REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 17515/2013

DATE: 26 SEPTEMBER 2014

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

DANIEL MOFOKENG **PLAINTIFF**

And

ROAD ACCIDENT FUND **DEFENDANT**

JUDGMENT

THOBANE AJ,

[1] The plaintiff in this matter issued summons against the Road Accident Fund, the defendant, for damages arising out of a motor collision that occurred on the 29th July 2011 at about 19:30 on the Baragwanath Road or the Old Potchefstroom Road in Soweto.

[2] The defendant defended the matter and denied all forms of negligence. The defendant further pleaded, over and above denial of negligence, by way of three special pleas that;

1. There was non compliance with section 17 as read with Regulation 3 of the Road Accident Fund Amendment Act 19 of 2005,

2. The summons were premature in that the plaintiff had failed to exhaust all processes and available

remedies in terms of Regulation 3;

3. The Court did not have jurisdiction as contemplated in section 17 (1) (b) 1 A) and Regulation 3,of Act 19 of 2005.

The special pleas were not pursued during trial.

[3] At the commencement of proceedings, the parties advised that they had agreed on a separation of issues in terms of the provisions of Rule 33 (4) of the Rules of Court. The matter accordingly, as was ordered, proceeded on the question of liability only and the question of quantum was held over for later adjudication.

[4] It was stated during the opening address that the following issues were common cause and therefore not in dispute;

1. That the accident occurred at about 19h30,

2. The date of the collision being the 29th July 2011,

3. The insured driver is one Sipho Nxumalo who drove a motor vehicle with registration letters and numbers L[...],

4. That the plaintiff was a pedestrian.

[5] The plaintiff was the only witness to testify on his own behalf and he testified thus;

5.1. On the 29th July 2011 he was passenger in a taxi traveling on the Old Potchefstroom Road near Diepkloof. The road on which they were traveling was a dual carriage road however at the traffic lights (robots) it had two shoulders on both sides transforming it into a four vehicle carriage road. The two lanes, in the middel, carrying on straight, the left lane turning to the left and the right lane turning to the right.

5.2.The lanes were for purposes of identification labelled lane 1, for vehicles turning left, lane 2 for the first lane of vehicles proceeding straights, lane 3 for the second lane proceeding straight and finally lane 4 for those vehicles intending to turn to the right.

5.3. He indicated that it was dark but that there were street lights and that he could see with the help of these.

5.4. The taxi in which he was a passenger had been traveling on lane 2. It stopped there and then at

the robots and he alighted therefrom and ended up in lane 1.

5.5. He thereafter went around the taxi he had alighted and passed behind it. He stuck his head out and checked on the right to establish if there were vehicles approaching therefrom. When he could not see any he crossed.

5.6. As he crossed the lanes in a hurry as the road was a busy road, he just heard a bang and the vehicle that emerged from his right, collided with him on the 3rd lane and flung him to the 4th lane where he fell. At that point the robot had been red and he didn't see the vehicle approaching. All he heard were the passengers in the taxi creaming.

5.7. After the vehicle had collided with him it came to a stand still on lane 3. According to him the driver wanted to move however other vehicles would have collided with him. The driver then said to him he had caused him trouble cause he was in a hurry and that they must now take him to the hospital.

5.8. He didn't hear a hooter, didn't hear the screeching of tyres and can not say if the headlamps were on. There were no cars on lane 3 and 4 as he crossed the road in a straight line and not at an angle. The vehicle from which he alighted was a Quantum and so was the one behind it. This means that he emerged and stuck out his head in between two high vehicles.

[6] During cross examination he accepted that the insured driver was driving a VW Golf, that the accident occurred on the Old Potchefstroom Road, that it was on a Friday and that the road is a busy road. He denied that he was weaving amongst cars as he crossed. He didn't cross at the pedestrian crossing as the traffic light was red when he passed behind the taxi he had alighted. When it was put to him that he had not acted like a reasonable person, he indicated that he had been using the road for about 10 years and that he had during that time crossed the road to the other side so as to buy things at the mall.

[7] It was put to him that the version of the driver was similar to his save for three things.

It was put to him that the insured driver agrees that there are 4 lanes, that he was driving towards the robot in lane 3, that it was at about 19:30 in winter, that the road was busy, that the robot was red for him and that because of the red robot he had been driving at about 35km/h. The plaintiff could not dispute all the above. It was further put to him that there is a policeman who will testify that it is "always impossible to speed on that road". He replied that the policeman should be called. He confirmed that he was taken to the hospital by the insured driver.

