IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: 14962/2016

Date: 6/12/2016

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

6-12-2016 .....
DATE SIGNATURE

In the matter between:

RUAN PIENAAR **PLAINTIFF**

Versus

ROAD ACCIDENT FUND **RESPONDENT**

JUDGMENT

TOLMAY, J:

[1] This action for damages for personal injuries against the Road Accident Fund ("the RAF") stems from an accident which occurred at approximately 06:00 on 20 July 2014 when the Polo vehicle which the plaintiff drove ("the Polo") collided from the rear with the single cab LDV vehicle ("the bakkie") driven by the insured driver on the N12 freeway in the vicinity of the Rondebult Road bridge.

[2] The parties agreed that merits and quantum be separated and it was so ordered.

[3] The issue of liability is the only issue for adjudication. This involves

3.1 the issue of the alleged negligence of the insured driver; and

3.2 the issue of the alleged contributory negligence of the plaintiff.

[4] The plaintiff's version was in essence that he was driving towards Johannesburg in the third lane from the left of four lanes carrying westbound traffic on the N12. It was dry and the road surface was tarred. It was still dark and there was no artificial illumination of the road by street lights. The Polo's headlights were switched on, but were dimmed due to traffic from the opposite direction. He was driving at approximately 120 km/h, which is the legal speed limit on that section of the N12. He was on his way to fetch his brother to play cricket later that morning.

[5] Plaintiff intended to change lanes to move to the fourth lane and had looked in his right side mirror and rear-view mirror, and had checked "his blind spot". The next moment as he looked to the front again, he became aware of an object in front of him. He applied the brakes of the Polo and attempted to swerve to the left, but he collided with the bakkie. His impression was that it was either stationary or moving very slowly prior to impact. The bakkie ended up on the right hand side against the concrete divider dividing the eastbound and westbound traffic on the N12. The Polo came to a standstill, partly on the grass verge and partly on the concrete culvert on the far left of the westbound lanes of the N12.

[6] Although the Plaintiff sustained injuries, he climbed out of the Polo after the collision and spoke to the insured driver who initially swore at him. There were other passengers in the insured vehicle. He was adamant that the dark blue bakkie's tail lights were not working at the time of the accident.

[7] The Plaintiff was unable to furnish exact distances and time periods canvassed with him during cross-examination. He estimated the distance which his headlights were able to illuminate the road as being in the region of 45 meters. He estimated with reservation and caution that he was between 15 and 20 meters from the bakkie when he saw it for the first time. He was adamant that he simply had insufficient time, after noticing the bakkie for the first time, to avoid the accident. He described the time lapse between first noticing the bakkie and impact

as "split seconds". He confirmed that the photographs of the Polo after the accident depicted the damage sustained during and as a result of the collision.

[8] The plaintiff's version pertaining to the speed he was travelling at and the fact that the Polo's headlights were on dim and his attempted action to avoid the collision, was uncontested.

[9] Mr Grobbelaar, an accident reconstruction specialist testified that it would have been impossible for the plaintiff to have seen an unlit bakkie timeously if he was traveling at 120 km/h with the Polo's headlights switched on dim and if it was dark. Given that it was dark he opined that a reasonable normal reaction time allowed would have been in the order of 2 seconds. Even if that is reduced to the usual daytime reaction time of 1 to 1.5 seconds, it would have been impossible for the plaintiff to have avoided the accident at the speed at which he was traveling given that he covered 33 m/s at that speed. It would have required 148 meters to have brought the Polo to a standstill. He was unable to contribute to a calculation of the speed of the Polo at the time of collision due to a paucity of information.

[10] He confirmed that the speed differential between a vehicle in the position of the Polo and the bakkie if the latter travelled at 100 km/h would have been 4-5 m/s (33m/s minus 28 m/s). If the latter travelled at 80 km/h it would have been in the order of 11m/s (33.3m/s minus 22.2 m/s).

