

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 08353/09

Date: 03/09/2010

In the matter between:-

**SARAH BIBI AMLA**

**Plaintiff**

And

**THE ROAD ACCIDENT FUND**

**Defendant**

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**J U D G M E N T**

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**MATHOPO, J:**

- [1] The plaintiff sued the defendant for damages arising from a road accident which occurred on the 18 June 2005. At the time of the collision the plaintiff was a front seat passenger in a motor vehicle bearing registration numbers KJH 590 GP, a Toyota Camry, driven by her sister, Ms Hayman Amla (Amla). The said motor vehicle was involved in a collision with motor vehicle with registration number PPD 715 GP driven by the Insured driver Mr Steven Masuku (Masuku).

- [2] At the commencement of the trial and by agreement between the parties the issue of liability was separated with quantum in terms of Rule 33(4) the quantum was postponed sine die and case proceeded on the merits only.
- [3] Both parties agreed that the accident occurred along the N3 Highway near Leondale off ramp. Both motor vehicles were travelling in the same direction.
- [4] The plaintiff testified and called two (2) witnesses in support of her case, the driver of the motor vehicle Ms H Amla and Mr Dangor a police constable stationed at Heidelberg. The defendant only called Masuku (the insured driver)

## **EVIDENCE**

- [5] Ms Hoomaya Amla testified that she was the driver of the Toyota Camry along N3 Highway at or about 19H15 to 19H30. She was travelling on the right hand lane (which she described as the fast lane) at a speed of 110 to 120 km per hour. The speed limit is 120. It was dark and there were no street lights. The lights of her motor vehicle were on and also on dim. On her right there is an island which separates traffic from the opposite direction. She testified that there were no other vehicles travelling in their direction.
- [6] While busy driving she suddenly noticed a black car, which later turned to be grey, stationary motor vehicle parked at a 90° angle on the road, as it was too close she tried to swerve to the right to avoid the collision but it was too late and she collided with the right side of the motor vehicle near the driver's door extending to the fender. According to her this vehicle had no lights neither did it have any reflectors no hazards or indicators to warn other motorists like herself. In a nutshell she stated

that she observed the motor vehicle moments/seconds before the impact. After the collision her motor vehicle landed on the island. The accident happened on the right hand lane of the road.

- [7] When asked how far was the insured vehicle when she first observed it, she responded by saying that “it was sudden and I was almost upon it when I realised it and it was on my path”. The damage to her motor vehicle was on the front side from the left side extending to the passenger side.
- [8] During cross examination she was asked why she did not see the Insured driver’s motor vehicle prior to the collision if she had her lights on. She responded by saying it was dark and only saw it at the last minute and also because the insured driver’s vehicle had no lights. She denied that the insured driver’s vehicle had its reflector lights on and also denied that she did not keep a proper look out and reiterated that she was not driving negligently because she was (8) eight months pregnant at that time.
- [9] She denied that the insured driver was travelling on the left lane and about to exit to the Leondale off ramp. She disputed the version of the insured driver that he was travelling at 60km per hour with lights on, and on the left lane. She was adamant that the point of impact was on the right hand lane and not as alleged by the Masuku.
- [10] Ms Sarah Amla, the plaintiff testified that she was a front seat passenger in the Toyota Camry and corroborated the evidence of Ms H Amla in many material respects. In particular stated that they were travelling on the right hand lane and collided with the insured driver’s vehicle which was stationary on the road at a 90° angle position. The insured driver’s vehicle had no lights or reflectors. According to her testimony because it was dark, they noticed the insured driver seconds before the collision at a distance of about 4 to 5 metres. The insured driver was across the right lane in a horizontal position.

