

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

Case Number: 69374/14

10/6/2016

Not reportable

Not of interest to other judges

Revised

In the matter between:

K.J.F MADONSELA

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

Coram: HUGHES J

JUDGMENT

HUGHES J

[1] On 5 June 2011 at 14h10 and on the Evander/ Embalenhle Road, the plaintiff, K. J. F. Madonsela, was involved in motor vehicle collision which resulted in bodily injuries.

[2] From the outset the parties sought a separation of the determination of liability and

quantum in terms of section 33(4) which order was granted by consent.

[3] The plaintiff's version of how the collision unfolded and the insured driver, Ms Ndlovu, account of the collision are totally at odds with each other on the facts.

[4] The evidence of the plaintiff is that she was alone in her vehicle travelling from Embalenhle to Evander at a speed of 80 to 100kymph. She drove on her way and she observed veld fire on both sides of the road. The fire on her side was not so intense and the visibility on her side of the road was good. Whilst on the other side of the road, on the oncoming traffic side, the fire was intense, the smoke was dense and visibility was not good.

[5] She further testified that whilst she was driving, suddenly, a vehicle travelling in the opposite direction came into her path of travel. She only saw the vehicle which drove into her when the collision took place and could do nothing to avoid the collision this was because of the dense smoke on the side of the oncoming traffic.

[6] The impact on the plaintiffs vehicle was on the right hand side of her vehicle. She states that after impact she lost control of her vehicle and it careered into the veld on the right hand side of the road, being on the side of the oncoming traffic.

[7] The insured driver testified that she was traveling at a speed of 120kmph from Kinross on her way to Standerton. She was traveling in the Evander to Embalenhle direction. She had passengers in her vehicle one of whom was her mother, Mrs Ndlovu, a witness in this trial.

[8] Whilst she was traveling she noticed a veld fire in the distance on the oncoming side of the road. She states that at this stage the fire was not close to the road but as she drove closer, the fire was suddenly close to the road. The smoke from the fire was really intense and visibility was bad.

[9] Whilst the visibility was bad and the smoke was dense she drove into this dense smoke without reducing her speed. She testified that it came to a stage where her visibility was so bad that she could not see past the end of her bonnet. She states that

is when she reduced her speed and gradually brought her vehicle to a stop. In doing so, stopping, she stopped her vehicle in the middle of that lane she was travelling in and when the vehicle had stopped, she her hazards on. She says that even though she put had hazards on because the smoke was so dense she doubts if anyone could see them.

[10] At some stage a taxi drove past in front of her vehicle, she could not say where this taxi came from. The taxi careered in front of her towards the left side of her vehicle eventually traveling in the emergency lane past her stationary vehicle.

[11] Suddenly a vehicle collided with the front of her vehicle. After the smoke dissipated and the visibility was good she noticed a vehicle in the burning veld on her side of the road. This she discovered was the plaintiff's vehicle and she cannot say how the plaintiff's vehicle ended where it did in the veld.

[12] The evidence of Mrs Ndlovu corroborated her daughter's evidence, to the extent that they could not see ahead because of the smoke being dense and her daughter stopping in the middle of her lane. Mrs Ndlovu's reasoning for stopping was the appearance of the taxi from nowhere and driving in the emergency lane, they thought that other vehicles on the road would engage in the very same manoeuvre like the taxi.

[13] Turning to the cross examination of the plaintiff. During this exercise by counsel for the RAF the counsel put a version to the plaintiff, professing it to be that which the insured driver would say which is totally different to the version testified by the insured driver at the trial.

[14] It was put to the plaintiff that the insured driver would say that the visibility was very bad in her lane. That she was stationery on the road when the plaintiff collided into her vehicle and the reason why the plaintiff veered onto her path of the road was because there was a taxi in front of plaintiff's vehicle. The collision having just occurred, the plaintiff then 'took the initiative to reverse. In doing so she ended on the right side of the road in the veld fire. The insured driver will also say that she could not go onto the yellow lane because of the veld fire on her side of the road.

[15] Adv. Dredge, represented the plaintiff, during his cross examination of the insured driver it emerged that the insured driver made a concession that in the situation of poor visibility she could have veered onto the plaintiff's side of the road. This is a pertinent concession argued Adv. Dredge.

[16] He also heightened the inconsistencies between that which was put to the plaintiff by the defendant's representative and that which was in fact testified by the insured driver. Firstly, the insured driver and Mrs Ndlovu were adamant that they did not know how the plaintiff landed in the veld fire whilst it was put to the plaintiff that she 'took the initiative to reverse' into the veld fire. The latter was supposedly obtained from the insured driver by those representing the RAF.

