

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

Case No: 29473/2016

In the matter of:

Phaledi Reginald Mothemela

Plaintiff

And

RAF

Defendant

**SENTENCE**

Maumela J.

1. This is a third party matter. In it, the Plaintiff is Phaledi Reginald Mothemela, an adult male. The action, which is defended, is brought against the Road Accident Fund, “the Defendant”. The defendant is a statutory body, with legal capacity, established in terms of Section 2 (1) of the Road Accident Act 1996: (Ac No 56 of 1996), ‘the Act’. The registered address of the defendant is at No 38, Ida Street, Menlopark, Pretoria in Gauteng Province; South Africa.

**BACKGROUND.**

2. In this case, plaintiff’s claim is based on a motor vehicle collision which took place at around 22h00, on the 14<sup>th</sup> of December 2013, (day of the accident). It happened along the R23 Road, (a public road). Plaintiff claims to have sustained bodily injuries in that accident. He told court that he was driving a white Citroen motor vehicle with registration numbers [...]. The defendant was driving a white

Nissan bakkie, (“the insured vehicle”), with registration number of [...]. The driver of the “insured vehicle” was Mr. Fanyana Edmon Ngwenya, (*“the insured driver”*). The above facts are common cause between the parties.

3. Plaintiff’s evidence is to the effect that on the day of the accident, at the stated time and place, he drove his vehicle into the back of the “insured vehicle”. The parties are in dispute in that the plaintiff alleges that the tail-lights of the “insured vehicle” were off and therefore he was not able to see that there is a stationary vehicle inside the road ahead of him. The defendant on the other hand contends that the tail-lights of his vehicle were on at the time the plaintiff drove his vehicle into its back. In other words, the plaintiff claims that the defendant is the one who caused the accident; which claim the defendant disputes.

4. The insured driver contends that his tail-lights were on. The defendant submits that should the court find that the tail-lights of the insured vehicle were on, then the claim shall stand to be dismissed. Should the court find that the tails-lights of the insured vehicle were not on, then liability and apportionment shall have to apply. Plaintiff contends that in terms of the provisions of the Act, the defendant is liable to compensate him in respect of his proven or agreed damages arising from the accident. The scene of this accident is alleged to be located between Johannesburg and Standerton.

5. For the **plaintiff**, Adv. Coetzee called Phaledi Regionald Mothemela as his **first** witness. Under oath this witness testified that on the 14<sup>th</sup> of December 2013, he drove a vehicle, “the insured vehicle”, along the R23 from Johannesburg to Standerton. He stated that whilst driving, he collided with a stationary vehicle driven by one Mr. Ngwenya; “the insured driver”. The road along which he was driving is well known to him because he often travels along it. He said that at the place where the collision took place there was at a stop-and-go signage and there were road works underway because the road was under construction. The placement of the stop-and-go signage would the result in a 15 minutes’ delay. He stated that if one was heading towards Standerton, the road was uneven and it had a bulge in the middle which compromised the lower clearance his vehicle.

6. He stated that this road is situated in a mining area and it had up and down hills. According to him, the accident happened at around 10h00 at night. He said that at that time, there were signals indicating speed limits and they were reflected on boards. According to him, the said speed limits ranged around 120, 100, 80 and 60 K/p/h interchangeably. There were also signs in place to indicate that roadworks are underway, much as other signs displayed different speed limits that were applicable from place to place. He said that the stop-and-go signage was affixed onto flip boards. The people operating the flipping board had cabin lights at their disposal. It was normal LED lights and there was no other source of light.

7. This witness stated that at the time of the collision, he was under the impression that he was still far from the flipping board. He said that as he approached the stop-sign, he slowed down intending to stop in the event where there is a vehicle in the road which is ahead of him. He said that he was driving a Citroen C4 sedan with his headlamps on. There were vehicles heading towards the opposite direction. He told court that all of a sudden, whilst he was slowing down, he saw an object in front of him as a result of which he swerved towards the right. This witness told court that until the morning on which he was testifying; the 15<sup>th</sup> of November 2019, he had not established what vehicle it was in front of him. He cannot tell whether it was the, second or third first stop-and-go traffic control signage that he was encountering.

