



IN THE HIGH OF SOUTH AFRICA  
(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE No: 64322/2010

DATE: 3 April 2012

(1) REPORTABLE: ~~YES~~ / NO  
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO  
(3) REVISED. ✓  
3/4/2012  
DATE  
SIGNATURE

In the matter between:

MASIELELA, DUMA KHOLWA

PLAINTIFF

AND

THE ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

**RANCHOD J:**

[1] This is a matter in which the plaintiff claims damages arising out of a motor vehicle accident. It is common cause that the accident occurred on 12 August 2008

and not 2009 as stated in the summons. The Plaintiff was a passenger in the motor vehicle with registration PMD 650 GP and is required to prove 1% negligence on the side of the defendant's insured driver if his claim is in excess of R25 000.00 which is the limited amount he can claim if the driver of the vehicle in which he was a passenger was negligent. This limit has since apparently been declared unconstitutional but is not applicable in this case.

[2] The driver of the vehicle in which plaintiff was a passenger was Mr Sandile Mokoena. The driver of the vehicle ('the insured vehicle') which plaintiff alleges was the sole cause of the collision was Mrs Lerato Gambu ('the insured driver'). The registration of the insured vehicle in the particulars of claim is stated to be ERL 273 GP. Again, it is common –cause that it is in fact ERL 273 MP.

[3] At commencement of trial the parties agreed to separation of the issue of negligence or merit and the quantum of damages of the plaintiffs claim. I deemed it appropriate to do so and ruled accordingly and the matter proceeded on the issue of merits of the claim only.

[4] Two witnesses testified for the plaintiff: Mr Mokoena the driver of the vehicle in which plaintiff was a passenger and Mr. Salebena Dhlamini, who was himself a passenger seated next to Mokoena. The Plaintiff did not testify.

[5] Three witnesses testified for the defendant: the insured driver and her husband who were both seated in the insured vehicle and the driver of a vehicle travelling directly behind the insured vehicle at the time of the collision.

[6] It is common cause that both vehicles travelled in the same direction. The defendant's evidence that a friend of the insured driver, Ms Pascalina Khopu and her husband were travelling behind the insured driver is disputed by the plaintiff's witnesses.

[7] The evidence of the two witnesses for the plaintiff was almost identical on the material aspects of what happened immediately prior to the accident, how it happened and what transpired after the collision. Both of them testified that immediately prior to the collision the insured vehicle was travelling in the left hand lane of the two lanes from west to east on the old Potchchefstroom road. The two of them, together with the plaintiff and another person were returning home around midnight to Vosloorus after attending a night vigil in Pimville. As they approached the Baragwanath taxi rank they stopped at a robot and the insured vehicle had stopped as well but in the left lane. When the traffic light turned green in their favour, both vehicles pulled off. About 100 to 150 metres from the robot there is a slight curve to the right and thereafter to the left. Both of them testified that at the time they were travelling about 50- 60 km per hour. Whilst negotiating the first curve the insured vehicle's right rear tyre protruded onto the right hand lane of travel and collided with their vehicle's front left part. In an attempt to avoid the collision, Mr Mokoena swerved to his right and his vehicle landed on the island and collided with a lamp post.

[8] Both the witnesses testified that the insured driver came to them and apologised. The insured driver and her husband denied this.

[9] Mr Mokoena said he was taken to Lesedi Hospital and was discharged two days later. He was adamant that he was taken there by ambulance and not, as alleged by the insured driver and her husband that he was taken away by his wife, whom he had called telephonically to come to the scene.

[10] The insured driver testified that she was travelling in the left hand lane and her friend Ms Khopa was travelling behind her. Both of them stopped at the traffic light and, when it turned green, they pulled off. There was no other car at the traffic light. As she pulled off she heard a bang. That's when she noticed the plaintiff's car for the first time and also realised that her car had been hit on its side. The impact caused her to move to the left. She hit the kerb and came back on the road. She stopped and went to where the plaintiff's car had landed on the island. Her friend Khopa took details from the other driver. A pregnant lady came and took away one of the men in her car. She did not know who the lady was. Her husband took photos of the car as they were angry that the person was taken out of the ambulance and he left with the lady. She candidly admitted that she did not see how the accident happened. Ms Khopa testified that she smelt alcohol in the plaintiff's car. Again, the insured driver readily admitted that she did not smell any alcohol there and did not know if any of the occupants of the car smelt of alcohol. If there was any collusion

between her and Ms Khopa one would expect her to corroborate her on this point but she did not. She denied apologising to anyone after the accident. She said she was in her lane of travel when the impact took place. I find her to be a credible witness.

