


## REPUBLIC OF SOUTH AFRICA



## SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 12218/11

APPEAL NO: A3018/12

(1)	REPORTABLE: YES / <u>NO</u>
(2)	OF INTEREST TO OTHER JUDGES: YES/ <u>NO</u>
(3)	REVISED.
<u>12/12/12</u>	
	

In the matter between:

**PETKO MARGARITOV**

APPELLANT

and

**WILLIAM MOROLONG**

RESPONDENT

Neutral citation:

Coram: SATCHWELL J and COLLIS AJ

Heard: 9<sup>th</sup> October 2012Delivered: 12<sup>th</sup> December 2012

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## JUDGMENT

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COLLIS, A J:

### INTRODUCTION

[1] This is an appeal by the appellant, who was the plaintiff in the Court *a quo* and to whom I shall refer as the plaintiff against the judgment of the magistrate for the district of Randburg in which he dismissed the claim of the plaintiff. The respondent was the defendant in the Court *a quo* and I shall refer to him as the defendant.

[2] The plaintiff sued the defendant for damages sustained to his motor vehicle in a collision which occurred between himself and the defendant.

[3] It was agreed between the plaintiff and the defendant that the court *a quo* would deal with the merits of the action only and the court *a quo* ordered such separation.

[4] The facts of the matter are relatively simple on either side. Both the plaintiff and the defendant gave mutually exclusive versions before the court as to how the collision had occurred.

### SUMMARY OF EVIDENCE

[5] The plaintiff testified on the evening in question around midnight he was returning from an event held at the Coca-Cola dome. The highway where the collision occurred carried five lanes of traffic, was well lit and congested on the night. Driving in the fast lane at an approximate speed of 100km/h he was then struck on the left rear side of his motor vehicle. Immediately, his vehicle started skidding and in the process it ended up in the slowest lane, on the far left side facing oncoming traffic. Upon alighting from his motor vehicle he noticed on the far right side, next to the fastest lane, a red Toyota Corolla, which had smashed into the barrier. He proceeded to this vehicle and could only manage to speak to the passengers as

the driver was not present. The passengers informed him their driver had absconded. At court the witness proceeded to identify the defendant and a female passenger as the persons he had met on the evening standing next to the Toyota.

[6] The independent witness Mr. Alexander Murry's testimony can be summarised as follows: He testified on the night in question travelling along the middle lane of the highway at a distance of about 400 metres behind the plaintiff, he first noticed the vehicles of the plaintiff and the Toyota. At that distance the Toyota was travelling in the lane alongside the fast lane, veered slightly to the right, then back left and then right again and crashed into the left rear side of the plaintiff's vehicle. Upon impact the plaintiff went right across to the left lane and the Toyota into the barrier adjacent to the right lane. Immediately following the collision he brought his vehicle to a standstill, alighted from it and ran to assist the occupants of the vehicles involved. It was his testimony, no other vehicles were in the vicinity of the vehicles driven by the plaintiff or that of the defendant at the point of the collision albeit that the traffic was heavy on the day. He likewise testified the plaintiff had damage on his rear left side towards its back. Mr. Murry denied the version of the defendant, that he was struck by another vehicle which resulted in his vehicle veering across the highway and hitting the barrier. He thus denied, the involvement of any other vehicle in the collision.

[7] The defendant's evidence in summary was as follows:

On the particular evening he was the driver of a red Toyota Corolla driving along the N1 highway in the extreme left lane. As he was driving along he felt a bump on his left side, lost control of his vehicle which spun across the highway and came to a standstill after hitting the steel barriers on the extreme right. Upon standstill he alighted from his vehicle and noticed he was knocked on his left front door. He testified there was no other damage to his vehicle. He then noticed three other vehicles stationary on the other side of the highway, which he assumed was also involved in a collision. He denied having collided with the plaintiff and further denied having spoken to Mr. Murry upon his vehicle becoming stationary. This then in essence, the evidence presented before the court *a quo*.

## JUDGMENT COURT *A QUO*

[8] In its judgment the court *a quo* referred to the judgment in National Employers General Insurance Co Ltd v Jagers.<sup>1</sup>

[9] It has been held that where the versions of a plaintiff and defendant are diametrically opposed to each other, as are these versions in regard to how the collision actually occurred, unless there are probabilities either way, the court must be satisfied that the version of the plaintiff is correct and that of the defendant is false.

[10] It was the court's finding, upon an assessment of the evidence the probabilities were evenly balanced, and did not favour either of the parties. As a result, the court could not reject either version as false and as a consequence, dismissed the plaintiff's claim.

[11] In its judgment, the court *a quo* had concluded.

- (1) That counsel acting for the plaintiff had failed to contest the evidence of the defendant, who testified four vehicles were involved in the collision;
- (2) The court also found, the plaintiff's counsel had failed to dispute the defendant's evidence that his vehicle was damaged on the left hand side;
- (3) Similarly, the court *a quo* had found, plaintiff counsel had failed to dispute, the defendant's vehicle, should have had damage on the right hand side seeing that defendant's vehicles right side had collided with the plaintiff's vehicle, on the left side.

## LAW

[12] The purpose of cross-examination is to give the party being cross-examined an opportunity to deal with the plaintiff's case as put by him. The decision ultimately as to whether the failure to cross-examine must be held against that party failing to do so, is a matter of deciding what is fair between the parties and a witness.