8. He said that he then swerved to the left and the front-tight side of his vehicle made contact with an object. At the time, he was with his girlfriend, who has since become his wife. His girlfriend was asleep at the time. He said that his girlfriend woke up at impact and told him that he drove into another vehicle. His girlfriend was not injured. He on the other hand got injured on his pelvis and forearm. He told court that immediately before impact, he applied brakes. The vehicle he was driving was fitted with a 5-speed manual transmission mechanism or gear and at the time of impact he had in its 5<sup>th</sup> gear. He said that he could not see the vehicle into which he drove at an earlier timing because the tail-lights of that vehicle were not on. He could not see it although visibility was clear. He said that the road along which he was driving has numerous inclinations.

9. He told court that the collision took place at the beginning of a downslope. Around the time or day of the accident, he was finding himself driving along the same road twice to four times per week and he would always obey the stop-and-go traffic control signs. He stated that whenever he stopped for about 15 minutes, he would turn off the engine of his vehicle and he would check if there is a vehicle approaching from behind. According to him, most people would switch off the engines of their vehicles whenever they would have brought their vehicles to a standstill while obeying the stop-and-go traffic control road-signs. He said that he did not see the tail-lights of the “insured vehicle”.

10. Under cross-examination by Adv. Mashaba, this witness reiterated that before he testified, no one had told him that what he drove into is the back of a Nissan bakkie. He said that he holds a BSC degree in Mining Engineering. He made a statement at the time when he lodged his claim. He stated that the signature on that statement is his. He signed the statement on the 2<sup>nd</sup> of December 2015. Around the time when the accident took place, he would travel along that road about twice per month. He would be travelling along that road making that trip on a to-and-fro basis.

11. This witness was adamant that he was not fatigued at the time the accident took place. He said that around the scene of the collision, the road was not well lit and there was no traffic light. He said that under other locations when he travelled along that road, there would be a swing board in place. However, on the day of the accident he saw neither the cabin nor the board. All he saw suddenly was an object ahead of him. To the best of his ability, he made concerted efforts to avoid colliding with it but he failed.

12. He does not know how long the que was that had formed as vehicles waited in compliance with the stop-sign but he disputes that there were only two vehicles ahead of him. While his vehicle was stationary, in compliance with the stop-and-go traffic control sign, he expected the vehicle behind him to also stop. He said that he switched his engine off. Some of the vehicles headed towards the opposite direction had their bright lights on but the drivers would dim on noticing his vehicle. He cannot recall whether there were vehicles headed towards the opposite direction at the

exact moment when the collision happened. He could not comment on whether there was a drizzle or not and on whether the road was wet or not.

13. The witness stated that he would have been able to avoid driving into the back of the insured vehicle had it been in motion as he approached. The vehicles headed towards the opposite direction were coming at random intervals. He did not check the speed at which he was driving before the collision took place. He told court that as a result of the impact, he got trapped inside his vehicle. He conceded that in his affidavit, there is no mention of the fact that the headlamps of the insured vehicle were not on. He said that he instinctively applied brakes a moment before the collision. However, he stated that before seeing the boards erected as a warning about construction work that was underway and the speed limits, he was travelling at 120km/h. According to him, there were no structures on the roads. He said that the R25 was in a very bad state of repair. He said that this road is still under construction even at the time he gave testimony. Plaintiff then closed his case.

14. Edmond Fanyana Ngwenya was the **first** to testify for the **defence**. Under oath, he told court that on the 14<sup>th</sup> of December 2013, he was rear ended by a vehicle driven by the plaintiff. He said that on that day he was driving from Johannesburg to Natal. He said that the Standerton road along which he drove was under construction and there was a stop-and-go traffic control sign in place. He said that a vehicle stopped before him in compliance with the stop-and-go traffic control sign. As a result, he too stopped behind that vehicle. He said that although it was at night, there were lights on along the road and visibility was clear. The lights in place were a movable type. He said that he stopped because only one side of the road was in use and he and others had to yield to vehicles headed towards the opposite direction.

15. He said that while his vehicle was at a standstill, it was shoved onto the opposite lane and was consequently hit by a vehicle headed towards the opposite direction. As a result, it spun around and faced the opposite direction. He insisted that the tail-lights of his vehicle, like his headlamps were on. According to him, there were no road-blocks along that road.

16. Under cross-examination by Advocate Coetzee, this witness stated that he cannot recall the model of his vehicle but he knows it was about 10 years old. He would transport people on this van. He told court that upon stopping should in compliance with the stop-and-go traffic control sign, he switched off his engine and had his park lights and hazards on. At that time, it was a turn for the vehicles headed towards the opposite direction to move. He stated that vehicles headed to the opposite direction did not affect his sight. He denied that his headlamps or tail-lights were not on. According to him, it is not true that the only light was the one at the stop-and-go traffic control signpost. He said that a hut had been constructed to accommodate people who were operating the stop-and-go traffic control sign. Of the two lights; one was red and the other green. The defence then closed its case.

