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

CASE NO: 10580/2015

In the matter between:

M J

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

JUDGMENT

M.H YAN TWISK (AJ)

1. This is the merits part of a claim for damages suffered by the Plaintiff as a result of a motor vehicle accident, instituted against the Defendant, hereinafter referred to as the Fund.
2. It is not in dispute that a motor vehicle accident took place on 30th June 2012 at approximately 19h30.
3. The Plaintiff was the first witness who testified in her case. She testified as follows:

- 3.1 She was driving on the road from Marble Hall to Apel. Her late husband (he passed away months later due to injuries sustained *in* the accident) was seated next to her in the passenger seat and her younger brother was seated on the back seat.
- 3.2 The Plaintiff testified that she was familiar with the road, that the speed limit was 70 km per hour and that she was travelling at 70 km per hour and that the road was a single carriage road.
- 3.3 The Plaintiff testified that she was travelling from Marble Hall to Apel and that the Defendant was travelling from Apel to Marble Hall. She said that the accident occurred when the Defendant failed to negotiate a sharp curve and collided with the motor vehicle she was driving, hitting it on the driver's side of her car.
- 3.4 The collision occurred on her side of the road and the car was write off.
- 3.5 The Plaintiff said that she spoke to the insured driver after the accident as she walked over to him whereupon the Defendant apologized for causing the accident and said that he was drunk.
- 3.6 The Plaintiff testified that she fractured her right hand, her left leg (the Plaintiff was using crutches when walking in and out of Court) and she injured her left ribs.
- 3.7 When asked that when did she noticed the Defendant's vehicle for the first time, she answered that she just heard a loud bang.
4. Cross-examination elicited the following responses:
 - 4.1 The road on which the Plaintiff and the insured driver were travelling on curved where the accident occurred. It was a sharp curve.
 - 4.2 It was put to the Plaintiff that the accident report indicates that both vehicles had multiple damage. The Plaintiff answered that her car had the most damage. She said the most damage was in the middle on the driver's side of the door and not on the front of the vehicle.
 - 4.3 The Plaintiff was asked whether she was travelling on the outside or the inside of the curve. It seemed as if the Plaintiff did not understand the question whereupon counsel for the Fund drew a

sketch of the road curving from the left side of an A4 paper to the right side of the paper. It was later handed in as Exhibit "An". The Plaintiff marked the spot where the impact occurred with an "X" on Exhibit "A". This indicated that impact was in her lane of travel.

4.4 The Plaintiff testified that between the two travelling lanes there was a solid white line which indicates that one may not overtake and that should one overtake it is unsafe to do so and also unlawful.

4.5 The Plaintiff reiterated that she did not see the insured vehicle before she heard the loud bang sound when the accident occurred and that there were no other cars on the road when the collision took place.

4.6 After the accident the Plaintiff's vehicle was on the side of the road where the insured driver travelled and the latter's vehicle was in the lane that she travelled on.

4.7 The Plaintiff again confirmed that she stepped out of the passenger side of her motor vehicle towards the Insured driver who extended his apologies and said that he was drunk. It was put to her that the insured driver would say that the first time he saw and/or spoke to the Plaintiff was at the first court appearance in 2018. The Plaintiff denied this and said that she did speak to the insured driver at the scene of the accident.

4.8 The Plaintiff was cross-examined about what she did with the information she received from the insured driver that he was under the influence of alcohol. She said that she requested the first police officer who arrived at the scene of the accident to conduct a breathalyzer test and he said that that will be done at the hospital.

4.9 It was put to the Plaintiff whether she agrees that the information, i.e. that the insured driver admitted to being under the influence of alcohol, is important for her case, whereupon the Plaintiff

answered that she does not understand what information counsel referred to. It was then put to her that it is against the law to drive under the influence of alcohol and that she could have laid a charge against the insured driver with the police. She said that after her discharge from hospital she went to the attorneys to report the accident. It is not clear whether she also reported the fact that the insured driver admitted to being under the influence of alcohol to the attorneys.

4.10 It was once again put to the Plaintiff that she did not lay a charge at the police station whereupon she confirmed this, and added that the police officers on the scene noticed that the insured driver was under the influence of alcohol and that they were supposed to do follow-up investigations and take a statement from the insured driver. She further testified that the police smelled alcohol on his breath. When asked how the Plaintiff would know this, she answered that she does not know what the police have done after they themselves became aware of the fact that the Insured driver was been driving under the influence of alcohol, but that they said that they are going to draw blood at the hospital.

