REPUBLIC OF SOUTH AFRICA

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

CASE NO: A454/13

13/2/2014

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

..... 13/2/14 .....

In the matter between

PW MDLALOSE — APPELLANT

And

AFGRI OPERATIONS LTD — RESPONDENT

JUDGMENT

THULARE AJ

[1] The appellant issued summons against the respondent in the Magistrates Court of Pretoria in respect of damages arising out of a motor collision between his Tazz motor vehicle and respondent's truck driven by one B Makwadikwa, a driver in respondent's employment.

[2] The appellant and his sister testified after which the respondent successfully applied for absolution from the instance. It is against that order of the magistrate that appellant comes for higher relief.

[3] It is common cause that both vehicles were moving in the same direction, which was an off-ramp from the N2 freeway with three lanes traveling in the same direction. It is also common cause that there are two intersections in that road, both to the left allowing a turn towards Springfield. It is also common cause that the collision between the two vehicles occurred between the two intersections leading to Springfield.

[4] The point of impact is in dispute. The appellant alleges that the point of impact was on the extreme left lane in his path of travel and that respondent's driver drove into his car from behind as he was proceeding straight. The respondent alleges that the point of impact was in the lane next to the extreme left lane in respondent's path of travel and that it was when appellant was changing lanes after overtaking its driver on the left when appellant realized that the left lane was a compulsory left turn.

[5] Appellant testified that he was driving from his brother with his sister, and was on his way to his home in Umlazi, but had first to drop his sister where she lived in Springfield and he was to use the second exit into Springfield. To get home, he would not have taken the off-ramp but would have proceeded straight on the N2 freeway.

[6] He had passed the first exit into Springfield and was approaching the second exit. He was not aware of the respondent's truck behind him until he saw its lights very close to him. There was traffic in front of him. According to him the respondent's truck was travelling at a high speed. The truck drove into his vehicle and the Tazz spun clockwise a number of times and came to a standstill. His sister sustained injuries for which she lodged a claim with the Road Accident Fund. He did not see what happened, but from the damages, he deducted that the Tazz was hit from its right rear by the Truck's left front. After the collision, the driver of the truck said he did not see the appellant's car before the collision.

[7] Ziphondile Lorraine Ngcobo testified that she was the passenger in appellant's Tazz on that evening. Appellant was driving in the extreme left lane as he was preparing to take the second exit into Springfield to take her home. He could not have taken the first exit as it leads to an industrial site and is long winded whereas the second exit is simple and straightforward to get her home. She did not see the Truck before the collision. After the collision, the driver of the truck said he did not see the Tazz before the collision. She could not explain the damages to the vehicles nor how the collision occurred.

[8] The approach that this court should adopt is set out in *Gafoor v Unie Versekeringsadviseurs (Edms) Bpk* 1961 (1) SA 335 (A) at 340D-G as follows:
"Another observation that may be made is that as a rule when a trial Court refuses absolution at the close of the plaintiff's case, it avoids unnecessary discussion of the evidence, lest it seem to take a view of its quality and effect that should only be reached at the end of the whole case. In the same way on appeal it is generally right for the Appellate Tribunal, when allowing an appeal against an order granting absolution at the close of the plaintiff's case, to avoid, as far as possible, the expression of views that may prematurely curb the free exercise by the trial Court of its judgment on the facts when the defendant's case has been closed."

[9] The approach to an absolution application is set out in *De Klerk v ABSA Bank Ltd and Others* 2003(4) SA 315 (SCA) at 323B-G in paragraph 10 as follows:
"The correct approach to an absolution application is conveniently set out by Harms JA in Gordon Lloyd Page & Associates v Riviera and Another 2001 (1) SA 88 (SCA) at 92E -93A:

'[2] The test for absolution to be applied by a trial court at the end of a plaintiff's case was formulated in Claude Neon Lights (SA) Ltd v Daniel 1976 (4) SA 403(A) at 409G-H in these terms:

"... (W)hen absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. (Gascoyne v Paul and Hunter 1917 TPD 170 at 173; Ruto Flour Mills (Pty) Ltd v Adelson (2) 1958(4) SA 307 (T),"

This implies that a plaintiff has to make out a prima facie case – in the sense that there is evidence relating to all the elements of the claim – to survive absolution because without such evidence no court could find for the plaintiff (Marine & Trade Insurance Co Ltd v Van der Schyff 1972 (1) SA 26 (A) at 37G-38A; Schmidt Bewysreg 4th ed at 91-2). As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one, not the only reasonable one (Schmidt at 93). The test has from time to time been formulated in different terms, especially it has been said that the court must consider whether there is 'evidence upon which a reasonable man

might find for the plaintiff' (Gascoyne (loc cit) – a test which had its origin in jury trials when the 'reasonable man' was a reasonable member of the jury (Ruto Flour Mills). Such a formulation tends to cloud the issue. The court ought not to be concerned with what someone else might think; it should rather be concerned with its own judgment and not that of another 'reasonable' person or court. Having said this, absolution at the end of plaintiff's case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises, a court should order it in the interests of justice."

[10] Plaintiff's case is simply that he was travelling straight on the extreme left lane of three lanes travelling in the same direction approaching an exit which he was to take when a speeding truck drove into his Tazz from behind in his path of travel. This version is corroborated by his sister, who alleges she was a passenger in that Tazz. Applying her mind reasonably to such evidence, the magistrate might find for the plaintiff, in my view. The inference of negligence of the respondent's truck driver is a reasonable one under the circumstances, in my view. In those circumstances absolution ought not to have been granted and the appeal must succeed.

[11] In my view, wrong tests were applied.
The penultimate paragraph of the Magistrate's reasons is very worrying. Therein she says:
"In the absence of personal observation of both of the two witnesses in correlation what is seen on the exact damages on the bodies of both vehicles this court is not in a position to say how this accident occurred to come to a finding based on the plaintiff's case that any one party could have been negligent at the end of the plaintiff's case."
Earlier on, the magistrate had this to say at page 8 from line two of the judgment:
"Now the court is taking cognizance of the defendant's version which is not evidence unless it is repeated under oath but should the defendants be placed to give a version in all likelihood there will be two mutually exclusive versions before this court and a similar test on credibility, reliability, probabilities and improbabilities inherent in both versions and a discharge of onus will still persist at the end of the defendant's case."

[12] I would make the following order:

1. The appeal is upheld.

2. The order of the court *a quo* is set aside and replaced with the following order:
   "The application for absolution from the instance is refused. The costs occasioned by the application are costs in the cause."

3. The matter is referred back to the magistrate to be dealt with further in accordance with the law.

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DM THULARE
ACTING JUDGE OF THE HIGH COURT

I agree, and it is so ordered.

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JR MURPHY
JUDGE OF THE HIGH COURT