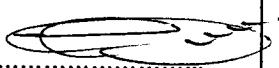




IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

23/01/2015
CASE NUMBER: 7989/12

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED 23/1/2015 DATE
	 SIGNATURE

In the matter between:

KELLY JOHNSON WILLIAMS

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

MOSEAMO, AJ

[1] This is an action for damages brought by the plaintiff following injuries he sustained as a result of a collision that took place on the 22 January 2011.

[2] At the commencement of the trial the parties applied for a separation of the merits and quantum in the matter, which order was granted. The matter proceeded only on the merits.

[3] It is common cause that (a) the plaintiff was the driver of a motor vehicle bearing registration letters and numbers JFZ 509 GP and John Chirwa was the driver of a motor vehicle bearing registration letters and numbers KLC 025 GP when the collision occurred; (b) both vehicles were travelling in the same direction; (c) the plaintiff's vehicle went over the pavement to the left into the bushes until it collided into a tree.

[4] Plaintiff testified and called one witness. He testified that on the 22nd January 2011 he was travelling on the N17 from Secunda to Sophiatown. The road is a free way with three lanes going in the same direction. He was the driver of a VW Golf 4 with registration letters and numbers JFZ 509 GP. He was travelling at 80km per hour. He was travelling together with his wife, two daughters and three grand children aged four years thirteen months and one month respectively. The collision occurred when motor vehicle driven by John Chirwa (insured driver) attempted to 'cut' in front of him and collided into his motor vehicle pushing it off the road. He lost control of the vehicle and it veered to the left down the hill until it collided into a tree and stopped.

[5] Lucinda Williams (Lucinda) testified that she is the daughter of the plaintiff and was a passenger in plaintiff's vehicle when the collision occurred. She was seating in the seat behind the plaintiff. Plaintiff was driving on the extreme left lane on the road that had three lanes going in the same direction. She saw a VW with a big learner sticker on the rear window driving on the right lane, the middle lane. It swerved to the left as it was going past them and collided into their vehicle. Their vehicle went over the pavement to the left, into the bush and hit a tree where it came to a stand still. Plaintiff got out of the vehicle to assist her sister who was having problems breathing. He was assisting her sister when he lost consciousness next to her. She, Lucinda was

busy with her baby who was also not breathing. She called her uncle from her cellphone. Three ambulances came to the scene and she, her father and her sister were taken to the hospital in different ambulances.

[5] John Dick Chirwa (insured driver) testified for the defendant. He was travelling on Wemmer Pan Road, which is a dual carriage road. He was travelling on the left lane at approximately 50 to 60km per hour as he was about to turn left at the robots ahead. He was alone in his vehicle while his friend, Mbonisi Mabena (Mabena) was following him in a different vehicle. He saw the lights of Mabena's vehicle flashing and then he saw a vehicle travelling at a high speed overtaking his friend and he heard a bang. His vehicle veered to the right and stopped on the side of the vehicles going in the opposite direction while the plaintiff's vehicle veered to the left went into the bushes and collided into a tree.

[6] Mbonisi Mabena also testified for the defendant. He testified that they were travelling from Boksburg on N17. They approached the robots and the insured driver who was travelling ahead of him turned into Wemmer Pan Road. As he turned into Wemmer Pan Road plaintiff's vehicle came from nowhere and overtook him. He flashed his lights as the vehicle swerved in front of him and he saw the insured driver's vehicle veer to the right and the plaintiff's vehicle veered to the left into the bushes. The insured driver's vehicle was damaged on the left rear. During cross-examination he said that the three vehicles drove for 10 to 15 seconds on the left lane before the collision. He was driving 60m behind the insured driver prior to the collision. After the collision he stopped behind the plaintiff's vehicle while the insured driver's vehicle stopped 14 to 15 meters away.

[7] It is on the evidence before me that I have to determine the two issues: whether the insured driver was negligent and whether the negligence of the insured driver resulted in or caused the injuries of the plaintiff.

