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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

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Case Number: 31116/12

In the matter between:

DATE: 6/6/2014

JONATHAN MOYO

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

Coram: **HUGHES J**

JUDGMENT

Delivered on: 6 June 2014

Heard on: 19 to 21 May 2014

HUGHES J

1. The plaintiff Jonathan Moyo, a male born on [...] was involved in a motor accident collision on 19 June 2011 in the vicinity of Lavender Road Onderstepoort Pretoria. At the time of the collision plaintiff was the driver of a Toyota Hilux bakkie with registration and numbers P[...]. The insured driver, Mr C Pholosi, was the driver of a Toyota Tazz with registration letters and numbers M[...].
2. By consent of the parties the issues have been separated and I am only assigned to deal with the matter of merits. This motor vehicle collision involves only two vehicles and as to its occurrence I am faced with two mutually destructive versions.
3. The insured driver states that on the day in question he was alone in his vehicle travelling to work. Whilst the plaintiff states that as it was a Sunday he was on his way to church with passengers totalling eight (8) inclusive of himself. He and a female passenger sat in the front cab of the bakkie whilst the rest of the passengers sat in the bin which was without a canopy.
4. The road that the accident occurred on was that from Hammerskraal to Pretoria, also known as the Old Warmbaths road.
5. From the documents immediately filed in the docket after the collision, the plaintiff is alleged to have given an account and made a statement to the South African Police Services.
6. Firstly I propose to deal with the common cause facts of the case:
 - 6.1 On the day in question it was recorded that the plaintiff was driving with seven (7) other passengers in his bakkie without a canopy ;
 - 6.2 The plaintiff was traveling towards Hammerskraal whilst the insured driver was travelling towards Pretoria;
 - 6.3 The insured driver was alone in his vehicle and at the time of the collision he was on his way to work;

- 6.4 The plaintiff and his passengers were on their way to church;
- 6.5 The geographic makeup of the road was that of a road with a single carriage on either side, with the plaintiff travelling in a northerly direction and the insured driver was travelling in a southerly direction;
7. On the accident report, completed by the South African Police Service on arrival at the scene, it is recorded that: A - being the bakkie and B - Tazz:

“Driver A alleges that he was travelling toward Hammerskraal when a vehicle white Toyota Tazz collided with his vehicle head on”.

8. On 20 June 2011, a day after the collision, the plaintiff gave a statement to the police that reads as follows:

“On 2011/06/19 I was driving in a Maroon Toyota Hilux bakkie with registration no. P[...] I was driving from Cosmo driving to Hammerskraal using Old Warmbath road it was at about 06:40 when I saw a white Toyota tazz with registration no. M[...] that was travelling from Hammerskraal to Pretoria changing from right lane to lane to the left which I was travelling on as it was coming towards me I tried to change lane to aviode (sic) colliding with the vehicle the driver of the white Toyota followed me and we collided all cars came to stand still. That’s all I can declare.”

9. The plaintiff’s statutory affidavit duly compiled on 5 May 2014 reflects that the collision occurred as follows:

“On 19 June 2011 at approximately between 06h30 I was the driver of the motor vehicle bearing registration letters and numbers P[...] along Lavendar (sic) and Old Warmbaths road in Onderstepoort, Pretoria.

As I was driving my motor vehicle on the aforementioned road when a collision occurred with a motor vehicle bearing registration letters and number M[...] there and then driven by Mr Cornelius Pholosi, Mr Pholosi lost control of his motor vehicle and we had a collision.”

10. In the plaintiff's plea the negligence plead of the insured driver is set out as:

"5.1.1 He failed to keep a proper lookout;

5.1.2 He failed to take any, alternatively, sufficient, cognisance of the presence, the actions and the visibility intended and alternatively probably further actions of the Plaintiff;

5.1.3 He travelled at a speed which was excessive in the circumstances;

5.1.4 He failed to apply the brakes of the insured vehicles at all timeously and / or sufficiently, alternatively he drove the insured vehicle whilst the braking system and / or one or more of the tyres thereof was or were in a defective and unroadworthy condition, the fact of which he was aware.