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<sup>1</sup> 1984 (4) SA 437 (E) at 440

[13] The foregoing was set out very clearly by the Constitutional Court in *President of Republic of South Africa & Others v South African Rugby Football Union & Others*.<sup>2</sup>

*“[61] The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness attention to the fact by questions put in cross-examination having that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness-box, in giving an explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness is correct. This rule was enunciated by the House of Lords in *Brain v Dunn* and has been adopted and consistently followed by our courts.*

*[62] The rule in *Brown v Dunn* is not merely one of professional practice but “is essential to fair play and fair dealing with witnesses. It is still current in English and has been adopted and followed in substantially the same form in the common wealth.*

*[63] The precise nature of the imputation should be made clear to the witness so that it can be met and destroyed, particularly where the imputation relies upon inferences to be drawn from other evidence in the proceedings. It should be made clear not only that the evidence is to be challenged but also how it is to be challenged. This is so because the witness must be given an opportunity to deny the challenge, to call corroborative evidence, to qualify the evidence given by the witness or others and to explain contradictions on which reliance is to be placed.”*

[14] Having regard to the above, this court was called upon to assess whether the failure on the part of the plaintiff’s counsel to put certain questions in cross examination to the defendant, resulted in the plaintiff not being able to discharge the *onus* which it carried.

[15] On a closer examination of the evidence tendered in the court *a quo*, the following is of relevance:

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<sup>2</sup> 2000 (1) SA 1 (CC), a decision of the Constitutional Court at 360 – 388 (paragraphs {61} – {63}).

- 15.1 It was the evidence of the plaintiff following the collision his motor vehicle was damaged on its left rear side. He testified to be more precise, it was damaged on the rear wheel as the whole axle was damaged. This, the respondent when he cross-examined the appellant denied as it, was his version at the time, he never collided with the appellant.
- 15.2 When the defendant in turn gave evidence, he testified, it was his evidence, he was bumped on the left side of his vehicle merely heard the bump but could not tell which car had bumped him. During cross-examination the plaintiff's counsel once again asked questions as to the damage on the defendant's vehicle; and the defendant confirmed he had damage on his left front passenger door.
- 15.3 The plaintiff's counsel proceeded to ask further whether that was the only damage on the vehicle to the defendant to which the defendant had answered yes.
- 15.4 As a result, although the plaintiff's counsel, did not specifically deny it was improbable for the defendant to have damage on the left side of his vehicle as opposed to the right side of his vehicle, as on the plaintiff's evidence, he had damage on his left rear side, I cannot find failure to deny specifically the location of the damage on the defendant's vehicle as a failure to have cross-examined thereon.
- 15.5 The defendant further testified upon alighting from his vehicle he noticed four vehicles in total which was involved in the collision on the furthest left lane on the highway in question. The defendant, was specifically asked by counsel representing the plaintiff, whether he could see these other three cars colliding. To this question, he had answered no. The defendant further testified although he did not witness the collision the driver of one of the motor vehicles had reported to the metro police attending the scene on the day, his motor vehicle was also collided into.

15.6 The plaintiff through his counsel could not be expected to have denied the involvement of other cars, travelling on the extreme left lane of the highway. Surely, a litigant can only be expected to deny, that which falls within his knowledge. That having been said, the evidence of Mr Murry, the independent witness in respect of the involvement of other cars as testified to by the defendant and being in the vicinity of the point of impact with the plaintiff's vehicle, was put to the defendant, which he could furnish no answer to.

15.7 Mr. Murray, upon being cross-examined by the defendant's counsel denied the involvement of other cars on the day, and was adamant he observed the defendant's vehicle collide with the plaintiff's vehicle on the evening in question. He further offered both the plaintiff and defendant his business card and denied having known either of them prior to the collision.

15.8 Upon, Mr. Murry being cross-examined as to the involvement of other vehicles, Mr. Murry denied such participation. The counsel acting for the respondent, did not dispute in cross-examination the defendant was offered a business card by Mr. Murry.

15.9 This is another probability in favour of the appellant i.e an independent witness supporting the evidence of the plaintiff.

[16] To my mind on the evening in question there could not have occurred two unrelated collisions. One which occurred in the extreme left lane resulting in the defendant veering to the extreme right lane and coming to a standstill after hitting the barrier adjacent to the extreme right lane; and another which occurred between the plaintiff's vehicle and another unknown vehicle in the extreme right lane.

[17] There is simply no evidence, of another motor vehicle having come to a standstill in the vicinity of where the appellant's vehicle was struck, except the evidence pointing to the vehicle of the defendant.

[18] The probabilities rather dictate the plaintiff's motor vehicle was collided into by the defendant and then veered across the highway and come to a standstill in the slowest lane facing oncoming traffic.

[19] As mentioned previously, this description of the collision with the plaintiff's vehicle, the defendant denied, but to my mind is the most probable explanation for the collision on the evening in question.

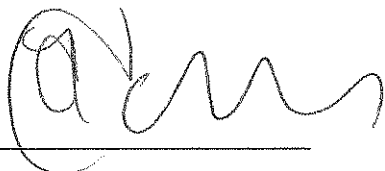
[20] For the above reasons, I find no misdirection on the part of the court *a quo*, in dismissing the plaintiff's claim.

[21] In the result, I propose the following:

21.1 The appeal is upheld with costs.

21.2 Judgment in favour of the plaintiff on the merits, with costs.

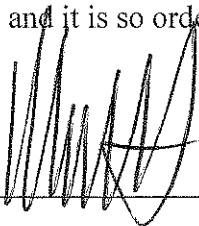
DATE AT JOHANNESBURG ON 12<sup>th</sup> OF DECEMBER 2012



**COLLIS A J**

**ACTING JUDGE OF THE HIGH COURT**

I AGREE and it is so ordered:



**SATCHWELL J**

**JUDGE OF THE HIGH COURT**