[11] The defendant adduced the evidence of the insured driver, Mr Michael Khumalo. He testified that he was traveling in the bakkie at 80 to 100 km/h in the first lane from the left of the N12 when he suddenly felt an impact from the rear. The bakkie's rear was lifted up and pushed to the right side of the road into the concrete divider where it came to rest after the accident facing in the direction from where he came. The Polo came to rest on the "island" to the left of the westbound lanes of the N12. During the cross-examination of the plaintiff the opposite was put to the plaintiff by defendant's counsel, but it may be due to a misunderstanding and I will not draw any negative inference from it. The variance between Mr Khumalo's evidence and what was put in cross-examination was not relied on by Mr De Waal SC as reflecting negatively on Mr Khumalo's credibility.

[12] Mr Khumalo testified that the street lights were on and illuminated the road enabling a clear unobstructed view to the front or rear in the order of 100 to 200 meters. He did not see the Polo at all prior to impact. Immediately prior to impact there was one other vehicle in the lane to his right (i.e. the second lane from the left). He said that even if he had looked in his rear view mirror and saw that a collision was imminent, he would not have been able to swerve either left or right due to the concrete culvert on his left and the other car to his right. The headlights of the bakkie were in working order.

[13] Mr Khumalo confirmed having made and signed the statement he made to the assessor of the defendant the day before trial, 22

November 2016. Although he didn't read the statement prior to signing it, everything recorded in it was correct, save for one single sentence which was in conflict with his evidence in court that the plaintiff in fact answered him during the discussion they had. His statement records that the plaintiff did not answer him at all. This variance only became apparent when the plaintiff introduced the undiscovered assessor's report of the defendant. Mr Khumalo was unable to explain why he did not point out to the assessor that he was traveling at 80 to 100 km/h (as opposed to the 100 km/h recorded in the statement) or why he did not point out in cross examination when he was given the opportunity to do so, that the statement was also not entirely in accordance with what he had told the assessor in this regard.

[14] The essence of Mr Khumalo's version is that he was traveling slightly below the speed limit on the far left of the N12 whilst being clearly visible to any approaching traffic when the collision occurred.

[15] In this instance the Court is faced with two mutually destructive versions.

[16] The approach to evidence where the court is faced with mutually destructive versions is trite. If the court is satisfied that the preponderance of probability favours the party upon whom the *onus* rests, that is the end of the enquiry. If not, there is no such preponderance and such a party has not discharged the *onus* and

must fail because there is no proof of anything unless the court is satisfied that it believes the one party and disbelieves the other. The probabilities are first considered to indicate where the probable truth lies and only if there is no balance of probability, may the court consider the relative credibility of the witnesses[1].

[17] The following facts are either undisputed or common cause:

17.1 The plaintiff was traveling at approximately 120 km/h in the same direction on the N12 as the insured driver with his headlights switched to dim;

17.2 The plaintiff collided with the insured vehicle from the rear;

17.3 The plaintiff's vehicle ended up to the left off the N12 and the insured vehicle to the right against the dividing concrete barrier;

17.4 The plaintiff and the insured driver had a brief conversation.

[18] The following material facts or issues are in dispute at the conclusion of all the evidence:

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[1] See *National Employers Mutual General Insurance Association v Gany* 1931 AD 187; *Koster Ko-operatiewe Landboumaatskappy Bpk v Suid -Afrikaanse Spoorweë en Hawens* 1974 4 SA 420 W at 425 ;*African Eagle Life Assurance Co Ltd v Cainer* 1980 2 SA 234 WLD at 237B-238A ; *National Employers' General Insurance Co Ltd v Jagers* 1984 4 SA 432 ECD at 440D- 441A

18.1 Whether the insured driver was traveling in the 3rd lane from the left (plaintiff's version) or whether he was traveling in the far left hand lane (defendant's version);

18.2 Whether the insured vehicle was stationary or moving very slowly (plaintiff's version) or whether it was traveling at a speed slightly below the speed limit (80 to 100 km/h-defendant's version);

18.3 Whether the area where the collision occurred was unlit (plaintiff's version) or whether the freeway lights were working and provided good visibility (defendant's version).

[19] On the plaintiff's version and the evidence of Mr Grobbelaar, the insured driver is entirely to blame for the accident and there is no room for any finding of negligence on the part of the plaintiff.

[20] On the defendant's version the insured driver, despite not keeping a proper lookout in his rear view mirror by his own admission, was entirely blameless and the plaintiff is entirely to blame for the accident.

