



DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO.	
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	
(3) REVISED.	
23/9/2010 DATE	 SIGNATURE

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

NOT REPORTABLE

CASE NO: 29610/08

In the matter between:

23/9/2010

SJ COMBRINCK

Plaintiff

And

ROAD ACCIDENT FUND

Defendant

JUDGMENT

LEDWABA, J

- [1] Plaintiff instituted an action against the defendant for the damages he suffered arising out of an accident which happened on 16 December 2005 at or near Hammanskraal within the jurisdiction of this court wherein his Audi motor vehicle with registration number DRB 591 GP (the Audi) collided with a vehicle with registration number FJL 684 NW

(the insured vehicle) driven by Mr V. Mtshwene (the insured driver).

- [2] When the trial commenced the parties agreed that there should be a separation of merits and quantum. I accordingly ordered that the trial would proceed on the merits and quantum was stayed. The plaintiff's counsel further made an application to amend his particulars of claim. The Defendant did not object to the proposed amendment of the date of accident and paragraph 4 of the particulars of claim. The application to amendment was granted and the defendant did not amend its plea.
- [3] The plaintiff testified and called two police officers as his witnesses. After the closing of the applicant's case, an application for absolution from the instance by the defendant's counsel was dismissed. The defendant closed its case without calling any witnesses.
- [4] In paragraph 5 of the plaintiff's particulars of claim, it has been alleged that the accident was caused by the sole negligent driving of the insured driver. The defendant pleaded to paragraph 4 of the plaintiff's particulars of claim is as follows:

"4.1 Each and every allegation contained in this paragraph is denied as if specifically traversed and the Plaintiff is put to the proof thereof.

4.2 The defendant specifically pleads that no collision occurred either as alleged or at all, and that the Plaintiff was not involved in a collision either as alleged or at all." (own underlining)

- [5] This matter will therefore be adjudicated on the value of the evidence presented by the Plaintiff and his 2 witnesses. Which evidence will be summarised hereunder.
- [6] The plaintiff testified that on the day of the accident he was from Radium, in the Limpopo district, driving the Audi and had one passenger, Mr Kobus Viljoen. As he was driving to the southern direction towards Pretoria, when he was next to the scene of the accident, shown on the photo in bundle B, he had a heart attack and he cannot therefore explain how the accident occurred. He only regained his consciousness on the 25 December 2005 and realised that he had injuries to his head, chest and legs. During cross examination it was put to him that the defendant's witnesses will testify that the point of impact was on the stop line of vehicles from the eastern direction from Murrayhill, and that the accident was solely caused by his driving in a zig zag manner. The plaintiff's response was that it was impossible, however he could not give reasons why he says it is impossible.
- [7] The two police officers Inspector Sammuel B. Sithole and Inspector Johannes P. Chabalala testified that as they were busy with their duty patrol and were attracted to the scene of the accident by the flashing lights of the tow trucks. They

arrived at the scene of the accident between 20h00 and 21h00.

- [8] Inspector Sithole confirmed that he drew the rough sketch, which is not according to scale, took measurements and noted the key to the plan, see Bundle A pages 77 and 78. He further said he used his torch to check the debris on the road to determine the point of impact. There were no debris on the road next to the stop sign at the T junction. He marked the point of impact with an alphabet 'C' because of the broken glass and the oil spots he noticed on the road. He further said he spoke to nobody at the scene of the accident.
- [9] Inspector Chabalala testified that he spoke to the insured driver and asked for his driver's license. He further said the plaintiff stuck in the Audi. He said he knows that the plaintiff was involved in the accident because he found his identity document in the Audi.
- [10] In evaluating the evidence, notwithstanding the defendant's plea that no collision occurred, it is clear from the evidence that there was an accident between the Audi and the insured vehicle. The defendant further in the pre-trial minutes in stating its version said 'plaintiff was the sole cause of the collision. This, in my view, is an acknowledgement that the accident did occur.

