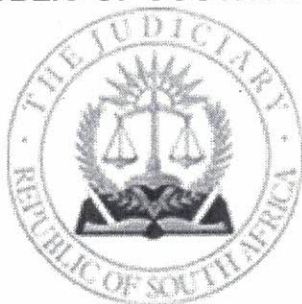


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2017/26408

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED. YES / NO
20/09/2018 DATE	
 SIGNATURE	

In the matter between:

FOURIE MORGAN

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

J U D G M E N T

MABESELE, J:

[1] The plaintiff claims damages due to the injuries he sustained in a collision between a motorcycle driven at the time by him and a motor vehicle driven by Mr Manqoba Myeza, the insured driver. The collision occurred in Barry Marais Road, Boksburg, on 30 December 2016 at approximately 14h30.

[2] The plaintiff avers that the sole cause of the collision was the negligent driving of the insured driver in one or more of the following aspects:

- 2.1 He failed to keep a proper lookout;
- 2.2 He failed to apply brakes timeously or at all;
- 2.3 He drove at an excessive speed under the circumstances;
- 2.4 He failed to keep the motor vehicle of which he was the driver under control;
- 2.5 He collided with the plaintiff's motorcycle which was stationary to the left of the emergency lane;
- 2.6 He failed to avoid a collision when he could and should have done so by the exercise of a reasonable care;
- 2.7 He failed to pay due regard to the rights of other road users, in particular the rights of the plaintiff;
- 2.8 He failed to exercise the care a reasonable man would have exercised under the circumstances.

[3] The defendant raised a special plea of *volenti non fit injuria*. It contends that the plaintiff willingly placed himself in a position where harm might result, knowing very well that some degree of harm might result.

[4] In its plea the defendant specifically denies each and every allegations in so far as they relate to the cause of the collision. In the alternative, the defendant pleaded that should it be found that he, the insured driver, was negligent in any of the respects as alleged by the plaintiff, then and in that event, the defendant denies that such negligence was a cause of, or contributed to the collision.

[5] This matter proceeded on the merits only.

[6] The plaintiff and his witness were called to testify for the plaintiff on both the special plea and merits and two witnesses including the insured driver, testified on behalf of the defendant.

[7] It is common cause that prior to the accident an incident of road rage occurred between the plaintiff and the insured driver at the entrance to the Parkland Estate and the intersection of Van Wyk Louw Drive up to and including the intersection slipway area of the intersection of Van Wyk Louw Drive and Barry Marais Road. The plaintiff and the insured driver were each in the company of a passenger.

[8] The plaintiff and the insured driver stopped at the intersection slipway area of the intersection of Van Wyk Louw Drive and Barry Marais Road and alighted from their vehicles together with their passenger. They started exchanging words between them. Thereafter the plaintiff and his passenger got onto their motorcycle and left the area.

[9] The plaintiff testified that after he and his passenger left the scene he drove in the normal lane of travel of Barry Marais Road. Along the way he pulled over into the emergency lane to his left and stopped to check whether their helmets were properly fastened. He looked back and spoke to the passenger. As soon as he turned to pull away he looked through the side mirror and suddenly saw a silver Dodge behind him collide with his motorcycle. Due to that sudden impact he fell down on his back. When he looked up he saw the passenger doing a somersault away from the motorcycle. At the same time he noticed a piece of his own bone sticking out and saw his takkies lying around. He realised at that time that his leg was missing.

[10] Whilst he was lying on the ground someone came and offered assistance. He was finally taken to the hospital by a helicopter.

[11] Mr Chesney Stewart is a member of the Community Policing Forum ("CPF"). He testified that on the day of the incident he was travelling along Barry Marais Road towards the intersection of Van Wyk Louw Drive and Barry Marais Road. He pulled off the road to his left and stopped in order to smoke

a cigarette. Whilst he was busy smoking outside the vehicle he looked down the road in front of him and noticed an altercation between the occupants of a motorcycle and silver motor vehicle. He saw the motorcycle coming from the incident and travelling towards him. The motorcycle pulled off the road and stopped in the emergency lane at a distance of 20 meters from him, at point X as depicted on photo 1 on page 10 of the scene photos in the Metro Police investigation report.

[12] He testified that approximately two minutes after the motorcycle had stopped the passenger jumped off and a silver vehicle collided with the motorcycle. Thereafter the driver of the motor vehicle drove into Jubilee Street. Nothing obstructed his view from the time that he first noticed an altercation down the road until the collision occurred.

[13] After the collision he drove down to the robot to make a U-turn and went to assist the driver of the motorcycle who was lying on the road at point Y as depicted on photo 1 on page 10 of the scene photos in the Metro Police investigation report.

