

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

CASE NUMBER; 64196/11

DATE: 16 MAY 2014

In {he matter Between.

SKHUMBUZO SIBUSISO MABUZA

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

MOSEAMO. AJ

[1] This is an action for damages brought by the plaintiff following injuries he sustained which injuries were caused as a result of a collision that took place on the Nelspruit-Barberton road

[2] At the commencement of the trial the parties applied for a separation of the merits and the quantum in the matter, which order was granted and the matter proceeded to be dealt with purely on the merits.

[3] It is common cause that the plaintiff was the driver a motor vehicle bearing registration letters and numbers C[...] and Mr Makamo was the driver of a motor vehicle bearing registration letters and numbers D[...] when the collision occurred.

[4] Plaintiff testified and called two witnesses, Ms Monyane and Mr Ngwenyama. Ms Monyane testified that she is a police constable. On the 25 January 2009 she got a call that there was an accident on the R40 road. She found two motor vehicles at the scene that were involved in an accident. She does not know how the

accident happened. During cross-examination Ms Monyane confirmed that Mr Ngwenyama told her about the accident. Mr Ngwenyama identified the drivers of the two vehicles to her. She made a statement which is contained in Exhibit 6 page 28 of record.

[5] Mr Ngwenyama testified that he was driving towards Barbeton when he heard a loud bang from, behind. He made a u-turn and found that there was a collision between a Jetta and a Hyundai, He took the driver of the Jetta out of the vehicle as it was burning. Both drivers were taken by ambulance to the hospital. He testified that there were no cars coming from opposite direction before he heard the loud bang. During cross-examination he admitted that he made a statement on the 02 May 2013. He said he did not know Plaintiff by name but only got to know him after the accident. He denied having given the name of the plaintiff to the police He did not make a statement on the day in question. He was asked why he mentioned that there were no cars coming from the opposite direction, he said that he was stating his observation. The Defendant s version was put to him and he said it is not true as he did not see either the plaintiffs vehicle or the insured vehicle before the collision.

[6] Mabuza testified that he was travelling from Nelspruit to Baberton. He saw headlights of the vehicle coming from behind through a rear view mirror The vehicle collided into his vehicle from behind. He lost consciousness and he regained consciousness during March 2009. He sustained injuries to his right hand, right leg, soma! chord and neck. During cross-examination he stated that there were vehicles ahead but he cannot say how many vehicles as the road was steep. There was no vehicle coming from the opposite direction. He lost consciousness as soon as the collision occurred He was referred to Exhibit 2 of record page 235 . clinical psychologist's report, where it is mentioned that 'he has complete amnesia of this ent.re period' He admitted that is what he told the clinical psychologist and further admitted that he is sometimes forgetful He said that he knew Mr Ngwenyama from before the accident, he knows nim from Baberton. When he was told that Mr Ngwenyama said that he did not know him from before the collision He said he did not know him by name but only knew his face. Defendant's version was put to the Plaintiff but he denied it.

[7] Norman Makamo, also known as Sibusiso Malambela, (insured driver) was the only witness for the defense. He testified that he was travelling from Baberton to Nelspruit He saw two vehicles coming from the opposite direction overtaking each other The driver of the overtaking vehicle left the road and went to the gravel on the side of the road There was a crescent on the side of the road, he went on the crescent and went back to his side of the road. He saw darkness and did not see anything He hit the vehicle from his side of the road. He collided with it on the side from the boot of the plaintiff's vehicle. He was informed of the identity of the driver of the vehicle he collided with afte^r he regained consciousness. He mentioned that he was told by his brother that he collided 'with a vehicle that was overtaking. The driver stays at the same location as Mr Makamo. He did not give the constable his details on the day It was his brother who gave the police his

details. He only gave details to the police after a month

[8] During cross-examination he mentioned that he collided with the plaintiff's vehicle on the right-hand side behind the driver's side. It was put to him that the car was hit from the left at the back. Defendant denied that the Exhibit 5 of record photo 16 depicted the damage to the vehicle, he said he cannot be sure that it is the same vehicle.

[9] It was put to him that the version that the car was hit from the right is not correct. He insisted that it was hit from the left. Defendant was asked about driver's licence and he stated that at the time of the collision he only had a learner's licence. He later changed and confirmed that he did not have a learner's licence. He admitted that he knew that he was not supposed to drive without a licence.

[10] It is on the evidence before me that I have to determine the two issues, whether the insured driver was negligent and whether the negligence of the insured driver resulted in or caused the injuries of the plaintiff.

[11] It is trite that the plaintiff bears the *onus* of proving negligence on the part of the insured driver on a balance of probabilities. See *Madyosi and Another v SA Eagle Insurance Co Ltd* (1990 (3) SA 442 at 444D-F)

[12] There are two mutually destructive versions as to how the collision occurred. The versions testified to by the parties are entirely different and are mutually destructive with regard to.

- a) The direction in which the plaintiff's vehicle and the insured driver's vehicle **were travelling**;
- b) Whether the collision took place as a result of the insured driver colliding into the rear of plaintiff's vehicle or not;
- c) Whether the collision took place as a result of plaintiff overtaking at an inopportune moment and colliding with the insured driver.

[13] The correct approach to be adopted when dealing with mutually destructive versions was set out in the case of *National Employers General Insurance Co Ltd v Jagers* **1984** (4) SA 437 (E) at 440E-G.