4.11 The insured driver's version was then put to the Plaintiff. This is to the effect that a motor vehicle was driving in front of the Plaintiff's vehicle and that she overtook this vehicle in the curve and then before executing the overtaking manoeuvre, she collided with the insured driver on the right hand side of his motor vehicle. The Plaintiff said that she disagrees with this version and said that if she was overtaking the vehicle in front of her, the insured vehicle would have collided with the passenger door of her vehicle or it would have collided with her vehicle head-on. It was put to the Plaintiff that the insured driver is saying that the right front side of the Plaintiff's vehicle collided with the right front of the

insured vehicle. Her answer was in the form of a question, namely which car was I overtaking and then she stated that there was no car in front of her. That concluded the Plaintiffs evidence.

5. Mr Ramushu was then called by the Plaintiff. He testified that on the day of the accident he was travelling together with the Plaintiff and was seated behind the Plaintiff. He was asked to provide an opinion as to what speed the Plaintiff's vehicle was travelling at and he testified that it was estimated at 40 km per hour. He then testified about his injuries and could not really contribute to explain how the accident took place as he said that he only noticed when the Plaintiff's vehicle was struck by another vehicle and he does not know how that came about. He however confirmed that the Plaintiffs vehicle was struck on the driver's side. Mr Ramushu was not cross-examined and the Plaintiff closed her case.
6. The insured driver, Mr Talome, was called to testify on behalf of the Fund. His evidence was the following:
 - 6.1. He confirmed that he was the driver of the insured vehicle and was travelling from Apel to Marble Hall between 19h00 and 19h30. He is not familiar with the road. A Mr Nkomane was travelling with him. He and Mr Nkomane are not related but he referred to him as his *"home boy"* and asked him to accompany him to his indented destination.
 - 6.2. He testified that he was travelling at 60 km per hour, that he was travelling on a single carriage road and that the accident occurred on a curve, as also testified to by the Plaintiff.
 - 6.3. The insured driver testified that two cars were coming from the opposite direction when one vehicle tried to overtake the other vehicle which was travelling in front of it. He testified that the vehicle that was travelling in front was a bakkie. When the vehicle, which we now know was driven by the Plaintiff, was in the process in overtaking the bakkie, it collided with the right front wheel of the insured driver's vehicle causing the wheel. as I understood his evidence, to collapse. He said that it collided with the car. The insured driver's leg was broken.
 - 6.4. The insured driver was asked how far the Plaintiff's vehicle was away from his vehicle when he saw it for the first time, whereupon he

replied that it was a short distance, anything from 15 to 20 metres. He testified that the Plaintiff's vehicle was travelling very close to the bakkie.

6.5. The insured driver testified that he could not do anything to avoid the accident. He lodged a claim with the Fund which claim was settled.

6.6. He further testified that he was sitting in his motor vehicle after the accident and that an unknown person came and spoke to the passenger and this person telephoned the police. He denied that he was driving under the influence of alcohol and said that he was travelling from Pretoria and only stopped to pick up his passenger and he does not know where on this route they were supposed to drink.

6.7. At this point of the insured driver's evidence, the attorney for the Plaintiff drew counsel for the Plaintiff's attention to something and it transpired that she informed counsel that the interpreter did not interpret correctly. I was informed that what the Plaintiff in fact testified is that he was coming from a traditional celebration. The insured driver denied that he made any mention of a traditional celebration and said that he is working in Pretoria and was driving from Pretoria on the day that the accident occurred. In my view nothing turns on the alleged Incorrect interpretation.

6.8. The insured driver testified that he did not speak to the Plaintiff at the scene and saw her for the first time at court when both of them were waiting for the case to proceed and they were in the same room.

6.9. The two vehicles collided with their right front fenders. The impact occurred in the insured driver's lane.

6.10. The insured driver was then cross-examined and the cross-examination elicited the following:

6.10.1 The impact occurred in the insured driver's lane of travel and the Plaintiff was driving bumper-to-bumper with the bakkie and just after the bakkie passed the insured driver's vehicle the Plaintiff appeared from behind the bakkie in an attempt to overtake it when her vehicle's right front struck the insured driver's vehicle on its right front. It was not a head-on collision.

6.10.2 He said that although he saw the vehicles approaching he

could not avoid the accident as it happened too quickly.

6.10.3 He reiterated that he was not familiar with the road and that he did not anticipate a curve approaching. He said that when driving on an unfamiliar road you adjust to the road as you find it whilst driving on it.

6.10.4 It was then put to him that the accident occurred in the Plaintiff's lane of travel and this accident occurred because the insured driver was not familiar with the road and he did not realise a curve was coming up and he lost control and collided with the Plaintiff. The insured driver denied that this is so.

6.10.5 At this juncture counsel for the Plaintiff referred the insured driver to the accident report and what is written down regarding the accident. I questioned both counsel whether the content of the accident report are admitted and whether the Police Officer who completed it will testify. I was informed that the content is not admitted. Counsel for the Plaintiff argued that counsel for the Defendant introduced the accident report when she made reference thereto during her cross-examination of the Plaintiff. When counsel referred to the accident report it was to note that both vehicles had multiple damage. It does not seem to be in dispute that both vehicles were severely damaged.