[14] On arrival at the accident scene he took off his T-shirt and tied it around the driver's thigh to prevent bleeding. Thereafter he and the passenger asked other motorists for help. It was at that stage that he got back into his vehicle and drove into Jubilee's Street to look for the driver of the motor vehicle. He could see the vehicle then. As he drove back to the accident scene he posted on the CPF's WhatsApp group for a lookout of a

silver SUV which crashed into a motorcycle in a "*hit and run*" incident. He said he was the first person to assist the driver of the motorcycle at the accident scene.

[15] He saw the motor vehicle again that day in Jubilee Street. He was in the company of other Community Police Forum members. The vehicle was already being jacked up to change the front left tyre. There were two male persons trying to change the wheel. He noticed blood on the passenger side of the vehicle and flesh stuck in the wheel. The left fender and tyre of the vehicle were completely damaged. The left side mirror was also damaged. The persons who were changing the tyre threatened to beat him with a wheel spanner. Due to the threats he and other CPF members got into their vehicle and drove back to the scene of the accident. He did not notice any potholes at the area where the accident took place.

[16] The insured driver testified that the altercation took place in the emergency lane after he and the motorcycle driver had stopped and alighted from their vehicles. The occupants of the motorcycle continued to swear at him.

[17] As he went back to his vehicle the motorcycle drove off. He followed. The plaintiff accelerated and decelerated at the same time in front of him on the yellow lane, thereby making it impossible for him to join the road.

[18] Whilst he was still trying to negotiate his way into the road from the emergency lane he swerved around the motorcycle. At some point they were driving parallel and close to each other. During that process he heard a bang which made him look at the side mirror. He noticed a motorcycle on the ground and realised that a collision occurred. He nevertheless proceeded driving. He said he could not stop because he was intimidated, confused and scared. He drove into Jubilee Street and stopped somewhere along that road to phone his mother and inform her about the accident at Barry Marais Road and his whereabouts. He does not know how the accident occurred.

[19] He testified during cross-examination that his vehicle was not damaged before the accident and admitted that he stopped in Jubilee Street because of a tyre burst. He was fetched from Jubilee Street by a group of people and the police and taken to the accident scene. At the scene he gave a written statement to the police, informing them that he sideswiped the motorcycle after he had swerved to avoid collision with the motorcycle which was accelerating and decelerating in front of him. He was scared, confused and intimidated.

[20] Mr Ramotsekuwa Moloi lives in Van Wyk Park at Barry Marais Road. He testified that on the day of the incident he was standing and smoking at the gate of his yard. He first heard a loud sound from the motorcycle. When he looked down the road he saw both the motorcycle and motor vehicle accelerating and decelerating. The incident occurred at a distance of approximately 20 metres from where he was standing. The motor vehicle was

travelling behind the motorcycle. He saw a motor vehicle moving into the emergency lane followed by a motorcycle which overtook the vehicle and blocked its way of travel. The motor vehicle finally accelerated and swerved to the right to join the road.

[21] He testified that during that process the vehicles were travelling parallel and closer to each other. He then saw the driver of the motorcycle kick the vehicle on the left side two to three times. At the same time he heard a bang, followed by the motorcycle falling onto the emergency lane whilst the motor vehicle was still in motion.

[22] After the incident he went to the scene to offer assistance. The person who was a passenger on the motorcycle was also asking for assistance. Whilst he was at the scene, someone driving a Mercedes Benz arrived and attended to the plaintiff's thigh. From the accident scene he went back home, took his vehicle and drove to Jubilee Street to look for the insured driver. The people from the neighbourhood had already arrived when he got there. The insured driver was taken back to the accident scene.

[23] He was adamant that he saw the plaintiff kick the vehicle and a motorcycle falling on the emergency lane after he heard a bang.

[24] During cross-examination it was pointed out to him that his evidence-in-chief differs from paragraph 3 of his statement wherein he mentioned that the plaintiff's leg got trapped into the fender of the wheel and caused a tyre

burst. It was again pointed out to him that no mention is made in his statement that he went to the accident scene after the accident occurred.

[25] There is no doubt that there are two mutually destructive versions before me. On the one hand the plaintiff testified that he was struck by the vehicle of the insured driver whilst he was stationary on the emergency lane. His evidence was corroborated by Mr Chesney Stewart. On the other hand the version of the insured driver that accident occurred whilst he and the plaintiff were travelling parallel and closer to each other is corroborated by Mr Moloi.

[26] The correct approach to be adopted when dealing with mutually destructive versions was briefly set out in *National Employers General Insurance Co Ltd v Jagers*¹ wherein the following was said:

‘... Where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the court will weigh up and test the plaintiff’s allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with the consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff’s case any more than they do the defendant, the plaintiff can only succeed if the court nevertheless believes him and is satisfied that his evidence is true and that the defendant’s version is false.’

