

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 09479/2013

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

.....
SIGNATURE

.....
DATE

In the matter between:

JOHAAN DANIEL BOTES

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

COLLIS AJ:

[1] The plaintiff, an adult male, has instituted a damages action against the defendant for certain bodily injuries he sustained in a motor vehicle collision on 3 November 2011. At the time of the accident the plaintiff was the driver of a

black scrambler motorbike 180 CC which collided with a maroon Toyota Corolla motor vehicle, bearing registration number TSH 738GP, there and then being driven by Ms Mamaele Thekoane, referred to as the insured driver.

[2] In the particulars of claim at paragraphs 5 and 10 thereof the plaintiff alleged as follows:

“5 The sole cause of the collision aforesaid was the negligent driving of the said Ms Mamaele Era Thekoane; she having been negligent in one or more or all of the following respects:

5.1 She failed to keep a lookout, alternatively, any proper lookout; and /or

5.2 She failed to keep the insured vehicle of which she was the driver under any, alternatively, any proper control; and/or

5.3 She failed to avoid the collision when, by the exercise of reasonable care, she could or should have done so; and/or

5.4 She failed to apply the brakes of the insured vehicle of which she was the driver timeously or at all; and/or

5.5 She failed to allow the Plaintiff a safe berth at a stage where she could and should have done so; and/or

5.6 She failed to give any audible or visual signs to warn the insured vehicle, of any possible danger; and/or

5.7 She failed to pay due regard to the rights of other users of the road and in particular the rights of the Plaintiff; and/or

5.8 She drove her insured vehicle onto the road at a moment when it was inopportune and dangerous to do so; and/or

5.9 She proceeded to execute a right hand turn in front of the Plaintiff, who had the right of way at the time when it was both dangerous and inopportune to do so; and /or

5.10 She failed to exercise the care a reasonable person would and could have exercised under the circumstances.

10 The impact of the aforesaid collision caused the Plaintiff to sustain the following bodily injuries as reflected in the serious injury assessment completed by Dr M de Graad, Orthopaedic Surgeon, dated 20 December 2012, a copy of which is annexed hereto, as annexure “B”:

10.1 Open reduction and internal fixation of fracture (left) femur.”

[3] In its plea the defendant denied the allegations and placed the plaintiff to proof thereof.

THE DISPUTE

[4] The matter comes before me for the determination of the *liability* and the *quantum* of damages suffered by the plaintiff. In the event of the plaintiff being successful on the merits, I was called upon to decide the quantum of damages for the plaintiff's past loss of earnings and future loss of earnings and /or earning capacity more particularly the retirement age of the plaintiff and the contingencies to be applied.

COMMON ISSUES

[5] Insofar as the plaintiff's claim for future hospital and medical expenses is concerned, the defendant has undertaken to furnish the plaintiff with an undertaking in terms of Section 17(4) (a) of the Road Accident Fund Act, Act 56 of 1996 for the costs of the future accommodation of the plaintiff in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to him after the costs have been incurred and upon proof thereof subject limitation of an apportionment of liability, if any.

[6] As the injuries sustained by the plaintiff was not placed in dispute by the defendant, the parties further agreed to refer the issue of general damages herein to the Health Professional Council of South Africa tribunal for a

determination on the severity and seriousness of the plaintiff's injuries sustained in the collision. The plaintiff did not proceed with his claim for past hospital and medical expenses.

[7] It should also be mentioned that at the commencement of the trial the defendant abandoned its special plea.

THE EVIDENCE

[8] The plaintiff, Mr Johaan Botes testified that on 3 November 2011, he was travelling from Eikenhof towards Alberton on Swartkoppies Road. He was travelling on the right lane at point A as is depicted on Exhibit A (the sketch plan). On the morning in question, he was riding his scrambler motorbike and his daughter Vicky Botes was his passenger. They were both wearing their helmets. He described the weather conditions as clear and sunny with no rain and the road surface as tarred and smooth. He testified that the flow of traffic was fairly heavy.

[9] He described Swartkoppies Road to be a dual carriageway, with two lanes to the left of the road and a further two lanes to the right of the road carrying traffic in the opposite direction. Both sides of the dual carriageway allowed for

traffic to execute a turn into Peggy Vera Road. He testified that he was familiar with the area and with the specific intersection in question.

[10] He testified that the traffic light facing his direction turned green from red upon him approaching the said intersection. He was at a distance of 7-8 metres away from the vehicles travelling ahead of him when that occurred. The vehicles which had been stationary at the intersection, proceeded to drive off.

[11] He testified further that he was in a continuous motion and that he made his way through the intersection. At a distance of approximately 5 metres away, he then noticed the insured driver travelling in his opposite direction intending to turn right across his path of travel.