[21] If the court is able to make a finding that one version is more probable than the other that is the end of the matter and findings on credibility or reliability becomes irrelevant.

[22] It was argued by the plaintiff that:

a) the preponderance of probability favours the plaintiff and that he has discharged his onus of proving that the insured driver was negligent.

b) there is no room for any finding of contributory negligence and, accordingly, any apportionment, against the plaintiff.

[23] The plaintiff's counsel argued that the plaintiff's version is plausible and entirely in keeping with normal human experience with a good explanation why the accident occurred. He was traveling at a much higher speed relative to the insured vehicle. His vision was impaired due to the darkness, the inherent limitation of illumination provided by the Polo's headlights on dim and the unlit rear of the insured vehicle. He was approaching the insured vehicle at a speed, although within the legal limit and not unreasonable in the circumstances, which made it impossible for him to have avoided the collision given the limitation of normal human reaction and ability.

[24] After considering the evidence I am of the view that the insured driver's version is highly unlikely, while Plaintiff's version is plausible and in keeping with normal human experience.

[25] The insured driver's version is improbable because:

25.1 There was no reason why the plaintiff would have travelled in the far left lane at a speed of 120 kmph. It is far more likely, given

the lack of other traffic, that he would have travelled in the lanes to the right and given the fact that slower traffic are usually found to the far left;

25.2 It is unlikely that the collision would have occurred on Defendant's version because:

25.2.1 The insured vehicle was perfectly visible for a few hundred meters and traveling at marginally below the speed limit;

25.2.2 If the plaintiff was traveling at 120 km/h (which is uncontested) a slight push of the brake pedal would have reduced the speed of the Polo to within the speed of the insured vehicle resulting in easy avoidance of the accident;

25.2.3 There is no apparent explanation and none was suggested in cross-examination of the plaintiff, why the plaintiff would not have seen the insured vehicle and would have driven straight into the rear of it when it was clearly visible and not moving unreasonably slowly;

25.2.4 There is no apparent reason why the insured vehicle did not collide with the vehicle to its right, seeing that it was in such a position so as to have prevented Mr Khumalo from moving to his right hand side.

[26] I agree with the plaintiff's submissions that the Defendant's version is improbable. It is highly unlikely that the plaintiff would have collided

with the Defendant if I accept the insured driver's version. I consequently find that the Plaintiff's version is more probable.

[27] It was clearly negligent for the insured driver to have been stationary or driving very slowly in the 3rd lane from the left of the N12, a national road where fast moving traffic is found and foreseeable;

[28] I found that the plaintiff was not in any way negligent and consequently the plaintiff discharged his onus to prove the defendant's liability based on the negligence of the insured driver.

[29] Consequently the plaintiff is entitled to 100% of his proven or agreed damages flowing from the injuries sustained in or as a result of the accident which occurred on 20 July 2014.

COSTS

[30] Counsel for the defendant argued that costs for senior counsel should not be awarded as it is a relatively simple matter. It is trite that a Court has a discretion as far as costs are concerned. In this matter, even if the facts turned out to be quite simple during the trial, the merits were contested and based on two mutually destructive versions which complicated the matter. Furthermore the amount claimed is in excess of R5 000 000-00. Lastly it is a party's prerogative to brief the counsel of his choice. Consequently I am of the view that costs of senior counsel should be allowed.

[31] Consequently I make the following order:

31.1 Plaintiff is entitled to 100% of his proven or agreed damages flowing form the injuries sustained in or as a result of the accident which occurred on 20 July 2014; and

31.2 Defendant is ordered to pay Plaintiff's costs, including costs of senior counsel and costs of heads of argument.

R G TOLMAY
JUDGE OF THE HIGH COURT

DATE OF HEARING:	23 NOVEMBER 2016
DATE OF JUDGMENT:	6 DECEMBER 2016
ATTORNEY FOR PLAINITFF:	ADAMS & ADAMS
ADVOCATE FOR PLAINITFF:	ADV W P DE WAAL (SC)
ATTORNEY FOR DEFENDANT:	TAU PHALANE INC
ADVOCATE FOR DEFENDANT:	ADV U B MAKOLA