

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

Case No.: 24047/11

Date: 26 September 2014

Not reportable

Not of interest to other judges

In the matter between:

LORATO PRECIOUS SEBOKOLODI

Plaintiff

And

ROAD ACCIDENT FUND

Defendant

JUDGMENT

MNGQIBISA-THUSI J:

1. The plaintiff instituted an action for damages against the defendant arising from injuries she sustained in a collision which occurred on 20 October 2006 along the Bothaville and Orkney Road. The collision involved a motor vehicle bearing registration number B[...], driven by the insured driver and motor vehicle bearing registration number F[...], being a taxi in which the plaintiff was a passenger.

2. At the start of the hearing, the parties had agreed on the following facts:

2.1 that the relevant collision took place on the 20th October 2006 as per Accident Report;

2.2 that the plaintiff was conveyed as a passenger in a taxi wherein the driver was Mr Mere;

2.3 that the insured driver is Mr Van der Merwe;

2.4 that the police photographs are to be handed in by agreement;

2.5 that the damages on the two vehicles are as reflected on the photographs;

2.6 that the position of the two vehicles where they ended up after the collision are as per the photographs;

2.7 that the insured driver had the intention to turn right immediately before the collision; and

2.8 that the two vehicles involved in the collision were both travelling in the same direction immediately before the collision took place.

3 An order separating the merits from quantum in terms of rule 33(1) was granted.

4 The issues to be determined are the following:

4.1 where the point of impact was; and

4.2 whether the insured driver was negligent.

5 Lerato Sebokolodi, the plaintiff, testified as follows. On 20 October 2006 she was a passenger in a taxi, bearing registration number FKW 409 NW, travelling from Bothaville towards Orkney. She was seated in the front left seat. As they were travelling, her head was bent down as she fell asleep. There was a bakkie (driven by the insured driver) travelling slowly in front of them. As she was dozing off and not paying much attention, she felt the taxi swerving from right to left (making a zig-zag motion). When she looked up she saw the bakkie, which was travelling in front of them, looking like it was about to turn right. Suddenly she heard a sound. She could not remember anything about how the taxi and bakkie collided. As a result of the collision she sustained certain injuries.

6 Under cross-examination the plaintiff admitted that she did not actually see how the collision happened. She testified that she woke up as the taxi was swerving from the right to left. At the time she thought that the taxi was trying to overtake the bakkie although she did not see the taxi driver giving an indication of his intention to overtake. On being confronted with what she stated in paragraph 3 of her statement to the police (dated 30 January 2008), which reads as follows:

“Terwyl die voertuig gery het, het ek h bakkie voor die voertuig gesien wat stilgehou het en besig om na regs te...”

she denied that the bakkie was stationary.

7 Curiously plaintiff testified that when she made that statement to the police and signed it, she was still drowsy. On re-examination the plaintiff stated that she narrated her statement in Setswana and it was written in Afrikaans by the police officer who took her statement and that it was never read back to her.

8 The next witness called by the plaintiff was Warrant Officer Jan Hendrik de Bruyn (“De Bruyn”). He was the police officer who took photographs of the scene of the collision 1-2 hours after the collision happened. In his evidence De Bruyn explained the scene as depicted on the photographs he took which were in Bundle 5 pages 121 to 124. De Bruyn described the road as a dual road with two single lanes in the opposite direction. According to De Bruyn the point of impact was on the wrong side of the road on which the taxi and the bakkie were travelling, being on the lane of on-coming traffic. The point of impact was depicted as ‘B’ of photo 1. After the collision, the taxi landed on its back across the lane in which the two vehicles were travelling and the bakkie was facing in the opposite direction, on the curb of the lane of on-coming traffic. He surmised that the reason the bakkie was facing the opposite direction after the collision is that when the two vehicles collided, it was already across the barrier line. He testified that the point of impact was beyond the turn-off. He testified that the damage to the bakkie was on the right rear end, more towards the vehicle’s fender.

9 Under cross-examination De Bruyn conceded that he was not mechanically skilled to draw a conclusion as to where the point of impact could be. He testified that the point of impact as indicated was what he presumed based on the road-markings he found after the collision. He further testified that he could not confirm that the brake marks on the photos were of either of the two vehicles involved. He also conceded that the skid marks leading to where the bakkie landed could possibly have been caused by the bakkie. He surmised that when the taxi hit the bakkie, the bakkie must have been in the process of turning right and was not stationary.

10 From questions asked by the Court he testified that the point of impact could be just before the turnoff to the right. Further that when the taxi hit the bakkie it was in the process of turning.

