

IN THE HIGH COURT OF SOUTH AFRICA



GAUTENG NORTH, HIGH COURT PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO. ☒ YES ☐ NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO. ☒ YES ☐ NO

(3) REVISED.

5 May 2010 

DATE SIGNATURE

05/05/2010
CASE NO: 2097/2008

In the matter between:

DR MOTSEKI HLATSWAYO

Plaintiff

and

MR ANNANAIS MALIBE

Defendant

J U D G M E N T

MAKGOKA, J:

[1] This is a judgement on a damages claim instituted by the plaintiff against the defendant, consequent upon a motor vehicle collision which occurred on 26 April 2006 at approximately 21H00.

[2] The collision took place along Hans Strydom Drive, Pretoria, between vehicles with registration numbers P XK 479 GP, and H MH 030 GP, driven by the plaintiff and the defendant, respectively.

[3] Both parties testified in their respective cases. The plaintiff did not call any further witnesses, while the defendant called one witness, Ms Lydia Mathato.

[4] The plaintiff testified that on the day of the collision, he was driving his Nissan along the Hans Strydom Drive from Mamelodi in the southerly direction. He was alone in his car. When he approached a gentle curve passing through Nellmapius, he observed the defendant's Volkswagen Jetta approaching from the opposite direction.

[5] Suddenly the Jetta veered into his lane. Because it was so fast, he tried to swerve to his left but it was too late, as a result of which he collided with the Jetta. He lost control of his vehicle and it stumbled across the road, ending up in a ditch on the outer part of the opposite direction. After the collision the Jetta was on his left, a bit far from his vehicle. His vehicle was damaged on the driver's side and the front right part.

[6] During his cross-examination by Mr. *De Kock*, for the defendant, the plaintiff testified that he observed the Jetta in a matter of seconds before the collision, at the distance of approximately 30 metres, while it was still in its lane. He was driving between 80 and 100 km/h. He did not pay attention to

the Jetta until just before the accident. He could not remember if there was a solid or broken line on the road, but he remembered that there were road markings. He further conceded that had he made a full swing to his left, he could have avoided the collision.

[7] The defendant's version, put to the plaintiff during cross-examination, was a mirror image of the plaintiff's version. That concluded the plaintiff's case. As stated earlier, no witnesses were called to testify on behalf of the plaintiff.

[8] The defendant took the stand to testify in his defence. He testified that he was driving from Nellmapius, approaching the Hans Strydom Drive from Nellmapius Extension 3. He was in the company of Ms. Lydia Mathato, who was a front seat passenger in his car. There was a right gentle curve ahead and he could see two to three vehicles approaching from the opposite direction. There was a solid line marking on the road.

[9] He was driving approximately 70 km/h. As he was approaching the gentle curve, he saw a bright light which obstructed his view and there was a collision on his lane of travel. He did not at any given stage cross the barrier line to the opposite lane. The collision happened very suddenly. His windscreen was shattered and the front part of his car was damaged and moved inwards. After the collision, he was still on his side of travel, but could not remember whether his vehicle was still on the road or on the tarmac. He was also unable to remember the position of the plaintiff's vehicle.

[10] In cross-examination the defendant was unable to explain the position of the vehicle immediately after the collision. He was also unable to estimate the distance from which he first observed the lights of the plaintiff's vehicle. He further stated that the timespan between him being "brighted" by the plaintiff's lights, and the collision, was a matter of "split seconds". When he first saw the plaintiff's vehicle, the latter was already in his lane. He did not know where the plaintiff's vehicle emerged from, but thought that the plaintiff overtook another vehicle. All he saw were the bright lights in front of him and the collision occurred. He could not tell the distance between the two vehicles before collision. Before then his view was unhindered.

[11] Asked what he did to avoid the collision, the defendant testified that as the collision took place suddenly, he did not swerve, nor applied his brakes, as he did not see the car veering from its lane to his - he just saw it in his lane. The damage to his vehicle was in the middle of the front portion up to the driver's door. According to him the collision was a partial "head-on".

[12] Asked by the court whether the whole or part of the plaintiff's vehicle had crossed over to his lane when the collision occurred, he testified that the whole of the plaintiff's vehicle had crossed the solid barrier line into his lane. He further confirmed that the plaintiff's vehicle came straight to him in his lane.

[13] Ms. Lydia Mathato testified that she was a passenger in the defendant's vehicle on the night of the accident. She saw bright lights and heard a sound of the two motor vehicles colliding with each other. After the collision, the two vehicles veered towards the gravel road, on their lane of travel. Their vehicle came to a stand-still there. She never lost consciousness and was alert after the collision. Like the defendant, Ms. Mathato was unable to explain the distance from which she observed the plaintiff's vehicle, but testified that she only noticed the vehicle when it was in their lane, with bright lights, and the collision occurring very suddenly. Before then, her view was not hindered.

