

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)



Case number: A 332/14 3

Date: 30/5/16

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

25/5/2016

DATE

SIGNATURE

In the matter between:

OUPA ODATH MOGOELELWA

APPELLANT

Versus

ROAD ACCIDENT FUND

RESPONDENT

JUDGMENT

TOLMAY, J:

- [1] The appellant instituted action against the defendant following a motor accident that occurred on 30 April 2008 while travelling on the Disaneng Village Road in the district of Mafikeng.

- [2] Merits and quantum were separated and the matter proceeded on merits only. The Court a quo found that the appellant did not prove his case on a balance of probabilities and dismissed the claim with costs. The appellant appealed against the judgment and order.

- [3] The appellant and an independent witness who was a passenger in the taxi testified. The respondent did not call any witnesses. At the appeal hearing there was no appearance on behalf of the respondent.

- [4] The appellant testified that he was a taxi owner and driver. On 30 April 2008 he was transporting passengers on the Mafikeng Makgobestad road. The accident occurred at 20:00, it was dark and there were no street lights. He estimated his speed at around 80 kmph prior to the incident. A vehicle, whose headlights were on bright, approached from the opposite direction. The appellant flicked his lights to warn the approaching vehicle that he should dim his lights and he reduced speed to \pm 60 kmph. The lights of the oncoming vehicle however remained on bright and blinded the appellant. As this vehicle went past, appellant suddenly saw a cow in front of his vehicle. He braked and swerved to his left as the cow was approaching from the right, but despite these efforts collided with the cow. As a result of the collision

his vehicle left the road and collided with a tree. He said that there was nothing he could do to avoid the accident.

[5] The appellant's evidence was confirmed by Ms Sethlako who was a passenger in the taxi and who sat next to the appellant in the front passenger's seat. She confirmed the speed that the driver was driving, the fact that they were blinded by the lights of the approaching vehicle, and that the plaintiff reduced speed. She also confirmed the actions that the appellant took to avoid the accident. She testified that she also did not see the cow until it was too late. She said that there was nothing that appellant could have done to avoid the accident.

[6] Based on the aforesaid evidence the learned judge found that the appellant's version was not probable. She said the following in this regard:

"Had the insured driver been passing the plaintiff on his right, how is it possible for the cow to come from the right hand side immediately after he passed the plaintiff's vehicle. If so the passing vehicle would surely collide with the cow before passing the plaintiff, as the cow was passing directly in the lane of travel of the insured driver."

[7] She then proceeded to find that the appellant was not confronted with a sudden emergency, she said the following:

"On an examination of the circumstance [sic] surrounding this particular collision, the actions of the insured driver, with his blinding

lights, cannot be construed as creating a sudden emergency for the plaintiff. On the plaintiff's own version, he states that he had ample time to give the insured driver a warning about his lights. Ms Sehlako's testimony, that she saw the insured driver's vehicle approach some 100 meters away, as well as the fact that the plaintiff collided with the cow at the time when the sudden emergency, that being the insured driver having passed when the collision occurred."

- [8] It is trite that the appellant carries the onus to prove his claim on a balance of probabilities. The appellant testified as to what happened and his evidence was corroborated by an independent witness. No evidence was led by the defendant. The learned judge did not make a credibility finding against the appellant or his witness, she merely found that the appellant's version was improbable.
- [9] She apparently based this finding on the fact that the driver of the oncoming vehicle would have collided with the cow if it was approaching from the right. Her conclusion in my view loses sight of the fact that we know, irrespective of from which side the cow was coming, appellant did not see the cow because he was blinded by the lights of the approaching vehicle. Both the appellant and the witness testified that appellant indicated to the approaching vehicle that it should dim its lights but that was ignored. This indicates that the appellant took preventative measures to ensure that he would not be blinded by the lights. There was nothing more that appellant could

have done to prevent him being blinded by the bright lights. Appellant and Mrs Sethlako proceeded to testify that they were blinded by the approaching vehicle, consequently they did not see the cow before it was too late. The sudden emergency was not the fact that the appellant was blinded by the approaching vehicle, but the presence of the cow that he failed to see due to the fact that he was blinded. There is no indication of any negligence on the part of the appellant on the evidence before us.

[10] In my view the learned judge's misdirected herself when she found to the contrary, consequently the appeal must succeed.

[11] I make the following order:

11.1 The appeal is upheld; and

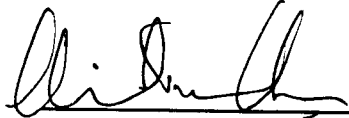
11.2 The finding of the Court *a quo* is set aside and substituted with the following:

"The defendant is 100% liable for the damages occasioned by the collision.

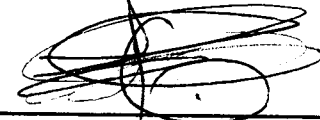
11.3 The defendant is ordered to pay the costs of the action as well as the appeal.


R G TOLMAY
JUDGE OF THE HIGH COURT

I AGREE:


N TUCHTEN
JUDGE OF THE HIGH COURT

I AGREE:


T A N MAKHUBELE
ACTING JUDGE OF THE HIGH COURT

ATTORNEY FOR APPELLANT:

MC KWI KONTGEN SNI

ADVOCATE FOR APPELLANT:

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ATTORNEY FOR RESPONDENT:

DEIAN LAMABON INC

ADVOCATE FOR RESPONDENT:

NO APPEARANCE

DATE OF HEARING:

5 MAY 2016

DATE OF JUDGMENT:

26 MAY 2016