IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

REPUBLIC OF SOUTH AFRICA

Case Number: 24162/2016

7/12/2016

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO

(3) REVISED

7.12.2016

DATE

SIGNATURE

In the matter between:

RAMOHLOPI WILBUR MMOWA — Plaintiff

and

ROAD ACCIDENT FUND — Defendant

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

[1] The plaintiff instituted a claim for damages he suffered due to injuries he sustained in a motor vehicle collision that occurred on the 9th of May 2014 in Duvenhage Avenue, Kempton Park.

[2] The parties agreed to a separation of the merits and quantum of the plaintiff's claim and an order in terms of rule 33(4) of the Uniform Rules of court was accordingly granted.

EVIDENCE

Facts common cause

[3] There is not much in dispute regarding the facts giving rise to the collision.

[4] It is common cause that the plaintiff and Mr Nzimande ("the insured driver") were travelling, at approximately 21:00, in the same direction along Zuurfontein road on the evening in question. Zuurfontein road is a dual carriage way with a built up cement island between the lanes going in opposite directions.

[5] The insured driver was driving in the left lane and the plaintiff in the right lane. It is common cause that the plaintiff's vehicle veered to the left lane and scratched the right front bumper of the insured vehicle ("the first collision"). A high speed chase ensued. Both vehicles turned into Duvenhage Avenue, which road had several speed bumps and sharp curves.

[6] At some stage during the chase, the plaintiff hit a speed bump at high speed, lost control of his vehicle and collided with a wall next to the road. The plaintiff lost consciousness and cannot recall what transpired thereafter.

[7] The dispute between the parties pertains to the reason for the high speed chase.

Facts in dispute

Plaintiff's version

[8] The plaintiff testified that he stopped along the road after the first collision to apologise to the insured driver. The insured vehicle stopped some meters behind him. The plaintiff alighted from his vehicle and proceeded to the vehicle of the insured driver. The insured driver alighted from his vehicle and whilst alighting took out a firearm from his waist belt. The insured driver's demeanour was aggressive and the plaintiff ran back to his vehicle, got in and drove off at high speed. He believed that his life was in danger.

[9] The insured vehicle was in hot pursuit. The plaintiff turned into Duvenhage Avenue and, according to his evidence, the insured vehicle was a few meters behind him. The insured vehicle would gain ground when the plaintiff manoeuvred a speed bump, where after the plaintiff would reclaim the ground on the stretch of road between the speed bumps. The result of the second collision has been referred to *supra.*

[10] The plaintiff alleges that he verily believed his life was in danger and as a consequence, he was acting in a state of emergency. In the premises, he is not to be blamed for the second collision.

Defendant's version

[11] The insured driver denied that the plaintiff stopped after the first collision. He testified that the insured vehicle is the property of his employer and he deemed it prudent to obtain the details of the plaintiff. Consequently, he chased the plaintiff at high speed.

[12] In reaction to the plaintiff's version, the insured driver testified that he neither had a firearm licence nor a firearm.

[13] According to the insured driver, a police vehicle approached from the opposite direction whilst he was chasing the plaintiff in Duvenhage Avenue. Due to the high speed the plaintiff was travelling at, the police vehicle executed a U-turn and chased after the plaintiff. The police vehicle was in between his vehicle and that of the plaintiff and he lost sight of the plaintiff's vehicle. Consequently, he did not witness the accident. Upon his arrival at the scene of the collision, he was informed that the plaintiff had hit a pedestrian prior to colliding with the wall.

[14] He wanted to report the first collision, but was told by the police officials at the scene to report the collision at the nearest police station.

[15] The Accident Report Form indicates that he reported the matter at Norkem Park Police Station at 23:00 on the 9th of May 2014.

EVALUTION

[16] The version of the plaintiff and the insured driver in respect of the motive for the high speed chase are mutually destructive.

[17] Referring to previously decided cases, Grosskopf JA summarised the applicable legal principles applying in a case of mutually destructive versions in *Baring Eiendomme BPK v Roux* [2001] 1 All SA 399 SCA at para [7] as follows:

"Die uiteenlopende weergawes van die partye is wedersyds onversoenbaar. Wat 'n hof in so 'n geval te doen staan, word soos volg uiteengesit in die beslissing van die volle hof in die saak van National Employers' General Insurance Co Ltd v Jagers 1984 (4) SA 437 (E) op 440E-441A (per Eksteen Wnd RP):

"...where there are two 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. The estimate of the credibility of a witness will therefore be inextricably 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 views expressed by Coetzee J in Koster Ko-operatiewe Landboumaatskappy Bpk v Suid-Afrikaanse Spoorweë en Hawens [1974(4) SA 420 (W)] and African Eagle Assurance Co Ltd v Cainer [1980 (2) SA 234 (W)]. 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 of probabilities that he was telling the truth and that his version was therefore acceptable. It does not seem to me to be 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 that enquiry, to consider the probabilities of the case, as though the two aspects constitute separate fields of 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 had to an estimate of relative credibility apart from the probabilities."

[18] In considering the probabilities of the plaintiff's version, it is noteworthy that his account of the events directly after the first collision was extremely vague. He did not indicate where exactly he stopped his vehicle after the first collision. This lack of clarity is significant if one has regard to the lay out of the road. He could not merely stop, because he was in the right lane next to the cement island. He would have had to cross the left lane and thereafter found a suitable place to park next to the road.

[19] From the evidence, I do not know whether it was at all possible to simply park next to the road. The plaintiff was equally vague in his description of the firearm.

[20] Ms de Meyer (Olivier), counsel for the defendant, correctly pointed out that, having regard to the mere scratches on the insured vehicle, the alleged aggressiveness does not make sense and is improbable.

[21] The fact that the insured driver immediately proceeded to a police station to report the accident, contributes to the probability of his version. It is highly unlikely that he will willingly report the incident if he knew he had threatened the plaintiff with a firearm. Criminal liability would surely follow upon a police investigation into the accident.

[22] In the premises, the plaintiff did not discharge the onus, on a preponderance of probabilities, that he acted in an emergency situation.

[23] Having accepted the insured driver's version, the question pertaining to contributory negligence arises. The insured driver was negligent in driving at an excessive speed in the prevailing circumstances.

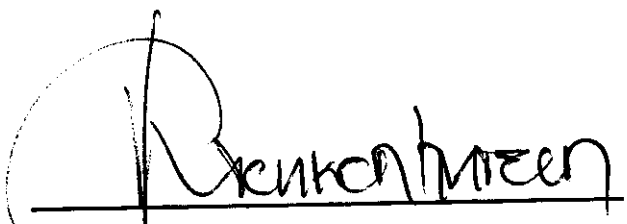
[24] In my view, his negligence contributed equally to the cause of the second collision. In the premises, he was 50% negligent and the defendant is only 50% liable for the damages suffered by the plaintiff as a result of the second collision.

[25] The plaintiff did succeed in proving that the insured driver's negligence contributed to the collision and is consequently entitled to the cost of suit.

ORDER

In the premises, I grant the following order:

1. The defendant is liable for 50% of the plaintiff's proven or agreed damages.
2. The defendant is ordered to pay the cost of suit.



N JANSE VAN NIEUWENHUIZEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

APPEARANCES

Counsel for the Applicant : Advocate A L Legong

Counsel for the Defendant : Advocate M de Meyer (Olivier)