



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

Case No: 55813/2014

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED.

10/5/2018

[Signature]

10/5/18

In the matter between:

PHAKEDI JOSEPH KOTSINKWA

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

SENYATSI AJ:

A. INTRODUCTION

- [1] This is an application for damages for injuries arising from a motor vehicle collision on 29 January 2012, in Mohodi Village, Bochum, Limpopo.
- [2] The parties applied for separation of the merits and quantum at the hearing of the matter and that quantum to be postponed *sine die* for later determination.

The application was granted. The defendant disputed the merits of the accident.

B. THE EVIDENCE

- [3] The plaintiff, Phakedi Joseph Kotsinkwa, was a single witness, who testified to prove the merits of his claim.

- [4] He was travelling on the tarred road from Dendron to Bochum on the day of the collision at about 08h00. He noted an Isuzu light delivery vehicle in front of him as he approached Mohodi Village and claimed that the driver of the Isuzu vehicle, one Joseph Mashudu Ramavhoya ("Ramavhoya"), indicated that he was going to turn right to the side junction that led to Mohodi Village. The plaintiff was driving a Nissan NP200 light delivery vehicle with registration BXJ131L. He was in the company of an unknown female passenger whom he had given lift from Polokwane.

- [5] At the time when the plaintiff became aware that the insured vehicle was indicating to turn right, the plaintiff's vehicle was approximately 4 to 5 meters behind Ramavhoya's car. He stated that as Ramavhoya proceeded towards making the right turn, he accelerated with the intention to continue straight in the direction of Bochum. Suddenly, Ramavhoya realised there was an approaching vehicle from the opposite direction and he subsequently swerved back into his lane. The plaintiff attempted to avoid the collision by swerving to the left but his vehicle collided with the rear left corner of the insured car.

- [6] The plaintiff's vehicle veered off the road, to the left side where the vehicle came to a standstill. The plaintiff sustained injuries to his waist and to his right leg. He was trapped in his vehicle and was taken to hospital where he was treated for his injuries and discharged the same day.

- [7] In leading his evidence in chief, the plaintiff referred to the affidavit which was signed on 25 February 2018, in Senwabarwana. This affidavit states that the insured vehicle with registration number BYG531L, signalled to turn to the left. After the insured vehicle changed lanes, it suddenly went back to the lane in

which the plaintiff was approaching in order to avoid colliding with an oncoming vehicle from the opposite lane. The plaintiff sought to correct the affidavit by stating that in fact, the insured driver was turning to the right and not left as stated therein.

- [8] The plaintiff conceded under cross-examination that he paid for the damages caused to the insured vehicle, after his movable property was attached by the sheriff presumably pursuant to a claim, by the owner insured vehicle for the damages caused by the plaintiff to the insured vehicle. The plaintiff proceeded to close his case without calling further witness to corroborate his version of events.
- [9] The driver of the insured vehicle, Ramavhoya was the first witness to testify for the defendant. He testified that he was travelling from Matombisa Village towards Bochum. He had three passengers with him in the insured vehicle, Willy Mudau ("Mudau"), the latter's younger brother, as well as an unknown elderly lady whom he offered to give a lift to Bochum and picked up at Dendron. The two male passengers were in the front cab of the insured vehicle whilst the lady where seated in the back.
- [10] Ramavhoya testified that the purpose of his trip to Bochum was to fetch the belongings of Mudau's younger brother, who was attending school in Bochum and was in future intending to proceed with schooling in Thohoyandou.
- [11] Ramavhoya further testified that as he approached Mohodi, he looked in his rear view mirror, and observed a Nissan NP200 light delivery vehicle, approaching from behind at a high speed. He testified that he shared his concern regarding the high speed at which the Nissan NP200 was approaching them with his two passengers.
- [12] Ramavhoya further testified that he knew Mohodi well as his wife's father was from that Village. He denied that he indicated that he was going to turn right into Mohodi as the plaintiff alleged. He confirmed that he was proceeding to Bochum on the day of the collision and that the plaintiff's vehicle collided with

his vehicle, from behind. Ramavhoya testified that he was not the owner of the insured vehicle and in fact, he had to pay the owner of the vehicle an amount of R4000 for the damages caused by the collision. Ramavhoya submitted that he was unaware of the fact that the owner of the vehicle also claimed damages from the plaintiff in respect of the damage caused and of the fact that the plaintiff paid the amount as claimed. Ramavhoya, subsequently purchased the insured vehicle from the owner as the owner did not want the vehicle anymore.

