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NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NR: 26958/2006

DATE: 28/01/2011

In the matter between:

JOSe LUIS DOS SANTOS PINTO

PLAINTIFF

And

S P MTHALANE

DEFENDANT

JUDGMENT

Ranchod J,

[1] This case concerns a claim for damages to a motor vehicle arising out of a collision on 30 September 2005 between 20:45 and 21:00 at night on Lever Road. Midrand.

Plaintiff alleges that the defendant was negligent and caused the collision between their respective motor vehicles, namely, a Mercedes Benz with registration NRK 162 GP and (Opel Corsa) vehicle with registration RNJ 495 GP causing damage to the plaintiffs' vehicle in the amount of R167 436.84 for repairs and R2 500.00 for towing and release charges.

[2] At the hearing of the matter and by agreement between the parties it was ordered that the issue of the quantum be separated for determination at a later stage. It was accordingly ordered that the issue of quantum be postponed *sine die*. The trial then proceeded on the issue of liability only.

[3] It was common cause between the parties that the accident occurred on the stated date, time and place and that the defendant had exited from an Engen filling station, turned right into Lever Road and travelled from South to North. It was also common cause that plaintiff was also travelling on Lever Road from South to North and collided into the rear of Defendants motor vehicle.

[4] In issue are the precise point where the accident occurred and who of the two drivers was negligent. Plaintiff's *locus standi* to sue was admitted by defendant. At the commencement of trial copies of a sketch plan of the scene of the accident and a trial bundle marked "A" were handed up.

[5] Plaintiff himself was the only witness in his case. He testified that he entered Lever Road from Liebenberg Road, which forms a "T" junction at Lever Road. That means he executed a left turn into Lever Road. The north-bound portion of the road from Liebenberg Road consisted of two lanes up to approximately opposite the entrance to the Engen garage when it became a single lane. He could not remember whether at that time there was a traffic light at that intersection or a stop sign on Liebenberg Road but currently there was a traffic light there. The distance from the intersection to the entrance to the Engen garage was about 100 meters, he said. The street lights were not on hence Lever Road was in darkness. Lights from nearby houses would have been

obstructed by nearby trees. His car's headlights were switched on.

[6] Plaintiff further testified that he was not in a hurry and immediately before the collision he was travelling at about 60km/h which, he thinks, was the speed limit there at the time. His car's headlights were on. He is familiar with Lever Road having travelled on it for about twenty years. (Plaintiff disputed that the entrance to a Spar Shopping Centre was where it was indicated on the sketch plan. He pointed to a different place, which was marked "A" on the sketch, as the place where the entrance was.)

[7] Plaintiff further testified that after turning into Lever Road he saw that the road ahead was clear and he was the only one on that section of Lever Road. A motor vehicle came out from the Engen garage and approached yellow lines. He referred to these as "yellow markings" in his description of the accident to his insurer which is page 4 of bundle "A" and which was referred to during the trial. He said he saw the other motor vehicle moments before the impact. That other vehicle was a dark coloured car and he did not observe any lights nor indicators on it. Plaintiff says he swerved to his left to avoid an accident but at that point the two lanes converge into a single lane. He collided with the rear left of the other vehicle with the right front side of his own car. His motor vehicle travelled about ten to fifteen meters after the impact before coming to a stop. He made the following marks on his copy of the sketch plan, which was page 31 of Bundle "A" (there were two more copies which were marked by the defendant and his witness respectively).

"XB" according to plaintiff was the point of impact, "XC" where his vehicle came to a stop after the collision, "XD" is where defendant's motor vehicle came to a stop after the collision and "XE" was where plaintiff was when he first saw defendant's vehicle. He got out of his car and went to the other car to see if everyone was all right. He saw the

driver and a passenger in the car. They had food and drinks with them but he could not say what type of drinks they were.

[8] Plaintiff was referred to certain photographs of the scene of the accident. However, he pointed out that that portion of Lever Road did not look as it appeared in the photographs as there was road construction taking place at the time and the photographs were taken later.

[9] Under cross examination, plaintiff said he could not recall whether defendant's motor vehicle's lights were on and that he could not deny it if defendant says the lights were in fact switched on. He said the defendant was travelling at perhaps five to ten kilometres per hour immediately before the collision. He did not recall apologising to defendant for the collision. He was well acquainted with the road having travelled on it both during the day and at night. He did not actually see defendant exiting from the Engen garage but concluded this from the fact that he did see defendant at the yellow lines or markings on the road. These yellow markings are apparently the diagonal lines in the middle of the road as marked on the sketch plan.

