REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 9014/2014

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

DATE:14//2016

In the matter between:

NOHAM LEVENDAL **PLAINTIFF**

and

ROAD ACCIDENT FUND **DEFENDANT**

JUDGMENT

SIKHWARI, AJ

[1] On the 29th day of July 2010 at about 21h15 in the evening at or along the tarmac main road from Sabie to Lydenburg in Mpumalanga province a motor collision accident occurred between the plaintiff's motor vehicle bearing register number [F...] the insured vehicle bearing motor register number [D....] being driven by one Louis Pat Makwakwa (hereinafter referred to as "Makwakwa"). The insured driver was driving from Sabie to Lydenburg direction whereas the plaintiff was driving towards the town of Sabie.

[2] At the beginning of the trial, the parties agreed that the issue before court for adjudication is the contributory negligence of the plaintiff in the occurrence of the said motor collision. The issue of quantum will be postponed *sine die* pending the decision on contributory negligence and / or apportionment of damages.

[3] The defendant's basis for claiming contributory negligence on the part of the plaintiff is based on the allegations that the collision has occurred on the side of the correct lane of the insured driver.

[4] Professor Gerald Lammer testified as an expert witness of the plaintiff. He has made a good impression to the court with his evidence which was fair and objective as well as logically sound. I n *Coopers (South Africa) Ltd v Deutsche Gesellschaft fur Schadlingsbekampfung MBH* 1976 (3) 352 SA 352 (A) at page 371G-H, the court held that "as I see it, expert's opinion represents his reasoned conclusion based on certain facts or data, which are either common cause, or established by his own evidence or that of some other competent witness. Except possibly where it is not controverted, an expert's bald statement of his opinion is not of any real assistance. Proper evaluation of his opinion can be undertaken if the process of reasoning which led to the conclusion, including the premises from which the reasoning proceeds, are disclosed by the expert. Even bearing in mind that the addressee of the summary is probably also an expert, I am of the opinion that the addressee may not be able to evaluate the opinion, so as to enable him to advise the party consulting him thereon, if he is not informed in "the summary of the reasons" in for the opinion. Having regard to the above meaning of the word "reasons" in the context of the sub-rule as a whole and the purpose thereof, I am of the opinion that the summary must at least state the sum and substance of the facts and data which lead to the reasoned conclusion (i.e. the opinion). Where the process of reasoning is not simply a matter of ordinary logic, but

involves, for example the application of scientific principles, it will ordinarily be necessary to set out the reasoning in summarised form, The addressee should then be in a position to advise the party consulting him whether the opinion can be controverted, and, if so, what evidence is required to do so".

[5] In *Michael and Another v Linksfield Park Clinic (Pty} Ltd and Another* [2002] 1All SA 384 (SCA); [2001] JOL 7984 (SCA); 2001 (3) SA 1188 (SCA) the court stated in paragraph 36 that "what is required in the evaluation of such evidence is to determine whether and to what extent their opinions advanced are founded on logical reasoning. That is the thrust of the decision of the House of Lords in the medical negligence case of *Balitho v City of Hackney Health Authority* [1998] AC 232 (HL. €]. With the relevant *dicta* in the speech of Lord Browne-Wilkinson we respectfully agree. Summarised they are to the following effect".

[6] Professor Lammer's evidence was not contradicted in any material respect. He compiled a summary of his opinion which was accepted as exhibit A. His conclusion that the collision has occurred on the correct lane of the plaintiff's motor vehicle is supported by many facts, including the debris, oil and smash glasses which were found on the correct lane of the plaintiff, the brake marks which were on the correct lane of the plaintiff and the position of the plaintiff's vehicle after the collision. It is common cause that after the collision, the plaintiff was unconscious. The damage in his vehicle was so severe that it caught fire which was quickly extinguished with the assistance of the insured driver. This excludes the possibility of it being driven away from the point of impact. Professor Lammer testified that the more the plaintiff's vehicle is put in its incorrect lane, the more unlikely it would end where it was.

[7] Police officers who attended to the scene are also confirming the same facts as observed by Professor Lammer. Police officers Clayton Mnisi and Stanley Mathlake were

objective credible witnesses who made a good impression to the court.

[8] The brother of the plaintiff, one Bieber Levendal, and the mother of the plaintiff, one Gerda Levendal-Potgieter have also confirmed the position of the plaintiff's motor vehicle after the accident. They denied that the plaintiff was under the influence of alcohol. They denied that they have threatened to assault the insured driver. They denied having removed alcohol or liquor bottles from the plaintiff's vehicle on their arrival at the scene. They said that they were concerned about saving the life of the plaintiff.