17. Based on the evidence adduced in this case, this court has to determine liability as against both the insured driver and the plaintiff. The version of the plaintiff and that of the defence directly contradict one another. In the case of *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et cie and Others*<sup>1</sup>, the court had to deal with versions by opposing parties which were mutually exclusive to one another. The court laid out an approach to be applied in such instances. In that regard, the court stated the following:

*"To come to a conclusion on a disputed issue, 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 or 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 extra curial statement or actions;*
- (v). The probability and/or improbability of particular aspects of his version;*

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<sup>1</sup>. 2003 (1) SA 11 (SCA).

and

*(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 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 analysis and evaluation of the probability or improbability of each party's version on each of disputed issues. In the light of its assessment of (a), (b) and (c), the court will then, as a final step, determine whether party burdened with 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 court 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.*

#### EVALUATION.

18. There is not much that is in dispute in this case. There is consensus on the fact that plaintiff drove into the back of the insured vehicle and this was at night. There were road works at the time and a stop-and go traffic control sign was in use. The vehicle of the insured diver obeyed a stop sign. The only issues to be determined has to do with whether a reasonable driver in the place of the plaintiff could have seen the insured vehicle where it was stationary as he approached. Plaintiff alleges that the tail-lights of the insured vehicle were not on and therefore he could not notice the insured vehicle as he approached it. The insured driver contends that his tail-lights were on. Should the court find that the tail-lights of the insured vehicle were on, then plaintiff's claim shall stand to be dismissed. However, should the court find that the tail-lights of the insured vehicle were not on, then the defendant has to be liable and in that case, apportionment shall have to be done in line with the degree of liability that will be attributed to each driver.

19. On the other hand, if the court finds that the tail-lights of the insured vehicle as well as its hazards were on as the insured driver claims, the plaintiff's claim stands to be dismissed. Plaintiff is adamant that he was not able to see the insured vehicle where it stood because its taillights were off thus preventing him from noticing that

there is a stationary vehicle ahead of him. The roadworks underway were not new to the plaintiff who would use the same road no less than twice per week. It is also common cause between the parties that there were road signs drawing the attention of road-users to the roadworks underway. It means therefore that all drivers stood sensitized to be extra vigilant and to expect conditions and features along the road which are not usual.

20. The above scenario connotes two conclusions. Firstly, the court notes that the plaintiff should have been more vigilant than he would be under normal circumstances. He would therefore have noticed the tail-lights of the insured vehicle if they were on. Secondly, it connotes that in the event where the tail-lights of the insured vehicle were not on, the unusual conditions along the road should have induced increased vigilance on the part of the plaintiff, therefore resulting in his ability to avert a collision. The fact that this did not happen insinuates that contributory negligence on the part of the plaintiff played a role in causing the accident. Because of the unusual conditions along that road on the day of the accident, the insured driver should even have switched on his “hazards” in order to warn drivers behind him to the perilous situation obtaining which forced him to bring his vehicle to a stand-still at a place where he would normally not be expected to do so.

21. The insured driver took no extra measures to warn drivers behind him of the unusual fact which brought his vehicle to come to a stand-still at a place where it would not be normally expected that there is a stationary vehicle in the middle-of-the-road. It means therefore that negligence on the part of the insured driver could not have been the sole cause of the accident because contributory negligence on the part of the plaintiff also played a role. On that basis, the court finds that where negligence on the part of the insured driver played a role in causing the accident; contributory negligence on the part of the plaintiff also played a role.

22. The court finds that the negligence on the part of the insured driver partly gave rise to the collision that took place. It finds at the same time that plaintiff’s negligence also contributed to the collision and that contribution had a 40% effect in causing the accident. Consequently, the court makes the following order:



ORDER.

22.1. The “insured driver” is found to have contributed on a scale at 60% to the collision that took place between his vehicle: (“the insured vehicle”), with registration number of [...] and the plaintiff’s vehicle, a white Citroen motor vehicle with registration numbers [...].

22.2. The defendant is ordered to compensate the plaintiff to the extent of 60% of plaintiff’s proven damages.

22.3. The defendant shall pay the costs of this application.

T.A. Maumela.

Judge of the High Court of South Africa.