

THE REPUBLIC OF SOUTHAFRICA

(GAUTENG DIVISION, PRETORIA)

**Case no: 82263-14
DATE: 9/9/2016**

**NOT REPORTABLE
NOT OF INTEREST TO OTHER
JUDGES
REVISED**

APPLICANT

In the matter between:

VAN HEERDEN

AND

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

MOLAHLEHI AJ

Introduction

[1] This is a damages claim arising from the collision between the plaintiff's motor cycle and the motor vehicle which was driven by the driver insured (the insured driver) by the Road Accident Fund (the respondent).

[2] The quantum are by agreement between the parties separated from the merits in terms of Rule 34 of the Uniform Rules of the Court.

[3] The plaintiff contended that the cause of the accident was the negligent driving of the insured driver. The respondent on the other hand disputed the claim and contended that the cause of the accident was the plaintiff alternatively he contribute to cause of the accident.

Background facts

[4] It is common cause that the plaintiff and the insured driver were involved in a motor collision, on 19 October 2010 at 7H10 and on the R21 Highway at Boksburg. They were both travelling northwards.

[5] The insured driver, Ms Madelin Olivier, was driving the motor vehicle, registered [DMB 7... FS]. The plaintiff was driving a Suzuki SXR1000 motor cycle with registration number [ZCK 1.. GP].

[6] It is common cause that there were road works on the R21 on that day and that there were concrete barricades on the right hand side of the road. The road which operated on two lanes was dry with good visibility on the day.

The plaintiff's case

[7] The plaintiff in support of his case presented the testimony of three witnesses including himself. His testimony in brief was as follows: The accident occurred on a Sunday morning whilst he was travelling from Boksburg to Edenvale on his way to work.

[8] The plaintiff was travelling on the right hand lane of R21, when he suddenly saw the motor vehicle driven by the insured driver moving from the slow moving lane on the left hand side of the two lane road to the right. By the time he noticed the insured driver's car it was too late. He tried to swerve to the right but could not avoid the accident because of the concrete barriers. He also applied the brakes to no avail.

[9] He further testified that upon impact his motor cycle caught fire. For him the consequences was that he was seriously hurt and had to be taken to the hospital by an ambulance.

[10] The second witness for the plaintiff was his father, Mr Van Heerden. He briefly, testified that he arrived at the scene of the accident soon after he received the telephone message about the accident. On arrival there he spoke to the passenger, who described to him, how the accident occurred. He then spoke briefly to his son who at that stage was already in the ambulance. The son told him that the insured driver swerved into his lane, causing the accident.

[11] The third witness was the plaintiffs mother. The essence of her testimony was that she was responsible for dealing with the insurance of the insured driver. They accepted liability and paid for the motor cycle which had been written off.

The case of the respondent.

[12] The insured driver, testified that the morning of the accident she was travelling with a friend on their way to attend a conference of O.R Tambo airport. She was travelling of the R21 towards the north.

[13] Before the accident she was travelling on the right hand side of the road. The traffic on the left side was moving very slow. As soon as she realised that there was an opportunity to move to the left lane she proceeded to do so after satisfying herself that it was safe to do so.

[14] After, travelling for about 100 to 150m on the right hand lane she suddenly heard a bang at the back of her car which was the result of the impact by the plaintiffs motorcycle. She also in this regard testified that she looked around and had her indicators on before moving to the left lane. She reported the accident at the Kempton Park police station where she made the statement including making the rough sketch showing how the accident occurred.

Evaluation and analysis

[15] The dispute which the court in this matter need to resolve concerns, who caused the accident. In this respect it is clear that there are two mutually destructive versions.

[16] The version of the plaintiff on the one hand is that the collision was caused by the insured driver who suddenly without any warning changed the lanes from the left to the right. The accident according to him happened so quickly that there was nothing he could do, to avoid it.

[17] The version of the insured driver on the other hand is that she was travelling on the left lane of the road which was moving very slow, she moved to the left lane when she noticed that it was safe to do so. She testified that at the time of the accident she was already travelling in the right hand lane.