"...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 must 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 sense that they do not favour the Plaintiff's case any more than they do the Defendant, 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 case of *Stellenbosch Farmers Winery Group Ltd and Another v Martell Et Cie and Others* 2003 (1) SA 11 (SCA) at 14 the court dealt with an approach employed by the courts to resolve factual disputes and it stated that to come to a conclusion on the disputed issues, the court must make findings on (a) the credibility of the various factual witnesses, (b) their reliability, and (c) the probabilities,

[15] Plaintiff testified that the insured driver's vehicle collided into his vehicle from behind. The testimony of Mr Ngwenyama is that he heard a loud bang from behind him. He did not see how the collision occurred. He also stated that there were no vehicles travelling in the opposite direction prior to the collision, therefore confirming that the collision could have occurred in a manner as explained by the plaintiff.

[16] In the summons, paragraph 4 of the annexed particulars of claim reads as follows

On or about the 25th of January 2009 Plaintiff was a driver of a motor vehicle bearing registration letters and numbers CLP 709 MP. He was travelling at Barberton when a head-on collision occurred between a motor vehicle bearing registration D[...] and the motor vehicle C[...] which was driven by the Plaintiff, (my *emphasis*)

[17] Counsel for the plaintiff referred this court to Exhibit 5 of record photo 16 which depicts the damage to the plaintiff's vehicle. Defendant initially objected to the photo being used but then later withdrew their objection

[18] Counsel for the plaintiff used the above photo to disprove the insured driver's testimony that he collided into the right-hand rear of the plaintiff's vehicle. It was put to the insured driver that the plaintiff's vehicle was hit from the left at the back. It was also put to the insured driver that his vehicle was going to Barberton direction when the collision took place and that is the reason why his vehicle was facing Barberton after the collision

[19] The first question that I have to answer is whether the plaintiff has proven that the insured driver was negligent

[20] The plaintiff has put forth a number of versions as to how the collision occurred, which are as follows:

- a) In the summons it is alleged that the collision was a head-on collision;
- b) Before me plaintiff testified that insured driver hit his vehicle from behind;
- c) Exhibit 5 of record photo 16 shows damages to the left-hand side rear of the plaintiff's vehicle.
- d) It was put to the insured driver that he collided in to left-hand rear of the plaintiff's vehicle

[21] The versions advanced by the plaintiff are contradictory. The version that the collision was a head-on collision is not supported by the plaintiff in his evidence nor by the evidence before me. According to the accident report, Exhibit 1 of record page 41, the damage to insured driver's vehicle is recorded as front centre while the damage to the plaintiff's vehicle is recorded as multiple. Exhibit 5 of record photo 18 shows damage to the left-hand side rear of the plaintiff vehicle.

[22] The damage on the plaintiff's vehicle i.e the damage on the left-hand side rear, as depicted in Exhibit 5 of record photo 16 does not support his testimony before me that the insured driver's vehicle collided in to the rear of his vehicle (even though it was not pleaded). It however partly supports the insured driver's version that he hit the plaintiff's vehicle on the side towards the boot. Although there is a discrepancy regarding the side on which the insured driver hit the plaintiff's vehicle.

[23] It is common cause that both drivers were unconscious after the collision. It is also not in dispute that plaintiff suffered from amnesia immediately after the collision. The insured driver testified that he immediately saw darkness when the collision took place. He further testified that he was informed by his brother after regaining consciousness, a month later, that he had collided with a motor vehicle that was in the process of overtaking. As a result I find that the post-collision evidence, for example, the positions of the vehicle after the collision, the damage to the vehicles could only have been obtained from other sources.

[24] Although Mr Ngwenyama was ostensibly an independent witness, he was indirectly involved in the events leading up to the collision and from his evidence I get the distinct impression that, he was **partial**, he **wished to** favour the plaintiff's case.

[25] Mr Ngwenyama testified that he made a u-turn and saved plaintiff from the burning vehicle and later went to visit him in the hospital: he testified that he did not know what happened to the insured driver.

[26] Mr Ngwenyama denied that he knew the plaintiff prior to the collision: Constable Monyane in her testimony and in the statement she made immediately after the collision stated that Mr Ngwenyama identified both the plaintiff and the insured driver to her at the scene of the collision. Mr Mabuza testified that he knew Mr Ngwenyama from Barberton and when it was put to him under cross-examination that Mr Ngwenyama

testified that he did not know him prior to the collision, he changed and said he only knew Mr Ngwenyama facially and not by name.

[27] Mr Ngwenyama's unsolicited explanation that there had been **no** vehicle going in the opposite direction prior to the collision, seems **to have been** tailored to support the plaintiff's evidence that the insured driver **and** the plaintiff were travelling in the same direction when the insured driver **collided** in **to** the back of the plaintiff's vehicle.

[28] Mr Ngwenyama testified that he noted **at** the scene of the collision that the plaintiff's vehicle was damaged at the back; the damage on the plaintiff's vehicle, as per Exhibit 5 photo 16, which is on the left-hand side rear contradicts Mr Ngwenyama's version.

[29] Due to the abovementioned facts I find Mr Ngwenyama's testimony to be inaccurate and unreliable,

[30] In my view the evidence of the plaintiff taken as a whole is full of inconsistencies and material contradictions and cannot be said to be true and accurate. I therefore find that plaintiff has failed to prove on a balance of probabilities that the insured driver was negligent.

In the result I make the following order:

1. Plaintiff's claim is dismissed with costs.

P D MOSEAMO

ACTING JUDGE OF THE HIGH COURT