IN THE GAUTENG DIVISION HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

Case Number: 20291/2013

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

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DATE **SIGNATURE**

In the matter between: DATE: 12/6/2014

STEVE SLATER **PLAINTIFF**

and

ROAD ACCIDENT FUND **DEFENDANT**

JUDGMENT

MOLEFE, J:

[1] On 17 April 2010 on the R544 road between Van Dijksdrift and Kriel, a motor vehicle with registration numbers ND […], there and then being driven by M.L.

Ngobeni ("the insured driver") collided with the plaintiff who was riding a motorcycle with registration numbers DJP […].

[2] As a result of the aforesaid collision, the plaintiff sustained bodily injuries for which he had to receive medical treatment. The plaintiff instituted an action against the defendant in terms of the Road Accident Fund Act No 56 of 1966 ("the Act") for damages suffered as a result of the injuries so sustained. The plaintiff's claim is based on negligence of the insured driver.

[3] At the commencement of the trial, by agreement between the parties, an order to separate the issue of liability ("merits") and quantum in terms of Rule 33(4) was granted. In the present proceedings, the issue of liability must be determined and the issue of quantum was postponed *sine die*.

[4] The plaintiff testified on his own behalf and two witnesses testified on behalf of the defendant, the insured driver, Mr Ngobeni and Constable Matlala.

[5] The issues which must be determined are the following:

5.1 whether the insured driver was negligent;

5.2 whether the plaintiff was negligent;

5.3 the apportionment of negligence, if applicable.

[6] The plaintiff's version is that on 17 April 2010 at approximately 17h00, he was travelling home to Kriel from Witbank. He was not pressed for time and was not in a hurry to get home. He was travelling on the R544 road between Van Dijksdrift and Kriel. The road consisted of two lanes, one in each direction. There were barricades

on the side of the road due to roadworks. The estimated space between the barricades and the point where the lane began was approximately 4 meters.

[7] There were a lot of trucks on the road, which was usual for this road. He was travelling behind a slow moving truck and was travelling at a speed of approximately 40 to 45 km\h. He proceeded to move slightly over the middle line in order to determine whether there are any oncoming vehicles and whether it was safe for him to overtake the truck in front of him and then moved back to his own lane as it was not safe for him to commence with the overtaking manoeuvre. He did this on several occasions and during all the occasions he moved back to his lane as there were oncoming vehicles.

[8] Shortly before the accident he again moved closer the middle line to obtain a better vantage point with the intention to overtake should it be safe to do so. He was confronted with the approaching oncoming insured vehicle from the opposite direction, travelling very close to the middle line. The insured vehicle and the plaintiff's motorcycle collided and the point of impact was slightly over the middle line. Plaintiff testified that when the collision occurred he was not in the process of overtaking but was simply checking if it was safe for him to commence with his overtaking manoeuvre, but the collision occurred before he could move back to his lane behind the truck. He did not notice the approaching insured vehicle earlier and did not have any time to avoid the accident. The damage to the insured vehicle was to the right front part.

[9] Under cross-examination, he stated that he could not suddenly swerve back to his lane when he saw the approaching insured vehicle as a sudden swerve would have caused him to crash as it is more difficult to swerve a motorcycle than a motor

vehicle. He stated that he moved from behind the truck four or five times before the collision to check if it was safe to overtake. He was not following the truck too closely and left sufficient space to move back behind the truck if there was oncoming vehicles. The collision happened too quickly and there was no time for him to move back to his lane to avoid the collision. He stated that he expected the insured driver to swerve to his left to avoid the collision. Plaintiff denied under cross-examination that he was carrying alcohol at the time of the accident.

[10] The version of the insured driver was substantially different. He testified that he was travelling on the R544 road towards Witbank. He noticed from a distance a big 26 wheeler truck and when he approached a bend on his right, he saw the plaintiff's motorcycle through the wheels of the truck, in the process of overtaking the truck. When he approached the motorcycle, he noticed that the motorcycle was further into the middle line of the road and on his lane of travel. He applied brakes and attempted to swerve to the left up to a point where the road barrier stopped him from swerving further. A collision occurred and at the point of impact which was on his lane of travel, he was nearly stationary.

[11] Under cross-examination the insured driver stated that when he first observed the plaintiff's motorcycle it was some distance away and it was travelling very fast at a speed of between 120 – 140 km\h. He conceded that it would have taken some time for the truck and the motorcycle to reach the insured driver's vehicle. He conceded that his motor vehicle came to a halt at an angle to the lines of the road. It was then shown to him on the photographs used as exhibits that but for the car that was parked at a slight angle and immediately prior to him swerving slightly to his left, he must have been very close, if not on top of the middle line.

[12] The police officer who completed the accident report form, Constable B.E. Matlala conceded in her testimony that her report is wholly unreliable and that she obtained the information contained therein exclusively from the insured driver. She further conceded that she cannot dispute the plaintiff's evidence about the point of impact being on the middle line or slightly over it. The evidence of the constable is unreliable and no weight can be attached to it.

