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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.

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DATE

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SIGNATURE

Case Number: 3819/2013

CORAM: MOLEFE J

DATE HEARD: 30 AND 31 JULY 2014

DATE OF JUDGEMENT: 14 AUGUST 2014

In the matter between

ANDREW WITNESS TSHABALALA

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

JUDGEMENT

MOLEFE J:

[1] On 12 June 2011 along the R510 Thabazimbi / Rustenburg Road, Northam an accident occurred involving a motor vehicle being driven by Mr M. Ramono (“the insured driver”) and a motor vehicle being driven by Mr A.W. Tshabalala (“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, by agreement between the parties an order was made to separate the issues of liability (“merits”) and quantum in terms of Rule 33(4). The trial proceeded on the issue of liability and the issue of quantum was postponed *sine die*.

[4] The defendant in its plea on merits denied that the insured vehicle collided with the plaintiff’s vehicle, alternatively, in the event that the court found that the collision took place, denied any negligence on the part of the insured driver and that the sole cause of the collision was the negligent driving of the plaintiff.

[5] Three witnesses testified on behalf of the plaintiff and the insured driver was defendant’s only witness.

5.1 **Mr Andrew Witness Tshabalala** the plaintiff, testified that on 12 June 2011 at approximately 19:00, he was the driver of a Nissan Hardbody motor

vehicle bearing registration numbers H[...]. He was travelling along the R510 road on his way to Brits from Thabazimbi. He was travelling with a colleague, Mr Kabelo Sekwe, who was sitting on the passenger seat. He was travelling at a speed of approximately 80 km/ph and his lights were on. It was dark as it was in the evening and the road is a tarred single carriage with a single lane to each direction.

5.2 The plaintiff testified that he saw the lights of an oncoming vehicle ("the insured vehicle") travelling from the opposite direction. The lights were high as if the insured vehicle was flying. He could even see the vehicle's undercarriage. The plaintiff tried to swerve his vehicle to the left in an attempt to avoid the oncoming vehicle but the insured vehicle collided with the frontal part of his vehicle. He lost consciousness after the collision and when he regained consciousness, he was at Thabazimbi Hospital. He sustained severe injuries from the collision and was transferred to Kalafong Hospital. The plaintiff's vehicle was extensively damaged; on the frontal part, the radiator, the engine and the driver's door and the windscreen was shattered. The car was written off as it was uneconomical to repair it.

5.3 Under cross-examination plaintiff testified that when he first saw the insured vehicle when it was approximately 20 meters away and was approximately 8 meters high. He testified that in addition to swerving his vehicle to the left in an attempt to avoid the oncoming insured vehicle, he also reduced his speed.

Plaintiff was cross-examined on the discrepancy between this testimony in chief and the statement he gave to the police. In his statement to the police

he testified that the insured vehicle first collided with a cow before it collided with his vehicle. Plaintiff testified under cross-examination that he never saw the insured driver colliding with the cow but heard about the insured driver's collision with the cow from his passenger, Mr Sekwe after the accident. He denied that he collided with the cow and not the insured vehicle and that there was cow hide on his vehicle after the collision.

6. **Mr Kabelo Selby Sekwe**, testified that he was the passenger in the plaintiff's vehicle on 12 June 2011 and his testimony can be summarised as follows:

6.1 On 12 June 2011 at approximately 19h00, he was a passenger in a Nissan Hardbody vehicle, driven by the plaintiff. They were travelling from Thabazimbi where they had been attending a meeting and were on their way to Brits, travelling along the R510 road. It was dark but he could see from the lights of the plaintiff's vehicle.

6.2 He saw the insured vehicle approaching from the opposite (Rustenburg) direction driving at a high speed and it was flashing its lights. The insured vehicle hit a cow which was reddish in colour, which was standing on its lane of travel, became airborne from the impact of the collision with the cow, lost control and came and collided with the plaintiff's vehicle. Mr Sekwe heard a loud banging sound from the impact of the collision. This happened so fast.

6.3 Mr Sekwe lost consciousness and he regained consciousness the following day at Thabazimbi hospital. He could not see the model of the insured vehicle prior to the collision but heard that it was a BMW vehicle from a colleague, Mr Mokgoba who was travelling in front of them on that evening.

He denied that the plaintiff's vehicle collided with a cow and not the insured vehicle.

6.4 Under cross-examination, Mr Sekwe testified that the plaintiff's vehicle was hit on the frontal part but more on the driver's side. The insured vehicle cleared the vehicle which was in front of the plaintiff's vehicle before it collided with the plaintiff's vehicle. Mr Sekwe was cross-examined on the discrepancy between the plaintiff's testimony and his testimony that the plaintiff did not reduce speed but only swerved to the left in an attempt to avoid the collision and he confirmed that the plaintiff did reduce speed when he swerved to the left.