5.1.5 He failed to avoid the collision when by taking reasonable and proper care (including but not limited to traveling more slowly, serving) he could and should have done so;

5.1.6 He travelled on the incorrect side of the road at an inopportune moment when it was not safe to do so;"

11. The plaintiff's case comprises of his evidence and two female passengers who were in his vehicle. On the other hand the insured driver gave evidence together with an independent witness. This independent witness was travelling in a vehicle behind the insured driver's vehicle.

12. The insured driver admits that the collision occurred on 19 June 2011 and on the road between Hammanskraal and Pretoria, however he denies that he was negligent in any way. He states in his plea that the plaintiff was in fact negligent in one or all of the following respects:

- “5.3.1 He failed to keep a proper lookout;*
- 5.3.2 He failed to avoid the collision when by the exercise of reasonable care he could and should have done so;*
- 5.3.3 He failed to take any, alternatively sufficient cognisance of the presence, the actions and the visibly intended and or alternative probable further actions of the insured driver.*
- 5.3.5 He omitted to brake, alternatively brake timeously, alternatively brake at all, alternatively the braking system of the vehicle he was driving was defective;*
- 5.3.6 He was traveling too fast under the traffic conditions;*
- 5.3.7 He failed to keep control alternatively, keep proper control of the vehicle.”*
13. In the statement of the insured driver taken from him on 7 July 2011, he states the following:
- “that on Sunday 2011/06/19 at about... I was the driver of a white Toyota Tazz with registration numbers M[...]. I was travelling along R101/ Old Warmbad (sic) road from north to south. It was misty on the road so I was concentrating on my lane. And suddenly a car travelling from the opposite direction south to north collided with my vehicle head on on (sic) my lane. The accident happened so fast that I didn't have time to swerve or avoid that accident. I sustained serious injuries due to that accident and I was taken to Pretoria Academic hospital where I was admitted for 17 days. The other car involved was a Maroon Toyota Hilux bakkie with registration P[...].”*

14. The independent witness made a statement to the South African Police Services after the collision and the important extract appears below:

“3. *On 2011-06-19 at about 06:45 I was travelling along Old Warmbad road from North to South. I was going to work at the above mentioned work address. I was a passenger in a vehicle which was traveling behind a white Toyota Tazz.*

4. *I was sitting in a passenger front seat. We were at a distance of +-20 meters behind the Toyota Tazz and I then saw a Maroon Double Cab bakkie traveling from the opposite direction (South to North) colliding with the said Toyota Tazz.*

5. *Furthermore the Maroon Double Cab bakkie collided with the Toyota Tazz on the left lane and they both landed on the pavement (extreme left of old Warmbad road). That is all I can declare.”*

15. From the statement it is evident that the versions of both the plaintiff and the insured driver are two totally different versions and thus two mutually destructive versions. I will revert to this aspect after I have set out the testimony of all those who gave evidence.

16. The plaintiff testified that on 19 June at about 5:45am he was travelling along the Old Pretoria Road on his way to Hammerskraal. In essence he was travelling in a northerly direction and the road in question was a single carriage in opposite directions. He noticed a vehicle approach from the opposite direction travelling in southerly direction.

17. The plaintiff states that he noticed that this vehicle was “*too much on his lane*” and he saw that this vehicle would cross in front of him. He screamed, flashed his head lights and did not move towards his left as he did not know if there was a furrow off the road. He then decided to move towards his right because he saw a space on the left side of the other driver. As he was conducting this

manoeuvre the driver of the other vehicle also moved toward his correct path of travel.

