

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NO: 7274/08

In the matter between:

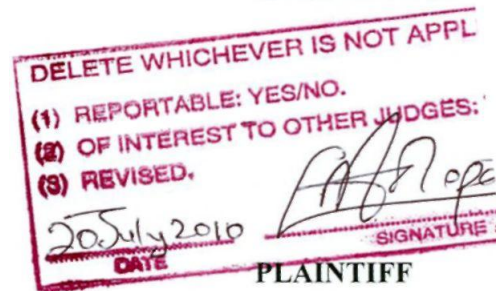
R BLOM

And

ROAD ACCIDENT FUND

PLAINTIFF

DEFENDANT



3/8/2010

JUDGMENT

MOLOPA J

In this action the Plaintiff has instituted an action against the Defendant for damages arising from a motor vehicle collision which occurred on 13 April 2005 along the Hartswater/Jan Kempdorp Road between a motor vehicle with registration letters and number BPD 872 NC ("the insured vehicle"), driven by one Muvhango Richard Mukhari ("the insured driver/Mukhari"), and a motor vehicle with registration letters and number BMF 580 NC driven by the Plaintiff.

When the trial commenced, the Plaintiff made an application for separation of liability and damages, i.e. separation of merits and quantum in terms of Rule 33 (4) of the Uniform Rules of the Superior Court ("The Rules"), the Defendant's counsel indicated that he had no instructions from the Defendant to agree to separation of the merits and quantum and that he left this in the hands of the court. In principle, in my view, there are no grounds upon which the Defendant could oppose the application for separation. They themselves did not seem to be ready to proceed on quantum. On the facts before me I granted an order for separation of the merits from quantum in terms of Rule 33(4) of the Rules. The matter thus proceeded on the merits and the quantum was postponed *sine die*.

As already stated above, the two vehicles aforesaid, which travelling in opposite directions, were involved in the collision in question herein. The Plaintiff seeks full liability from the Defendant. If the driver of the insured vehicle is found to be negligent, full damages against the Defendant are recoverable by the Plaintiff. If the Plaintiff is found to be contributory negligent then, an apportionment to his damages will be applied.

It is common cause that a collision occurred on 13 April 2005 along the Hartswater/Jan Kempdorp Road between the insured vehicle, driven by Mukhari and a motor vehicle driven by the Plaintiff. The allegations in this regard are set out in paragraph 3 of the Plaintiff's particulars of claim read with paragraph 3 of the Defendant's plea (pages 4 and 9 of the paginated papers).

The issue for determination in this matter is whether the driver of the insured vehicle was negligent as alleged in paragraph 4 (4.1- 4.9 of the particulars of claim as amended) page 4 of the paginated papers, and what degree of fault, if any, can be attributed to the Plaintiff in relation to the collision that occurred on 13 April 2005.

The Plaintiff testified that he stays at house no. 36 Disa Road, Bonitapark, Hartswater. That he is a police officer, constable in the South African Police Service, stationed at Hartswater, Northern Cape.

He further testified that on 13 April 2005, on the day of the collision, he was a police officer, stationed at Warrenton, and that he stayed at the same address as mentioned above, i.e. 36 Disa Road, Bonitapark.

He testified that the collision occurred between 22H00 – 23H00. That on the day in question he was on duty at Warrenton police station; that he reported for work at approximately 8H30 and knocked off work at 22H00.

He testified that he was driving back home, to Hartswater, when the collision occurred. That he drove along the Jan kempdorp/Hartswater road, that there is a crossing, T-junction, near Hartswater where Piet Strydom road which leads to Pampierstad, intersects.

He testified that he drove from South to North. That near the crossing/intersection he saw a motor vehicle coming from the opposite

direction. That the on coming vehicle drove with its lights on bright, and that he tried to show the insured driver with his dim lights but the driver aforesaid did not react, and he (the Plaintiff) moved towards the intersection and started driving slower. That the intersection aforesaid was on his left side.

