



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

CASE NO: 17560/2007

DATE: 11/2/2011

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO.	
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	
(3) REVISED.	
8/2/2011 DATE	 SIGNATURE

IN THE MATTER BETWEEN

A M MASEMOLA

PLAINTIFF

AND

THE ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

KOLLAPEN, AJ

- [1] This is an action for damages brought by the plaintiff following injuries she sustained which injuries were caused as a result of a collision which took place on 5 July 2002 on the Broederstroom road.

[2] At the commencement of the trial the parties applied for a separation of the merits and the *quantum* in the matter which order was granted and the matter proceeded to be dealt with purely on the merits.

[3] It is common cause that the plaintiff was a pedestrian on the day in question and that the insured driver was driving a red VW Golf registration number NRR400 T. The collision occurred between 16:00 and 17:00 and visibility was good.

[4] The plaintiff's version was that she was standing on the gravel of the road close to the Broederstroom road/Lanseria T-junction. At the time she was talking to an acquaintance of hers one Romeo Masebe and her back was facing the road while Masebe was looking in the direction of the road. They were apparently discussing an unpaid debt that Masebe had with the plaintiff in respect of certain items that the plaintiff had sold to Masebe some time before.

[5] Plaintiff did not recall any of the events before the collision and did not see the insured vehicle prior to it colliding with her. Her evidence was that she was struck on the left hand side of her body and it also appears that the injuries she sustained as a result of the collision were injuries to the left hand side of her body.

[6] Romeo Masebe was also called as a witness and he in broad terms confirmed the evidence of the plaintiff. There were some differences, however, in their testimony in that the plaintiff's testimony was that she and Masebe were standing

approximately three metres away from the road whereas Masebe estimated this distance to be approximately a metre away. In all other respects, however, Masebe confirmed the testimony of the plaintiff with regard to the insured vehicle essentially coming off the road and the vehicle colliding with the plaintiff on the gravel section of the road. As indicated there is some difference precisely where on the gravel section the collision occurred. Masebe places the collision much closer to the road than does the plaintiff.

[7] The insured driver also testified and her testimony was that she was travelling towards the Broederstroom/Lanseria intersection where she had planned to turn right. She estimated that her speed was approximately 25kph and her further testimony was that she suddenly noticed something appear from the left of the road and the next thing she knew was that she had collided with the plaintiff. Her further testimony was that it appeared that the plaintiff was smelling of alcohol. The insured driver Ms Pinter also testified that at no stage prior to the impact did she observe the plaintiff approaching from the left hand side and she virtually saw her at the point of impact.

[8] It is clear that there are two irreconcilable versions in this matter with regard to the manner in which the collision occurred. In *Stellenbosch Farmers Winery Group & Another v Martell & Others* 2003(1) SCA 11 the court indicated that in instances where there are two irreconcilable versions before it the approach of a court in resolving factual disputes should be to come to a conclusion-

- (a) on the credibility of the various factual witnesses;
- (b) their reliability; and
- (c) the probabilities.

[9] This case involves precisely such a conflict between two irreconcilable versions and when one has regard to the guidance set out in the *Stellenbosch* case *supra* it is apparent that from a credibility and reliability point of view there is not much that separates the testimony offered on behalf of the plaintiff as compared to the testimony offered on behalf of the defendant. As indicated there was some difference between the two witnesses called on behalf of the plaintiff with regard to the point of impact but I am of the view that such difference as does exist is hardly material. Having regard to the fallibility of human recollection it does not mean that where the plaintiff and her witness differ in their estimation of precisely where the collision occurred even though they are broadly in agreement with regard to how and where gently it occurred that in itself cannot be a basis to reject their testimony.

[10] I am satisfied that they testified in an open, honest and candid manner and there was no suggestion that they were tailoring their evidence to support or suit each other as was suggested by the defendant.

[11] If indeed there was some conspiracy on their part to tailor and suit their evidence to support each other then I would have imagined that they would have succeeded

also in placing the point of impact at the same place in their respective testimony. The fact that they did not do so militates against any suggestion of collusion.

[12] In very much the same way the evidence of the insured driver appear to be credible and she did not come across as a dishonest witness but appeared to be honestly recalling the events of the day in question.

[13] Having regard to these factors one must then approach the matter on the probabilities and on the probabilities there are various concerns with regard to the version of the insured driver in the manner in which she describes the collision as having occurred. They are as follows:

- (a) If indeed she was travelling at approximately 20-25kph and visibility was good there would be no reason why she did not see the plaintiff approaching from her left hand side just prior to the impact.
- (b) If indeed the plaintiff approached and entered the road from the insured driver's left hand side then one must reasonably assume that if she then collided with the plaintiff the injuries to the plaintiff would be to the right hand side of the plaintiff. The plaintiff sustained injuries to the left hand side of her body and this was not disputed in testimony.
- (c) The only damage to the vehicle of the insured driver was damage to the front of the vehicle. If the plaintiff approached the vehicle from the left hand side and entered the road as described by the insured driver then in

all probability the damage to the insured driver's vehicle would have been to the left as opposed to the front.

[14] Having regard to the probabilities then it is abundantly clear that the probabilities favour the version of the plaintiff. It is highly unlikely that the collision could have occurred as described by the insured driver for the reasons that I have offered above and under the circumstances I am satisfied that the plaintiff has on a balance of probabilities established negligence on the part of the insured driver.

[15] With regard to the question of contributory negligence it is indeed so that there are two irreconcilable versions before the court and the collision could have only occurred on either of the versions offered. On the version that I have accepted which is the version of the plaintiff it is my finding that the collision occurred on the gravel section of the road as described by the plaintiff and under those circumstances there can be no basis to apportion any of the plaintiff's damages on account of any contributory negligence on her part.

[16] I accordingly make the following order:

- (a) the sole cause of the collision was the negligent driving of the insured vehicle;
- (b) the defendant is ordered to pay the costs of the action.

A handwritten signature in black ink, appearing to be 'J Kollapen', written in a cursive style.

J KOLLAPEN
ACTING JUDGE OF THE NORTH GAUTENG HIGH COURT