[9] Aaron Mokoena is a security officer who works next to the scene of the collision. He testified that he heard the bang and immediately saw the insured vehicle reversing back. He assisted the insured driver with water to extinguish the fire on the plaintiff's vehicle. This was the case for the plaintiff.

[10] The defendant called one witness, the insured driver. He testified that he had offered a lift to some three people who were going to York Timber for work. Then he saw the vehicle of the plaintiff driving its incorrect lane and coming to the lane of the insured vehicle. When asked as to for how long was the plaintiff's vehicle in his (insured driver's) lane, he was evasive and answered that he was not sure. He testified that he could not avoid the accident because on his left side there was an electricity transformer. When it was shown to him that photograph 1 in page 91 shows enough space for him to avoid the collision by swerving to the far left, he became evasive and had no answer except to insist that there was a transformer.

[11] When confronted by plaintiff's counsel in cross-examination about the discrepancy between his evidence and the statement he made to the police after the accident where he made mention that he had given a lift to one person, the insured driver was evasive and came with no answer except to state that he denies the police version that he gave a lift to one

person. In his statement to the police after the accident he did not make any mention of assisting the plaintiff by removing him from the car, contrary to what he testified in court. He has no answer to the question as to what has caused the plaintiff's vehicle to be where it was found after the accident.

[12] The insured driver did not make a good impression as a witness. He was evasive and unnecessarily argumentative. He failed to answer simple questions even when the said questions were further clarified. He was denying everything including facts which are obvious or were earlier not put ion dispute. He denied that the road is straight as depicted in the photographs and he insisted that there is a curve which might have beaten the plaintiff and caused the plaintiff to lose control of his vehicle and ended up encroaching into the lane of the insured driver. He claimed that the plaintiff was driving at the speed of 80-90km/h whereas he was not in a position at all to measure the said speed in view of the fact that the plaintiff and the insured driver were driving towards the opposite directions. He testified that the family of the plaintiff wanted to assault him whereas he has also testified that he never disclosed to anyone that he was the driver of the insured vehicle until the arrival of the police.

[13] The version of the insured driver is irreconcilable with the version of the plaintiff. In *SFW Group Ltd & Another v Martell et Cie & Others* 2003 (1) SA 11(SCA) the court stated in paragraph 5 that "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 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 tum will depend on a variety of subsidiary factors, not necessarily In order of Importance, such as (i) the witness' 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 facts 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' reliability will depend, apart from the factors mentioned under (a)(ii),(iii) and (v) above, on (I) the opportunities he had to experience or observe the events 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. n 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"

[14] The version of the defendant as presented by the insured driver is not reasonably probably true. The insured driver has no reasonable explanation as to why he did not request his passenger(s) to make a statement to the police in order to give credibility to his (insured driver) version of events. The insured driver has contradicted himself in many material respects relating to the number of the passengers he had, the statement he made to the police under oath, the admission to the police officers that he revered the insured vehicle in order to avoid catching fire from the plaintiff's vehicle which he later denied in his evidence, the improbability of the point of impact which he said it was on his correct lane of the road.

[15] In *Maritime & General Insurance Co v Sky Unit Engineering Ltd* 1989 (1) SA 867

(TPD) at page 8878-H the court stated that:

"Since our treatment of the circumstantial evidence in this case involves the sort of reasoning that was discussed in *R v Blom* 1939 AD at 202 and 203, it is appropriate to say a few words on the approach to be adopted. We need do little more than to quote what was said by 5elke J In *Grovan v Skidmore* 1952 (1) SA 732 (N) AT 733H- 734B.

'I ought perhaps to mention now a submission made by *Mr Harcourt* in the course of his argument, to the effect that the principles, enunciated In *R v Blom* 1939 AD 158 at 203, govern the making of Inferences In every case, whether criminal or civil. *Mr Harcourt* relied particularly on the second principle, namely that "the proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn", and he invited me to apply this principle generally in the making of all inferences in the present case, and submitted that, on that footing, the Court could not find that the plaintiff had proved the case of fraudulent misrepresentation which he set out to make. Now it is trite law that, in general, in finding facts and making inferences in a civil case, the Court may go upon a mere preponderance of probability, even although its so doing does not exclude every reasonable doubt. n a criminal case, however, as I understand It, every fact material to establish the guilt of the accused must, unless it is admitted, be established by proof beyond reasonable doubt, and inferences from facts must, in order to be permissible, be such as leave no reasonable doubt of their propriety and correctness. That is a difference between the proof requisite In civil and criminal proceedings. *R v Blom (supra)* was a criminal case, and, in my opinion, it is a fallacy to suppose that the second principle in *Blom's* case represents the minimum degree of proof required In a civil case, for, in finding facts or making inferences in a civil case, it seems to me that one may, as Wigmore conveys in his work on *Evidence* 3rd ed para 32, by balancing probabilities select a conclusion which seems to be the more natural, or

plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one.'