He further testified that there were single lanes for each lane of travel, that there was a single lane only on his side. That he was driving his vehicle on the right hand side of the sketchplan depicted on page 23 of Exhibit A.

He testified that there was a vehicle coming from his opposite direction. That there are lines that separate the two opposite lanes. That the speed limit before the T-junction is 80 km per hour, and that when he approached the intersection he drove at the speed of 80 km per hour, and that when saw the other/insured vehicle coming from the opposite direction with its lights on bright, he reduced speed.

He further testified that he tried to show the driver from the opposite direction that his lights were on bight by switching his lights on and off, i.e. that he flickered for him/the insured driver that he could not see.

He testified that at the intersection he just saw lights from his right side, and things happened quickly, he heard a thud, the windscreen of his vehicle broke and glasses got into his eyes and he could see nothing. Further that he could not even see if the oncoming/insured vehicle's right indicator was on or not because it was at night, and the lights (of the oncoming/insured vehicle, which were on bright shown into his eyes.

He testified that the vehicle he collided with was a 1ton green Nissan bakkie. That it was the same vehicle that came from the opposite direction.

He testified that the insured vehicle was supposed to have stopped before it turned to its right to give him (Plaintiff) the right of way to pass, but that it did not stop. Further that he could not see that the insured driver was going to turn because it was dark, and because his lights were on bright.

He testified that the collision occurred in the lane in which he (the Plaintiff) was driving. That he (the Plaintiff) had right of way in that lane. That after accident/collision the damage on his vehicle was on the whole right side; and that the damage on the insured vehicle was on its front right side.

He testified that after the collision his vehicle came to stop/standstill just a little past the intersection, marked a with a red pen on the sketchplan. That after collision the other/insured vehicle stopped right across the intersection, on his, (the Plaintiff's) lane of travel, marked b with a red pen on the sketchplan.

He testified that there is nothing he could have done to avoid the collision.

Under cross examination he stated that he cannot remember what speed he reduced to when he slowed down as he approached intersection when he saw the oncoming vehicle with bright lights on.

He disagreed (with the version of the insured driver, as put to him) that road in question had two (2) lanes. He further disagreed (with the version of the insured driver, as put to him) that the insured driver had his lights on dim when he approached the intersection.

He also disagreed (with the version of the insured driver, as put to him) that he did not that flicker his (Plaintiff) lights to show insured driver that his lights were on bright, stating that he did flick to him to show that he must switch to dim.

When it was put to him that the insured driver says that he was indicating to show his intention to turn right he stated that he (Plaintiff) could not see anything because it was dark and his (insured driver's) lights were on bright, shining into his (plaintiff) eyes.

When it was put to him that can't deny that insured driver indicated his intention to turn to the right, he (Plaintiff) stated that his (insured driver's) lights were on bright therefore he could not see.

He disagreed (with the version of the insured driver, as put to him) that the insured driver had stopped for him to pass, i.e. gave him the right of way.

He (Plaintiff) reiterated that he could not see whether the indicator of the insured vehicle was on because the headlights were on bright.

He indicated the point of impact with a c on the sketchplan, to the extreme right of his lane of travel.

He denied that the insured driver ever stopped to give him the right of way, nor that the insured vehicle was stationary when the collision occurred. He further disputed that his vehicle had only one light on, that his right side headlamp was not on. He stated that his right side headlight was damaged during the impact during this accident/collision.

He further stated that there is nothing else he could have done to avoid the collision because he was already in the intersection, that he applied his brakes but when he was inside the intersection he could see headlights from the right hand side coming towards him and thereafter he heard the impact; that he had already applied his brakes because he could not see because of the bright lights shining directly into his eyes.

He (Plaintiff) stated that he could not have swerved his vehicle to the left.

Still under cross-examination he stated that lights were coming towards him during the time when insured vehicle was turning to the right, after he had warned him with his (Plaintiff's) lights that his (insured driver) lights were on bright.