11 The defendant called Mr Japie van der Merwe (“Van der Merwe”) the driver of the insured car to testify and his evidence is as follows. He was travelling from Bothaville to Orkney. On the way, approximately 10km before Orkney, there is a right turn which he intended taking. When he was about 20m from the turn-off, he had indicated his intention to turn right and had also reduced his speed. At the turn-off he turned his wheels to the right and waited for cars coming from the opposite direction in the parallel lane to pass. After the last vehicle passed, as he was preparing to turn, he looked at his rear-view mirror and saw a vehicle approaching from behind. He decided to accelerate on to the lane of oncoming traffic in order to avoid the

vehicle coming from behind from colliding with his vehicle. It was, however, too late as the vehicle collided with the rear of his vehicle. As a result of being hit, his vehicle spun around, landing on the curb of the opposite lane, facing the direction from which he was coming.

12 Under cross-examination Van der Merwe testified that by the time he saw the taxi behind him approaching at high speed it was too late. He conceded that as he was waiting for the on-coming vehicles to pass, he focused more on them and did not check his rear-view mirror until all the vehicles going in the opposite direction had passed. He further conceded that as a diligent driver he should have looked at his rear-view mirror at reasonable intervals for the distance of about 10km and not only at the stage when he decided to turn. He further conceded that it was possible that by the time he looked his rear-view mirror, his front wheels might have crossed the barrier line which was at the turn-off.

13 The next witness called by the defendant is Mr Gerard Lemmer (“Lemmer”) an accident reconstructionist. He testified as follows. Having considered the photos taken at the scene and statements made by the drivers of the vehicles involved and by some of the passengers, in his opinion, the point of impact was not where De Bruyn indicated but where there was debris of the windscreen of the taxi. Further, in his opinion, when the taxi hit the bakkie, the bakkie was at an angle with its back still on the correct lane. He testified that from the skid marks on the road and from the plaintiff’s evidence that just before the collision the taxi swerved from right to left, it is possible that the taxi was trying to overtake the bakkie, but when the driver of the taxi realised that this was not possible, he must have swerved to the left, hitting the bakkie at its right rear and the taxi being damaged on its right side.

14 Under cross examination Lemmer admitted that he did not attend the accident scene. He maintained that in view of the direction of the skid marks, which were moving into the left lane, it is clear that the front part of the bakkie was over the barrier line, despite Van der Merwe’s evidence that he had accelerated. On being asked if an assumption can be made, taking into account the damage on the right front of the taxi, that the right portion of the taxi was on the oncoming lane, Lemmer indicated that the right wheel of the taxi was on the left side of the white line. He further testified that looking on the tyre marks made by the taxi it is possible that the driver of the taxi had the intention to overtake the bakkie, changed his mind and swerved back to the correct lane. He further testified that based on the evidence of the plaintiff that there was a zig-zag (right to left) movement by the taxi, the veering of the taxi to the left was a driver action and not as a result of the collision. He further testified that it would have taken the driver of the bakkie a longer time to turn left in order to try avoiding the collision.

15 Counsel for the plaintiff contended that the point of impact is on the lane of oncoming traffic (point ‘B’ of the photo 2 of the scene of the accident). This contention is based on the assertion that the collision occurred whilst the driver of the taxi was overtaking the bakkie. On behalf of the defendant it is contended that the

point of impact was where the debris of the taxi's windscreen was found in that there are also skid marks made by the taxi as it swerved to the left.

16 The only eye-witness as to how the collision occurred is the plaintiff and Van der Merwe. However, the plaintiff's only contribution as to what happened just before the collision occurred is that she had fallen asleep when she felt the taxi making a right to left and left to right movement (in her evidence she described it as a 'zigzag' movement). She could not testify whether the taxi driver was trying to overtake the bakkie, and if he was, whether he had given the necessary signal indicating his intention to overtake. The driver of the taxi did not testify. Although he was served with a subpoena, he did not attend court. The plaintiff relies on the evidence of De Bruyn, the police officer who attended the scene one to two hours after it occurred. In his opinion, the point of the impact was on the lane of oncoming traffic in the opposite direction, indicative of the fact that the driver of the taxi might have been overtaking the bakkie at the time of the collision.

17 Van Der Merwe, the driver of the bakkie, testified that before the collision he was stationary as he intended to turn right and was waiting for the oncoming traffic on the right lane to pass. He looked at his rear-mirror after the last car had passed and saw the taxi coming behind him at a speed. He then tried to accelerate onto the oncoming lane but was hit on the left rear of his vehicle. His further evidence was that from Bothaville he only looked at his rear-view mirror only at the time he intended to turn to the right and it was only at that stage that he saw the taxi coming behind him.

18 It is common cause that after the collision the taxi landed on its back on the curb of the left lane and that the bakkie, as a result of the impact, had spun around, landing on the curb of the oncoming lane, facing the opposite direction.