[8] The versions testified to by the parties are entirely different and are mutually destructive with regard to: (a) the place where the collision took

place; (b) whether plaintiff's vehicle overtook Mabena's vehicle prior to the collision; (c) whether the insured driver overtook or attempted to overtake the plaintiff's vehicle prior to the collision and (d) whether or not it was the plaintiff's vehicle that collided into the insured vehicle or *vice versa*.

[9] It is trite that the plaintiff bears the *onus* of proving negligence on the part of the insured driver on a balance of probabilities. See *Madyosi and Another v SA Eagle Insurance Co Ltd* (E) 1990 (3) SA 442 at 444D-F.

[10] The correct approach to be adopted when dealing with mutually destructive versions was succinctly set out in the case of *National Employers General Insurance Co Ltd v Jagers* (E) 1984 (4) SA 437 at 440 para E-G where Eksteen AJP 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 a 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.'

[11] The Supreme Court of Appeal, in the case of *Stellenbosch Farmers Winery Group Ltd and Another v Martell Et Cie and Others* 2003 (1) SA 11 SCA at 14I-15E, approved this approach saying: '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 improbability of each party's version on each of the disputed issues ...'

[12] The plaintiff's version is that he was driving on the N17 keeping the extreme left lane when the insured driver attempted to overtake him and collided into his vehicle forcing it off the road, over the pavement into the bushes on the left hand side of the road where it hit a tree. The road where the collision took place is a free way with three lanes going in the same direction.

[13] The defendant's version is that the insured driver was driving on Wemmer Pan Road on the left hand lane being followed by Mabena in a different vehicle. The insured driver saw Mabena flashing his lights, then he saw plaintiff's vehicle travelling at a high speed and he heard a bang from behind. The insured driver's vehicle veered to the right and ended on the side of the vehicles going in the opposite direction while the plaintiff's vehicle veered to the left and collided into a tree.

[14] The two versions are mutually destructive in the sense that the acceptance of the one must necessarily lead to the rejection of the other. In order to succeed the plaintiff has to prove on a balance of probabilities that his version is true and accurate and therefore acceptable. In deciding whether the evidence of the plaintiff is true or not I have to weigh up and test the plaintiff's allegations against the general probabilities.

[15] I now turn to consider whether the plaintiff has proved that the insured driver was negligent.

[16] I must state that I found the plaintiff to be a credible witness. The plaintiff remained consistent during his testimony and he gave clear and cogent evidence regarding how the collision took place. His evidence is in line with the statement he made to the police on the 18th August 2011 page 16 Bundle A. It also supports the accident report especially the sketch and description of

the accident on page 24 of Bundle A. The evidence of his daughter, Lucinda before me also supports his evidence.

[17] Plaintiff testified that the insured driver was attempting to overtake him when the collision took place. This evidence is corroborated by Lucinda who testified seeing the insured driver driving past them on the right hand lane and collided into their vehicle while attempting to overtake. The plaintiff's version that his vehicle was hit from the right by the insured driver who attempted to cut in front of him causing his vehicle to veer to the left is in accordance with logic and common sense, it explains how his car ended up on the left hand side of the road.

[18] It is more probable that the plaintiff was travelling on the left lane and that the insured driver while attempting to overtake his vehicle collided into his vehicle from the right. This would explain why the plaintiff's vehicle went over the pavement to the left and into the bushes. This would lend support to the plaintiff's version that the insured driver's vehicle collided into his vehicle from the right and pushed his vehicle to the left over the pavement.

[19] I found the evidence of the insured driver to be unsatisfactory. The insured driver does not really provide an explanation on how the accident happened. He testified that he saw Mabena flashing his lights, he then saw a vehicle come at a high speed and heard a bang from behind. During cross-examination when asked about how the collision took place he said 'I did not see much, all I saw were lights and I heard a bang'. He was not sure about the time of the accident. He could not provide the distance between himself and Mabena. When asked how his motor vehicle ended up on the right hand side of the road while the plaintiff's vehicle hit his vehicle from the right, the insured driver's answer was 'my car was bumped on the left hand rear and it crossed over to the other side.'