6.10.6 The portion that counsel for the Plaintiff read and put to the insured driver is a summary of how the accident happened. I pointed out to counsel that if I read what the Police Officer wrote down, I interpret it differently from her and I then ruled that I will not allow cross-examination on that portion of the accident report as it is not known which driver's version it is that the Police Officer wrote down.

6.10.7 The insured driver said that he made a statement to the police that the accident occurred as a result of the Plaintiff that was overtaking his vehicle but he does not know where that statement is.

6.10.8 The insured driver testified that he does consume alcohol once a month when he gets paid which is at month end and it

was then put to him that the accident occurred on the last day of the month, which he confirmed.

7. There was no re-examination. Mr Mamakomane was called to testify on behalf of the Fund. His version of how the accident occurred corresponds with the insured driver's version. This witness was however familiar with the road. He testified that in his opinion the insured driver could do nothing to avoid the collision.
8. The two versions before me were mutually destructive in the sense that the acceptance of one version had to lead to the rejection of the other. It is unfortunate that I did not have the aid of a sketch plan and/or photographs taken at the scene of the accident or even thereafter to at least indicate the damage to the motor vehicles and point of impact. It is trite that the Plaintiff bears the onus to prove that the Fund was liable for the damages suffered by her as a result of the collision. She could only succeed if she satisfied the court on a balance of probabilities that her version was true and therefore acceptable and the version advanced by the Fund was either false or mistaken and falls to be rejected.¹
9. In Jagers at 440 E- H the full court stated that:

"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 credibility of a witness will 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 Plaintiffs case anymore 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 the Defendant's version is false. "

10. In **National Employers Mutual General Insurance Association v Gany**

1931 (AD) 187 at 199 the following is stated:

"Where there are two stories mutually destructive, before the onus is discharged, the court must be satisfied that the story of the litigant upon

¹ National Employers General Insurance Co Ltd v Jagers 1984 (4) SA 437 (A)

whom the onus rests is true and the other false. It is not enough to say that the story told by Clark is not satisfactory in every respect. It must be clear to the court of first instance that the version of the litigant upon whom the onus rests is the true version and that in this case absolute reliance can be placed upon the story as told by A Gany."

11. This dictum was applied in **Koster Ko-operatiewe Landbou Maatskappy Bole v Suld-Afrilcaanse Spoorwee en Hawens** 1974 (4) SA 420 (W) where the court stated the following:

"Waar daar immers geen waarskynlikheid bestaan nie en die twee weergawes mekaar uitwis, word niks tog ooit bewys (wat ookal die bewys maatstaf mag wees) tensy mens 'absolute reliance' kan plaas op die getuienis van die litigant wat the bewyslas dra nie. Dit is net in ander taal gestel wat a/reeds bevat word in die eerste sin van sy dictum (refening to the Gani judgment) naamlik "...that the story of the litigant upon whom the onus rests is true and the other is false."

12. In analysing the evidence produced I have also applied the approach adopted in **Stellenbosch Farmers Winery Group Ltd & Another v Martell Et Cie & Others** 2003 (1) SA 11 (SCA).

13. Regarding the probabilities, in Martell it is stated that this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In *casu* the disputed issue is really whether the insured driver's vehicle drifted in the curve into the opposite lane and collided with the Plaintiffs vehicle in her lane or whether the Plaintiff attempted to **overtake** a motor vehicle in the curve and collided with the insured driver's vehicle in its lane of travel. One aspect of the Plaintiffs evidence that seems highly improbable is her evidence that she exited the motor vehicle after the accident and walked towards the Plaintiff. The Plaintiff's injuries as pleaded in the particulars of claim are a fracture of the left femur, a dislocation of her right knee and a fracture to her right rib cage. The Plaintiff was however not challenged during cross-examination with these facts and she therefore had no opportunity to explain what might be an inconsistency between her evidence and her injuries.

14. Due to the absence of any other proven facts which make one version of how the accident occurred more probable than the other, save for the oral

evidence presented by both parties, I find that the probabilities are evenly balanced. In applying the dictum in Gany, quoted above, and the application thereof in Koster, as well as the dictum in Jagers at 440 E - H, quoted above, I cannot find that the Plaintiff can succeed in her claim and it has to be dismissed.

15. I therefore make the following order:

15.1 The Plaintiffs claim is dismissed with costs.

MH VAN TWISK
ACTING JUDGE OF THE HIGH COURT
OF SOUTH AFRICA GAUTENG
DIVISION, PRETORIA

Heard on:

Judgement delivered:

Appearances:

For the Plaintiff: ADV MPE

Instructed by:

For the Defendant: ADV ROOS

Instructed by: