

## REPUBLIC OF SOUTH AFRICA

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

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

30/5/2014

DATE

SIGNATURE

CASE NO: 65678/2012

In the matter between

**HARRY SEDUMEMANYATELA****PLAINTIFF**

And

**ROAD ACCIDENT FUND****DEFENDANT****JUDGMENT****MOLEFE J:**

[1] On 6 June 2010, at approximately 18h45, and at Kalkfontein Road, Tuinplaas \ Modimolle R576, Marble Hall, Settlers, an accident occurred involving a motor vehicle being driven by Mr F.L. Themba ("the insured driver") and a vehicle being driven by Mr H.S. Manyatela ("the plaintiff").

[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 1996 ("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, the parties agreed to separate the issues of liability ("merits") and quantum in terms of Rule 33 (4). The trial proceeded with the issues of merits and the issue of quantum was postponed *sine die*.

[4] Two witnesses testified on behalf of the plaintiff; Mr Harry Sedume Manyathela the plaintiff and Mr Thabo Ephraim Manyatela.

4.1. **Mr Harry Sedume Manyatela** ("plaintiff") testified that on 6 June 2010 at approximately 18h45, he was the driver of a Ford Ikon vehicle travelling along the gravel road from Modimolle to Vaalbank. He was travelling towards Kadjibane village and was with four passengers in his vehicle. He was travelling on the left side of the road, which was the correct lane of his travel. He noticed another vehicle travelling along the same road by from the opposite direction. The other vehicle ("the insured vehicle") was approximately 7 meters away when plaintiff noticed that the vehicle was travelling along the plaintiff's lane of travel and its lights were not fully functional. The left head light was bright and visible but the right head light was not working properly and was dim. Plaintiff flicked his lights in an attempt to warn the oncoming vehicle but the vehicle kept on approaching on the plaintiff's lane of travel.

4.2. In an attempt to avoid the collision, the plaintiff swerved the vehicle to his right and reduced his speed and at the same time, the insured vehicle driver also swerved his vehicle to the left, his correct lane of travel, causing a collision between the two vehicles.

4.3. Plaintiff testified that prior to the collision he was travelling at a speed of 55-65 kilometres per hour. The road was gravel and bumpy and did not allow plaintiff to travel at a higher speed. Plaintiff and some of the occupants in his vehicle sustained serious injuries from the accident. Plaintiff testified that there was nothing he could have done to avoid the accident.

4.4. Under cross-examination plaintiff testified that the road was straight and the width of the road approximately 2 metres and that he applied brakes to reduce speed before he swerved. The visibility was clear except for the fact that it was in the evening and dark. Plaintiff was cross-examined on the discrepancy of his testimony in chief and the statement he gave to the police. In the police statement he testified that prior to the collision he was travelling at a speed of 70-80 kilometres per hour and that a Mr Jonathan Manyatela was following his vehicle at a distance of approximately 600 meters. Plaintiff denied that he gave the police that information when he gave a statement.

[5] **Mr Thabo Ephraim Manyatela** testified that the vs the plaintiff's nephew and his evidence can be summarised as follows:

5.1 On 6 June 2010 he was a passenger in the motor vehicle being driven by the plaintiff and was occupying the front passenger seat. They were travelling from Modimolle where they had been attending a wedding and were on their way to Kadjibane, Vaalbank. He possesses a driver's licence and was from time to time observing the road. They were travelling on the gravel road, on the left lane of the road when he noticed another vehicle travelling from the opposite direction along the same gravel road but on their lane of travel. When Mr Manyatela noticed the vehicle (for the first time), it was at a distance of approximately 8-10 meters and one of its lights was not working properly and was dim. The park lights were on.

5.2 The plaintiff flicked the lights and hooted to the vehicle in an attempt to warn the oncoming vehicle to move to its right lane but the insured vehicle kept approaching along the plaintiff's lane. Plaintiff reduced speed and swerved to his right side of the road to avoid the oncoming vehicle. At the same time, the insured vehicle swerved back to its right lane of travel and a collision between the two vehicles occurred on the insured driver's lane.

