles were travelling straight despite that therein two blocks above there was a provision for a block "overtaking : pass right" ; and that the truck was damaged back centre despite that a block above that one provided for " back right" . Despite the fact that he says Ramncwana explained the form to him, he understood it, he had specifically gone there to correct the report of the insured driver. Why he left these, if they were incorrect, is difficult to comprehend with.

[45] Mr Nyangiwe correctly conceded the shortcomings of the plaintiff's failure to subpoena his passenger and call an expert witness. This is a major consideration which in my view would not be explained by the costs factor, considering the quantum of plaintiff's claim being just under 10 million. I have to agree with Mr Bester and make a negative inference against the plaintiff for failure to call a witness who had indicated her willingness to testify but was just not available on the specific one day.

[46] With regard to the differences in his affidavits I do not accept that the substance is the same. First one says insured driver was driving on the right, then he changed lanes twice, the second one says he was driving on the left and changed lane to the right. I do not follow the plaintiff when he says he has a legal representative

in the second affidavit and not when deposed to the first. The affidavits are a day apart. Even

if that was the case, the first affidavit suggests that there was some time lapse, from flickering, waiting for a moment and changing of lanes twice, which he attributes to irritation and probably road rage. The second affidavit suggests sudden change of lanes which made his vehicle to collide with the truck. The plaintiff is a sophisticated learned person, who was an executive director. He did not present himself as a person who would struggle to recognize the difference in these versions.

[47] Similarly, he ought to have known what he was saying throughout when he said his motor vehicle "bumped, collided" with the truck. It is not surprising that in court he changed to say the rear wheel of the truck collided with his vehicle. He recognised the difference between the two statements, and he conceded as much in court but said he would leave the matter in the hands of the court. The probability is that earlier on, he was of the view that it was sufficient to say he collided with the truck because the insured driver changed lanes.

[48] In my view, the plaintiff's case presents these insurmountable difficulties, which place into question his version of the account of the collision.

[49] As regards the insured driver, he could not explain why his driving speed was not pleaded and his plea stated that the collision was not caused by his sole negligence. The plea refers to an unknown driver. This is indicative of the fact that he only had contact much later. However, there was no amendment filed to align the plea with his version.

[50] With regard to the framing of the plea, I accept the submission that, it was not meant to admit that the defendant was partly negligent, but it followed the language

used in the framing of the particulars of claim. This is particularly so, in the light of the denial of negligence in the plea in the alternative.

[51] As regards the insured driver as a witness, he came across as a simple witness who stuck to his version. The version that he was driving on the left side, he did not see the plaintiff's vehicle, he just heard a bang. He said he drove very frequently on that road, he was conscious of the heavy load in his truck and had left the right side for other vehicles to pass.

[52] He easily made concessions. He said so when he could not explain the shortcomings in his plea. Despite being adamant that he was not negligent he also agreed with the suggestion that the plaintiff would not just bump him. He was also not biased against the plaintiff. When asked as to why he testified about alcohol that was in the plaintiff's vehicle, he said it was what he saw. However, he said he told the police at the scene, and repeated it in court that he did not know if the plaintiff was drunk. If he had wanted to be biased against the plaintiff he could have at the least, suggested that the plaintiff did smell of liquor.

[53] In my view, the plaintiff's one version that suggests the insured driver saw his flickering lights, changed lanes a number of times, in a fit of road rage would not be probable in the circumstances of the driver who satisfactorily testified that he was always conscious of his heavy load. The insured driver throughout did not show any negative attitude against the plaintiff in his testimony.

[54] The second version of a sudden change from his correct left lane to the right may either suggest that the insured driver had seen the plaintiff's lights and decided to move right, but what would have been his reason for doing so, whilst heavy loaded.

Alternatively, if it meant that the insured driver was just changing lanes without having seen the plaintiff's motor vehicle, it is difficult to understand why whilst driving on the correct lane for slow vehicles he would just change to a fast lane.

[55] In my view the probabilities favour the defendant than the plaintiff in the circumstances of this matter. I prefer the version of the insured driver as the most probable one. Consequently, the plaintiff failed to discharge the onus resting on him to prove his case against the defendant.

In the result,

The plaintiff's claim is hereby dismissed with costs.

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B MAJIKI

JUDGE OF THE HIGH COURT

Counsel for the plaintiff	:	Mr Nyangiwe
Instructed by	:	Messrs B Bangani Attorneys 50 St Georges Road **EAST LONDON** **Emil : bangani@telkomsa.net**
Attorney for the defendant	:	Mr Bester
Instructed by	:	Messrs Ketse Nonkwelo Incorporated 100 Cape Road Mill Park **PORT ELIZABETH** C/O Smith Tabata Incorporated Smith Tabata Building 12 St Helena Street Beacon Bay **EAST LONDON** **lawpractel@ketsenonkwelo.co.za**