- [11] She disputed the version of the insured driver that they were travelling on the left lane and that the accident happened on his left lane. She also disputed that the insured driver's vehicle had its lights on including the reflectors. She sustained various injuries as a result of the accident *inter alia* her leg.
- [12] The last witness for the plaintiff was Mr Dangor, a police constable stationed at SAPS Heidelberg. Mr Dangor testified that he received a call that the plaintiff and his niece were involved in an accident. At that time he was in Heidelberg. He took 20 minutes to get to the scene of the accident, when he arrived there were traffic officers, paramedics and ambulance already at the scene. He noticed that the insured driver's vehicle was on the right hand lane facing Heidelberg on the N3 and the plaintiff's motor vehicle was on the island facing Southwards. He did not speak to the insured driver. He assisted his niece and the plaintiff. Of significance is his evidence that both motor vehicles were on the right side of the road when he arrived.
- [13] Mr Masuku the insured driver testified that he was driving his Ford Sierra motor vehicle from Meyerton and proceeding to see a church member. He was travelling at a speed of 60km/h. Before he could reach the Leondale off-ramp he noticed the plaintiff's motor vehicle coming from behind at a high speed. He said he slowed down because he did not want to race with them. When the motor vehicle approached him, the driver tried to overtake, and in the process collided with his motor vehicle on the left side near the driver's door. He denied that he was stationary or was travelling on the right hand lane with no lights on. He described the lights of his motor vehicle as being excellent. He said that he was familiar with the area and because he had frequented it several times.

- [14] During cross examination he denied that he was not familiar with the area and that when the accident happened he was looking for the off-ramp and thus not keeping a proper lookout. He denied that he executed a U-turn and that his motor vehicle was stationary on the right lane at the time of the collision. He sustained a head injury and which he described as mild. He also sustained an injury to his right leg. During cross examination when he was asked how the accident happened, he became irritated, argumentative, sarcastic, evasive and was hesitant in answering questions. He could not furnish any plausible reason why if the accident happened on the left lane, his motor vehicle landed on the right lane, save stating that he lost consciousness after the accident and regained same at the hospital.

### **SUBMISSIONS**

- [15] Counsel for the plaintiff submitted that on the objective facts, the accident happened on the plaintiff's lane because shortly after the accident, the witness Mr Dangor who arrived at the scene 20 minutes after the accident found the two motor vehicles on the plaintiff's side. In particular the plaintiff's motor vehicle was on the island facing South and the said insured driver's vehicle was on the right lane. He submitted that if the accident had occurred as alleged by the insured driver, the position of the motor vehicle would have been different. He also submitted that another fact which supports the version of the plaintiff is the damages to both motor vehicles.
- [16] He further submitted that the probabilities are that the insured driver thought he had missed the off-ramp and as he was attempting to make a U-turn and his motor vehicle stalled and his lights were switched off and in that process the plaintiff's motor vehicle collided with him. As it was dark, counsel submitted that there was nothing that the plaintiff could do to avoid the accident.

- [17] As regards contributory negligence he reluctantly conceded that in the circumstances, Plaintiff's driver may have been 20% negligent because of her failure to observe the insured driver a distance prior to the collision.
- [18] Counsel for the defendant argued that the version of the insured driver must be accepted because he was travelling very slow along familiar surroundings and she urged me to accept that the accident happened as alleged by the insured driver on his left lane of the road. She could not explain how the motor vehicles ended up on the right hand lane. She conceded that the weakness in the defendant's case was the failure to submit the police report and plan despite being available. She also argued that the Plaintiff's driver was negligent because she did not keep any proper look out and that any damages to be recovered by her must be apportioned accordingly and submitted that both drivers were equally to be blamed for the accident.

### **ASSESSMENT OF THE EVIDENCE**

- [19] This court is faced with two irreconcilable version or mutually contradictory versions, the resolutions of which will depend on my finding regarding a) credibility, b) reliability c) probabilities. See: **Stellenbosch Farmers Winery Group Ltd & Another v Martell Et Cie & Others 2003 (1) SA 11 SCA** at pages 141 – 156.
- [20] The plaintiff and her witnesses made a good impression to the court, their version was consistent, coherent, logical and did not contradict each other. I accept as correct and credible the plaintiff's case that the accident happened on the right hand lane when the Ms Amla collided with the insured motor vehicle which was stationary on the road at a 90° angle with its lights off. The position of the motor vehicles after the accident supports the view that the accident was on the right hand

lane. I also find as sufficient corroboration, the evidence of Mr Dangor who arrived at the scene 20 minutes after the collision and found the plaintiff's motor vehicle on the island and the insured driver's vehicle on the right hand lane. His evidence was not disputed and neither was the plaintiff's driver's evidence about the position of her motor vehicle after the collision challenged by the defendant.

[21] Again if one looks at the damages to both motor vehicles, it is consistent with the plaintiff's case. The defendant's case that the accident happened on the left hand side of the insured driver cannot be correct and I reject it. According to the insured driver he was travelling at a speed of 60km/h when he noticed the plaintiff's motor vehicle coming from behind at a high speed and he said he slowed down because he did not want to race with them, then suddenly plaintiff's motor vehicle whilst overtaking collided with him on the right side near the driver's door extending to the fender and he lost consciousness.