[7] **Mr Ramohale Mokgoba**, testified that on the day of the collision he was driving his vehicle in front of the plaintiff and his evidence can be summarised as follows:

7.1 On 12 June 2011 at approximately 19h00, Mr Mokgoba was driving his vehicle along the R510 road from attending a meeting with the plaintiff and Mr Sekwe in Thabazimbi and was on his way to Brits. The plaintiff was driving behind him and he was travelling at a speed of approximately 90 km/ph. Around Northam, Mr Mokgoba saw the insured vehicle travelling from the opposite direction airborne and coming towards his vehicle. He could see the undercarriage of the insured vehicle whilst on air. He swerved his vehicle to the left onto the gravel road and the insured driver flew over his vehicle, before Mr Mokgoba stopped his vehicle.

7.2 He saw the insured vehicle through the rear view mirror colliding with the plaintiff's vehicle behind him. He went out of his vehicle to investigate and found the insured vehicle overturned next to the plaintiff vehicle with its wheels facing up. The nose of the insured vehicle was facing the driver's door of the plaintiff's vehicle with most of the vehicle on the plaintiff's lane of travel. The plaintiff's vehicle was still on its lane of travel but slightly out of the tarred road to the left.

7.3 The damages to the plaintiff's vehicle were on the frontal part, windscreen, the right fender had shifted to the back and on the driver's door. The grill, bonnet and chassis were bent. The plaintiff and his passenger were taken out of their vehicle through the passenger door as the driver's door could not open due to its damages. They were both unconscious and were laid on the ground on the side of the road and covered with blankets.

7.4 Mr Mokgoba testified that he only noticed after the collision that the insured vehicle had first collided with a reddish brown cow which was lying on the insured driver's lane of travel, causing the car to lose control and to collide with the plaintiff's vehicle. He never saw the actual collision of the insured vehicle with the cow but saw people coming from the nearby farms cutting meat from the dead cow after the collision. Mr Mokgoba visited the plaintiff and Mr Sekwe at Thabazimbi hospital the same night and the following day and discussed the accident with them.

7.5 Under cross-examination, Mr Mokgoba testified that he never saw the insured vehicle flashing lights prior to the collision and never spoke to the

insured driver after the accident. He never gave a statement to the Police as the police did not approach him for a statement.

[8] The insured driver **Mr Mmusi Ramono** was the only witness for the defendant and his testimony can be summarised as follows:

8.1 On 12 June 2011 at approximately 19h00, he was the driver of a BMW motor vehicle, and was travelling alone. He was driving along the R510 road from Moruleng to Notham and it was dark as it was in the evening. He was travelling at a speed of 100 km/ph and there were no oncoming vehicles along the road. He suddenly collided with something but at that time he did not know what it was because he did not see it prior to the collision. Due to the impact he lost control of his vehicle and the vehicle overturned and landed on the left side of his lane of travel.

8.2 After he struggled to get out of the overturned vehicle he noticed that he had collided with a cow. He also noticed a bakkie (plaintiff's vehicle) on his right side and there was cow hide on the bakkie's bonnet and windscreen. Mr Ramono testified that he had altercation with one of the occupants from the plaintiff's vehicle and showed the person the traces of cow hide on their vehicle. The cow "looked like" it was black in colour and it was dead when he collided with it. He never collided with the plaintiff's vehicle.

8.3 Under cross-examination Mr Ramono testified that although the cow was on his lane of travel, he never saw it although his lights were on. He confirmed that the plaintiff's vehicle was facing the Rustenburg direction (the insured driver's opposite direction) and was on its lane of travel.

[9] It is common cause between the parties that the accident occurred on the evening of 12 June 2011 along the 510 Rustenburg/Thabazimbi road and that the two vehicles were travelling towards opposite directions. 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] 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, after colliding with a cow on his lane of travel, lost control of his vehicle, and collided with the plaintiff's vehicle on the plaintiff's lane of travel.

[11] Plaintiff and his witnesses corroborated each other regarding the manner in which the collision occurred. All three of them saw the oncoming insured vehicle from a distance, airborne and colliding with the plaintiff's vehicle. Plaintiff and Mr Mokgoba confirmed that they did not see the cow nor the collision between the insured driver and the cow. The passenger in the plaintiff's vehicle was the only one who saw the cow before the insured driver collided with it on his lane of travel. Plaintiff and his two witnesses corroborated each other regarding the insured vehicle which was in the air and they all could see its undercarriage. Save for the discrepancies on whether the plaintiff applied brakes and whether the insured driver flashed lights, the plaintiff and his passenger witness corroborated each other

regarding the actions taken by the plaintiff in an attempt to avoid the collision. Plaintiff and his witnesses were consistent in their testimonies regarding the damages to the plaintiff's vehicle and that the plaintiff and his passenger were unconscious after the collision. I find the plaintiff and his witnesses credible and reliable.