[11] Mr Jacob Gambu is the insured driver's husband. He corroborated his wife's evidence that Mrs Khopa and her husband were travelling behind them, that after his wife pulled off from the traffic light he heard a loud bang and their car veered to the left hand side but his wife managed to keep it on the road. He saw plaintiff's car go onto the island and hit the lamp pole with a huge impact. He speculated that plaintiff's driver must have been driving at 120 kilometres per hour. He telephoned the emergency services and an ambulance arrived. The occupants of the plaintiff's vehicle got into the ambulance. However, a pregnant lady took the driver of the plaintiff's vehicle out of the ambulance and left with him. This made him angry and he took photographs of the lady's vehicle as evidence. Photos 27 and 28 of the album tendered in evidence show the registration number of the vehicle, he said. He testified that the vehicle in which he was travelling was in the left lane at the time of impact.

[12] Ms Khopa testified that she was travelling behind the insured vehicle and had stopped behind it immediately before the accident at the traffic light. She said she saw plaintiff's vehicle, after passing her, moving to the left, colliding with the insured vehicle and then losing control and hitting the lamp post. The plaintiff's motor vehicle had not stopped at the traffic light next to the insured vehicle, she testified. She said

she smelt alcohol in the white car (plaintiff's car) when she was near it and for that reason wanted to phone the police herself. She took particulars of Mr Mokoena from his wife when she arrived at the scene as "they" (plaintiff's vehicle's occupants) did not want to furnish them. She further testified under cross-examination that plaintiff's vehicle had sped past her and the insured vehicle. When it passed her she got the impression that it wanted to come in front of or overtake the insured vehicle. She was sure that the accident occurred in the left hand lane as the insured driver was in that lane, although she could not say exactly how the accident occurred. She also smelt alcohol on a passenger of the plaintiff's motor vehicle who had been put inside the ambulance. She could not tell whether the plaintiff's driver had consumed alcohol.

[13] This court is confronted with two mutually destructive versions of how the accident occurred. I must therefore adjudicate, on a balance of probabilities, whether plaintiff's version, that the insured driver veered into his lane of travel is more probable than the defendant's three witnesses' evidence that the plaintiff's motor vehicle came from behind the insured vehicle at high speed and scraped the rear right side of the insured vehicle, and then lost control and collided with a lamppost on the island separating the two lanes of travel in each direction.

[14] In *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et cie and Others 2003 (1) SA 11 SCA 14-15* the Court stated that where it is faced with two conflicting versions, the court must make its 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 the veracity of the witness. That in turn will depend on a variety of subsidiary factors, . . . 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 extra-curial 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".

[15] It is common cause that both the insured vehicle and Mr Mokoena's vehicle were travelling in the same direction on the old Potchefstroom Road, that a collision occurred between their vehicles, that Mokoena's vehicle ended up on the traffic island and collided with a lamp post.

[16] The material facts for the purposes of this judgment that are in dispute are whether Ms Khopa was also travelling there at the same time behind the insured

driver, whether the insured driver and Mokoena had both stopped at the traffic light at the same time, whether the impact took place in the left hand lane or the right hand lane, whether the insured driver apologised to Mokoena and whether he, Mokoena, was taken away in an ambulance to hospital or by his wife in her car.

[17] Ms Khopa made a particularly good impression as a witness. Even though she is a friend of the insured driver there is no evidence to suggest that she was deliberately giving evidence only favourable to the defendant. She was confident in the witness stand and her demeanour could not be faulted. The two witnesses for the plaintiff testified that they did not see her vehicle behind the insured driver. No reason suggests itself from her evidence and that of the insured driver and her husband that they were falsely stating she was there. Her evidence had a clear ring of truth about it. She gave evidence of the events in such detail that it could not be said she was either coached into giving that evidence or that she was lying.