¹ 1984 (4) SA 437 (E) at 440E-G.

[27] This approach was approved in *Stellenbosch Farmers Winery Group Ltd and Another v Martell Et Cie and Others*² wherein the following was said:

'The technique generally employed by courts in resolving factual disputes of this nature may be conveniently summarised as follows: To come to a conclusion on the disputed issues the court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities ... As to (c) this necessitates an analysis and evaluation of the probability or improbabilities of each party's version on each of the disputed issues ...'

[28] The version of the plaintiff that he drove off first from the scene of altercation is corroborated by both Mr Stewart and the insured driver. The plaintiff left the scene to avoid further heated exchange of words between them. His version that he only stopped in the emergency lane where he was suddenly crashed into by the insured driver is corroborated by Mr Stewart. The plaintiff's version was again corroborated by Mr Stewart in that his passenger escaped injuries when the collision took place. It is common cause that the passenger was not injured. Certainly, if the collision had occurred as described by the insured driver and his witness the passenger would have sustained injuries. Due to the collision the left fender and tyre of the vehicle were completely damaged. The side mirror was also damaged. The extent of damage demonstrates clearly that the vehicle collided with the motorcycle. The insured driver did not stop after the accident had occurred. It was for that reason that Mr Stewart posted on their WhatsApp group for a lookout of a

² 2003 (1) SA 11 (SCA) at 14I-15C.

silver SUV which crashed into a motorcycle in what he described as a “*hit and run*”.

[29] Mr Stewart was an impressive witness, in my view. His evidence is reliable. I do not hesitate to accept his version that he was the first person to arrive at the accident scene and offered assistance to the plaintiff, after the motor vehicle crashed into the motorcycle.

[30] The insured driver testified that he was driving parallel and closer to the plaintiff when the accident occurred. However, he has no knowledge of how the accident occurred. Interestingly, he continued driving after he had realised that the accident occurred. The reasons he advanced, which are not persuasive, are that he was scared, confused and intimidated. Had that been the case, as he alleged, he would not alight from his vehicle at the spot where the altercation took place. In addition, the fact that the plaintiff drove off first from that spot demonstrates that he had no intention to harm him. From his evidence it is clear that he ran away from the accident scene in order to get opportunity to phone his mother to try to rescue him from possible arrest.

[32] His evidence-in-chief that he lacked knowledge of how the accident occurred is contradicted by his written statement wherein he informed the police that he sideswiped the motorcycle and caused the collision.

[33] He was not impressive when he responded to questions in that he was always hiding behind his version that he was confused and intimidated on the

day of the incident. He gave unnecessary explanations to evade questions. He could not explain the cause of damage to his vehicle.

[34] Mr Moloi regrettably failed to corroborate and advance the insured driver's special plea and defence on a material aspect of this case. He was adamant that he only saw the plaintiff kick the vehicle on the left side and the motorcycle falling on the ground whereas the insured driver mentioned in his statement that he sideswiped the motorcycle and caused the collision. Mr Moloi failed to explain worrying discrepancies between his evidence-in-chief and paragraph 13 of his statement in so far as they relate to the actual cause of the collision. His counsel correctly conceded that he was evasive when he was asked to explain the said discrepancies on this material aspect. He was not an impressive witness.

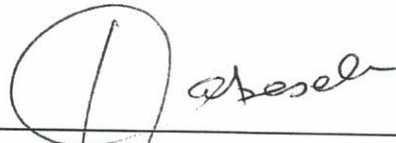
[35] There are no contradictions between the evidence of the plaintiff and his witness. Their evidence is consistent with the damage to the insured driver's vehicle as depicted in the photographs. In addition, the fact that the passenger was unharmed enhances the evidence that he escaped before the motor vehicle crashed into the motorcycle. Therefore, I consider the versions of the plaintiff and his witness to be true and accurate and therefore acceptable, and that the other versions advanced by the insured driver and his witness are therefore false and fall to be rejected. The result is that at no stage did the plaintiff place himself in a position where harm might result. Therefore the defendant's special plea should be dismissed. The plaintiff is entitled to claim damages from the defendant.

[36] In the result, I make the following order:

36.1 The defendant's special plea is dismissed.

36.2 The defendant shall pay 100% of the plaintiff's proven damages.

36.3 The defendant shall pay the plaintiff's costs to date relating to the merits.



M M MABESELE
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of hearing:	20 August 2018
Date of judgment:	20 September 2018
For the Plaintiff:	Adv A Myburgh
Instructed by:	Leon J J van Rensburg Attorneys
For the Defendant:	Adv L Mfazi
Instructed by	Twala Attorneys