[12] The distance between him and the insured driver by then had been too close. In an attempt to avoid the collision he slammed his brakes and swerved to the right. The collision however could not be avoided and he struck the insured driver on her left rear door and wheel. He described the point of impact as X on Exhibit A, almost towards the centre of the intersection in the same lane as the lane that he was travelling in.

[13] On impact his daughter was flung from his motorbike to the opposite side of the intersection at the island dividing the dual carriageway and he was dragged to the left lane by the vehicle of the insured driver.

[14] The collision left him in shock, he could not move and as a result of the collision, he sustained injuries.

[15] In cross examination he elaborated that upon approaching the intersection and having a clear view of the intersection, the insured driver allowed the vehicles travelling ahead of him an opportunity to pass before she proceeded to execute her right turn.

[16] The plaintiff's witness, Ms Vicky Botes testified that on the day of the collision she was a passenger on the plaintiff's motorbike on her way to school. Travelling along Swartkoppies Road, she had a clear view of the approaching intersection as it was her habit to lean over the shoulder of her father. As they got closer to the intersection with Peggy Vera, the traffic light facing them had turned from red to green and vehicles stationary ahead of them proceeded to cross into the intersection. Upon their motor bike approaching the white line at the intersection, the insured driver then suddenly turned in front of them and at this point the collision occurred. On impact she was flung from her father's

motor bike and upon landing on the road surface had lost the helmet she was wearing. She also sustained injuries during the collision.

[17] After the plaintiff had presented his *viva voce* evidence his legal representative applied for an amendment of his Particulars of Claim, which amendment was not opposed by the Defendant. The amendment was effected as per the Notice given in terms of Uniform Rule 28 dated 3 September 2014.

[18] In addition thereto, the parties by agreement requested the Court to record as exhibits the following reports:

18.1 Exhibit D, the Joint Minutes of the Industrial Psychologists dated 26 August 2014.

18.2 Exhibit E, the Joint Minutes of the Occupational Therapists dated 25 August 2014.

18.3 Exhibit F, the Revised Actuarial Calculations by Gerard Jacobson Consulting Actuaries, dated 2 September 2014.

[19] The insured driver, Ms Thokoane testified that on the day of the collision she was travelling on Swartkoppies Road in the opposite direction to the

direction of the plaintiff. Upon approaching the intersection with Peggy Vera, she selected the right turning lane, switched on her indicator, slowed down and proceeded to traverse into the intersection. As there were oncoming vehicles travelling in the opposite direction on Swartkoppies, which vehicles at the time, were in the process of crossing the said intersection, she waited for them to pass. When the traffic light turned amber vehicles approaching from this direction all had come to a stop and it was at this point that she proceeded to execute her turn.

[20] In the process of turning and having traversed across two lanes already, she then heard a bang at the back of her vehicle on the left hand side at point C as depicted on Exhibit A. The impact caused her vehicle to spin around and to face the opposite direction to which she had been travelling. She further testified that given where she had been struck she concluded that the motor bike was emerging from point F as illustrated on Exhibit A.

[21] During cross examination, she denied that the collision occurred at the point of impact as testified to by the plaintiff, but conceded that on the day of the collision that the plaintiff had right of way. The witness further conceded that prior to the point of impact she did not see the motor bike of the plaintiff and had only noticed the motor bike after the collision.

THE LAW

[22] At the conclusion of the *viva voce* evidence, this court was faced with two mutually destructive and irreconcilable versions as to how the collision occurred. In this regard Nienaber JA stated in the decision of *Stellenbosch Farmers Winery Group Ltd & Another v Martell et cie & Others* 2003 (1) SA 11 SCA, as to what technique to be employed by the courts in resolving factual disputes in order to come to a conclusion. The court is required to make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. In the present instance, two issues arise for consideration:

22.1 which of the two irreconcilable versions is more probable;

22.1 and secondly the duties upon a driver who enters a traffic light controlled intersection.

[23] On the question of *onus*, it has been held in previously decided cases that a party who asserts has a duty to discharge the onus of proof. In *African Eagle Life Assurance Co Ltd v Cainer* 1969(1) SA 553 (A) Coetzee J applied the principle set out in *National Employers General Insurance Association v Gany* 1931 AD 187 as follows:

‘Where there are two stories mutually destructive before the onus is discharged the Court must be satisfied that the story of the litigant upon whom the onus rests is true and the other false. It is not enough to say the story told by Clarke is not satisfactory in every respect, it must be clear to the Court of first instance that the version of the litigant upon whom the onus rests is the true version.....”

[24] Having regard to the totality of the evidence, it is common cause that the collision occurred as the insured driver was in the process of executing a right turn across a path of travel, of which the plaintiff had a right of way. According to the insured driver, she was already on the intersection, when she heard a bang at the back of her motor vehicle.