[8] The plaintiff believed that the insured driver was overtaking other cars. That he was not driving at such

high speed as to jump the red robot but that the speed was high enough for him not to be able to avoid colliding with him. The plaintiff thereafter closed his case.

[9] The insured driver Sipho Nxumalo testified that;

9.1. On the 29th July 2011, at about 19:30 being a Friday, he drove on the Old Potchefstroom Road which is a busy road and which he was very familiar with.

9.2. He was driving from East to West approaching a red robot. He indicated that there are three lanes on the road but that as you approach the robot there is a fourth lane for vehicles intending to turn right. He had been driving at about 35km/h to 40km/h.

9.3. He was already on the lane turning right i.e. the 4th lane, when he noticed the plaintiff in front of him and at that point he was about to turn to the right.

9.4. At that point he had been following other cars and when he was about "half a Quantum", meaning that the front portion of his vehicle was about half the Quantum on his left, the plaintiff emerged between two high vehicles.

9.5. He applied his brakes but nonetheless bumped him and the plaintiff fell in front of his vehicle. He was then asked if he was hurt to which he replied that he was. He was asked if he could be taken to the hospital to which he again answered yes, whereupon he was taken, with the assistance of the insured driver's wife, to Baragwanath Hospital.

9.6. He could not remember the date of the collision. He had switched on his headlamps, there were street lights which were on but there was nothing he could have done to avoid the collision.

[10] During cross examination he indicated that the collision occurred in lane 4. He indicated that the robot was further down and that the collision did not occur at the intersection. The robot was green in his favor and all vehicles were in motion. He was aware that people alight at that spot and cross the road as there is a mall on the other side of the road. Most drivers are aware on that stretch of road that there are people alighting from taxis and crossing the road. He agreed when it was put to him that a reasonable driver should have expected that pedestrians might cross the road on that spot.

[11] He was referred to the accident report which reflected the date of accident as the 5th August 2011. He further testified that although he swerved, it was too late to avoid the collision. The defendant closed its case.

[12] It is trite but must be repeated that the plaintiff always bears the onus of proving negligence on the part of the insured driver on a balance of probabilities. See ***Arthur v Bezuidenhout and Mieny 1962 (2) SA 566***

(AD) at 576G] Sardi and Others v Standard and General Insurance Co Ltd 1977 (3) SA 776 (A) at 780C-H and ***Madyosi and Another v SA Eagle Insurance Co Ltd 1990 (3) SA 442 (E) at 444D-F*.** In its endeavor to determine if the plaintiff has succeeded in discharging this onus, the court must view the entire evidence which was led during the trial in its entirety.

[13] What I am able to discern from the parties' respective cases are the following diametrically opposed versions;

1. The point of impact is not the same;

2. The cause of the collision differs. The version of the plaintiff is that the insured driver appeared to be overtaking and was driving at high speed. The version of the insured driver is that the plaintiff emerged between two high cars which were in motion into his lane where he there and then collided with him.

3. According to the plaintiff the robot was red but the testimony of the insured driver is that it was green.

[14] Both counsel were *ad idem* that the versions before court conflicted with each other and that they were mutually destructive. They further submitted that this is a matter where apportionment should be ordered, although they differed as to the proportion thereof. The correct approach to be adopted when dealing with mutually destructive versions was succinctly set out in the matter of ***National Employers General Insurance Co Ltd v Jagers 1984 (4) SA 437 (E)*** at 440E-441 A, where Eksteen AJP said:

> "*It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily be discharged by adducing credible evidence to support a case of the party on whom the onus rests. 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 in the present case, and where there are two mutually destructive stories, he 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. The estimate of credibility of the witness will therefore be inexplicably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If, however, the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is*

true and that the defendant's version is false.

