

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 25868/10

DATE:23/09/2011

NOT REPORTABLE

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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DATE

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SIGNATURE

In the matter between:

SESHOKA, JOHN

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

J U D G M E N T

MBHA, J:

Introduction

[1] This is an action under the provisions of the Road Accident Fund No 56 of 1996 ('the Act') in which the plaintiff sued the defendant for damages arising out of injuries he sustained in a motor vehicle collision which occurred on 18 January 2008 at about 17h30, at or along Golden Highway in Eikenhof.

[2] The matter became defended and all forms of negligence have been denied by the defendant. At the commencement of the trial the court made an order in terms of Rule 33(4) of the Rules of Court and the matter accordingly proceeded only on the question of liability. The issue of quantum has been held over for later determination.

The evidence

[3] The plaintiff was the first witness to testify on his behalf and his testimony can be summarised as follows:

- 3.1 On 18 January 2008 at approximately 17h30 he was travelling in his motor vehicle of which he was the driver, along the Golden Highway in Eikenhof in an east/westerly direction. This is a tarred road with one lane for travel in either direction. It is also divided by a broken white line. It was before sunset and visibility was good. Whilst he was driving, he observed the insured vehicle travelling ahead of him in the same direction as that in

which he was travelling. There was other traffic ahead of the insured vehicle which was also travelling in the same direction.

3.2 He said that he was driving at approximately 60 kph, which was a safe and acceptable speed and that the speed limit on that particular road is 60 kph.

3.3 As he intended overtaking the insured vehicle ahead of him, he first switched on the indicator signifying his intention to overtake. According to him the insured driver was well aware of his having switched on the indicator because the insured driver slowed down as soon as he had started to overtake. He said whilst he was in the process of overtaking the insured vehicle and when both cars were almost parallel to each other, the insured vehicle suddenly swerved to the right onto the right lane which carries traffic travelling in the opposite direction, and collided with the plaintiff's vehicle.

3.4 The plaintiff testified that the damage to his vehicle was on the left side around the left front fender, whilst the damage to the insured driver's was on the right rear side and right tail light. He also stated that the two motor vehicles collided on the right hand lane just over the broken white line.

- 3.5 He said the force of the impact caused his vehicle to move across the right lane which is for on-coming traffic, and crashed against a steel barrier on the right hand verge of the road.

[4] The plaintiff called Mr David Nkonko (“Nkoko”) to testify on his behalf and his evidence can be summarized as follows:

- 4.1 He was a passenger in the plaintiff’s motor vehicle and was seated on the front left passenger seat when the collision occurred.
- 4.2 There was not much traffic on the road but he saw the insured vehicle driving ahead of the plaintiff’s vehicle. Whilst travelling he observed the plaintiff switch on the indicator indicating that he intended overtaking the insured vehicle.
- 4.3 He said that when both the plaintiff’s and the insured driver’s vehicles were almost parallel, the insured vehicle suddenly started overtaking a bakkie ahead of it and as a result, the plaintiff’s car collided with the insured vehicle on its right rear side with its front left fender.
- 4.4 He described the particular road as a single lane road with traffic travelling in opposite directions. He said the plaintiff’s vehicle sustained damage on the left front fender while the insured

vehicle was damaged at the side on the right rear as a result of the collision.

- 4.5 He testified that the collision occurred in the middle of the two lanes and not on the left lane. Furthermore, he never saw the insured driver indicate his intention to overtake the bakkie that was travelling ahead of the insured vehicle.

[5] The defendant's first witness, Mr Amos Matjele, who is the insured driver testified that:

- 5.1 On 18 January 2009 at approximately 17h30, he was driving in the Eikenhof area. He had two passengers inside the insured vehicle. They were all from work and on their way to their respective homes.
- 5.2 Visibility was clear and there was no traffic ahead of him. However, he soon noticed that there was a kombi which was following from behind and which was travelling in the same direction as his motor vehicle.
- 5.3 The next thing he heard a sound and he noticed that the kombi had collided with the right rear tail light of his motor vehicle. Prior to the collision he never saw the driver of the kombi

indicate that he was going to overtake his vehicle. In fact, the Kombi never even attempted to overtake his vehicle.

5.4 He said as a result of the collision, the plaintiff lost control and his vehicle veered right across to the right where it crashed against a steel barrier.

