REPUBLIC OF SOUTH AFRICA

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

CASE NO: 21931/2013

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

19 NOVEMBER 2014 **FHD VAN OOSTEN**

In the matter between

DARRYN BRADSHAW POTGIETER **PLAINTIFF**

And

ROAD ACCIDENT FUND **DEFENDANT**

Motor vehicle – negligence - contributory negligence - stated case - improper to decide quantum of damages or factual issue requiring evidence on stated case - evidence analysed - plaintiff the only witness to have testified - his version contradicted by two earlier statements - plaintiff negligent in failing to take sufficient avoiding action - defendant liable for 90 % of the amount agreed on as damages.

J U D G M E N T

VAN OOSTEN J:

[1] In this action the plaintiff claims damages from the defendant as statutory insurer in respect of bodily injuries sustained in a motor vehicle collision on 14 March 2011. At the commencement of the trial the parties requested me to decide the merits and quantum of damages on a stated case. I indicated to the parties that a proper adjudication of the quantum of damages was not possible on the meagre facts set

out in the stated case. Further negotiations ensued and the plaintiff's quantum of damages was eventually settled in an amount of R2,3m.

[2] The trial proceeded on the merits only. I was gain asked to determine negligence on the stated case more in particular whether the plaintiff was contributory negligent. I once again indicated to counsel for the plaintiff the difficulty in deciding a disputed factual issue on the facts stated in the stated case. The plaintiff was then called to testify. The insured driver could not be traced and the defendant closed its case without having called any witnesses.

[3] The plaintiff testified that he was the driver of a Jetta motor vehicle on the N12 highway east, consisting of three lanes, on his way home after work, at midnight on 14 March 2011 when the collision occurred. The fact of the collision is not in dispute. The plaintiff proceeded in the middle lane up a steep hill past the Edenvale off-ramp at a speed of approximately 100 kilometres per hour when at the crest thereof and around a curve in the road he encountered an unlighted truck and trailer stationery across the road right in front of him. At that stage the truck was approximately 30 meters ahead of him. It was a blind rise and he therefore was unable to observe the truck any sooner. It was raining and the road was wet. There was no time to swerve and he slammed on his brakes resulting in his vehicle aquaplaning and colliding with the cabin of the truck, toward his left.

[4] The plaintiff bears the onus of proving negligence. The defendant was driven to concede, in the absence of evidence gainsaying that of the plaintiff and explaining the manoeuvres of the truck prior to the collision, that the insured driver was negligent. The issue I am asked to determine is whether the plaintiff was contributory negligent in respect of which the defendant bears the onus.

[5] The plaintiff's evidence was unsatisfactory witness in several material respects. His version in court differed from the version he proffered in a written statement made shortly after the collision. In the statement no mention is made of his vehicle aquaplaning although there is a reference to the rain that night. The statement further reflects that after he had observed the truck 'it was too late to brake or swerve to miss the truck'. As could be expected he was unable in his evidence to explain the contradiction. In addition the plaintiff's statutory statement makes no mention at all of either braking or aquaplaning: it is merely stated that there was nothing the plaintiff

could have done to avoid the collision. A further difficulty arose: the notion of a steep hill with a blind rise after a curve in the road with a mere 30 meter lookout distance towards the truck, *prima facie*, seemed doubtful. I accordingly requested the parties to conduct an inspection *in loco* with a view of establishing the distance at which the truck would have been visible to the plaintiff on his approach. On resumption of the hearing I was informed that an inspection *in loco* at the scene of the collision had been conducted, albeit in daylight, and that the parties are in agreement that the distance the truck would have been visible to the plaintiff is 100 meters.

[6] I am not satisfied that the plaintiff's version in court can be accepted unreservedly. The concern remains that the vital aspect of aquaplaning which afforded the plaintiff a sufficient explanation for the collision occurring was mentioned for the very first time in his evidence. As I have pointed out. it is not mentioned at all in the two statements and, I should add, it was also not mentioned in the facts set out in the stated case. That brings to the fore the possibility of the plaintiff having reconstructed or adapted the events to suit his case in which he has a monetary interest. In the absence of a proper explanation by the plaintiff for the occurrence of the collision it must be accepted that he failed to take the necessary avoiding action once having observed the truck in front of him. I have had regard to the instructive reasoning in *Santam Versekeringsmaatskappy Bpk v Byleveld* 1973 (2) SA 146 (A) and *AA Onderlinge Assuransie Assosiasie van SA v Van Rensburg en 'n ander* 1978 (4) SA 771 (A), both dealing with collisions with an obstruction in the road, in coming to the conclusion that the plaintiff was negligent, that his negligence contributed to the collision taking place and that percentage of the plaintiff's contributory negligence must be assessed at 10%. A draft order prepared by counsel for the plaintiff in which I am merely required to insert the percentage of the defendant's liability and the resultant amount to be paid to the plaintiff, has been handed up. The remainder of the orders reflect the agreement between the parties.

[7] In the result the draft order, marked 'X', is made an order of court.

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FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

COUNSEL FOR PLAINTIFF ***ADV CH VAN BERGEN***

PLAINTIFF'S ATTORNEYS	***MUNRO FLOWERS & VERMAAK***
COUNSEL FOR DEFENDANT	***ADV EI MOOSA***
DEFENDANT'S ATTORNEYS	***SHAI MNGOMEZULU INC***
DATES OF HEARING	***18 & 19 NOVEMBER 2014***
DATE OF JUDGMENT	***19 NOVEMBER 2014***