[22] I fail to understand why an overtaking car would suddenly cut into his motor vehicle at an angle and collided with him. What the insured driver wants the court to believe is that the plaintiff's motor vehicle whilst overtaking suddenly cut into his motor vehicle and caused the damages to the front right door extending to the fender of his motor vehicle. This version is not only improbable but one which is dangerous to rely on because it is not consistent with the damages to both vehicles. Mr Masuku did not make a good impression to the court, he was evasive, hesitant, argumentative and I was left with the distinct impression that either he could not remember how the accident occurred or he was attempting to adjust his evidence as the case progresses.

[23] Another aspect which militates against the acceptance of the defendant's case is the inexplicable failure to call the traffic officers who arrived at the scene shortly after the collision and saw the position of the motor vehicle and prepared a sketch plan. Counsel for the

defendant conceded that such a plan was available as part of the accident report in the police docket. Furthermore it is common cause that paramedics also arrived at the scene shortly after the collision. It is obvious that if they had been called as witnesses they could have shed some light about the position of the motor vehicles after the collision. The failure by the defendant to call those crucial witnesses and tender in evidence the sketch plan fortifies my view that the evidence of the plaintiff and her witnesses is credible, reliable and probable. As a result I accept the evidence of the plaintiff, that the accident occurred on the right lane and this was supported by the independent evidence of Mr Dangor about the position or location of motor vehicles after the collision.

- [24] In my view the probabilities are that the insured driver's motor vehicle was stationary on the road with no lights on and the plaintiff's driver collided with his motor vehicle which was dark (grey), visibility was poor because there were no street lights and he did not have any warning signs or reflectors on at that time.
- [25] On the analysis of the evidence I am satisfied that the insured driver motor vehicle was stationary on the road at a 90° angle with its lights switched off and with no warning to other road users. I accept that the evidence of the plaintiff and her witnesses as clear, credible, reliable and probable and accordingly reject the evidence of the insured driver.
- [26] I now turn to deal with the defendant's submission that the plaintiff's driver also contributed to the accident. The question as to whether either of the two drivers was indeed negligent or not must account for all the proven facts. One does not draw inference of negligence on a piecemeal approach. One must consider totality of all the facts and then decide whether the driver has exercised the standard of conduct which the law requires. The standard of case so required is that which a reasonable man would exercise in the circumstances. That degree of care will vary according to the circumstances, in all cases. The



question is whether the driver should reasonably in all the circumstances have foreseen the possibility of a collision, See **Santam Versekeringsmaatskappy Bpk v Swart 1987 (4) SA 816 (A)** at 819B.

- [27] The area where the collision occurred was dark, the insured vehicle was dark in colour (grey), there were no street lights, the insured driver's lights were off. Apart from the fact that the collision area was dark, the place where the collision took place was a flat area where the road was straight. During cross examination the plaintiff's driver (Amla) testified that the insured vehicle appeared suddenly on her path of travel and she did not have any opportunity to apply her brakes save swerving to the right in an attempt to avoid the collision. The plaintiff herself testified that they first observed the insured vehicle when it was about 4 to 5 meters from them. This is too close a distance. I have some difficulty with this evidence because Amla in evidence stated that her lights were on or dim prior to the collision and further conceded that the collision occurred on a flat and straight dry road. I fail to understand why if there was nothing obstructing her view she did not see the insured vehicle at a greater distance allowed by the brightness of her lights. Failure to observe the insured driver timeously indicate that Amla did not keep a proper look out. In my view this constitutes contributory negligence. It is my finding that the driver of the plaintiff's motor vehicle was 20% to blame for the accident.

I therefore make the following order:

1. It is declared that the insured driver (Masuku) is 80% to blame for the accident
2. The defendant is liable for the plaintiff's costs on a party and party scale thus far.

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**RS MATHOPO**  
**JUDGE OF THE HIGH COURT**

**Appearances:**

For the Plaintiff	:	Adv. Waner
Instructed by	:	Rafiq Khan and Company
For the Defendant	:	Adv. Mabena
Instructed by	:	Sishi Incorporated
Date of hearing	:	17 August 2010
Date of Judgment	:	03 September 2010