- [13] Ramavhoya testified that upon the plaintiff's vehicle colliding with his, his vehicle overturned, however, he suffered no injuries. The elderly passenger at the back of the insured vehicle told Ramavhoya that she was concerned about the plaintiff. Ramavhoya approached the plaintiff on her advice and noted that the plaintiff had both his hands on the dash board. He noted that there was a pack of alcohol bottles inside the plaintiff's vehicle, one of which was opened. He did not speak with the plaintiff but confirmed that the plaintiff together with the elderly lady was later taken to hospital.
- [14] The female passenger of the plaintiff was not injured in the collision, caught a lift and left the scene of the collision. Mudau and his brother were also uninjured.
- [15] Ramavhoya stated that the plaintiff, driving at high speed, was the sole cause of the collision. He denied that he had indicated to turn to the right to Mohodi Village as alleged by the plaintiff, as he had no reason for doing so and confirmed his destination was Bochum.
- [16] Mudau was the second witness to testify for the defendant. He confirmed that he and his younger brother were passengers in the insured vehicle driven by Ramavhoya and they were on their way from Matombisa to fetch the personal belongings of his younger brother from Bochum. His younger brother had attended school at Bochum and was now going to continue with school in Thohoyandou.

- [17] Mudau testified that he was alerted to the approaching speeding Nissan NP200, by Ramavhoya. He looked in the left side mirror of the vehicle and saw the speeding vehicle approaching their vehicle from behind. Mudau was unable to estimate a distance between the plaintiff's vehicle and the insured vehicle, at this point in time. Mudau testified that the plaintiff's vehicle collided with the insured vehicle from behind, causing their vehicle to veer to the right, overturning onto its left side, where it came to a standstill.

C. ISSUES FOR DETERMINATION

- [18] The first issue to be determined is whether the plaintiff has discharged the *onus* of proving that the insured driver was the cause of collision and whether the insured driver drove negligently. The other issue to determine is whether the burden of proof of negligence, had been discharged, given the two mutually destructive versions by the witnesses.

D. THE LEGAL PRINCIPLES

- [19] The approach that a Court should follow in instances where it has to deal with mutually destructive versions has been dealt with previously by our Courts. Coetzee J had this to say in ***African Eagle Life Assurance Company Ltd v Cainer***¹:- quoting his own judgment in ***Koster Ko-operatiewe Landboumaatskappy Bpk v Suid-Afrikaanse Spoorwee en Hawens***² at 425:-

*"Where there are two stories mutually destructive, before the onus is discharged the Court must be satisfied that the story of the litigant upon whom the onus rests is true and the other false. It is not enough to say that the story told by Clarke is not satisfactory in every respect, it must be clear to the Court of first instance that the version of the litigant upon whom the onus rests is the true version...."*³

And Coetzee J went on to say:-

¹ [1980] 1 All SA 122 (W), 1980 (2) SA 234 (W).

² [1974] 2 All SA 420 (W), 1974 (4) SA 420 (W).

³ See also Stellenbosch Farmer's Winery Group Ltd & Another v Martell & Others 2003 (1) SA 11 (SCA); National Employer's General Insurance Company Ltd v Jagers 1984 (4) SA 437 (E) at 440D; African Eagle Life Assurance Company Ltd v Cainer 1980 (2) SA 234 (W) at 237; Oosthuizen v Van Heerden t/a Bush Africa Safaris 2014 (6) SA 423 (GP) at 430.

"Ek ag my verbonde aan die uitspraak in die Gany-saak. Afgesien daarvan dat die Appelhof nog nooit sedertien met hierdie genadering weg gedoen het nie, wat nie sonder betekenis is nie, sou ek my graag respekvol met die onderliggende logika daaraan wil vereenselwig, en paar opmerkings oor die verband daartussen en welbekende bewysmaatstawwe waag."

- [20] The learned Judge went on to state that his judgment had been quoted out of context. He stated at 231F that:

"...I had hoped to make it clear what I thought what Wessels, J.A. meant (in **National Employers Mutual General Insurance Association v Gany 1931 AD 187**), and something which does not seem to have been sufficiently clearly stated (judging by the frequency with which this further portion of the judgment is not quoted) is that this approach in this type of case only applies in cases where there are no probabilities one way or the other. Where there are probabilities, inherent or otherwise, there is no room for this approach. On the other hand, where there are no probabilities – where, for instance, the factum probandum was whether a particular thing was white or black, with not the slightest evidence as to the preponderance of white or black things in that particular community, there are clearly no probabilities of any sort.

...