18. Both vehicles were moving sideways and in the same direction. The plaintiff states that this is how the collision occurred close to the centre of the road but on the plaintiffs path of travel. The other vehicle came to rest in the centre of the road whilst his vehicle came to rest on the verge or end of the road of the traffic travelling in a southerly direction.
19. At the time of the collision he stated that there were eight (8) passengers in his bakkie, one sat as a front seat passenger with him and the other six (6) sat in the bin portion of the bakkie which had no canopy.
20. During cross-examination it emerged that the insured driver entered the plaintiff's lane "gradually driving fast". It also came to the fore that the insured driver was conducting a zigzagging movement before impact with the plaintiff's vehicle.
21. In re-examination the plaintiff stated that he noted the insured driver zigzag from the lights of the vehicle and that he first noticed the insured vehicle approaching towards him by its lights. He testified that the insured driver had already passed the passenger side of his vehicle when the insured vehicle entered his lane.
22. In re-examination the plaintiff testified that he flashed his lights continuously and hooted at the same time. He also slowed down, and then applied brakes when he was close to the centre line where the collision occurred. This testimony came to the fore when the plaintiff was shown a sketch compiled by the South African Police Service which indicated brake marks thereupon.
23. Two passengers who were in the plaintiff's bakkie testified. The first, Caroline Ndebele, the front seat passenger testified that the insured driver was driving a Toyota Tazz on the day in question. The Tazz proceeded straight for their vehicle in a zigzag fashion. The collision occurred on the centre line. She testified that when the plaintiff hooted the insured driver who was in their lane moved back to his correct lane.

24. In cross-examination she stated that the plaintiff did attempt to swerve to the left but the insured driver kept coming so the plaintiff swerved to the right, so too did the insured driver and the collision occurred. The insured vehicle's final resting position was on his correct side of the road being blocked by the pavement. Whilst the plaintiff's vehicle came to rest on the incorrect side of the road. Caroline Ndebele at this stage of the proceedings testified that the plaintiff flashed his lights, hooted, swerved and applied brakes before the collision. This was a response to questions on what evasive action the plaintiff took on the say in question.
25. The second witness, Nthombi Zodwa Ndebele, stated that she was seated at the back of the bakkie in the bin area, directly behind the plaintiff with her back against the side of the bakkie facing the left hand side of the plaintiff.
26. Nthombi's evidence is that according to her they were travelling on a road that was a double carriage in both directions. Her testimony is that the point of impact in her own words was "*towards the end of the road...crossing over our lane*". She recanted her entire description of the collision that she had advanced and proceeded to say she was not sure anymore how the collision occurred.
27. The insured driver's testified that all he remembers is that he was on his way to work on that fateful day. He was driving from south to north and looking in front when he realised that there was an oncoming vehicle. He noticed this vehicle from its head lights. As this vehicle approached it proceeded to encroach on his path he. He states that he tried to avoid the collision but it was too late to do so. He testified that he did not hoot or apply brakes as he was so frightened and it happened so fast. He denied that he was zigzagging on the road and persisted that he was travelling straight in his path of travel when the plaintiff encroached and moved into his path of travel. He lost consciousness and does not remember much thereafter
28. An independent witness, Clifford Khoza gave evidence on behalf of the defendant. He testified that on the day in question he had obtained a lift, as he was hitch hiking, from a motorist on route to Pretoria from Hammerskraal. He

said that he can't recall the make of the vehicle but he was seated in the front passenger seat, three other occupants were seated at the back. He stated that the vehicle that he was travelling in was following a Toyota Tazz, being the insured driver's vehicle,

29. The testimony of Khoza is that as the plaintiff's vehicle approached it was still in its correct path of travel and as it got closer to the insured driver's vehicle it left its path of travel and entered the path of travel of the insured driver. None of the vehicles hooted, flickered their lights and neither did the vehicles apply brakes to reduced their speed. He was emphatic that the insured driver's vehicle did not zigzag on the road and neither did it leave its path of travel.
30. He pointed out the point of impact on the sketch plan provided as having occurred in the vicinity of the beginning of the bus stop which was situated on the edge of the south bound lane. He pointed out that where the collision took place the insured driver's vehicle came to rest and the vehicle of the plaintiff came to rest at the other end of the bus stop in a northerly direction as compared to the insured driver's vehicle.
31. This witness explained that he did not know the parties at all and that he was approached by the police after he had advised a colleague at work, who spoke of the collision, that he had witnessed the collision.
32. Both counsel for the plaintiff and the defendant agree that the main issue in this matter is the fact that this court is faced with a situation of two mutually destructive versions.
33. The approach when faced with two mutually destructive versions is set out in the case of **Stellenbosch Farmers' Winery Group Ltd And Another v Martell Et Cie And Others 2003 (1) SA 11 at paragraph [5] on page 14-15:**

"[5] 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 the veracity of the witness. That in turn will depend on a variety of 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."