[25] The conduct of the insured driver (executing a right turn), should be judge against the following principles confirmed by Msimeki J in the matter of Jacobs v Road Accident Fund¹

25.1 To turn across the path of oncoming or following traffic is an inherent dangerous manoeuvre and that a driver who intends executing such a manoeuvre bears a stringent duty to do so after satisfying himself that it is indeed safe to do so after satisfying himself that it is indeed safe

¹ (A402/2008) [2011] ZAGPPHC121 (13 June 2011)

and then choosing the right moment (See AA Mutual Insurance Association Ltd v Noneka, 1976 (3) SA 45 (AD));

25.2 A driver turning to the right must signal his intention clearly and avoid turning until an opportune moment presents itself (See Welf v Christner 1977 (2) SA 170 (N));

25.3 He should only turn to the right once he has satisfied himself that there is room enough between his motor vehicle and the approaching vehicles to allow him to complete the manoeuvre safely (See R v Court TPD 133 at 134);

25.4 A driver is entitled to assume that those who are travelling in the opposite direction will continue in their course and that they will not suddenly and inopportunistically turn across the line of traffic. This assumption may continue until it is shown that there is a clear intention to the contrary (See Van Staden v Stocks 1936 AD 18).

[26] The author W E Cooper in his textbook Delictual Liability in Motor Law Volume 4 at page 134 defines a driver's duty to keep a proper look-out as follows:

It entails '*a continuous scanning of the road ahead, from side to side, for obstructions or potential obstructions.*'

[27] On assessing the witnesses, the plaintiff made a good impression on the court. His evidence tendered, I found to be reliable and credible. Upon observing him, he was clearly not a very highly educated individual but nevertheless, he was able to tender his evidence in a coherent and logic manner. Where necessary, he was able to make concessions in favour of the insured driver, such as admitting having observed that the insured driver waited for vehicles travelling in his direction to successfully pass across the intersection and thereby acting cautiously. He also conceded that his statement made to the police contained an incorrect assertion that the insured driver admitted her fault to him on the day of the collision, whereas this in fact did not occur.

[28] Similarly, the witness who testified on behalf of the plaintiff made a favourable impression on the court. Albeit that the witness was very young and not independent I still found her evidence to be truthful and reliable. She too made certain concessions during her testimony, such as conceding that prior to giving evidence she had discussed her recollection of how the collision occurred with her father.

[29] The insured driver, I also found made a favourable impression on the court. She too tendered her evidence in a coherent and logical manner. That

having been said, I cannot however place reliance on her evidence, nor is her version found to be probable and this I say for the following reasons:

29.1 It can be accepted that to turn to the right across the lane of following or approaching traffic is a potentially dangerous manoeuvre.² Furthermore, a driver who intends to turn right should refrain from turning until an opportune moment.³ The insured driver testified that she did not see the plaintiff prior to the collision even though she observed other vehicles approaching from the same direction as the plaintiff and waited for these vehicles to come to a standstill prior to executing her turn. If it was to be accepted that indeed she kept a proper look-out, she fails to explain why she did not observe the plaintiff prior to executing her turn.

29.2 Furthermore, the insured driver conceded that the plaintiff and all other traffic approaching in the same direction had right of way. On her testimony she gave other vehicles an opportunity to pass before she proceeded to execute her turn at a point where the traffic light facing her had turned amber and other approaching vehicles had come to a stop. The plaintiff on the other hand gave evidence that he proceeded to traverse through the intersection, at a stage when the traffic light facing him, was green in his favour. Even if it is to be accepted that the traffic light facing the insured driver had turned amber, all vehicular traffic, including the plaintiff should have cleared the intersection,

² S v Olivier 1969 (4) SA 78 (N).

³ Allen v Standard General 1983 (1) SA 628 (W)

before she proceeded to execute her turn. On her own version, she thus executed her turn at an inopportune moment.

29.3 In considering the damage on the insured vehicle, i.e. such damage having been recorded to the left rear side above the wheel, such damage sustained, is in line with the version of the plaintiff that the collision occurred as he was in the process of traversing through the intersection and the insured vehicle then turned in front of him. In this regard, the insured driver, not having observed the plaintiff, gave evidence that she was struck at point C (Exhibit A) and thus had almost traversed entirely through the intersection. Even on this version, at best she should have waited for the plaintiff to turn in front of her before executing her turn. Firstly the plaintiff had a right of way and secondly the plaintiff allegedly proceeded (on her version) from an exclusively left turning lane, point F (Exhibit A). The damage to her vehicle supports the version of the plaintiff and fails to explain, how on her version the damage occurred to her left rear side, above her wheel.

[30] On the issue of probabilities it has been submitted correctly in my view that there is nothing improbable about the plaintiff's version as to how the collision had occurred. On the contrary, I find it to be improbable that the collision occurred as alleged by the insured driver.