[14] That concluded the evidence. Mr. *Hattingh*, for the plaintiff, submitted in closing argument that I should find in favour of the plaintiff, while Mr. *De Kock*, for the defendant, on the other hand, contended for the dismissal of the plaintiff's claim, arguing, among others, that the defendant's version that the two vehicles ended up on the defendant's side of the road, was not disputed. He further submitted that if I were to find any negligence on the part of the defendant, such negligence should be limited to 10%.

[15] When one has regard to the versions of the parties, each one blames the other in exactly the same manner for the collision. As stated earlier in the judgment, the parties' versions are the mirror image of the other. What does emerge though, is that neither of the parties can be held 100% negligent for the collision. The plaintiff, for example, conceded during his cross-examination, first, that he did not pay attention to the defendant's vehicle, until

it encroached into his lane, and secondly, that had he swerved fully to the left, he could have avoided the collision. In my view, the concessions on these two aspects, points to an inference that the plaintiff was not keeping a proper look-out.

[16] On the other hand, the defendant and his witness were unable to explain how they could not have seen the plaintiff's vehicle approaching, if their view was unhindered. That they testified to have seen the plaintiff's vehicle just when it encroached onto their lane, similarly, in my view, suggests that the defendant was not keeping a proper lookout.

[17] I have not had the benefit of an independent sketch plan, (usually drawn by the police), to assess the point of impact and the location of the vehicles immediately after the collision. The fact that the plaintiff's vehicle ended up on the far end of the opposite direction, is not, in my view, definitive of where the point of impact would have been. It is only but one consideration in complex web of factors such as the speed at which the vehicles were travelling, etc. Having regard to the photos depicting damage to the plaintiff's vehicle, I remarked during argument that the damage did not appear commensurate with the speed at which both drivers testified to have driven. Perhaps, with hindsight, one of the parties should have presented the evidence of a motor collision reconstruction expert.

[18] At the end of the day, I am saddled with two mutually destructive versions of what happened immediately before the collision. A useful guide to

unlocking the impasse, lies, in my view, not only on the credibility of the witnesses but also on the nature of the damages to the two vehicles. In this regard, the plaintiff's vehicle was severely damaged on the whole right side, from the fender right through the driver door to the rear door. The photos of the defendant's vehicle, if any available, were not presented in evidence. However, it would be recalled that the defendant testified that the collision was a near "head-on", and that his vehicle was damaged in the middle of the front portion to the driver's door.

[19] In my view the defendant's version of the partial head-on collision, is not supported by the nature of the damages as outlined above. If the collision was a partial head-on, the plaintiff's front would have been affected, even if slightly so. This is not the case, regard being had to the photos of the plaintiff's damaged vehicle. The said front portion is largely intact.

[20] The damages to the vehicles establishes strong probabilities, in my view, that the defendant veered into the travel of path of the plaintiff, thus hitting the large part of the right side of the plaintiff's vehicle. If the collision had occurred on the defendant's version, the damage to the plaintiff's vehicle would have been more on the front towards the left. I am therefore satisfied that the version of the plaintiff, on the probabilities, is a more coherent one.

[21] I have, however, already found that both parties were negligent in the respects I have outlined in paragraph 15 of this judgment. The only question to be determined is therefore the percentages of negligence to be apportioned

to each party. Having given due consideration to all factors, I am of the view that the defendant was 40% negligent.

[22] With regard to the *quantum* of damages, the plaintiff's admitted damages is the sum of R258 749. 38. Applying the apportionment I have decided on, the defendant would accordingly be liable to the plaintiff in the sum of R155 249.63.

[23] Finally, the issue of costs. There is no reason to deviate from general principle that costs should follow the cause. The plaintiff has been substantially successful in his claim, as a result of which he is entitled to his costs. There are also costs occasioned on 16 and 20 October 2009. These costs were occasioned by the late filing of the plaintiff's plea to the defendant's counterclaim. The plaintiff must bear these costs.

[24] I therefore make the following order:

1. Judgement is granted against the defendant in favour of the plaintiff for payment of a sum of R155 249.63;
2. Interest on the said amount at the rate of 15.5% p.a *a tempore morae*;

3. The defendant is ordered to pay the costs of the suit, which costs shall not include the costs occasioned on 16 and 20 October 2009, which costs shall be paid by the plaintiff.



T M MAKGOKA
JUDGE OF THE HIGH COURT

DATE HEARD : 26 & 27 OCTOBER 2009

JUDGEMENT DELIVERED: 5 MAY 2010

FOR THE PLAINTIFF : ADV J. HATTINGH
INSTRUCTED BY : *WEAVIND & WEAVIND*, PRETORIA

FOR THE DEFENDANT : ADV. H DE KOCK

INSTRUCTED BY : *GROVE, DEYSEL & PARTNERS*,
PRETORIA
