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**REPUBLIC OF SOUTH AFRICA**



**GAUTENG LOCAL DIVISION**

**JOHANNESBURG**

**CASE NO.: 2015/9589**

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

In the matter between:

**HLEZIPHI DOVOZA NTSELE**

**PLAINTIFF**

and

**THE ROAD ACCIDENT FUND**

**DEFENDANT**

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## JUDGMENT

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**Hundermark AJ:**

### **INTRODUCTION**

- [1] This is a delictual claim for damages by the Plaintiff against the Road Accident Fund as a result of an accident that occurred 1 September 2013 at about 20h00 on Chris Hani Road, Soweto, Gauteng Province. The Plaintiff collided with the rear of a Motor Vehicle bearing registration letters and number S[...]GP. These facts are common cause.
- [2] By agreement between the parties there was an order sought and granted which separated the issue of liability and quantum and therefore this court is only required to decide on the issue of liability.

### **PLAINTIFF'S EVIDENCE**

- [3] The Plaintiff was returning home to Lawley from visiting his child in White City, Soweto riding his motor bike along Chris Hani Road, which has 2 lanes in both directions. He was travelling in the left lane at a speed of less than 60km/h.
- [4] The Plaintiff confirms that there are street lights and that he had his headlight on and that there was traffic on the road although it was not heavy and that there were vehicles ahead and behind him as well as passing him.
- [5] He was behind the motor vehicle with registration SH[...]GP, at a following distance of 6 – 8 metres, when an unknown motor vehicle collided with the rear

of his motor bike whereupon he lost control of his motor bike which zig zagged and he then collided with the rear of the aforesaid motor vehicle.

[6] The offending motor vehicle shifted past him into the right lane and did not stop after the collision.

[7] As a result of the collision the Plaintiff sustained serious injuries which rendered him unconscious and he woke up in hospital a week or 2 after the accident.

### **DEFENDANT'S EVIDENCE**

[8] The Defendant presented the evidence of Mr Tshabuyo who lived in Chawelo, Soweto and was employed by EPX Courier Services.

[9] The evidence of Mr Tshabuyo was that he was traveling along Chris Hani Road in the left lane at a speed of less than 30km/h on his way to purchase electricity at the garage. He checked his review mirror and saw a motor bike in the distance and behind the motor bike were blue lights far in the distance.

[10] Upon seeing the speeding motor bike he changed lanes from the left to the right lane to avoid an accident but he then noticed the motor bike behind him in the right lane and so he then again decided to change lanes and moved back to the left lane and then when he went back to the left lane the motor bike collided with the rear of his vehicle.

[11] The collision was of high impact that almost made him swerve into oncoming traffic. When he got out of the car there was a metro police car and the traffic

officer said he was chasing the Plaintiff. It was this metro police officer that took the relevant details from Mr Tshabuyo.

## **DISPUTED FACTS**

[12] There are 2 mutually destructive versions that were placed before this court and the following are the disputed facts between the version of the Plaintiff and the Defendant:

- The Plaintiff's version is that his motor bike was knocked from behind by an unidentified vehicle whereas the Defendant's version is that there was no other vehicle involved that collided with the Plaintiff's motor bike.
- The Plaintiff states that he was travelling at a speed of 60km/h or less whereas Mr Tshabuyo evidence is that the Plaintiff was travelling at a high speed as he was being chased by the Metro Police and that he (Tshabuyo) changed lanes from the left lane to the right lane and then back to the left lane in order to avoid an accident with the Plaintiff.

## **ANALYSIS**

[13] Ordinarily, the party who bears the onus can discharge it only if that party has adduced credible evidence, particularly where there are mutually destructive versions. The assessment of the witnesses and general probabilities will usually be decisive. Eksteen AJP in **National Employers General Insurance v Jagers**<sup>1</sup> formulated the following approach when there are mutually destructive versions:

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<sup>1</sup> 1984 (4) 437 (E) at 440D-G

“It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless 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 scene that they do not favour the plaintiff’s case any more than they do the defendant’s, 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.”

[14] In the matter of **SFW Group & Another v Martell et Cie & Others**<sup>2</sup> the court expounded the following technique as the basis for resolving two mutually destructive versions:

“On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So, too, on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court’s finding on the credibility of a particular witness will depend on its impression about

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<sup>2</sup> 2003 (1) SA 11(SCA) at 14I to 15D

the veracity of the witness. That in turn will depend on a variety of A subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. 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. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the *onus* of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

**[15]** The evidence of the Plaintiff was of good quality and it was clear and he did not contradict himself in any material respect having regard to the version contained in the pleadings or put to the Defendant's witness. He answered the questions put to him in both evidence in chief and in cross examination readily and without hesitation especially in relation to his speed and following distances.