5.3 Mr Manyatela further testified that immediately prior to the collision, the plaintiff was travelling at a speed of approximately 60-80 kilometres per hour. The plaintiff's vehicle was damaged on the left front fender and the windscreen was shattered. According to Mr Manyatela, there was nothing more that the plaintiff could have done to avoid the collision; he could not swerve the vehicle to his left side as there are bushes and a heap of soil on the left side of the road. The visibility was clear except that it was dark.

5.4 Under cross-examination, Mr Manyatela testified that he was watching the road during their travel and that the gravel road was wide enough to accommodate three vehicles. Mr Jonathan Manyatela was with them at the wedding but he drove past them whilst they were filling up petrol at the petrol station. The insured driver did nothing to attempt to avoid the collision.

The plaintiff closed his case.

[6] The insured driver Mr Frans Thema and one of the occupants of the insured vehicle Mr Sello Robert Ringane testified on behalf of the defendant.

6.1 **Mr Frans Thema** ("the insured driver") testified that on 6 June 2010, he was the driver of the motor vehicle, a Nissan Tonner travelling from Kadjibane village to Modimolle. Prior to departing, he claims to have done a pre-trip inspection and all was well including the lights. He was travelling with two passengers in his vehicle. The road he was travelling along was gravel with a width which could accommodate three vehicles. From Kadjibane, a Mazda vehicle drove past him on the opposite side of the road and towards the opposite direction. He then noticed the lights of another vehicle travelling from the opposite direction, approximately 50 metres away. When the car was approaching he noticed that the plaintiff's vehicle was travelling along his lane of travel. The insured driver flicked the lights twice to warn the oncoming vehicle. The vehicle kept on coming and when it was 20 metres away, Mr Thema, on realising that the vehicle was not moving to its correct lane of travel, applied brakes.

6.2 The insured driver testified that he decided not to swerve to his right side (the plaintiff's lane of travel) in case the plaintiff also swerves to his correct lane of travel. He also did not want to swerve to the other lane because he did not want the collision to occur on the wrong lane of his travel as he would be blamed for causing the accident. The two vehicles collided on the insured driver's lane of travel.

6.3 The insured driver testified that prior to the accident, he was travelling at a speed of approximately 70 kilometres per hour. He was adamant that the headlights in his vehicle were in good working condition; because prior to departing from Kadjibane he did a pre-trip inspection of the vehicle.

6.4 After the collision, the insured driver and his passengers went to the plaintiff's vehicle and assisted the occupants out of the vehicle. There were babies crying in the plaintiff's vehicle. Police were summoned and the insured driver and his passengers were taken to Modimolle hospital in an ambulance.

6.5 Under cross-examination, Mr Thema testified that the visibility on the road was dark as it was in the evening. He also confirmed that he did give a statement to the police on how the incident occurred even though the statement was not in the police docket. He conceded under cross-examination that he did not swerve his vehicle to the other lane in an attempt to avoid the collision because if the collision would have occurred on the wrong lane of his travel he would have been blamed as the negligent driver. According to the insured

driver, the wrong negligent party is the plaintiff due to the fact that the accident occurred on his (insured driver's) lane of travel. At the time of the accident, the insured driver possessed a valid learner's driving licence and not a valid driver's licence.

[7] **Mr Sello Robert Ringane's** evidence can be summarised as follows:

7.1 On 6 June 2010, in the evening, he was a passenger in a Nissan Tonner vehicle being driven by the insured driver. They were travelling from Kadjibane village on their way to Modimolle. He was seating in the middle front seat of the vehicle. They were travelling on a gravel road with a width which could accommodate four vehicles. The road was flat. From Kadjibane he noticed, a Mazda vehicle driving towards the opposite direction which drove past their vehicle.