[18] The leading authority on the approach to adopt when faced with conflicting versions of the parties is *Stellenbosch Farmers Winery Group Limited and Another v Martell et Kie*, which provides the following guidelines in this regard:

"On the central issue, as to what the parties actually decided, there are two irreconcilable versions. The technique generally employed by the 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 (c) this necessitated an analysis and evaluation of the probability or improbability of each

party's version on each of the disputed issues. In the light of 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."

[19] In *City of Johannesburg Metropolitan Council v Ngobeni*,¹ the SCA had the following to say:

"The approach to be adopted when dealing with the question of onus and the probabilities was outlined by Eksteen JP in National Employers' General v Jagers, as follows: 'It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfied 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 plaintiffs allegations against the general probabilities. The estimate of the credibility of a witness will

¹ (314/11) [2012] ZASCA 55 (30 March).

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." (Footnotes omitted).

[20] In argument the defendant's counsel emphasised the fact that this was a rear-end collision. The inference to be drawn from this submission is that, because of that reason the plaintiff is automatically the cause of the accident. In dealing with the issue of rear end collision this court in *Van Der Berg v Road Accident Fund*,² held that:

"[14] The general approach to adopt when dealing with rear end collision is set out by the author H B Kloppers in The Law of Collision in South Africa (7th Ed) page 78 as follows:

'A driver who collides with the rear of a vehicle in front of him is prima facie negligent unless he or she can give an explanation indicating that he or she was not negligent. "

² (35504/11) [2013] ZAGPJHC 94 (20 March 2013).

[15] The driver who collides with another from the rear end can escape prema facie liability for negligence by providing an explanation that shows that the collision occurred because of the negligence of the driver of the other vehicle or due to other intervening circumstances. The example of the exception to the general rule of rear end collision is said to be where for an example, as stated by Klapper, the driver in the front suddenly swerves immediately and applies the breaks."

[21] In the present instance the plaintiff has provided the explanation as to how the accident occurred which is that insured driver sudden swerved to his side which is the cause of the accident.

Evaluation

[22] In my view, the version of the plaintiff is more plausible than that of the defendant. In this respect the probabilities point to the fact that the accident occurred as the insured driver was changing from the left lane, where the traffic was moving slow, to the right lane. The traffic on the left lane was flowing smoothly. The plaintiff's version which was not challenged is that the space between him and the next vehicle before the accident was about 15 meters.

[23] Before dealing with the conflicting versions presented before this court, I need to point out that the defendant did not call the passenger of the insured vehicle as its witness. This is a witness who could have assisted the court in understanding as to what actually happened on the day in question. She could have assisted the court in relation to how her friend moved from the right lane to the left lane more importantly whether the insured driver had her indicators on as she was moving from the right to the left lane. The respondent has provided no reason as to why she was not called to testify. The only inference to draw is that she was likely to give an adverse version to that of the respondent.

[24) Turning to the two versions as presented by the parties, the version of the plaintiff is more plausible than that of the defendant. There are a number of areas where the version of the plaintiff is in some way supported by that of the respondents.

[25) It is common cause that at the time of the accident the plaintiff was driving on the left hand lane where the traffic was moving smoothly than that in the right hand side. The insured driver did not dispute that she was on the right hand lane which was moving very slow and that it is for that reason that she decided to move to the right lane. The draft sketch of the accident which she drew at the police station support the version of the plaintiff that she swerved to the right lane and cut off in front of the plaintiff's motorcycle. This is also supported

by the sketch drawn by the plaintiff's father which he did on the basis of the information given to him by the insured driver.

[26] I also find the plaintiff to have been a good witness. He answered questions, including those that were not favourable to his case, in a fair and objective manner. He indicated that the speed limit on the road was 100km an hour. He stated that he could not tell what speed limit he was travelling at but suggested that, it could not have been above the speed limit because there was traffic congestion. He also conceded that the collision was on the rear end of the insured vehicle.