5.5 The insured driver was adamant that the collision occurred at or near a bridge and that on that particular stretch of the road there is a barrier line prohibiting any overtaking of vehicles. As such it would have been unsafe for anyone, in particular the driver of the kombi, to have attempted to overtake another vehicle at that particular spot.

5.6 He said that the collision occurred on the left-hand lane and disputed the plaintiff's version that it occurred just across the middle of the road.

5.7 He denied that he tried to overtake any bakkie that was travelling ahead of him as the plaintiff's witness alleged. He said that the impact caused by the collision propelled his car forward and that if there had been any other vehicle ahead of him, he would have collided with it.

[6] The defendant's second witness Mr Moses Vundla ("Vundla") testified that:

- 6.1 He was a passenger in the insured vehicle and he was sitting in the left front passenger seat.
- 6.2 He saw the plaintiff's vehicle as it tried to overtake the insured vehicle and collided with the right rear of the insured vehicle.
- 6.3 The collision occurred next to a bridge and there is a barrier line on that particular stretch of road. As such it was unsafe for the plaintiff to have tried to overtake the insured vehicle at that part of the road.

The Law

[7] It is trite that the plaintiff always bears the *onus* of proving negligence on the part of the insured driver on a balance of probabilities. See *Arthur v Bezuidenhout and Mieny* 1962 (2) SA 566 (AD) at 576G; *Sardi and Others v Standard and General Insurance Co Ltd* 1977 (3) SA 776 (A) at 780C-H and *Madyosi and Another v SA Eagle Insurance Co Ltd* 1990 (3) SA 442 (E) at 444D-F. In deciding whether the plaintiff has succeeded in discharging this *onus*, the court has to view the entire evidence which was led during the trial *in toto*.

[8] The versions testified to by the parties are entirely different and are indeed mutually destructive with regard to:

- 8.1 the point of impact;
- 8.2 whether or not the plaintiff's vehicle either overtook or attempted to overtake the insured vehicle prior to the collision; and
- 8.3 whether or not it was the plaintiff's vehicle that collided into the insured vehicle or *vice versa*.

[9] The correct approach to be adopted when dealing with mutually destructive versions was succinctly set out in the case of *National Employers General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (E) at 440E-G, where Eksteen AJP said:

"... Where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant, the plaintiff can only succeed if the court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false."

[10] The Supreme Court of Appeal, in the case of *Stellenbosch Farmers Winery Group Ltd and Another v Martell Et Cie and Others* 2003 (1) SA 11 (SCA) at 14I-15E, approved this approach saying:

“The technique generally employed by courts in resolving factual disputes of this nature may be conveniently summarised as follows. To come to a conclusion on the disputed issues the court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. ... 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 ...”

[11] The principle is therefore established that when there are mutually destructive versions before the court, the plaintiff’s *onus* of proof can only be discharged if he establishes his case on a preponderance of probabilities. The principle is also established that the requirement that a court has to be satisfied that the plaintiff’s version is true and that of the defendant false in order for the plaintiff to succeed in discharging his *onus* of proof, is only applicable in cases where there are no probabilities one way or the other. See *African Eagle Life Assurance Co Ltd v Cainer* 1980 (2) SA 324 (W).

[12] The following facts are common cause in this case:

12.1 On 18 January 2008 at approximately 17h30, the plaintiff was driving his motor vehicle when it was involved in a collision with the insured motor vehicle along the Golden Highway in Eikenhof.

12.2 The plaintiff's motor vehicle was damaged on the front left fender while the insured driver's vehicle was damaged on the rear right side and right tail light.

12.3 As a result of the impact, the plaintiff's vehicle lost control and crushed into or against a steel barrier on the other side of the lane for on-coming traffic.

12.4 Shortly before the collision, both the insured's and the plaintiff's vehicles were travelling behind one another in an east/westerly direction, along the Golden Highway, Eikenhof

[13] I must state that I found the plaintiff to be a credible and consistent witness. From the onset the plaintiff testified that he was attempting to overtake the insured driver's motor vehicle when the two vehicles collided. His evidence in this regard is corroborated by Nkoko, the passenger in the vehicle driven by the plaintiff, who testified that the plaintiff first switched on the indicator and started overtaking the insured vehicle, and that at about the same time, the insured driver started an overtaking manoeuvre attempting to overtake a bakkie that was travelling ahead of the insured vehicle. This aspect of the plaintiff's vehicle overtaking or attempting to overtake the insured vehicle, was put beyond doubt by the defendant's own witness Vundla, who was a passenger in the insured driver's vehicle at the time of the collision, who testified that he saw the plaintiff overtake the insured vehicle.