[10] Plaintiff said the distance from the Engen entrance to the point of impact would be a few meters but the illumination from the garage was not sufficient. The Engen signage shown on the photographs was not there at the time of the collision. From the Engen exit to the barrier line in the middle of Lever Road he estimated to be about five meters.

[11] He disagreed with defendant's version that the street lights were on that night. He also disagreed that defendant had travelled some 70 to 80 meters and was parallel to the entrance to the Spar Centre on Lever Road when the collision took place. He also

denied defendant's version that his (defendant's) vehicle come to a stop further down the road between a private entrance and Olifantsfontein Road (which intersected with Lever Road). When it was put to him that defendant will say he (Plaintiff) was travelling at a high speed he responded that that was "their opinion".

[12] There was no re-examination and that was the case for the plaintiff on the merits.

[13] Defendant testified that he was the driver of his black Opel Corsa vehicle. With him was his friend Mr Richard Ngwenya. He said before he left the Engen garage and while at the stop sign at the Engen exit he looked to his left and right then entered Lever Road in the direction of Olifantsfontein Road. As he approached Olifantsfontein Road he noticed that the traffic light was red hence he travelled slowly at about 10 to 20 kilometres per hour when he heard a bang.

[14] Defendant testified that visibility was good because the lights at Engen, the Spar Shopping Centre, the traffic lights and the street lights were all on. He was referred to a copy of the sketch plan (marked "B") on which he marked where, according to him, the collision took place and where his vehicle came to a rest after the accident. "XI" was the entrance to the Spar Shopping Centre, "XG" the place of impact and "XH" where his vehicle came to a stop. He identified the point of impact from the fact that when he got out of the car he was facing the Spar Centre entrance, he said.

[15] According to defendant there was no traffic light at the intersection of Liebenberg and Lever Roads. He said he did see a motor vehicle approaching on Lever Road when it was still before the Liebenberg Road junction. He concluded it was far away so he proceeded into Lever Road. Defendant further testified that after the collision Plaintiff

came to him and said "I did not see you".

[16] Defendant said after he entered Lever Road, he did not see the other car behind him. His opinion was that plaintiff was travelling at a high speed -perhaps 100km/h - though he could not say so with certainty.

[17] Under cross examination he testified that a black coloured car may not be visible if it was dark but would be visible if there were lights. Defendant said when he pulled off from the Engen exit and crossed over the south-bound lanes of Lever Road he did so "fast" and then slowed down when he saw the traffic light red at Olifantsfontein Road. It was then that the collision from the rear took place with his vehicle. His reason for crossing over fast, he said, was because he "did not want to be slow for vehicles on his right hand side". But he then went on to say that there were no vehicles on his right but he did see plaintiffs' motor vehicle on his left at Liebenberg Road. He conceded that the distance from the Engen exit to Liebenberg Road could be 120 meters. He said plaintiff's vehicle would have been about 5 meters beyond Liebenberg Road, interestingly, he said he wanted to cross over at about 50-60 km/h when he saw plaintiff's motor vehicle approaching. He pertinently stated that he accelerated because he wanted to turn into Lever road ahead of plaintiff.

[18] Defendant said although he checked for vehicles on his left hand side (when he saw plaintiff's vehicle) he did not look again for plaintiff's motor vehicle when he turned into Lever Road. He then contradicted himself and said when turning into Lever Road he saw that plaintiffs motor vehicle was still far away. He then became argumentative telling plaintiff's counsel that he (counsel) is a driver and should know that you must check whether there are any vehicles on the road. Defendant repeated that he travelled

about 70-80 meters at a speed of about 10-20 km/h after turning into Lever Road.

[19] At this point it was placed on record that both parties' legal representatives agreed that the distance from Liebenberg Road to the middle of the Engen entrance was 150 meters.

[20] In re-examination, defendant said that after being stationary at the Engen exit he travelled at 40-50km/h across Lever Road. He was aware of the plaintiff because he was checking all the time. His own counsel put it to him that he had said earlier the only time he saw plaintiff was when he wanted to exit from Engen. His response was that he did check again before entering the road.

[21] Mr Mandia Richard Ngwenya, who was the passenger in defendant's vehicle at the relevant time testified for the defence. A copy of the sketch plan, marked "C" was handed up. Mr Ngwenya marked the places where according to him the Spar entrance was, the point of impact and where defendant's vehicle came to a rest after the collision. They were "XM", "XJ" and "XK" respectively. "XL" indicated where he saw plaintiff's vehicle from the Engen exit. He marked the various points at substantially the same places as did defendant. He testified that plaintiff's vehicle was far away when they (he and the defendant) checked before crossing over from Engen. They had moved some distance after turning into Lever Road when he heard the impact. He could not say how long it was before the impact took place.