[18] I accept that Ms Khopa was travelling behind the insured driver as well as her other evidence, including that immediately before the collision the insured driver was in the left hand lane. In my view, the only reason why both witnesses for the plaintiff deny the presence of Ms Khopa at the scene is she may serve to corroborate the insured driver's evidence as indeed has happened. I view the evidence of the plaintiff's witnesses with particular caution as their evidence was almost identical, including that both of them said Mokoena was driving between 50 – 60 km/h. Mr Dhlamini did not explain how it is that he happened to know the speed at the time.

This, together with the other aspects of his evidence, leaves me with the distinct impression that they colluded with each other about the evidence they would give in court. The occupants of the plaintiff's vehicle were allegedly returning from the funeral of one James Nkosi. Mr Dhlamini said Nkosi had been his friend. When cross-examined, he was unable to state the cause of Nkosi's death. He did not know how long he had been ill nor had he asked him what his illness was. He did not even know where his friend Nkosi had lived and was not even sure whether he had been married.

[19] In his evidence-in-chief Dhlamini testified that the insured vehicle left its lane as it approached the curve and came into their lane and he heard a noise. Under cross – examination he conceded that the damage to plaintiff's motor vehicle was severe. When it was put to him that the plaintiff's vehicle could not have been travelling at 50 to 60 km/h his response was that he did not see it. On another aspect he contradicted Mr Mokoena. Mokoena said he had sustained head injuries, whereas Dhlamini said no one had sustained head injuries when it was put to him that the damage to the windscreen may be due to a head colliding with it.

[20] Mr Dhlamini testified that Mokoena was not with him in the ambulance but did not know whether he had left with his wife. Mr Mokoena, however, insisted he did not leave with his wife but went to the Lesedi hospital which is much further than Baragwanath hospital, which was close to the accident scene, by ambulance. There is no evidence that there was more than one ambulance at the scene.

[21] Photographs 27 and 28 of plaintiff's bundle "A" were put before Dhlamini, who confirmed that the registration letters and numbers thereon, namely, TVZ 847 GP, were that of Mokoena's wife's vehicle. As I stated earlier, Mr Gambu, the insured driver's husband, testified that he took these photographs as evidence of the vehicle in which Mr Mokoena left. The note to the copies of the photographs states, "Photos E & F indicating the vehicle that took the plaintiff's (sic) driver from the scene." This was not disputed.

[22] The insured driver testified that she had pulled off from the traffic light and the collision took place a short distance later. Ms Khopa confirms this. Both Mokoena and Dlamini testified that plaintiff's motor vehicle was also travelling slowly, having pulled off from the traffic light as well. Yet the extensive damage to plaintiff's vehicle and the fact that it veered to the right after merely scraping the insured vehicle, mounted the raised kerb of the traffic island, spun around and hit the lamp post indicates that in all probability the vehicle was travelling at a much higher speed than testified to by Mokoena and Dhlamini. It in fact serves to corroborate the evidence of the defendant and the probabilities are that plaintiff's motor vehicle had not stopped at the traffic light. The extent of the damage to the plaintiff's vehicle is consistent with a vehicle travelling at high speed.

[23] In my view it is highly improbable that the three witnesses for the defendant would lie when they had no reason to do so, whereas the plaintiff has everything to

gain from the version that would suit his case. Both the plaintiff's witnesses were in my view not credible witnesses.

[24] It is most probable that a vehicle will veer to the left, that is, the plaintiff's vehicle, at a point in the road where it curves slightly to the right. I find, on a balance of probabilities, that the collision took place in the insured driver's lane and no negligence can be attributed to her.

[25] In all circumstances, the plaintiff's claim is dismissed with costs.

A handwritten signature in black ink, appearing to read 'N Ranchod', is written over a horizontal line.

**N RANCHOD**

**JUDGE OF THE NORTH GAUTENG HIGH COURT, PRETORIA.**

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