[12] The insured driver testified that he did not see the cow prior to colliding with it although his lights were on. He only realised after the collision that he had collided with the cow. He denies colliding with the insured vehicle and only saw the plaintiff's vehicle after the accident as there were no oncoming vehicles on the road. This is despite the fact that the plaintiff and Mr Mokgoba were travelling along the same road at the time of the accident. Although both occupants of the plaintiff's vehicle were unconscious after the accident, the insured driver testified that he had an altercation with one of them after the accident. Although the insured driver did not see the cow prior to the collision, he knew that the cow was dead when he collided with it.

I find the insured driver to be unreliable with contradictions to the established facts.

[13] 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:

13.1 Findings must be made on:

¹ 2003 (1) SA 11 SCA at paragraph (5)

13.1.1 *the credibility of the various factual witnesses which depends on a court's impression about the veracity of the witnesses;*

13.1.2 *their reliability;*

13.1.3 *the probabilities.*

13.2 *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.*

13.3 *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.*

13.4 *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.*

13.5 *In light of its assessment of the factors in 13.2 and 13.4 above, a court should then, as a final step, determine whether the party burdened with the onus of proof, has succeeded in discharging it.*

13.6 *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.*

[14] The test propounded by Wessels JA in **National Employers' Mutual General Insurance Association v Gany**² is to the effect that "*where there are two stories mutually destructive, before an 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*".

[15] In a civil case 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**³).

[16] The plaintiff *in casu* appeared to be basically honest and there is no reason for preferring the insured driver as being a better or more reliable witness than the

² 1931 AD 187 at 199

³ 1984 (4) 432

plaintiff. I find both the plaintiff and his witnesses to be more reliable witnesses than the insured driver. On the evidence before me, the plaintiff's version is clear: he observed the insured vehicle airborne coming towards his vehicle, attempted to avoid the collision with the insured vehicle by swerving his vehicle to the left side but the insured vehicle collided with his vehicle on the right frontal part.

[17] The insured driver's version of how the collision occurred is in my view flawed and unreliable in that (i) he failed to see a cow (huge beast) which was standing on his lane of travel although his lights were on; (ii) he testified that there were no oncoming vehicles on the road prior to the collision although there is evidence that there were at least two oncoming vehicle; (iii) he testified that just felt like "he drove over something" when he actually collided with a huge beast; (iv) he testified that he knew that the beast was dead when he hit it, although he did not see the cow prior to the collision; (v) he testified that he had an altercation with one of the occupants in the plaintiff's vehicle although both occupants were unconscious after the collision and only regained consciousness at the hospital; (vi) although the windscreen of the plaintiff's vehicle was shattered from the collision he testified that there was cow hide on the windscreen.

[18] The insured driver's version of how the collision occurred is in my view improbable. The probability is that the insured driver was driving at a high speed, failed to pay proper attention, collided with a huge cow which was standing on his lane of travel, due to the impact of the collision, the insured vehicle was caused to be airborne, flew over the oncoming vehicle driving in front of the plaintiff's vehicle and collided with the plaintiff's. The damages on the plaintiff's vehicle are consistent with the plaintiff's version on how the accident occurred.

I therefore find the plaintiff's version on how the accident occurred to be more probable.

Contributory negligence

[19] 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 if 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 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.

[20] In *casu*, it is common cause that the insured driver lost control of his vehicle after he collided with the cow and was in all probabilities on the incorrect side of the road. The plaintiff did not remain passive but swerved to the left to avoid the insured vehicle which was in the air. It must have been difficult for the plaintiff to determine where the airborne vehicle would land.

[21] I am unable to find any negligence whatsoever that can be attributed to the plaintiff. The negligence of the driver of the insured vehicle was the sole cause of the collision. In the circumstances, I find that the plaintiff has successfully

discharged the *onus* expected of him of proving negligence on a balance of probabilities, on the part of the insured driver.

[22] I therefore make the following order:

The defendant is liable to pay 100% of the plaintiff's proven or agreed damages.

D S MOLEFE
JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel on behalf of Plaintiff	:	Adv. W Phiega
Instructed by	:	Mashapa Attorneys

Counsel on behalf of Defendant : Adv. Lusenga

Instructed by : **Iqbal Mahomed Attorneys**