[22] Contrary to defendant's evidence, he said defendant was travelling at about or less than 40km/h immediately before the impact. Defendant had said he was travelling at about 10-20km/h. He was sure of the point of impact because he knows the place as

he travels on that road regularly. He said visibility was good as there were lights on at Engen, the Spar Shopping Centre and the street lights. The lights of defendant's motor vehicle were also switched on.

[23] Under cross examination he said the first and last time he saw plaintiff's motor vehicle before the accident was when it was still about 150 meters away. He and defendant had both seen the other car. If defendant had not done so he would have told him to do so. He said both he and defendant saw plaintiff's car. He saw defendant turning his head to check. He was adamant that the point of impact was not opposite the Engen entrance.

[24] That was the case for the defence.

[25] The onus is on the plaintiff to prove his case on a balance of probabilities in this civil case. Plaintiff gave his evidence in a forthright manner. He readily conceded where he had to do so. Where he was not sure about some aspect he admitted not being sure about it. However, there were some aspects of his evidence that can be criticized. He said he saw defendant's motor vehicle moments before the impact but then said he saw it moving slowly before him into Lever Road. He also said in evidence in chief that he did not see the Corsa's lights but under cross examination he conceded that they could have been on. He also said he was not sure what the speed limit was on the relevant portion of Lever Road even though he said he had been travelling on it for about twenty years. However, this latter aspect does not have any bearing on the issues to be decided.

[26] The defendant contradicted himself in some respects, such as whether he looked

again to his left after initially noticing plaintiff's motor vehicle near Liebenberg Road. He first said he only saw it once and then said he did look again and became argumentative on this point with plaintiff's counsel during cross examination. He would not make concessions when he should have. I infer that he changed his evidence on this point when he realised the implications of saying he had only taken note of plaintiff the one time only whereas he should have kept plaintiff's vehicle under observation as he manoeuvred into Lever Road in front of plaintiff.

[27] This matter came to trial almost five years after the accident occurred, I am therefore mindful of what was said by the learned Judge in the court *a quo* in the matter of JOHANNES v SOUTH WEST TRANSPORT (PTY) LTD 1994(1) SA 200 at 202 C-F:

'Witnesses who reconstruct their observations frequently make mistakes. There is no necessity to dismiss their evidence in toto. Schreiner JA said in Lambrechts v African Guarantee & indemnity Co Ltd 1955 (3) SA 459 at 456F:

"One must, of course, make allowance for the liability of witnesses to an accident, especially one in which they were themselves involved, to reconstruct the occurrence incorrectly by inference from fleeting and not certainly trustworthy impressions.'

The Court in such circumstances, having decided that the evidence of the witness cannot be accepted in one respect, must warn itself of the danger of accepting the evidence of such witness in other respects, but if the Court is on its guard and such evidence is objectively confirmed or there is other acceptable evidence, then there is no need to discard everything the witness tells the Court.

Furthermore, should some part of such evidence conflict in certain aspects only with some other witness on the same side, it would be wrong for the Court simply to say that because of such conflict the evidence in respect of that portion of both witnesses must

be discarded, when it is clear that one of the witnesses only is in error. Evidence of the opposing litigant or objective matter may well confirm the version of one or other witness.' It was cited with approval by the Full Bench of the Namibia High Court on appeal. Plaintiff's counsel said that defendant was not deliberately lying but was doing a reconstruction of the events of that night and much of it was guess work. I agree. Similarly I did not get the impression that plaintiff was being deliberately untruthful with regard to some of the aspect I have mentioned earlier.

[28] The parties agreed that the distance from Liebenberg Road to the Engen entrance was 150 meters. Plaintiff said he was travelling at about 60 km/h. Defendant suggested that plaintiff was travelling at probably 100 km/h but this was pure conjecture and he said as much. I accept, for the reasons that follow, plaintiff's evidence that he was travelling at about 60 km/h. Defendant also placed plaintiff's motor vehicle beyond Liebenberg Road by about 5 meters which is a relatively insignificant difference. He made this observation from a distance of about 150 meters. Again, I have no reason to doubt plaintiff's evidence that he entered Lever Road from Liebenberg Road. Defendant admits leaving the Engen exit at a fast speed after observing plaintiff's vehicle 150 meters away. His ostensible reason for taking off at a fast speed - he said at about 50-60 km/h - was to avoid traffic on his right hand side. The distance he had to cover was probabiy between 5 and 10 meters. It seems impossible that he could have reached a speed of 50-60 km/h in such a short distance. It seems he was trying to explain away his entering into Lever Road in front of plaintiff. What can be accepted though, and I do so, is that he left the Engen garage rapidly or quickly.