He stated that he did not flicker his lights to warn insured driver, the warning he gave was before he got to the intersection but that the insured driver did not react, that was before he could execute the right turn. He further stated that he saw the insured vehicle approaching with bright lights before getting to the intersection, and when he entered the intersection that's when he could see the lights flashing from the right side, that's when he heard impact. He said when approaching the intersection he saw the insured vehicle with lights on bright and warned

him that his lights were on bright, that he also said that he saw lights coming to the right.

He stated that saying, under cross-examination, that he (Plaintiff) applied brakes is not new evidence because in evidence in chief he said that he slowed down, that to reduce speed he had to apply brakes. That he did apply brakes to avoid the collision, but did not see in front because of the bright lights of the oncoming vehicle, that is why he applied brakes.

He stated that there were no other vehicles in the vicinity. That if he had known that the insured vehicle was going to turn right he would have turned left before to avoid the collision, but did not foretell the insured driver's conduct.

On clarification by the court as to when did he see the oncoming/insured vehicle for the first time he stated that he could not estimate the distance, that it was difficult for him to give an estimation.

Further, on questioning by his counsel he stated that he could not say whether the insured vehicle near or far away when he first saw it because the lights shown into his eyes.

On questioning by the Defendant's counsel he stated that he saw the point of impact that he marked **c** on the sketchplan, as well as the points he marked **a** and **b** [points where the says the respective motor vehicles came to stop after the collision] respectively after the collision (not on the same day of the collision), when the police had made some markings on the road in question.

That concluded the evidence for the Plaintiff.

For the Defendant one Muvhango Richard Mukhari (insured driver) testified. He testified that on 13 April 2005 between 22H00 – 23H00 he was involved in a collision along Jan kempsdorp and Hartswater, that he was coming from Hartswater to Pampierstad. That to go to Pampierstad he would have to turn right at Piet Strydom Road, and head for Pampierstad. That he was driving at the speed of 60 km per hour.

He testified that when he approached the intersection where he had to turn, on arrival there he turned a bit and indicated and stopped. That a car came from the direction of Jan kempsdorp travelling down the road, and the car aforesaid collided with him, hitting him on his right side front wheel. That his vehicle was stationery at the time of the collision.

He testified that the oncoming vehicle only had its right headlamp/light on and it was on dim. That his vehicle's lights were all on and they were on dim.

He testified that travelling from the direction of Hartswater towards Jan Kempisdorp, but before reaching Jan Kempisdorp at the intersection he was supposed to turn right to Pampierstad, and that is when the collision occurred.

He testified that there are road markings, e.g broken lines on the road in question. That the road has two lanes on the either side, i.e. it is a dual carriage road on either side, that there were two lanes on his lane of travel and two lanes on the Plaintiff's lane of travel.

He indicated the point of impact on sketch plan with an E, i.e as the place where collision occurred.

He disputed that his vehicle lights were on bright shortly before the collision, maintaining that his lights were on dim. He also disputed that the Plaintiff flickered for him to show him that his lights were on bright.

He testified that there was nothing he could have done to avoid the collision; that he had completely stopped and the Plaintiff approached and hit him on his right side and the Plaintiff then proceeded to the concrete island and ended there, that there was nothing he could have done as he already had the intention to turn, and there was nowhere he could not reverse because there were other vehicles from his rear end and if he could have reversed he could have caused another accident.

Under cross-examination he stated that before the accident came from Hartswater, that he was working at Hartswater, and he had been taking people that were working to their respective homes. That he was a driver and the people he had in his vehicle worked at a furniture manufacturer at Calicom Trading. That he worked for Calicom Trading, he was a driver there.

He further stated that it was his job to take people to work and back home; that he also used to go and fetch/collect material used to make furniture from other places to Calicom Trading.