This approach was approved of by Holmes JA in *Ocean Accident and Guarantee Corporation Ltd v Koch* 1963 (4) SA 147 (A) at 159C-D and by Viljoen JA in *AA Onderlinge Assuransie-Assosiasie Bpk v De Beer* 1982 (2) SA 603 (A) at 614G-615B.

In the *Ocean Accident* case *supra* Holmes JA commented as follows on the use of the word 'plausible' by Selke J in the *Govan* case supra:

'Ineed hardly add that 'plausible' is not here used in its bad sense of 'specious', but in the connotation which is conveyed by words such as acceptable, credible, suitable. *(Oxford Dictionary and Webster's International Dictionary.)'* "

[16] On a balance of probabilities, this court rejects the version of the defendant as false and improbable. There was no contributory negligence on the part of the plaintiff.

[17]In the closing heads of argument the defendant raised the issue of seat belts for the first time. Defendant submitted that the plaintiff was not wearing the seat belt and as such that should amount to 20°/o contributory negligence on the part of the plaintiff. Such an issue was firstly raised by Makwakwa in his evidence although it was not pleaded in the defendant's plea.

[18] The provisions of Rule 22(2) provides that "the defendant shall in his plea either admit or deny or confess and avoid all the material facts alleged in the combined summons or declaration or state which of the said facts are not admitted and to what extent, and shall clearly and concisely state all material facts upon which he relies".

[19] The authoritative writer on high court practice, *Van Loggerenberg,* in his work entitled *"Erasmus' Superior Court Practice',* 2nd Ed, 2015, at page 01-262 has stated that "the effect

of denial is to put the fact denied in issue between the parties, and also all the necessary implications which flow from it, and to Advise the plaintiff that he will be required to prove this at the trial".

[20] The issue as to whether the plaintiff was wearing seat belts or was never pleaded for the plaintiff to replicate, if necessary, and was never put to the witnesses of the plaintiff for them to comment. This court will not consider it at this stage because doing otherwise will prejudice the plaintiff and compromise the interests of justice and fair trial.

[21] n *Trans-Drankensburg Bank Ltd (Under Judicial Management) v Combined Engineering (Pty) Ltd and Another* 1967 (3) SA 632 (D) at page 641A-B the court stated that "having already made his case in his pleading, if he wishes to change or add to this, he must explain the reason and show *prima facie* that he has something deserving of a consideration, a triable issue; he cannot be allowed to harass his opponent by an amendment which has no foundation. He cannot place on the record an issue for which he has no supporting evidence, where evidence Is required, or, save perhaps in exceptional circumstances, introduce an amendment which will make the pleadings expiable…"

[22] I align myself with the above formulation. The issue of seat belts cannot be introduced at this late in the circumstances of this case. The defendant has no witness who will testify on the issue except the speculative evidence of the insured driver. No credible basis has been laid to sustain the test as stated above in *Trans-Drankensburg Bank Ltd (Under Judicial Management) v Combined Engineering (Pty) Ltd and Another.*

[23] In its plea, the defendant has raised three special plea; being non compliance with Regulation 3((1)(a) & (b) of the Road Accident Fund Amendment Act, No 19 of 2005, premature summons and lack of jurisdiction. The defendant has led no evidence on any of the special plea raised in his plea. No submissions were made regarding any of the special

plea. The onus is on the defendant to prove the special plea raised in the plea. The defendant has failed to discharge such an onus in this case.

[24] In the premises, I make the following order:

1. That all the special pleas raised by the defendant are dismissed.

2. That the defendant is liable for 100°/o of the plaintiff's proven or agreed damages;

3. That the defendant is ordered to pay the costs of the merits trial for the following dates: 17, 22nd and 29th days of March 2016 as well as costs for drafting heads of argument;

4. That the issue of quantum is postponed *sine die.* It is noted that the defendant has no objection to plaintiff applying for a preferential trial date.

DATED IN PRETORIA ON THIS THE 01st DAY Of APRIL 2016

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SIKHWARI, AJ

ACTING JUDGE OF THE HIGH COURT, PRETORIA