[29] Plaintiff says he saw defendant's motor vehicle for the first time moments before the impact. His evidence that he did not see the defendant's vehicle earlier would in the

circumstances make sense. However, both defendant and his witness testified that defendant had his headlights switched on. Plaintiff initially denied that the lights were on but under cross-examination said he could not recall if any lights of defendant's car were on. Plaintiff said the street lights were also not on while defendant and his witness Mr Ngwenya said they were in fact switched on.

[30] As I said, another issue is the point of impact. Plaintiff testified that it was just past the Engen entrance (but in the north-bound lane on Lever Road) whereas defendant and Mr Ngwenya said it was further down - some 70 to 80 meters - opposite the Spar entrance. Defendant's reason for saying so is that when he came out of his car after the collision he was across the Spar Centre entrance. But in that case the collision would have occurred some distance before the Spar entrance as it is common cause that both vehicles moved forward after the impact although the exact distance is in dispute. Plaintiff said his vehicle moved about 10 - 15 meters after the impact and past defendant's car. Plaintiff corroborates defendant's evidence that he (defendant) was travelling about 5-10km/h immediately before the impact.

[31] The evidence indicates the following: that after defendant left the Engen exit at a fast speed he turned into Lever Road in front of plaintiff's motor vehicle without observing where plaintiff's vehicle was when he did so and then immediately slowed down when, by his own evidence, he saw that the traffic light had turned red at the Olifantsfontein intersection. Mr Ngwenya said he only observed plaintiff's vehicle once, that is, when it was about 150 metres away. He testified that if defendant had failed to look to his left he would have told him to do so. Yet he did not himself look again to the left nor did he tell defendant to do so. Had defendant kept a proper lookout, as he ought to have, having moments before observed plaintiff's vehicle at a distance of a mere 150

meters away, he could have avoided the collision. The reasonable man in the position of the defendant would have made sure that it was safe to enter into Lever Road - which was a throughway - more especially when he had earlier observed plaintiff approaching. In *Bata Shoe Co. Ltd. (South Africa) v. Moss* 1977 (4) WLD 16 at 20H - 21C it was held:

"When the driver of a motor vehicle wishes to turn across an adjoining carriageway at right angles to his previous line of travel, his proposed action is pregnant with danger. He is about to do something which is inherently hazardous and he is therefore fixed with certain important obligations. The first of those is that he must signal clearly his intention to make the turn, and do so in such a manner as to warn approaching drivers, drivers following him, and the driver of any vehicle who may be seeking to overtake him, of the intended change of direction. It is not sufficient however that the driver of the vehicle which is about to turn signals his intention to do so, even if the signal is given in good time. His further obligation is to refrain from making the turn until an opportune time, to use the phrase which the Appellate Division has used in that regard. An opportune time in that context is a time when the motorist who wishes to turn can carry out his intention without endangering or even materially impeding the progress of any other person or vehicle lawfully on the road. It is the duty of the driver who wishes to make the turn to satisfy himself by full and careful personal observation that the time is opportune in the sense which I have indicated."

Defendant was negligent and substantially the cause of the accident.

[32] Was plaintiff also negligent? According to him, the street lights were not on and it was dark on that stretch of the road. It is incumbent upon a driver in that situation to be vigilant. He testified that he first saw defendant's vehicle when it was at the yellow markings which are in the middle of the road dividing the north and south-bound lanes. However, he collided into the rear of the Opel Corsa. This means that some moments

elapsed from when the Opel was at the yellow road markings and when it turned into and then proceeded straight in Lever Road. Had he kept a proper lookout, he could have reacted earlier. In that respect he too was negligent but to a far lesser degree and defendants counsel's submission that for that reason plaintiff was 100 per cent liable cannot be accepted. Plaintiff's claim falls to be apportioned accordingly, i am of the view that respective degrees of fault in relation to the damage of plaintiff and defendant are 75 per cent and 25 per cent respectively.

[33] Plaintiff has succeeded substantially and should therefore be entitled to his costs.

[34] I make the following order:

34.1 There shall be judgment in favour of the plaintiff for 75 per cent of his agreed or proven damages:

34.2 Defendant is to pay plaintiff's costs of the trial on the merits;

34.3 The issue of quantum is postponed *sine die*.

N RAMCHOD

JUDGE OF THE NORTH GAUTENG HIGH COURT

Representation for the Applicant:

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instructed by Attorneys: Alex Bosman Attorneys – Pretoria

Representation for the Defendant:

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