7.2 Approximately 5-10 minutes after the Mazda vehicle had driven past, he noticed the lights of another vehicle approached also from the opposite direction, but Mr Ringane could see from its lights that the oncoming vehicle was travelling on the insured driver's lane of travel. He alerted the insured driver about this oncoming vehicle and the insured driver flicked the lights at the oncoming vehicle to warn the driver and reduced his speed. When the plaintiff's oncoming vehicle got nearer, Mr Ringane commented to the insured driver that he doubted that the plaintiff's vehicle would move to the correct lane.

7.3 Mr Ringane, when he saw the imminent collision, lifted his feet and put them on the dashboard and the two vehicles collided on the insured driver's lane. After the collision, Mr Ringane and the insured driver rushed to the plaintiff's vehicle to assist in taking out the occupants of the vehicle. Mr Ringane disputed that Mr Thabo Ephraim Manyatela was a passenger in the plaintiff's vehicle. He testified that he saw Mr Manyatela driving the Mazda vehicle which drove past them prior to the collision. The plaintiff was sitting with a female passenger in the front seat. Three ladies and two babies were seated at the back seat. Mr Ringane summoned the police and the injured people were taken to the hospital in an ambulance.

7.4 The collision occurred just outside the Kadjibane village and the plaintiff's relatives came with blankets to the scene of the accident and covered the injured people with blankets. Mr Ringane sustained injuries to his forehead because he hit the windscreen with his forehead when the collision occurred.

7.5 Under cross-examination Mr Ringane confirmed the insured driver's ground for not swerving to the opposite direction in an attempt to avoid the collision being that the insured driver was on his correct lane of travel and to swerve to the right side or middle of the road would attract the blame should the collision have occurred on the plaintiff's correct lane of travel. Although he testified that the width of the road could accommodate four vehicles, he was adamant that the insured driver could not have swerved to the right to avoid the collision. Despite the road being wide enough, Mr Ringane was adamant that the insured driver could not have done any other thing to avoid the collision.



[8] It is common cause between the parties that the accident occurred on the evening of 6 June 2010 between the vehicle being driven by the plaintiff and the vehicle being driven by the insured driver. The collision occurred along a gravel road on the insured driver's lane of travel and the two vehicles were travelling towards opposite directions.

[9] The issues to be determined by the court are the following:

- a) Whether the insured driver was negligent;
- b) Whether the plaintiff was negligent;
- c) The apportionment of negligence, if applicable.

[10] Both the insured driver and the plaintiff are adamant that they were both travelling on their correct lane of travel. The plaintiff's witness testified that the plaintiff swerved to his right side, to avoid the insured driver's vehicle which was travelling on the plaintiff's lane of travel. Both the plaintiff and his witness testified that the plaintiff swerved to the right side, to avoid the insured driver's vehicle which was travelling on the plaintiff's lane of travel. Both the insured driver and his witness testified that the insured driver was travelling on his right lane of travel, and noticed the plaintiff's vehicle from a much longer distance travelling on the wrong lane. They both confirmed that despite noticing the plaintiff's vehicle approaching on their lane of travel, the insured driver could not swerve towards his right hand side to avoid the collision occurring on his right hand side because then the insured driver would be blamed because the collision would have occurred on his incorrect lane of travel. No

expert evidence was led which could have assisted the court in determining exactly how the collision occurred.

[11] The versions of the plaintiff and the insured driver are irreconcilable in material aspects regarding how the collision occurred and are mutually destructive. The success of the plaintiff's case is predicated upon a finding that the insured driver was driving on the incorrect lane of travel and by swerving to his right lane of travel at the same time the plaintiff was swerving to his right side in an attempt to avoid the collision.

[12] Plaintiff and his witness corroborated each other regarding the manner in which the collision occurred. They both confirmed that the lights of the insured vehicle were defective and the insured vehicle could be seen from a distance beyond 7-10 meters. Save for the discrepancies on whether the plaintiff applied brakes or hooted for the insured driver, they both corroborated each other regarding the actions taken by the plaintiff in an attempt to avoid the collision.

