IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.

~~(3)~~ REVISED.

29/4/2014.
DATE

SIGNATURE

Case Number: A781/2013

In the matter between:

29/4/2014

ANTON MULLER

Appellant

and

MODISE MASHABELA

Respondent

JUDGMENT

POTTERILL J

1 The appellant is appealing the judgment of the court *a quo* wherein the appellant's counterclaim was dismissed with costs and the respondent's claim was granted with costs.

2 The claim and counterclaim flowed from a collision that occurred on 30 March 2011 between the appellant and respondent as the respective drivers of their vehicles, both bakkies. The respondent's bakkie was towing a trailer. It is common cause that the accident occurred at approximately 07:50 on a sunny morning. The collision occurred on the N12 between Fochville and Potchefstroom. There are two lanes in a westerly direction i.e. the direction both the appellant and the respondent were travelling in. There is a single lane in the opposite direction and the western and eastern lanes of the road are separated by a broken white line. The collision occurred at the T-junction with the Losberg Road.

3 The appellant submitted that the court *a quo* erred in accepting the respondent's version and rejecting the appellant's version. The court did not apply the trite test in a civil matter of finding facts and on these facts finding a preponderance of probabilities. The court in fact speculated and did not make any findings. The court further did not give reasons for coming to its finding.

4 It is common cause that both the drivers were driving in a westerly direction. The dispute is in which lane the appellant was travelling. The respondent testified that the appellant was in the right hand lane of the two lanes going westerly. On the other hand the respondent testified that the appellant and the respondent were both in the left hand lane going westerly and that the appellant was in front of the respondent. The appellant further testified that he had passed the respondent 7,4 kilometres earlier and was travelling in front of the respondent but that the appellant was travelling to the right hand side of the left lane to avoid potholes and to avoid people standing at the T-junction to alight

from taxis. The appellant never saw the respondent prior to the collision despite him looking in his mirror. He also did not see the Mercedes Benz the respondent referred to. The respondent testified that he was in the left lane and without putting on an indicator the appellant suddenly turned left. He could not swerve right because of the Mercedes Benz approaching and he could not swerve left because of the chevron on the left side of the road. He accordingly hooted and braked but was not able to avoid the accident. He estimated the speed of the appellant at about 90 km/h. The damages to the respective vehicles are common cause. The appellant's vehicle was damaged severely on the left passenger door and the respondent's vehicle was damaged on the right front extending to the middle of the vehicle. The respondent identified the point of impact on the road as shown out on photo 1. That pointing-out can be described as being on the very left side of the road just before the turn. He initially in cross-examination conceded that the point of impact on the road was where the appellant had shown the point of impact to be and that is in the middle of the T-junction in the left lane.

5 It is thus common cause that both the drivers were driving in a westerly direction. The dispute is in which lane the appellant was travelling. The appellant insisted that he was in the left lane going westerly and that he had 7.4 kilometres before that point passed the respondent and he did not see the respondent before the collision. He suspected that the respondent was in his blind spot just before he executed his left hand turn. The respondent testified that the appellant was in front of him but to his right in the right hand lane whereas the respondent was travelling in the left lane going westerly.

6 The court *a quo* did not on credibility *per se* make a credibility finding in rejecting either the appellant or the respondent's version. He found on p150 of the record:

"I am satisfied that the most plausible version would be of two vehicles that were travelling to the same direction in parallel to each other with one vehicle bit further to the other."

He bases this on the point of impact on the road because that would mean *"for the point of impact to be where either party's to be, the plaintiff's vehicle would have to be completely on the gravel edge of the road and on the left to complete the impact."*

It would seem that he found this point of impact to be crucial to determine the cause of the collision in general and the negligence of the drivers in particular.

7 On the appellant's own version he contradicted himself pertaining to the point of impact on the road surface. He initially indicated it to the very left of the road and then conceded that it is where the respondent indicated it. His initial point of impact is of course highly improbable as the point of impact is then before he could even execute a turn. Furthermore his explanation that he kept to the right of the left hand lane to avoid potholes and people is inconsistent as in the evidence there was no reference to any potholes on the road and from the photographs no potholes could be seen. Furthermore on the evidence there weren't any people standing to alight from taxis on that particular day. A collision occurred so the respondent must have been in close proximity, as the trite saying goes the respondent could not have fallen from the sky. Yet the appellant did not see him. If on the appellant's own version the respondent was in the appellant's blind spot then the respondent must have been in close proximity. For the appellant's version to be probable the respondent must then have left the road on the left hand side with the trailer to then pass the respondent on the left side of the road. This is mere speculation because the damages to the vehicles are consistent with either the respondent's or the appellant's version.

8 On the respondent's version the appellant at 90 km/h executed a sudden very sharp turn to the left on a road that he travels often and of which he is very alive as to where the left turn off is. This is also improbable.

9 The point of impact can be utilised in coming to a finding on a preponderance of probabilities. This is so even without a reconstructive expert report. *In casu* however the point of impact is probable on the version of the appellant and the respondent. This is so because it is in the left lane where both the appellant and the respondent agree the collision occurred and it is more or less at the T-junction which is consistent with both versions.

10 The court *a quo* accordingly erred in finding that the one version was more probable than the other version. There are no common cause facts or findings that he made that can render the one version more probable than the other. The correct order would thus have been absolution from the instance with costs.

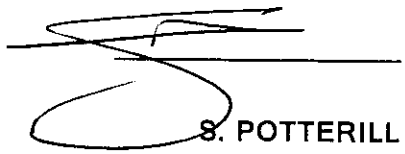
11 Counsel for the appellant conceded that this should have been the order and he suggested that on appeal each party pay their own costs. In view of the fact that the appellant is substantially successful but there was an offer of each party to pay their own costs I exercise my discretion in making the following order:

11.1 The appeal is upheld;

11.2 The order made by the court *a quo* is set aside and replaced with the following:

"Absolution from the instance with costs";

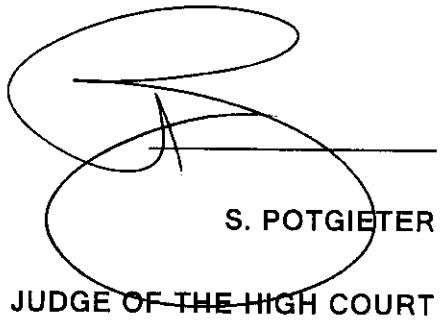
11.3 Each party is to carry their own costs pertaining to the appeal.



S. POTTERILL

JUDGE OF THE HIGH COURT

I agree



S. POTGIETER

ACTING JUDGE OF THE HIGH COURT

CASE NO: A781/13

HEARD ON: 17 April 2014

FOR THE APPELLANT: ADV. S. KROEZE

INSTRUCTED BY: Van der Merwe Peché

FOR THE RESPONDENT: ADV. O.H. SCHOEMAN

INSTRUCTED BY: Hardam & Associates Inc

DATE OF JUDGMENT: 29 April 2014