This view seems to me to be in general accordance with the view expressed by COETZEE, J in ***Koster Koóperatiewe Landboumaatskappy Bpk v Suid-Afrikaanse Spoorwee en Hawens*** *(supra) and* ***African Eagle Assurance Co Ltd v Cayner*** *(supra). I would merely stress, however, that when in such circumstances one talks about a plaintiff having discharged the onus which rested upon him on a balance of probabilities one really means that the Court is satisfied on a balance probabilities that he was telling the truth and that his version was therefore acceptable. It does not seem to me desirable for a Court first to consider the question of the credibility of the witnesses as the trial Judge did in the present case, and then, having concluded the enquiry, to consider the probabilities of the case, as though the two aspects constitute separate fields or enquiry. In fact, as I have pointed out, it is only where a consideration of the probabilities fails to indicate where the truth probably lies, that recourse is heard to an estimate of relative credibility apart from the probabilities."*

[15] In cases where versions are mutually destructive, the Supreme Court of Appeal has given guidance as to the technique. ***Stellenboch Farmers' Winery Group Ltd and Another v Martell Et CIE and Others 2003 (1) SA 11 (SCA),*** where the following is stated at 14I-15G:

"*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)* ***[credibility],*** *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 [s] 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 extra curial statements or actions; (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 (vi) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality and integrity and independence of his recall thereof. As to (c)* ***[probabilities],*** *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 the 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." [Words in square brackets and emphasis added.]

[16] The plaintiff was in my view a credible witness and gave a constant account of how the collision occurred. His testimony that upon alighting from the taxi which had stopped a red traffic light and thereafter went behind it and between it and another taxi stuck his head out to look to his right if there was a motor vehicle approaching, accords with probabilities. The version of the insured driver that the traffic light was on green does not accord with probabilities. So is his evidence that the vehicles were moving. To accept his evidence would mean that the taxi from which the plaintiff alighted was moving when he did so. That then he would have had to stick his head to check to his right, at a time when the taxi behind the one he had alighted from was also moving towards him. This I find to be improbable.

[17] During the cross examination of the plaintiff it was put to him that the version of the insured driver was similar to his save for three things. The three areas of difference were never identified or put to the plaintiff. Significantly, whereas it was put to the plaintiff that the insured driver would say the traffic light was red, when he testified he said the traffic light was green. It was further put to the plaintiff that the collision occurred on lane three. The insured driver's evidence however, was that the collision occurred in lane four. A further contradiction in my view is to be found when the insured driver testified in chief. He indicated that he was the only car on lane 4 (the sleep way), when the collision occurred yet he had testified that he was following other cars. The contradictions as pointed out coupled with the version that was put to the plaintiff but contradicted by the insured driver, point to the unreliability of the defendant's evidence.

[18] On what is expected of a reasonable person, I consider interesting the following evidence that came out during the cross examination of the plaintiff as well as the insured driver.

Mr. Olivier: Why didn't you cross at the robot with a pedestrian crossing?

Plaintiff: The robot was *red when I passed behind the taxi that had stopped.*

Mr. Olivier: If you would have gone left you would have been safe?

Plaintiff: At the robot there are many accidents happening so we use the middle of the road.

Mr. Olivier: I put it to you a reasonable pedestrian would walk to the left, get to the robot and cross over pedestrian lines?

Plaintiff: I didn't do that intentionally.

Mr. Olivier: You did not act like a reasonable pedestrian?

Plaintiff: I acted like a reasonable person, I used that road for about 10 years, we buy on the other side.

The cross examination of the insured driver proceeded as follows:

Mr. Jacobs: Do people alight from taxis to go to the right?

Insured driver: yes.

Mr. Jacobs: How often do pedestrians cross at the robot?

Insured driver: There is a robot at the pedestrian crossing, I did not expect people to come out there.

Mr. Jacobs: All drivers are aware of taxis stopping and passengers crossing the road?

Insured driver: Yes.

Mr. Jacobs: On a busy road a driver must always be careful?

Insured driver: Yes, but I wasn't thinking there will be somebody there. It happened suddenly.

Mr. Jacobs: As a reasonable driver you should have expected that pedestrians might cross the road?

Insured driver: I agree with you.

[19] The above exchanges illustrates the point that both the plaintiff and the insured driver did not act as was expected of a reasonable pedestrian and driver respectively. It is my view that the plaintiff, while he has succeeded in discharging the onus resting upon him, through his negligence, contributed towards the collision. I am mindful of the fact that Old Potchefstroom Road is a busy road, that taxis generally stop at times in an unsafe manner, that there is a mall to which the plaintiff was rushing and that the plaintiff had used that portion of the road for over ten years.

[20] In my view the plaintiff and the insured driver are equally to blame for the collision.

[21] In the circumstances I make the following order:

1. The defendant is 50% (fifty percent) liable for the collision,

2. The defendant is ordered to pay the plaintiff's costs.

SA THOBANE

ACTING JUDGE OF THE HIGH COURT