34. On an application of the above test to the facts of this case it is trite that the onus rest upon the plaintiff and the only way this can be discharged is if credible evidence is adduced. In this matter where there are two mutually destructive versions the plaintiff can only succeed if I am satisfied on a preponderance of probabilities that the plaintiff's version is true and accurate, thus acceptable and that the other version, of the defendant, is false, mistaken and falls to be rejected. **See National Employers' General Insurance v Jager 1984 (4) SA 437 ECD at 440D-G**

35. The plaintiff together with his witnesses provided this court with different accounts or versions of how the collision took place. Both the plaintiff and his front seat passenger depicted the point of impact at different place on the sketch. In addition they gave different accounts of how the plaintiff's and the insured driver's vehicle careered on the road before the collision. The passengers in the bin of the vehicle, depicted the collision on a totally different road. She was adamant that the road was a double carriage road to cater for her evidence which she later recanted and said she was not sure as to how the collision took place.
36. The plaintiff and his two witnesses were not impressive at all, they were confused, not concise with regards to the facts and sequence of events. They contradicted each other in all material respects.
37. In accessing this against the evidence adduced on behalf of the defendant, the insured was candid that he could not recall but for the fact that the plaintiff entered his path of travel, that he was frightened and everything happened fast. However the independent witness could not be faulted as he gave a clear and concise account of what had transpired. He was to the point and he testified to the facts in a sequenced fashion. He was not motivated or biased in testifying. I was impressed with his demeanour.
38. There is also the matter of the statements made shortly after the collision. That of the independent witness is in sync with his testimony whilst that of the plaintiff differs in material respects. The plaintiff's statement even differs with the case pleaded by the plaintiff and the evidence presented. This is evident from the various extracts set out above.
39. Having regard to the totality of the evidence and examining the probabilities it is common cause that the parties were travelling on a single carriage road, one heading north and the other heading south. The collision occurred early on a Sunday morning on the road between Pretoria and Hammankraal.

40. Even in the face of the insured drivers limited memory of what transpired his evidence was consistent with that of the independent witness. Both testified that the collision took place on the insured driver's side of the road and both stated that the plaintiff moved over and encroached on the path of travel of the insured driver.
41. The rest positions pointed out by the independent witness though different to what was depicted by the police doesn't detract from the fact that they are situated on the side of the road that the insured driver was travelling along. The evidence adduced on this aspect is clear that the rest position of the vehicles was on the side of the insured driver's path of travel.
42. After the aforesaid analysis it is evident that the probabilities are in favour of the insured driver and the independent witness as to how the collision occurred. Having reached the said conclusion on the probabilities and on the credibility highlighted above I cannot in the circumstances set out in this case attribute any negligence or blame upon the insured driver. The situation and circumstance that the insured driver was faced with in my mind he did the best that he could and as such I can but only conclude that no negligence can be attributed to the insured driver.
43. In the circumstances the plaintiff having failed to discharge the onus and prove its case against the defendant, the following order is made:

43.1 The plaintiff's claim is dismissed with costs.

W. Hughes Judge of the High Court

Delivered on: 6 June 2014

Heard on: 19 to 21 May 2014

Attorney for the Plaintiff

BORMAN DUMA ZITHA ATT

Tel: 011 886 4628

Ref: DM2285/AV DUMA/TANGA

c/o CHUENE THEMA

136 Main Street

New Muckleneuk

Brooklyn

PRETORIA

Attorney for the Defendant

DYASON INC

134 Muckleuneuk Street West

Nieuw Muckleuneuk

PRETORIA

Tel: 012 452 3500

Ref: M H MOSTERT/ac/KL1123