[17] There is also the evidence of the taxi. On the one hand the insured driver states that she was stationary when the taxi travelled in front of her vehicle then onto the emergency lane. On the other hand Mrs Ndlovu's evidence is that they were in motion when the taxi passed them on the left in the emergency lane.

[18] Adv. Dredge argued the plaintiff's evidence, that the visibility was good on her side as the fire was not so intense, was never disputed by the defendant at all. He further, argued that it was also never put to the plaintiff that the veld fire was so bad on her side that it came as far as the road. Thus again appears a contradiction between what was testified by the insured driver and what was put to the plaintiff.

[19] Adv. Dredge pointed out yet another contradiction in the evidence of the insured driver and that put to the plaintiff, in that the insured driver never testified that the plaintiff veered because of the fact that there was a taxi in front of her, as was put to the plaintiff by the defendant's representative.

[20] In circumstances such as these where we have two irreconcilable versions by parties a useful reminder on how the courts are to approach such evidence is found in *Stellenbosch Fanners' Winery Group Ltd and Another v Martell and Cie SA and Others 2003 (1) SA 11 SCA paragraph [5]* set out below :

"[5] On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So too on a number of peripheral areas of dispute which may have a bearing on the probabilities. 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), 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 extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (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's reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), 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 a 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."

[21] I note that the insured driver persisted with her version as testified. She refuted the version that had been advanced by the representative of the RAF. In fact she went so far as to say she had not advanced that version put to the plaintiff and it was not her version as she had not sufficiently consulted with the defence team as regards her version of how the collision took place.

[22] Clearly this creates two contradictory versions between what the insured driver's evidence was and that which was put to the plaintiff as what the insured driver would say by the defendant's representative.

[23] There are also problems with the insured driver's version itself. Firstly, she is not able to explain how a veld fire appeared on her side of the road after the collision. Her evidence was consistent that prior to the collision there was no veld fire on her side of the road at all.

[24] Secondly, I cannot understand regarding this veld fire, the insured driver sees the hazard, in the form of a fire, but she still continues to travel towards and into the hazard

at 120kmph with no attempt at reducing her speed at all.

[25] Thirdly is the contradiction between the insured driver's evidence and Mrs Ndlovu's regarding the reason why they stopped in the middle of their lane. The latter states that it was a result of the taxi which drove alongside them in the emergency lane. On the other hand the insured driver states that it was because she could not see beyond her bonnet.

[26] The above is of importance and significance. I say so because according to the insured driver the collision occurred immediately after the taxi passed. In my view this lends itself to the probability that the insured driver was still in motion when the collision occurred, on Mrs Ndlovu's version. If so the probability of colliding with the plaintiffs door, as testified by the plaintiff, is not a remote possibility.

[27] Taking the above together with the concession made by insured driver, she could have veered in the path of oncoming traffic it is not difficult to actually find that this is in keeping with the plaintiff's evidence.

[28] On the probabilities the insured driver's version that 'she just stop in her lane' is just farfetched and does not ring of truth. Which driver will stop in her/his lane causing a danger to other road users when her/ his visibility was impaired by dense smoke, and not moving over to the emergency lane, which is designated for that purpose, when she was confronted with a hazarder's situation.

[29] The plaintiff s evidence stands uncontested and her evidence was not challenged at all by the defendant' representative. Even in the face of that put to her as the insured driver testimony, which was refuted by the insured driver, the plaintiff stood her ground and kept steadfast as to her version of the collision.

[30] It is evident that the version put to the plaintiff in cross-examination did not existent and this was confirmed by the insured driver. In the circumstances that evidence is rejected.

[31] I accepted the untested and unchallenged version put forward by the plaintiff. The

plaintiff's evidence was straight forward and she was a credible witness, she did not endeavour to embellish her evidence in anyway whatsoever.

[32] In the circumstances the evidence and version of the plaintiff is more credible, probable and as such it can only be concluded that the sole cause of the collision is the insured driver.

[33] The matter was set down for the 3rd May 2015 it stood down due to the non-availability of judges. The matter proceeds on the 4th and 5th May 2015.

[34] Consequently the following order is made:

[34.1] The defendant, the Road Accident Fund, is liable to pay the plaintiff, K. J. F. Madonsela, her agreed or proven damages.

[34.2] The defendant is ordered to pay the plaintiff's costs on a party and party scale for the 3rd, 4th and 5th May 2015 respectively.

[34.3] The issue of quantum is postponed sine die.

W. Hughes

Judge of the High Court Gauteng, Pretoria

Date of hearing: 3rd, 4th and 5th May 2015

Date delivered: 10th June 2015

Attorneys for the plaintiff: Gert Nel Inc.

Reference: GN8124/mjb

Telephone: 012 333 829

Attorney for the defendant: TSEBANE MOLABA INC

Reference: Mr Mphahlele/KWK/ 9157

Telephone: 012 342 492117076