

IN THE NORTH GAUTENG HIGH COURT

(HELD AT PRETORIA)

CASE NO: 54980/08

DATE: 25 MARCH 2010

In the matter between:

SIMPSON, JOHN BERTHOLD

PLAINTIFF

And

FIRST RAND BANK LIMITED

FIRST DEFENDANT

VAN DER LINDER, ANDRIES I M

SECOND DEFENDANT

JUDGMENT

TOLMAY J:

This is an action for damages emanating from a motor vehicle collision that occurred on 22 November 2006 between a Honda CRV with registration number V[...] driven by plaintiff and an Astra with registration number R[...] driven by second defendant, acting within the course and scope of his employment with the first defendant.

The issues of *locus standi* and quantum were agreed between the parties and the only issues that need to be determined by me are the merits of the plaintiff's claim and defendant's counterclaim.

It is common cause between the parties that on the evening of 22 November 2006 and on the N14 roadway in the vicinity of Francis Road, Muldersdrift, a partial head-on collision occurred between the vehicles driven by plaintiff and second defendant respectively. The damage to the respective vehicles emanated from the collision between the aforementioned motor vehicles. Prior to the collision the plaintiff was driving

eastwards i.e. away from Magaliesburg and the second defendant was driving westwards i.e. in the general direction of Magaliesburg.

The respective versions of the plaintiff and the second defendant are that the other party crossed the middle of the road, crossing into the other party's side of the road, and that the collision occurred as a result of such negligent cross over.

The versions of the plaintiff and the second defendant were that each of them, was respectively the innocent party.

It is clear from the respective versions of the parties that their versions are mutually destructive.

On behalf of the plaintiff, three witnesses were called, Mr Clinton Proctor, a tow truck operator, the plaintiff and Helen Whitecross Simpson, the wife of the plaintiff who was a passenger in the car of the plaintiff at the time of the accident.

Mr Proctor, testified that he arrived on the scene shortly after the accident. He testified that the plaintiff and his wife as well as the defendant were still in their respective vehicles at the time when he arrived on the scene. His testimony was that the second defendant got out of his vehicle and smelled of alcohol. Due to the uncontested evidence of constable Nawane and second defendant I disregard Mr Proctor's evidence.

The plaintiff testified that he and his wife were coming from a school concert of their grandchildren at Magaliesburg. They were traveling in an eastward direction from Magaliesburg. Plaintiff was entering a bend in the road when the lights of a vehicle blinded him. He testified that the vehicle was in his lane right in front of him. He took an evasive swerve to the right in order to try and avoid colliding with the vehicle but could not avoid the collision. According to him the collision occurred in the middle of the road, but he was not sure of the exact point of impact. His vehicle was hit on the front left hand side i.e the passenger's side.

Mrs Simpson, the wife of the plaintiff testified that they were traveling along the road from Magaliesburg when all of a sudden a vehicle appeared in their lane directly in front of them. The plaintiff swerved towards his right in order to try and avoid the accident. She also testified that the second defendant also swerved to the right and that the two vehicles collided. According to her the point of impact was close to the middle of the road in the right hand lane. She testified that as a result of the bend in the road they didn't see the oncoming lights approaching before it appeared in front of them.

She testified that the bend in the road was sharp and she only became aware of the lights when it came around the corner. There are also certain chevron signs at the bend which indicate a rather sharp bend in the road.

On behalf of the defendants constable K I Nawana of the South African Police Services, as well as the second defendant testified.

Constable Nawane attended the scene of the accident on the night in question. He testified that he was called out to the scene of the accident. When he arrived there the second defendant was sitting in his car and was struggling to speak. He then went to the plaintiffs vehicle and was with them when the ambulance arrived. He drew a plan of the accident and indicated the point of impact as close to the middle of the road in the right hand lane, i.e the lane in which the second defendant was driving.

The second defendant testified that he was traveling westwards and observed a vehicle approaching from the front with its headlights on. When the approaching vehicle was in very close proximity to his vehicle, the approaching vehicle suddenly veered over to his side of the road. He had no opportunity to react in order to attempt to avoid the collision. His vehicle had been struck (from the driver's perspective) from just to the left of the right headlamp across the face of his vehicle. According to the second defendant the plaintiff had suddenly and negligently, crossed over into the second defendant's part of travel for no apparent reason.

I have to determine, whether on a balance of probabilities, the essential features of a witness's evidence was true: See **Santam BPK vs Biddulphs 2004 (5) SA 586 (SCA) at 592 B-C**, where the following was stated:

“ the proper test is not whether a witness is truthful or indeed reliable in all that he says, but whether on a balance of probabilities the essential features of the story which he tells are true.”

In this instance I am confronted with two mutually destructive versions. In circumstances such as these I must decide the matter solely on probability. If I find that the probabilities satisfy me one way or the other, I am justified to make a finding to that effect. If, however there are no probabilities one way or the other I must be satisfied upon adequate grounds that the story of the litigant upon which the *onus* rests is true and the other false. See **National Employers Mutual General Insurance Association v Gany 1931 (1) AD 187 at 199; National Employers General Insurance v Jagers 1984 (4) SA 437 (ECD) at 440 A-B**

In **Stellenbosch Farmers Winery Group Ltd & Another v Martell et Cie and Others 2003 (1) SA 11 (SCA) at 14 J - 15 E** the following was stated:

“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 (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' 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 fact 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), (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 an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In 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. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it 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."

It is common cause that the accident occurred near the middle of the road in the right hand lane. The point of impact correlates on the probabilities with both versions. The same applies to the damage on the vehicles. The vicinity where the collision occurred is around a bend in the road. The photographs indicate a rather sharp bend in the road this is also confirmed by the chevron signs which could explain the plaintiff's version. On the other hand it is also probable that plaintiff erroneously thought that second defendant was in his lane and suddenly veered into the right hand lane and in so doing collided with the second defendant.

The plaintiff, Mrs Simpson as well as second defendant were satisfactory witnesses and there is nothing to indicate that I should prefer the one version to the other. The plaintiff carries the onus on the claim and second defendant carries the onus on the counter claim.

Consequently neither plaintiff nor second defendant discharged their respective onus. In the light of the aforesaid I have no other choice but to grant absolution of the instance on both the claim and the counter claim.

In the light of my finding the only reasonable order is to order that each party pay its own cost.

Consequently the following order is made:

Absolution of the instance is granted on the claim and the counterclaim. Each party is to pay his or her own costs.

JOHN BERTHOLD SIMPSON

Vs

FIRST RAND BANK LIMITED

A I M VAN DER LINDEN

CASE NO: 54980/08

BEFORE: THE HON MS JUSTICE TOLMAY

Attorneys for Plaintiff:

Alex Bosman Attorneys

105 Garsfontein Road

ALPHEN PARK

PRETORIA

REF: MR A BOSMAN/TL/JP/A2427

Advocate for plaintiff:

ADV C R VAN ONSELEN

Attorneys for Defendants:

MOLEFE KNIGHT ATTORNEYS

C/O H B MOLEFE ATTRORNEYS

SUITE 403, 4TM FLOOR

RENTBEL BUILDING

BUREAU LANE

CHURCH SQUARE

REF: MR I KNIGHT/LL/MSA 115

Advocate for defendants

ADV A JACOBS (JHB BAR)

DATE OF HEARING: 12 MARCH 2010

DATE OF JUDGMENT: 25 MARCH 2010