[20] The evidence of Mabena regarding how the accident took place was not helpful, it was also unsatisfactory. He testified that after turning into Wemmer Pan Road plaintiff's vehicle cut in front of him and after few seconds he saw

the insured driver's vehicle veer to the right while the plaintiff's vehicle veered to the left over the pavement. He testified that he did not hear a bang.

[21] The defendant's version as put by defendant's counsel to the plaintiff is that the plaintiff overtook Mabena's vehicle then attempted to squeeze himself between the two vehicles and collided into the rear of the insured driver's vehicle. The insured driver did not agree that the plaintiff squeezed himself between the two vehicles. Mabena's testimony that the insured driver was travelling 60 meters ahead of him also does not support this version.

[22] The damage to the left hand rear of the insured driver's vehicle does not support the version that the plaintiff collided into the rear of the insured driver's vehicle. One would have expected the damage to be to the right hand side rear as the plaintiff's vehicle 'squeezed' itself alternatively came from the right after overtaking Mabena's vehicle.

[23] If one is to consider the evidence of Mabena that the plaintiff successfully overtook him and drove between his vehicle and the vehicle of the insured driver for 10 to 15 seconds before the collision, then the damage to the insured driver's vehicle would have been to the entire rear of the insured driver's vehicle and not to the one side.

[24] The insured driver testified that he had an agreement with the plaintiff not to involve the police. He further testified that there were police and traffic officers at the scene but they did not ask to take the statements from the drivers. I find it improbable that the police and the traffic officers would attend the scene of the accident and not compile an accident report and further fail to take statements from the drivers and witnesses especially considering the fact that it was a serious accident that resulted in serious injuries.

[25] It is also improbable that the insured driver whose vehicle was allegedly damaged through the negligence of the plaintiff in January 2011 would have taken no steps to recover damages suffered by him from the plaintiff. When asked during cross-examination for the reason why he has not attempted to

recover damages from the plaintiff he could not provide an explanation.

[26] The insured driver and Mabena also contradicted each other as to where the collision took place. According to Mabena the collision took place immediately after he and the insured left the N17 and turned right into Wemmer Pan Road. The insured driver testified that the collision took place on Wemmer Pan Road and described the road as a straight road with an off ramp ahead and that he intended to turn to the right ahead.

[27] I was provided with the map that the parties agreed on indicating the N17 and Wemmer Pan Road. The map indicates that the N17 splits into two and joins Wemmer Pan Road. There was no conclusive evidence led on either side to indicate the exact location of the collision. The Plaintiff and her witness testified that the collision took place on the N17 while the insured driver testified that the collision took place on Wemmer Pan Road and Mabena testified that the collision took place on Wemmer Pan Road immediately after they left N17. This however does not have any effect on my findings on negligence.

[28] In light of the evidence, I find that plaintiff's version is, on the probabilities, true and that the version of the defendant falls to be rejected. I accept the plaintiff's version that: (a) plaintiff's vehicle was travelling on the left hand side lane; (b) the insured driver attempted to overtake the plaintiff's vehicle; (c) the insured driver's vehicle suddenly swerved to its right and collided with the plaintiff's vehicle forcing it over the pavement to the left causing it to lose control and crash into a tree on the left in the bushes.

[29] The version of the plaintiff is more plausible than that of the defendant. I am satisfied that the defendant was the sole cause of the collision in that he drove at an excessive speed and he failed to keep a proper look out.

In the result I make the following order:

1. The defendant is liable to pay 100 percent of the plaintiff's proven or agreed damages.
2. The defendant is ordered to pay the plaintiff's costs.
3. The determination of quantum is postponed sine die.



P D MOSEAMO

ACTING JUDGE OF THE HIGH COURT