He stated that on 13 April 2005 he started work at 7H00. That on that day in question he spent the whole day in the factory because it was not busy; he had to wash some cars. That he knocked off at 17H00 and

there were people he had to deliver to their respective homes and he had to wait for them delivers them to knock off, and after delivering them he would go back to factory and that is where he slept.

He further stated that on that day in question herein he knocked off at 17H00 and he waited for those who knocked off at 21H00 to deliver them. That after 17H00 he bathed in his room, made food, had supper then waited for the 21H00 shift to knock off, he then took them home.

He stated that the employees aforesaid did not work full time, other days they did not work, and sometimes they would all knock off at 17H00 and each would use their own transport. That in that specific week of 13 April 2005 it was only that day that he was transporting these people, he did not transport them everyday.

He stated that on that day he had 9 people at the back of his vehicle and they in front they were two (including him). He stated that he did not have contact with those people/employees because their factory moved to Babelegi Industrial area in Hamanskraal.

He reiterated that he was travelling towards Jan kempsdorp before the turn off, and that he would have to turn right to get to Pampierstad. That the other vehicle coming from Jan Kempisdorp towards Hartswater had only one working lamp/light; that the right hand side lamp was on as he was facing the oncoming traffic and that that is what he had told his counsel.

He stated that when he approached the intersection he indicated before he turned, i.e. that before he turned he indicated, that before he

could even turn he had his indicator on, that on arrival there he indicated and then turned and at that stage the indicator was on, that there was misunderstanding on what he had said earlier that he turned a little bit and then indicated.

He stated that after collision his vehicle remained stationery as depicted on the sketch plan, that it shifted just a bit and the Plaintiff's vehicle went on and stopped on the other side at **F**, that after hitting the concrete pavement in the middle of the road it went and stopped at **F** outside the road.

He further stated that the concrete pavement is the area marked **G** on the sketch plan. That the road in question herein is divided by concrete pavement and not by a line.

He disputed that the Plaintiff's vehicle stopped at **a** as testified by the Plaintiff, stating that his (Plaintiff's) vehicle after impact with him went straight to the concrete island in the middle of the road and after hitting that concrete it swerved to the point marked **F** where it ended up.

He further stated that after the impact the driver of the other vehicle (Plaintiff) came out wanting to fight him; that he walked from his vehicle with his balled fists up. That Plaintiff however did not hit him, they talked and police sorted that out and the police arrived. He stated that he did not tell his legal representative about the fight, that the Plaintiff knows that he wanted to fight; that it did not come to who is wrong or not wrong, that the Plaintiff just came ready to fight, that while they sorted out the impending fight his colleagues phoned and the police arrived. He stated that he was not cross with the Plaintiff.

He disputed that his vehicle stopped at point **b** as testified by the Plaintiff, reiterating that his vehicle did not move; he stated that he did not know why his counsel did not dispute not dispute the Plaintiff's version.

He further disputed that the point of impact was at **c** as testified by the Plaintiff, reiterating that the point of impact was at **E**; he stated that he had told his counsel that the point of impact at **E**, that he does not know why his counsel did not dispute **c**, stating that the cars are depicted correctly but that the point of impact is not at **c** but at **E**.

He stated that his vehicle stopped at the point marked **H** on the sketch plan, just between the lines/concrete dividing the two lanes of travel with the front of his vehicle at point **H**.

Still under cross-examination he stated the road he was travelling on before where he was to turn is a long straight road and he can see up to 5 km in front. That when he saw the Plaintiff's vehicle for the first time he was about 300m away. That he was still indicating, before he could stop, when he saw it. That he was turning and had not stopped when saw him.

He stated that it took about 50 seconds, less than a minute from when he stopped to when the collision occurred. That before he stopped he saw the Plaintiff's vehicle, he is sure of it. That before turning he indicated, and that he had made a mistake yesterday.

He stated that he did not see vehicle first when he stopped; that he saw it earlier with one head lamp on, that he saw the Plaintiff's vehicle as approaching not only as he stopped. That the vehicle collided with him on right front wheel, only on the right wheel.