[14] As can be seen, Vundla's testimony that the plaintiff overtook the insured vehicle, is in stark contrast to that of the insured driver who is adamant that the plaintiff's vehicle never overtook the insured vehicle and that the plaintiff's vehicle struck the insured vehicle from behind.

[15] Both the insured driver and Vundla testified that it was unsafe for the plaintiff to overtake at or near a bridge and where there is solid white line at the particular stretch of the road. It was also their version that there were no vehicles ahead of them.

[16] Significantly, the court was informed during argument that both parties and their respective attorneys went to inspect the scene of the collision. Both parties are ad idem that there is no bridge where the accident occurred and neither is there any barrier or solid white line on that particular stretch of the road. The testimony of the insured driver and his witness, namely that the collision occurred at a bridge and where there is a barrier line on the road, is thus false and was clearly made up to try to impute negligence on the part of the plaintiff.

[17] Sight must also not be lost of the fact that the defendant's counsel even suggested to the plaintiff, during cross-examination, that the insured driver would testify that the collision occurred when the plaintiff was attempting to overtake the insured driver. This is consistent with the testimony of the plaintiff, Nkoko and Vundla, the defendant's witness.

[18] The versions advanced by the plaintiff and his witness are not only probable but also accord with common sense and logic. The plaintiff's testimony that after he started overtaking the insured vehicle and that when both cars were parallel, the insured vehicle suddenly swerved right, accords squarely with the testimony of Nkonko, namely that after the plaintiff's motor vehicle had started overtaking the insured vehicle, the latter vehicle then suddenly swerved to its right whilst attempting to overtake the bakkie that was in front. In my view, this is the only plausible reason that explains why the insured vehicle suddenly swerved to its right and collided with the plaintiff's vehicle causing it to lose control and veer further to its right across the lane for on-coming traffic, and crash into the steel barrier where it ultimately landed.

[19] In the light of what I have stated, I find that plaintiff's version is, on the probabilities, true and that the version of the defendant falls to be rejected.

The court accepts the plaintiff's version that:

- 19.1 both vehicles were travelling in the same direction;
- 19.2 the plaintiff attempted to overtake the insured vehicle that was travelling in front; and
- 19.3 that the insured vehicle suddenly swerved to its right and collided with the plaintiff's vehicle causing it to lose control and crash onto a steel barrier on the right verge of the road.

[20] On the facts, the court finds that the insured driver was negligent in that he failed to exercise his expected duty towards other motorists, in particular

the plaintiff's vehicle, in that he failed to keep his vehicle as far as possible to the left in the lane he was travelling, at the time when the plaintiff was overtaking the insured vehicle. He also acted negligently when he started to overtake the vehicle ahead of him after the plaintiff had started overtaking the insured vehicle.

[21] It is trite that a driver of a vehicle is entitled to assume that the driver who is overtaken will continue on his present course on the left-hand side of the road. See *Beswick v Crews* 1965 (2) SA 690 (AD).

[22] In terms of Regulation 298 of the National Road Traffic Act of 1996, the driver of a vehicle intending to pass any other vehicle proceeding in the same direction on a public road shall pass to the right thereof at a safe distance, and the vehicle being overtaken must move as far to the left as possible.

[23] In my view the insured drive acted negligently as he acted in a manner in which a reasonable person in his position would not have acted. Furthermore, his negligence was the sole cause of the collision.

[24] I am satisfied that the plaintiff has successfully discharged the required onus on a balance of probabilities and has shown that the insured driver drove the insured vehicle in a negligent manner. It has not been shown that any negligence can be attributed to the plaintiff. The defendant is accordingly liable to compensate the plaintiff fully for all his damages suffered as a result

of personal injuries he sustained in the collision that occurred on 18 January 2008.

[25] I accordingly make the following order:

1. The defendant is liable to pay 100% of the plaintiff's proven or agreed damages.
2. The defendant is ordered to pay the plaintiff's costs.
3. The determination of quantum is postponed sine die.

**B H MBHA
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG**

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DATES OF HEARING	:14-17 AUGUST 2011
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