The position is simply that there is no proof, by any criterion, unless one is satisfied that one witness evidence is true and that of the other is false.⁴

- [21] In **National Employers' General Insurance Co Ltd v Jagers**,⁵ it was also held that where two versions, are in effect, mutually destructive in the sense that the acceptance of the one must necessarily lead to the rejection of the other, the Court must be satisfied upon adequate grounds that the story of the litigant upon whom the *onus* rests is true and the other is false. If the case can be decided on probabilities, this test does not apply.

- [22] It is trite law, with issues pertaining to a rear-end collision that the driver who collides with the rear of a vehicle in front of him, is *prima facie* negligent. Such person is regarded as negligent, if the reasonable person in the same position as such driver would have reacted differently and if the unlawful

⁴ *Supra*.

⁵ [1984] 4 All SA 622 (E).

conduct causing damage, was reasonably foreseeable and preventable.⁶ In this matter, there are probabilities and the test, is therefore not applicable.

E. REASONS FOR JUDGMENT

- [23] I have considered the evidence led by the witnesses in this case. I have also considered the demeanour of the witnesses during their testimony. In my view, the plaintiff was evasive when pressed during cross-examination. He was unable to provide a reasonable explanation for deviating from his own affidavit in regard to the sequence of events. His version of the sequence of the collision was contained in two affidavits. The first affidavit did not explain how the collision took place and the second affidavit, done during February 2018, indicated that the collision happened when Ramavhoya signalled that he was going to turn left. However, this version as contained in the second affidavit was changed during his evidence in-chief and the explanation provided was that it was a mistake. The plaintiff did not come across as a truthful, although he tried hard to persuade this Court to accept his version, no matter how improbable his version was.
- [24] Ramavhoya and Mudau on the other hand were calm and collected witnesses. Ramavhoya was willing to provide an explanation as to why he did not lodge a claim for injuries. He clearly stated that he was not injured. He was willing to concede that the owner of the insured car was paid by both himself and the plaintiff, something that only came to his knowledge at this trial. I found both of the defendants' witnesses to be credible and truthful.
- [25] The probabilities are that the plaintiff was driving at an excessive speed and that he did not maintain a safe following distance from the vehicle in front of him, driven by Ramavhoya.
- [26] Furthermore, the plaintiff failed to provide a reasonable explanation, for paying for the damages to the vehicle driven by Ramavhoya, to the vehicles' owner. His explanation that he wanted to release his movable assets from

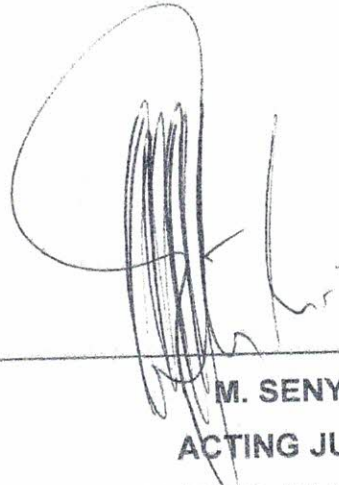
⁶ See *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430; *Santam Versekeringsmaatskappy Bpk v Swart* 1987 (4) SA (A) at 819-820; *Minister of Safety and Security v Rudman* 2005 (2) SA 16 (SCA) at 39.

the attachment by the local sheriff, leads to an inescapable conclusion that those assets were attached following a judicial process. There is, however, no need to make a determination on this point.

- [27] Having considered all the evidence, I am of the view that the plaintiff has failed to discharge the *onus* of proving that the insured driver was the cause of the collision.
- [28] Ms Van Rooyen submitted on behalf of the plaintiff that if, a finding is made that the plaintiff was the cause of the collision, a subsequent finding should be made that the insured driver was a contributor to such negligence. I disagree with this submission. It has not been argued before me, as to what else Ramavhoya could have done to avoid the collision.
- [29] In light of my finding that on a balance of probabilities, the vehicle driven by Ramavhoya, was not signalling to turn to the right, there cannot be an expectation that he could have done anything else to avoid the collision. No evidence or submissions was led that Ramavhoya, ought to have moved out of the way to avoid the collision. The doctrine of contributory negligence finds no application under these circumstances.

ORDER

- [30] Consequently the following order is made:-
- (a) The claim is dismissed with costs.



M. SENYATSI
ACTING JUDGE
GAUTENG DIVISION
PRETORIA

Appearances

For Plaintiff:

Adv M van Rooyen

Instructed by:

Savage Jooste & Adams

For Defendant:

Adv SB Vukeya

Instructed by:

Diale Mogashoa Attorneys