He stated that his vehicle was damaged on the right head lamp and right front wheel, that if one hits the wheel it will automatically hit the lamp and that he is not guessing he knows it that if a person has to come into contact with a wheel he will obviously first come into contact with lamp.

He reiterated that there is nothing could do to avoid collision because could not reverse because there were other vehicles at his back.

That he told his legal representatives about how accident occurred, that the Plaintiff's vehicle was driving very fast prior to the collision, seen by the manner in which it approached, that it hit him and went over the concrete pavement then to the left hand side.

He reiterated that the 300m is the time he saw Plaintiff's vehicle for the first time, that when he stopped his vehicle Plaintiff's vehicle was nearby and it then hit him. That there were no other vehicles except Plaintiff's vehicle when he stopped.

He stated that the Plaintiff's vehicle was travelling fast and that it could have been travelling at about 80km per hour.

On questioning by the court he stated that the speed limit at the time was 60km per hour because there are two garages on both sides as

well as a taxi rank. That his indicator was yellow in colour. He also stated that the damage he saw to the Plaintiff's vehicle was that the windscreen broken/shattered, further that the right side of Plaintiff's vehicle had scratch marks.

That concluded the evidence for the Defendant, and the evidence for the whole case.

The respective counsel argued that the versions of their respective clients be accepted.

It is so that there are two versions before this court.

On the one hand the Plaintiff's evidence is to the effect that the collision in question herein occurred as a result of the insured driver, first, blinding him with his bright lights, as a result of which he could not see his way properly; secondly, that the insured driver executed a right turn and proceeded to enter the intersection without affording him (the Plaintiff) his right of way; further that since he was blinded by the insured driver's bright lights, he did not see whether the insured driver indicated or not.

On the other hand there is the version of the insured driver that at all material times, the lights of his vehicle were on dim. That he indicated his intention to turn right, and when he reached the place where he was supposed to turn he stopped, that his vehicle was completely stationary and the Plaintiff hit the right wheel of his vehicle while he was so stationery.

Also there are two versions on the speed limit on the road in question, as well as on the respective lanes of travel on each side of the road, as well as on how the two (opposite) sides are divided.

In this regard, the Plaintiff, on the one hand testified that the speed limit on the road in question was 80 km per hour; that there were single lanes each on either side. His version also, as emphasised by his counsel, is that the two sides are separated with lines.

On the other hand the insured driver on the other hand testified that the speed limit on the road in question is 60km per hour; that there are two/dual lanes on either side; also that the two sides are separated with a concrete pavement.

There is also two versions on the point of impact. However, if one looks at the points indicated by the Plaintiff and the insured driver on page 23 of Exhibit A, on the sketch plan, c and E respectively, it is clear in my view that the areas/spots indicated are almost adjacent, they are much nearer the centre line, it is just that the one (E) is nearer the demarcating line whereas the other (c) is more to the middle of the road.

It is trite that where a court is sitting with two versions it must look at the credibility of the witnesses. In this case there was one witness each on both sides, the Plaintiff and the insured driver respectively. Neither party called any independent witnesses like the police officers who attended to the scene of the collision. Even the sketch plan on page 23 of Exhibit A was merely used for clarity and/or as a guideline since the person who prepared it never gave evidence.

It is so that counsel for the Plaintiff submitted that the insured driver was not a credible witness, and that the Plaintiff's version was more credible.

Looking at the evidence of the Plaintiff there is a contradiction as to when and how he was blinded by the insured driver as he alleges. On the one hand he says that as he was facing the oncoming vehicle the bright lights shone into his eyes such that he could not even estimate from what distance he first saw the insured vehicle and/or the bright lights in question. It was very clear to me that on this aspect of when did he (the Plaintiff) see the insured vehicle the first time he was very evasive and dodgy, he simply and deliberately avoided this question, did not want to tie himself to any specific distance. This aspect is very crucial to assess what evasive step one could have taken.