19 I am of the view that it is more probable that the point of impact was where the white debris of the windscreen was found. It is unlikely that the point of impact could have been where the plaintiff asserts it was in that, had the two vehicles collided at that spot, the bakkie's tyre marks, as it careened to the right whilst spinning would have been evident from that point. The evidence has shown the marks made by the bakkie start from where the debris lies, moving towards the point where the bakkie landed.

20 A driver who collides with the rear of the vehicle in front of him is *prima facie* negligent unless he can provide evidence that he was not negligent. See HB Kloppers, **The Law of Collision in South Africa** (7 ed) at page 78. It is trite that a driver who intends to turn must not merely signal his or her intention to do so but also look out for traffic approaching or overtaking. In *Bata Shoe Company Ltd (South Africa) v Moss* 1977 (4) SA 16 (W) at 20H-21C, the court held that:

“When the driver of a motor vehicle wishes to turn across an adjoining carriage way at right angles

to his previous line of travel, his proposed action is pregnant with danger. He is about to do something which is inherently hazardous and is therefore fixed with certain important obligations. The first of those is that he must signal clearly his intention to make the turn, and do so in such a manner as to warn approaching drivers, drivers following him, and the driver of any vehicle who may be seeking to overtake him, of the intended change of direction. It is not sufficient, however, that the driver of the vehicle which is about to turn signals his intention to do so, even if the signal is given in good time. His further obligation is to refrain from making the turn until an opportune time, to which the phrase which the Appellate Division has used in that regard. An opportune time in that context is a time when the motorist who wishes to turn can carry out his attention without endangering or even materially impeding the progress of any other person or vehicle lawfully on the road. It is the duty of the driver who wishes to make the turn to satisfy himself by full and careful personal observation that the time is opportune in the sense which I have indicated.”

21 Van Der Merwe’s evidence is that for the 10km stretch from Bothaville he did not look at his rear-view mirror until when he intended to turn right along the road, at which stage it is only then that he saw the taxi behind him. I am of the view that had Van Der Merwe looked at his rear-view mirror constantly as expected from a diligent driver, he would have seen that the taxi was driving behind him and would have, in all probability, indicated his intention to turn right long before he reached the turn off. The road along which the two vehicles were travelling had a single lane on each side and the taxi was closely following him. Van der Merwe’s failure to keep a proper lookout for vehicles coming from behind contributed to the cause of the collision. However, the driver of the taxi, who was coming from behind, should have seen the bakkie signalling its intention to turn right at the turn-off and should have taken appropriate evasive action to avoid colliding with the bakkie from the rear. I am therefore of the view that the driver of the bakkie was also negligent. From the facts before the court there is no evidence that the driver of the taxi was overtaking the bakkie.

22 Taking into consideration all the facts before me, I come to the conclusion that the driver of the taxi was the main cause of the accident. However, the insured driver also contributed to the collision in not checking for traffic behind him as he was driving. Had he done so, he might have seen the taxi and could have had the opportunity to swerve to the left and avoid being hit by the taxi. I have apportioned negligence against the insured driver of 10% and against the taxi driver 90%. However, in view of the fact that the plaintiff was a passenger in the taxi, she needs to prove only 1% negligence against the insured driver. Therefore the defendant is liable to pay 100% of the plaintiffs proven damages.

23 With regard to costs, I am not convinced that a higher scale than normal should apply. As submitted by counsel for the defendant, the defendant needed an opportunity, in view of the *Mvuvu* matter and the

transitional provisions, to weigh its options whether or not to make an offer to the plaintiff. However, I am satisfied that the employment of a senior-junior counsel was necessary.

24 Accordingly the following order is made, that:

1. the merits and quantum are separated in terms of Rule 33(4);
2. the defendant is ordered to pay 100% of the plaintiffs agreed or proven damages;
3. the defendant pays the plaintiff's taxed or agreed party and party costs, which costs will also specifically include, but not be limited to:
 - 3.1 the costs of senior-junior counsel up to and including the two day trial up to 06 March 2014, with specific inclusion of the pre-trial agenda, attendance and minutes within the discretion of the taxing master;
 - 3.2 reasonable costs of the correspondent on a high court scale where, in the opinion of the taxing master, the attorney shall be remunerated on the basis as set out in the tariff for the work necessarily done.
 - 3.3 the plaintiff and Mr Jan De Bruyn are declared necessary witnesses for purposes of attendance of the court proceedings.
4. In the event that costs are not agreed upon the plaintiff agrees as follows:
 - 4.1 the plaintiff shall serve the notice of taxation on the defendant's attorneys of record; and
 - 4.2 the plaintiff shall allow the defendant 14 (fourteen) court days to make payment of the taxed costs.
5. The issue of quantum is postponed *sine die*.

NP Mngqibisa-Thusi

Judge of the High Court

Appearances:

For the plaintiff: Adv Scholtz

Instructed by: Podbielski Mhlambi Inc

For the defendant: Adv Molai

Instructed by: Maponya Incorporated