[13] Both the insured driver and his witness were evasive when answering questions and elaborated on irrelevant issues not being asked. The insured driver's witness contends that the plaintiff's witness was not a passenger in the plaintiff's vehicle despite the plaintiff's witness name being recorded as such in the police accident report. This testimony was not disputed under evidence-in-chief and during cross-examination of the plaintiff's witness. There is contradictions on the part of the insured driver and his witness: the fact that the witness alerted him of the oncoming

vehicle twice; the witness's evidence that the plaintiff's relatives came to the scene of the accident and put blankets on the injured people.

[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**<sup>1</sup> 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;*

*14.1.3 the probabilities.*

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

*i) the witness's conduct and demeanour 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 versions;*

*vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or event.*

---

<sup>1</sup> 2003 (1) SA II SCA at paragraph (5)

14.3 A witness' reliability will depend in addition to the aforesaid factors mentioned above and on:

- i) the opportunity he had to experience the event in question;
- ii) the quality, integrity and independence of his 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 and 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 in 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 opinions 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 WesselsJA in **National Employers' Mutual General Insurance Association v Gany**<sup>2</sup> is to the effect that "where there are two stories mutually destructive, before the onus is discharged, the court must be satisfied upon

---

<sup>2</sup> 1931 AD 187 at 199

*adequate grounds that the story of the litigant upon whom the onus rest is true and the other false”.*

[17] 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 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 Jagers**<sup>3</sup>).

[18] The plaintiff *in casu* appeared to be basically honest and there is no reason for preferring the insured driver as being better or more reliable witness than the plaintiff. I found both the plaintiff and his witness to be more reliable witnesses than the insured driver and his witness. On the evidence before me, the plaintiff's version is clear; he observed the insured vehicle on his lane of travel, attempted to warn him, attempted to avoid the collision by swerving towards his right hand side as he could not swerve to his left side due to heaps of soil.

[19] The insured driver's version of how the collision occurred is in my view improbable for various reasons. It is improbable for the insured driver to observe the plaintiff's vehicle at a very far distance but, failed to avoid the oncoming vehicle on

---

<sup>3</sup> 1984 (4) 432

the insured vehicle's lane of travel to another part of the road when there was enough chance to avoid the collision. The insured driver's version is that the collision was reasonably foreseeable and preventable but he chose not to avoid it. The probability is that the insured driver was driving on the plaintiff's lane of travel prior to the collision.

[20] I therefore find the plaintiff's version on how the accident occurred to be more probable and that the insured driver was negligent.

### **Contributory negligence**

[21] 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 centre 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.

[22] 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 take at least three steps. The driver would brake, moves his motor

vehicle to the left as far as possible and would 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.

[23] *In casu*, even if the insured driver's testimony is accepted that the plaintiff was on the incorrect side of the road, he remained passive in the face of a threatening danger. The plaintiff's counsel<sup>4</sup> submitted that the insured driver has largely contributed towards the collision and damages should therefore be apportioned at 90% to 10% against the defendant.

The defendant's counsel<sup>5</sup> submitted that an apportionment should be at 50% against the plaintiff.

[24] 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 only observed the insured vehicle when it was relatively close to him. He could not move his vehicle to the left due to the heap of soil and bushes on his left side of the road. There is no evidence that he hooted repeatedly not did he brake his vehicle. In my view, the plaintiff's negligence should be assessed at 20% and the insured driver's negligence at 80%.

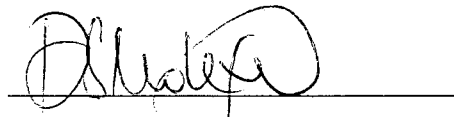
---

<sup>4</sup> Adv. M S Mangolele

<sup>5</sup> Adv. K L Mmanasoe

[25] *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 80% 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.*



---

**D.S. MOLEFE**  
**JUDGE OF THE HIGH COURT**



**APPEARANCES:**

**Counsel on behalf of Plaintiff : Adv. M S Mangolele**

**Instructed by : Maubane Attorneys**

**Counsel on behalf of Defendant : Adv. K L Mmanasoe**

**Instructed by : TsebaneMolaba Inc.**

**Date Heard : 19 & 20 May 2014**

**Date Delivered : 30 May 2014**