[27] The plaintiff also testified that when the insured vehicle suddenly moved from the left to the right lane, he attempt to avoid the accident by swerving to the right but that did not help because of the concrete slaps next to the road. This version is supported by what the insured driver says in her accident report.

[28] This testimony of the only witness of the respondent, the insured driver, was unsatisfactory for the following reasons:

- a. Although, the farther of the plaintiff seemed confused as to who he spoke to on arrival of the accident, it seems apparent that he spoke to the insured driver. The insured driver testified that she did speak to him and informed him how the accident occurred.
- b. The accident was reported on behalf of the plaintiff at the police by the father who also drew the sketch of the accident scene as indicated

earlier in this judgment. He drew the sketch on the basis of the information provided to him by the insured driver. His sketch is in all material respect the same as that drawn by the insured driver.

- c. The sketch drawn by the insured driver shows her movement from the right to the left lane, it is direct conflict with her when she says that at the point of the collision she was already on the left lane having travelled for about 100 to 150 meters in that lane. She could not provide a satisfactory explanation as to the contradiction between her testimony in court and her sketch.

[29] The insured driver was also confronted during cross examination with the contradiction between her accident report and the statement she made on 22 August 2016. The accident report reads as follows:

"Driving on R21 North, busy changing lanes after observing when B crashed into the back of my car. I didn't see him anywhere. B went into the barrier and back into my car A. B flew ahead and stopped about 30 m ahead bike."

[30] The relevant part of the statement she made read as follows:

"I was driving on N12 towards O.R. Tambo. The direction of which I believe was towards Westerly direction. I took an off to R21 Pretoria, as I drove through a "U" turn into R21, the lanes used at that time was only two lanes which I was driving on the right lane. A motorbike

bearing registration no. [ZCK 1.. GP] came from nowhere at a very high speed forcing its way on my right shoulder where there was no lane for any vehicle to pass. He hit my vehicle on the right back corner and hit the wall barrier of the road and bounced back onto my vehicle. The motor bike bounced a few times in front of my vehicle while I applied my breaks and moved towards left to observe this. When the bike caught fire he let it go and fell down.

The fact that he hit my vehicle from the right back and went on to bounce the wall rolling in front of my vehicle was evidence to me that he was travelling at a very high speed. He should have followed my vehicle from behind and overtaken me when there was a lane available and safe to do so.

The motorbike driver was seriously injured, the ambulance arrived and traffic officials arrived and took over control of the scene.

The weather was clear and the tar was dry."

[31] The other difficulty which the insured driver had was to deal the version of the plaintiff's mother relating to the fact that the insurance of her (insured driver) car accepted liability and paid for the damages to the motorcycle which was written off in the accident. She provided no satisfactory explanation as to why her insurance would accept liability if she was the cause of the accident.

[32] In light of the above, I am of the view the version of the insured driver is unreliable and that she lacked credibility as a witness. Accordingly, I am of the view that the plausible story to accept as to who caused the accident is that of the plaintiff.

(33) In summary, the accident was caused by the insured driver who changed lanes without keeping a proper look-out and did so in a manner that had no regard to the safety of herself and other users of the road.

(34) As concerning contributory negligence the respondent's counsel contended in the alternative that the plaintiffs negligence contributed to the accident. There was however, no evidence led by the respondent to support this allegation.

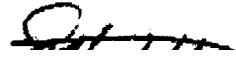
(35) In conclusion, I find that the accident in this matter was caused by the negligent driving of the motor vehicle of the insured driver. I see no reason why costs should not follow the results.

Order

[36] In the result the following order is made:

1. Judgement is entered in favour of the plaintiff.
2. The defendant is liable to pay 100% of the plaintiffs proven or agreed damages.
3. The defendant is to pay the costs of the plaintiff.

4. The issue regarding quantum is postponed *sine die*.



Molahlehi E
Actin Judge of the
Gauteng Division