**[16]** The Defendant's witness was not a good witness and came across as hesitant and not candid under cross examination particularly when he was been cross examined about where the Plaintiff's motor bike was positioned and the distance

between of the Plaintiff's motor bike at the time when he changed lanes. He also contradicted himself in evidence where in evidence in chief he stated it was only him and Plaintiff on the road but in cross examination he contradicts this and states that there were other vehicles in the right lane.

**[17]** In addition, the evidence of the Defendant's witness, Mr Tshabuyo, does not accord with what was pleaded or put to the Plaintiff in the following respects:

- There is no allegation in the pleadings that the Plaintiff was speeding and/or that he was being chased by the Metro Police. It was only pleaded that he was negligent in not wearing a helmet or properly fastening the helmet;
- It was put to the Plaintiff in cross examination that he was speeding but it was not put to the Plaintiff that he was being chased by the Metro Police.

**[18]** Furthermore, the Metro Police Officer, who arrived on the scene and recorded Mr Tshabuyo's details was not called to corroborate his evidence especially in relation to whether they had been pursuing the Plaintiff or not. This court must therefore conclude that this aspect of Mr Tshabuyo was a recent fabrication.

**[19]** In considering the probabilities or improbabilities of the two versions as presented, it has to be considered how a motor vehicle could come close enough to the Plaintiff without the Plaintiff being able to accelerate away from such a vehicle. This must however be juxtaposed to the Plaintiff focusing on the vehicle driven by Mr Tshabuyo's which was in front of him.

[20] It was argued by the Defendant that the speed at which the accident is alleged to have occurred is improbable having regard to the injuries that the Plaintiff sustained as well as the damages caused to the vehicle driven by Mr Tshabuyo.

[21] As decided and emphasized in **Commissioner for Inland Revenue v Pick 'n Pay Wholesalers (Pty) Ltd**<sup>3</sup> at 469F-G:

"Human memory is inherently and notoriously liable to error. One knows that people are less likely to be complete and accurate in their accounts after a long interval than after a short one. It is a matter of common experience that, during the stage of retention or storage in the memory, perceived information may be forgotten or it may be modified, or added to, or distorted by subsequent information. One is aware too that there can occur a process of unconscious reconstruction."

The Plaintiff's evidence must therefore be seen in the light of the fact that when he gave evidence more than 2 years that had passed since the accident as well as in the context of the severe injuries that the Plaintiff sustained in the accident, which would have been traumatic for the Plaintiff.

[22] Then one must consider the probabilities or improbabilities of the Defendant's version that the Plaintiff was travelling at a high speed as he was being chased by the Metro Police and that Mr Tshabuyo who was travelling at 30km/h in the left lane would find the need to execute a manuvre of changing lanes, not one but twice, especially when there were, according to his version, no other vehicles in the right lane which would restrict the Plaintiff from passing without incident. It

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<sup>3</sup> 1997 (3) SA 453 (A)



is improbable that this manuvre was required to avoid an accident as put forward by the Defendant's witness.

**[23]** Having regard to the principles as set out above as well as the analysis of the evidence presented by both parties and weighed against the probabilities of the various versions, I find that the Plaintiff has discharged the onus to prove his case on a balance of probabilities and this court accepts that the Plaintiff's version is probably true and that the version of the Defendant is probably mistaken or false.

**[24]** Even if this court were to have regard to the Defendant's version, it would have to be found that Mr Tshabuyo, while travelling at 30km/h executed what must be said to be a dangerous manuvre, not once but twice, by changing lanes when he on his own evidence he did not know where the Plaintiff was at the time when he changed lanes first from the left to the right lane and then back to the left lane.

## **ORDER**

As a result the following order is made:

1. That the unknown driver of the unidentified motor vehicle was the sole cause of the collision and that the Defendant is accordingly liable for 100% of the Plaintiff's agreed or proven damages; and
2. That the Defendant must pay the Plaintiff's cost of suit.

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**P Hundermark**

Acting Judge of the High Court

Gauteng Local Division, Johannesburg

Heard: 23 November 2015

Judgment delivered: 1 March 2017

Appearances:

For Plaintiff: Adv Makeleni

Instructed by: Mchunu Attorneys

For Defendant: Adv. R Saint

Instructed by: Mothle Jooma Sabdia Incorporated