

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG HIGH COURT DIVISION, PRETORIA**

Case no: **26954/2021**

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED

Date: **29 June 2023**

In the matter between:

JOHANNES MABENA

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

MAKHOB A J

[1] The plaintiff claims damages against the road accident fund for damages arising from a motor vehicle accident.

[2] Both the defendant and the plaintiff agreed to separate merits from quantum, merits was postponed sine die.

[3] In proving the merits, the plaintiff testified that on the 11 May 2019, he was driving his Motor vehicle on Molefe Makinta Street, when all of a sudden, a motor vehicle appeared from his right hand side of the road and collided with his vehicle.

[4] At the time of the collision he was traveling at about 40 km/h. He tried to avoid this vehicle by swerving his vehicle away from the insured vehicle but it was too late as he collided with this vehicle.

[5] The plaintiff called a witness Mr. Modibe Maluleke who testified that he was a passenger in the plaintiffs vehicle when a motor vehicle emerged from the right hand side of the road and collided with their vehicle. His testimony is that the insured vehicle came from the right hand side trying to join the road they were travelling in.

[6] The plaintiff swerved to the left trying to avoid the collision but it was too late. He was seated behind the driver and was able to see what was happening. The plaintiff was traveling in a speed of between 40KM/H to 50KM/h.

[7] In paragraph 4.8 of his plea the defendant pleads as follows : “ 4.8 *Further alternatively, and in the event of the honorable court finding that the said insured driver was negligent as alleged or at all and that such negligence caused or contributed to the collision, all which is denied, the defendant pleads that the said collision was caused partly by the negligence of the said insured driver and partly by the negligence of the plaintiff who was negligent in one or more or all in respect set out in paragraph 4.1 to 4.6 above*”.¹ The plaintiff closed his case.

[8] The defendant did not call any witnesses and close its case. Both parties submitted their heads of argument. The plaintiff asked for judgment in his favour arguing that the accident was the sole responsibility of the insured driver.

[9] In his heads of argument counsel for the defendant submits that defendant's insured driver is negligent however, the plaintiff contributed to negligence to some extent. The defendant further submits that the appropriate apportionment of at least 50% negligence must be considered by the court.²

¹ CaseLines 4-19 – 4- 4-21 Par 4 and 5.

² CaseLines 19-7.

[10] It is trite that the onus rest on the Plaintiff to prove his case on the balance of probabilities see *Pillay v Krishna*.³ Thus therefore, the duty is on the plaintiff to produce evidence that the defendant is liable for the damages suffered by the plaintiff.

[11] The credibility and demeanour of the plaintiff and his witness is critical to determine whether indeed the collusion took place and whether the defendant is liable.

[12] In regard to the determination of the factual dispute and credibility in *Stellenbosch Farmers' Winery Group And Another V Martel Cie SA and others*⁴ the court said in Paragraph 5 “technique generally employed by the courts in resolving disputes where there are two irreconcilable versions said the following “*to come to a conclusion on the disputed issues hey court must make a finding on (a) the credibility of various factual witnesses; (b) there reliability and (c) the probabilities. As to (a) the court’s finding on the credibility of a particular weakness will depend on its impression about the veracity of the weakness. That in turn will depend on the variety off subsidiary factors, not necessarily in order of importance, such as (i) the witness candor end demeanor in the witness box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence (iv) external contradictions with what was pleaded or put on his behalf; or with established fact or with his own extracurricular statements or actions, (v) the probability or in probability of a particular aspect of his version, (vi) the calibre occupancy of his performance compared to set of other witnesses testifying about the same incident or event.*

[13] The plaintiff Mr. Mabena presented two versions to this court how the accident happened.

[14] The first version is contained in his particulars of claim paragraph 4 where he says the following “*suddenly the insured vehicle with registration letters numbers TY3[...] coming from the opposite direction swerved into his lane of travel and he*

³ 1946 AD 946.

⁴ 2003 (1) SA 11 (SCA).

tried swerving to the left to avoid the head on collision and he was late, and the vehicle collided on his lane of travel” .⁵

[15] The second version is the testimony of both the plaintiff and his witness. They both testified that the insured driver entered their path of travel from the right-hand side of the road.

[16] Entering the road from the right and travelling in the opposite direction is not the same. In my view there is a contradiction between the evidence in chief of the plaintiff and his witness and the version of the plaintiff as set out in his particulars of claim.

[17] Counsel for the plaintiff did not address this contradiction in his heads of argument. Counsel for the plaintiff, should have been aware of the contradiction.

[18] A witness's reliability depends on the factors mentioned in the Stellenbosch Farmers winery case.⁶ I am of the view that the contradiction as to exactly how the accident happened is fundamental to the determination of liability in this matter.

[19] The plaintiff expects the court to choose between his testimony, his version contained in his affidavit, particulars of claim and the testimony of his witness. The court cannot choose from various contradicting versions.

[20] I'm unable to determine whether the collision took place and if it did, how it happened. For that reason, I am of the view that the plaintiff failed to prove his case on preponderance of probabilities.

[21] I make the following order.

1.1 The plaintiff's claim against the defendant is dismissed with cost.

MAKHOB A J

⁵ CaseLines 4-6.

⁶ Loc Cit.

**JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

MATTER HEARD AND RESERVED ON: 03 MAY 2023

JUDGMENT HANDED DOWN ON: 29 JUNE 2023

APPEARANCES:

For the Applicant: Adv JPF De Klerk

Instructed by MASHININI ATTORNEYS

For the Respondent: Mr J Perumal

From STATE ATTORNEY PRETORIA