[11] The plaintiff's counsel argued that having regard to the position of the point of impact depicted on the rough sketch it could be reasonably inferred that the insured driver turned right at the t-junction into the path of the Audi which had a right of way. He further argued that a negative inference should be made from the defendant's failure to call the insured driver who was available at court to testify.

[12] On careful analysis of the evidence of inspector Sithole I am not convinced that his evidence concerning how the point of impact was depicted is reliable because of the following reasons:

12.1 he said he was tired on that night in question, that is the reason why he could not even reflect the registration numbers of the vehicles on the key to the plan,

12.2 he said he prepared the rough sketch on page 78 of Bundle A based on an initial rough sketch that he prepared at the scene of the accident, which rough sketch he could not produce,

12.3 *ex facie* the sketch of Bundle A of on page 78 alphabet 'E' of represents the break marks of the insured vehicle and vehicle A came to a standstill at position where it is shown on the sketch. I find it extremely difficult to understand how vehicle A collided with vehicle B at point C considering the positions of the

vehicles after the collision and the alleged brake marks of both vehicles.

12.4 Both inspectors said they do not know whose negligence caused the accident and do not know if the vehicles were shifted after they collided with each other.

[13] What compounds the uncertainties in this matter is that the court does not have the version of the insured driver. What has been put to the plaintiff and his witness under cross examination can not be regarded as evidence.

[14] The passengers in the Audi and the insured vehicle were also not called as witnesses to put their version before the court.

[15] The onus is on the plaintiff to prove its case on the balance of probabilities. Plaintiff can not testify as to how the accident happened and the police officer can also not assist regarding how the accident happened.

[16] In deciding whether the plaintiff has discharged the onus which rests upon it, the court must have regard to the totality of the evidence considered together with the documents presented to the court.

[17] The other factor to be taken into account is that the defendant did not call its witnesses in particular the insured

driver who was available and whose evidence could assist the court. This case depends mainly on the evidence of inspector Sithole who prepared the rough sketch. The strength and the weaknesses of the plaintiff's case should be considered, see **Levy NO v Rondaller Assurance Corporation of South Africa Limited 2971(2) SA 598 AD.**

[18] I have alluded to some of the problems in the evidence of inspector Sithole. There are other facts that are unknown to the court concerning the accident. The witnesses who could possibly assist the court regarding what happened did not testify.

[19] I have also considered what Beadle CJ said on the distinction between absolution at the close of the plaintiff's case, and absolution at the close of the case in **Supreme Service Station (1969) (PVT) Ltd vs Fox and Goodridge (PVT) Ltd at page 92 paragraph C-H** when the learned Judge expressed himself as follows:

"The locus classicus of the cases dealing with the procedure of absolution from the instance is the old Transvaal case of Gascoyne v. Paul and hunter, 1917 T.P.D. 170. In that case it was pointed out that an application for absolution from the instance stands much of the same footing as an application for the discharge of an accused at the close of the evidence for the prosecution, but it is stressed (see p. 173 of the judgement) that it would indeed be curious if in civil cases we were to apply a more stringent rule of practice than in criminal cases. It would seem to me that as in a criminal case the onus of proof is always higher than in a civil case, evidence which in a criminal case would be insufficient to justify refusing an application for the discharge of an

accused, might well in a civil case be sufficient to justify refusing an application for absolution from instance.

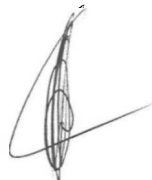
Gascoynes's case stresses that it is perfectly competent for a court to refuse an application for absolution from the instance when the application is made at the close of the plaintiff's case, but to grant it if the defendant then promptly closes his case and renews the application without calling any evidence at all.

There is no inconsistency in two such diametrically opposed orders, though the evidence before the court in each application is identical.

The reason why there is no inconsistency is because the test to be applied when application is made before the defendant closes his case, is "what might a reasonable court do", whereas the test to be applied when the application is made after the defendant has closed its case is "what ought a reasonable court to do."

[20] **I therefore, make the following order.**

- (i) I grant absolution from the instance in defendants' favour**
- (ii) Plaintiff is liable to pay the costs.**



A.P LEDWABA
JUDGE OF THE HIGH COURT