[13] The versions of the plaintiff and the insured driver are irreconcilable in material respects regarding how the collision occurred, and are mutually destructive. It is common cause between the parties that the plaintiff bears the onus of proving negligence on the part of the insured driver on a balance of probabilities.

[14] The technique generally adopted by the Courts in resolving factual disputes when dealing with two irreconcilable versions is set out in ***SWF Group Limited and Another v Martell ET CIE and Others***[1] , wherein the following relevant applicable principles are stated:

"14.1. Findings must be made on:

14.1.1 the credibility of the various factual witnesses which depends on a Court's impression about the veracity of the witnesses;

14.1.2 their reliability; and

14.1.3 the probabilities.

14.2 In regard to the credibility of a witness, a number of factors must be taken into consideration:

[1] 2003 (1) SA 11 SCA at paragraph (5); See also: Dreyer & Another NNO v AXZS industries (Pty) Ltd, 2006 (5) SA 548 (SCA) at 558 paragraph 30

i) the witness' candour and demeanor in the witness-box;

ii) his latent and blatant lies;

iii) internal contradictions in his evidence;

iv) external contradictions with what was pleaded or put on his behalf, or with the established facts or with his own extra curial statements or actions;

v) the probability or improbability of particular aspects of his version; and

vi) the caliber and cogency of his performance compared to that of other witnesses testifying about the same incident or events.

14.3 A witness' reliability will depend, in addition to the aforesaid factors mentioned in paragraph 14.2 (ii) (iv) and (v) above, on:

i) the opportunity he had to experience the event in question;

ii) the quality integrity and independence of this recall of the event.

14.4 Having regard to the probabilities, this necessitates an analysis and evaluation on the probability or improbability of each party's version on each of the disputed issues.

14.5 In light of its assessment of the factors in 14.2 to 14.4 above, a Court should then, as a final step, determine whether the party burdened with the onus of proof, has succeeded in discharging it.

14.6 When a Court's credibility findings compel it one direction and its evaluation of the general probabilities compels it in another direction, the

more convincing the former, the less convincing will be the latter. But when all factors are equipoised, probabilities will prevail".

[15] The opinion tendered by both the plaintiff and the insured driver are by and large irrelevant and do not assist in determining the probabilities.

[16] The test propounded by Wessels JA in ***National Employer's Mutual General Insurance Association v Gany***[2] is to the effect that "*where there are two stories mutually destructive, before the onus is discharged, the court must be satisfied upon adequate grounds that the story of the litigant upon whom the onus rest is true and the other false".*

[17] In ***Selamolela v Makhado 1988 (2) SA 372 (V)***, the court reconfirmed the principle that where there are two mutually destructive versions in a civil trial, the correct approach to be adopted in deciding the issue, is to determine which of the two versions is more probable than the other.

[18] 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 it is in the present case, and where there are mutually destructive stories, the plaintiff 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. (See ***National Employers' General Insurance v Japers***[3].

[2] 1931 AD 187 at 199
[3] 1984 (4) 432

[18] The Court when having regard to the credibility of the plaintiff, was impressed by his demeanor. He appeared to be honest, reliable and a credible witness. He gave evidence in a concise, to the point manner without exaggeration. Plaintiff's Counsel[4] submitted that the evidence of the plaintiff in relation to the point of impact being on or just over the middle line remained unchallenged. Counsel relied on ***President of the Republic of South Africa and Others v South African Rugby Football Union and Others 2000 (1) SA 1 (CC)***, wherein the Constitutional Court found that if a point in dispute was left unchallenged in cross-examination, the party calling the witness was entitled to assume that the unchallenged witness' testimony was accepted as correct[5].

[19] Defendant's Counsel[6] submits that the plaintiff's own version supports his own negligence and, apart from the evidence that the insured driver was "fairly close" to the middle line and that the insured driver could have swerved, no other evidence was adduced. As such, the plaintiff can only rely on the inference of negligence. Counsel relied in the matter of ***AA Onderlinge Assuransie Bpk v De Beer[7]*** wherein the court held per Viljoen JA that:

> *"It is not necessary for a plaintiff invoking circumstantial evidence in a civil case to prove that the inference which he asks the court to make is the only reasonable inference. He will discharge the onus which rests on him if he can convince the court that the inference he advocates is the most readily apparent and acceptable inference from a number of possible inferences".*

[4] Advocate S G Maritz
[5] Par 61, p37
[6] Advocate S J Myburgh
[7] 1982 (2) SA 603 (A) at 604 G

[20] Counsel for the defendant argued that on the plaintiff's own version, he moved over into the oncoming traffic when it was not safe to do so. He did not even take any steps to avoid the accident when he saw the insured driver. The accident occurred in the lane of the insured driver after he had applied brakes and swerved to the left. On this basis, defendant's counsel contends that plaintiff was negligent and failed to show on a balance of probabilities that the insured driver was negligent. Counsel submitted that the claim should be dismissed with costs.