On the other hand, when confronted with whether he saw the indicator of the insured vehicle he states that he could not see the indicator because the bright lights coming from his right side (no longer from the front), pierced into his eyes thus he could not see.

The plaintiff also contradicts himself on whether he applied his brakes or not. In his evidence in chief he testified that the only evasive step that he took was by reducing his speed, even here he avoids to answer to what speed did he reduce his speed, he was very evasive in this regard. In cross examination he testified that he applied his brakes because to reduce speed means that he reduced his speed. That cannot be so in my view; to reduce speed does not necessarily mean that one has applied one's brakes. On a balance of probabilities he did not even reduce

his speed. If he had applied his brakes he would have said so from the beginning.

On his own version he (the Plaintiff) at 80km per hour he was driving at an excessive speed. If one has regard to the undisputed evidence of the insured driver that the area was a built up area, then it is a well known fact that the speed limit was 60km per hour.

In my view the insured driver was more credible than the Plaintiff. As already stated above the Plaintiff avoided answering crucial questions, e.g. about the indicator, and how far was insured vehicle when he first saw him, he is a police officer, surely it is not impossible to estimate how far one would have seen the bright lights (as he alleges) before the collision. Plaintiff does not seem to be taking this court into his confidence.

The Plaintiff bears the onus to prove his case on a balance of probabilities.

On the versions of how many lanes each side of travel had, it is difficult for this court to believe that there were single lanes each as alleged by the Plaintiff. He merely says there was a single lane, there are no photos indicating how the lanes were at the time of the collision. No municipality official and/or any other independent witness was called to confirm this; surely this is a simple issue which Plaintiff could have easily proved; obviously this goes to the aspect of why did he not move or swerve to the left lane to avoid the collision.

In my view the evidence of the insured driver that there were two lanes on each side is more probable. Though the sketch plan on page 23 of Exhibit A was not necessarily proved, it clearly shows that there were two lanes on each side, hence I say that I have no reason not to believe the insured driver who says that there were two lanes on each side.

In fact to me the insured driver was a more impressive/credible witness than the Plaintiff. He answered all his questions openly, honestly and with conviction, save that there was some confusion as to when he started indicating his intention to turn.. One could sense from how he answered that he answered honestly, despite rigorous cross-examination. The Plaintiff on the other hand was evasive.

On the totality of the evidence before this court I find that the Plaintiff drove at an excessive speed, that he did not keep a proper lookout, and that he did not take any evasive action to avoid the collision.

On the other hand I find that the insured driver did not drive with his headlamps on bright as alleged by the Plaintiff. I also find that he did indicate his intention to turn to the right, though, in my view he did not indicate timeously, i.e. he indicated when he was already much nearer the place where he was going to turn. I also find that the insured driver had stopped his vehicle prior to turning towards Pampierstad, however, on his own version I find that at the point, **H**, which he himself indicated to have stopped and how he had stopped, his vehicle slightly protruded onto Plaintiff's lane of travel. The Plaintiff on his own version drove on the extreme right of his lane, much closer to the centre line, hence the collision; and because on a balance of probabilities he did not keep a

proper look out he (the Plaintiff) did not swerve to his left to avoid the collision.

On all the facts before me, set out above, and on a balance of probabilities, I find that the Plaintiff was more to blame for the collision, and that the insured driver was less to blame for the collision.

As already mentioned above, this is a case where in my view negligence can be attributed to both the Plaintiff and the insured driver. In my considered view the Plaintiff is 60% negligent and the insured driver is 40% negligent. The Plaintiff thus succeeds on 40% of his claim.

In the result the Defendant is thus ordered to pay 40% of the Plaintiff's proven damages, as well as the Plaintiff's costs. Such costs to include the costs of 21, 24 and 25 August 2009.



Molopa-Sethosa J

JUDGE OF THE HIGH COURT