[31] On a proper conspectus of all the evidence I find that the collision occurred solely by reason of the negligence of Ms Mamaele, the insured driver in one or more of respects referred to in the particulars of claim. The insured driver was clearly negligent in failing to keep a proper look-out and thereby executing her right turn across the plaintiff's path when it was inopportune to do so.

[32] On the liability thus the defendant is held liable to compensate the plaintiff 100% of such damages as the plaintiff is able to prove as a result of the collision which occurred on 3 November 2011.

ON QUANTUM

[33] As to the injuries sustained by the plaintiff, the facts before court are undisputed. Thus it is not disputed that the plaintiff sustained a left femur fracture, which rendered him unemployable.

[34] At the outset it should be mentioned that no expert witnesses testified before the court, and as such reliance had to be placed on the orthopaedic report, together with the actuarial report, in addition to the joint minutes produced and handed in as exhibits before the court. That having been said, I have no reason to reject the findings of the orthopaedic surgeon and the

actuary, together with the joint minutes produced by the industrial psychologists and the occupational therapists.

[35] With reference to the joint minute of the industrial psychologist⁴, both agree, albeit that no proof had been submitted that the plaintiff's highest level of education was an N3 certificate to qualify as a panel beater, and as at the date of the collision, that the plaintiff had been self-employed. The industrial psychologist further agreed that having regard to the age of the plaintiff (65 years), he will not be able to qualify for suitable positions again and is likely to remain unemployed for the remainder of his working life.

[36] If one has regard to the joint minute produced by the occupational therapists⁵ they agreed that at the time of the accident the plaintiff was self-employed performing contract work as a panel beater. Post-collision, the therapists further agree that the plaintiff is now limited in his choice of work and in his ability to compete in the labour market and thus has been rendered unemployable in his chosen field of work.

⁴ See Exhibit D

⁵ See in this regard Exhibit E

[37] The only actuarial report presented⁶ before the court is that on behalf of the plaintiff, and it sets out two calculations in respect of the plaintiff's loss of earnings and /or earning capacity. Basis I calculation is based on a retirement age of 65 years whereas Basis II is based on a retirement age of 67 and a half years.

[38] Counsel appearing on behalf of the plaintiff had argued that given that the plaintiff was self-employed at the time of the collision, in all likelihood he would have continued working up until age 67 and a half years and as a result submitted that the court should consider Basis II as an equitable award. In rebuttal to the above, the only counter argument presented on behalf of the defendant, was that the court should apply a higher contingency as the courts are not bound by expert opinions and that such expert opinions ought not to usurp the function of the courts. As to the likely retirement age of the plaintiff no evidence in rebuttal was presented on behalf of the defendant. As already mentioned no actuarial report was presented by the defendant to disprove the plaintiff's quantum as suggested by the report of M.S. Jacobson.

[39] The said report, I am of the opinion, reflects an objective and fair capitalised value of loss of income of the plaintiff. I also find the contingency deductions applied to be in line with prior cases albeit that it must be borne in

⁶ See in this regard Exhibit F

mind that contingency calculations differ according to the facts of each case. As to the likely retirement age of the plaintiff, I am inclined to agree with the sentiments expressed by counsel for the plaintiff, that the plaintiff with his fair good health permitting and the minimal government pension available, that in all likelihood the plaintiff would not have retired at age 65 years.

ORDER

[40] For the reasons as set out above following order is made:

40.1 The merits are awarded 100% in favour of the plaintiff;

40.2 The defendant shall furnish the plaintiff with an undertaking in terms of section 17(4) (a) of Act 56 of 1996, in respect of the payment of cost of the plaintiff's future accommodation in a hospital or nursing home, or treatment of, or rendering of a service or supplying of goods to him arising out of the injuries sustained by him in the motor collision which occurred on 3 November 2011 and the *sequelae* thereof, after such costs have been incurred and upon proof thereof;

40.3 The defendant shall pay the plaintiff past loss of earnings in the amount of R 315 739;

40.4 The defendant shall pay the plaintiff future loss of earnings in the amount of R 1 120 570;

40.5 Interest on the above amounts at a rate of 15,5% per annum calculated from a date fourteen (14) days after date of judgment to date of final payment;

40.6 General Damages to be referred to the Health Professional Council of South Africa;

40.7 The defendant shall pay the plaintiff's costs of suit on the High Court party and party scale.

C COLLIS

ACTING JUDGE OF THE HIGH COURT

Counsel for plaintiff:	S Naidoo
Attorney for plaintiff:	A Wolmarans Inc
Counsel for defendant:	S Mahomed
Attorney for defendant:	Duduzile Hlebela Inc.
Date matter heard:	12 September 2014
Judgment date:	3 November 2014