[21] On the evidence before me, the plaintiff's version is clear; he was not overtaking the truck before him, but had simply moved onto or slightly over the middle line to obtain a better vantage point in order to check any oncoming traffic and to check if it was safe for him to commence with his overtaking manoeuvrer. He was travelling behind a slow moving truck at a speed of 40 – 45 km\h. I can find no reason why the plaintiff would have overtaken a long 26 wheeler truck without first establishing that it was safe to do so. He travelled on or slightly over the middle line and the point of impact was not challenged that it was on or slightly over the middle line. The damages on the insured driver's vehicle, on the right front part, corroborates the plaintiff's version that the motorcycle was not at the point of impact, travelling in the insured driver's lane of travel. Having regard to the totality of the evidence, I can find no reason not to believe the plaintiff.

[22] The insured driver however was not a very impressive witness. His versions of the events were inconsistent, differed from the version put to him by plaintiff's counsel. His version is in my view improbable for various reasons. It is highly improbable that the plaintiff was travelling at a speed of 120 – 140 km\h behind a slow moving truck. He conceded that he was travelling very close to the middle line

of the road as drawn by him on the photograph that was handed up as an exhibit. This confirms that he was too close to the middle line whilst he was aware that vehicles behind trucks would attempt to overtake slow-moving trucks. Although on his own version he noticed the truck and the motorcycle some distance away, he failed to take evasive action by moving his car slightly to the left and then straightening his vehicle. This is despite his version that the lane was big enough for a 26 wheeler truck to move around his lane even after the collision. The insured driver's version is that the collision was reasonably foreseeable and preventable but he failed to avoid it when he had time, the space and opportunity to take the required evasive action.

[23] The test for negligence has been authoritatively laid down in ***Kruger v Coetzee 1966 (2) SA 428 (A)***, where the Appellate Division held that:

> *"In an action for damages alleged to have been caused by the defendant's negligence, for the purposes of liability culpa only arises if a diligens paterfamilias in a position of the defendant not only would have foreseen the reasonable possibility of his conduct injuring another in person or property and causing him patrimonial loss, but would also have taken reasonable steps to have guarded against such occurrence; and the defendant failed to take such steps".*

I find the plaintiff's version on how the accident occurred to be more probable and that the insured driver failed the reasonable man test by failing to take reasonable steps to avoid the collision.

Contributory Negligence

[24] I therefore consider the causative negligence and whether there was contributory negligence to be attributed to the plaintiff. Because the observance of the rule of road which requires traffic to keep to the left of the center of the road is of such importance, a motorist keeping to his side of the road is entitled to assume that approaching traffic will do likewise. Even when an approaching vehicle is on its incorrect side of the road, a driver on his correct side may assume that the former will return timeously to its correct side of the road. But this assumption does not entitle a driver on the correct side of the road to remain passive in the face of threatening danger. As soon as the danger of the collision becomes evident he is under a duty to take reasonable steps to avert one.

[25] In ***Burger v Santam Versekeringmaatskappy Bpk*** ***1991 (2) SA 703 (A)***, the Court states that when a reasonable driver approaches a motor vehicle over a considerable distance, which had been veering onto the wrong side of the road, that driver would at least take three steps. The driver would brake, move his motor vehicle to the left as far as possible and hoot continuously. In this case the motor vehicle travelling on the correct side of the road failed to hoot and thereby bringing the other motor vehicle driver's attention to his presence and was found to be 25% at fault as a result thereof.

[26] In *casu,* the motorcycle was on or over the middle line of the road and the insured driver, despite noticing the plaintiff at some distance away, failed to take sufficient evasive action and contributed to the occurrence of the collision. Plaintiff's counsel submitted that an apportionment of 50% against the defendant should be

awarded and relied on the case of ***Jadezweni v Santam Insurance Co Ltd and Another***[8].

[27] Section 1 (a) of the Apportionment of Damages Act 34 of 1956, enjoins the Court to reduce the damages recoverable by a negligent claimant to such an extent as the Court may deem just and equitable, having regard to the degree to which the claimant was at fault in relation to the damages. The plaintiff in this case, on his version, moved over on and\or over the middle line of the road to check if it was safe to overtake. He did not have time to take any steps to avoid the accident as there was no time to do anything. In my view, the plaintiff's negligence should be assessed at 60% and the insured driver's negligence at 40%.

[28] I therefore make the following order:

1. *The issues of merits and quantum are separated in terms of Rule 33(4);*
2. *The aspect of quantum is postponed sine die;*
3. *The defendant is liable to pay 40% of the plaintiff's proven or agreed damages;*
4. *The defendant is liable to pay the costs in respect of the merits portion of the plaintiff's action on a party and party High Court Scale.*

[8] 1980 (4) SA 310 (C)

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D S MOLEFE
JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel on behalf of Plaintiff	**:**	**Adv.S M Maritz**
Instructed by	**:**	**Christo Botha Attorneys**
Counsel on behalf of Defendant	**:**	**Adv. S G Myburgh**
Instructed by	**:**	**Mothle, Jooma, Sabdia INC.**

Date Heard : **23 May 2014**

Date Delivered : **12 June 2014**