IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 39831/2013

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

In the matter between:

M LIEBENBERG **PLAINTIFF**

And

ROAD ACCIDENT FUND **DEFENDANT**

JUDGMENT

PHATUDI AJ

[1] INTRODUCTION:

1.1 This is an action in which the plaintiff sues the defendant for damages he sustained as a result of a motor vehicle accident that occurred on 23 June 2012 at approximately 11H45 along Hans Stryjdom Street, Klip Fontein, eMalahleni (Witbank), Mpumalanga Province.

1.2 The plaintiff was the driver of a motorcycle, which collided with a motor vehicle driven by the insured driver Ms Faith Mahamba, bearing registration numbers and letters F[...].

1.3 It was the plaintiffs case that on the one hand that the said collision was caused by the sole negligence of the insured driver as alleged in its particulars of claim, while on the other hand it was contended on behalf of the defendant that the collision was not caused by the negligence on the part of the insured driver, but solely through the plaintiff s negligent conduct, alternatively that the plaintiffs negligence contributed to the collision and that any damages awarded to the plaintiff, be reduced proportionally in accordance with the degree of fault established in terms of the Apportionment of Damages Act, 1956[1]

1.4 Before commencement of trial itself, counsel were not in agreement whether the contents of the summary of common cause facts as prepared and compiled by counsel for the plaintiff would be acceptable to counsel for the defendant, Mr Sekhula in which event, the trial would have only proceeded in respect of quantum as a stated case.

1.5 The summary of a common cause facts (鍍he summary・) was actuated by the concessions the defendant 痴 attorneys made during the pre-trial conferences, as held on 05 September 2013, and 04 November 2014, respectively[2]. The circumstances as to how and what caused the collision referred to, were noted in the said minutes including the minutes of the pre-trial conferences held on 22 January 2015. Accordingly, the minutes recorded by the parties・ legal representatives during the pre-trial conference mentioned, were indicative of the fact that the contents of the police痴 Accident Report[3] and the annexures thereto, were in fact admitted by the defendant痴 attorneys, thus placing the merits of how the accident occurred out of issue.

1.6 It was at the heart of the Expert’s Reports as abridged in the Summary of common cause facts, that counsel for the defendant found himself at odds to admit the contents thereof without being tested in due course.

1.7 Following this discontent, Ms Strydom, counsel for the plaintiff, then sought to apply for separation of merits and quantum of damages, and that only the merits be proceeded with. The application was accordingly granted.

[2] QUESTION FOR DETERMINATION:

Having granted the order for separation of the merits from the quantum, the next question for consideration was whether the insured driver took responsible steps or precautions to observe approaching traffic before commencing execution of her turn. Put differently, could it be said it was the insured driver’s conduct at the time of the collision negligent, or that on the flipside of the coin, whether contributory fault could possibly be imputed to the plaintiffs conduct as well.

[3] A SUMMARY OF THE PLAINTIFF’S EVIDENCE:

What follows is a summary of the plaintiffs evidence:

3.1 He testified that while riding on his motorcycle along Hans Strydom Street Witbank, he was involved in a collision against the motor vehicle driven by the insured driver on 23 June 2012. The collision occurred at about 11H40 or 11H45. According to the plaintiff, it was a very busy road where the collision occurred as the area has several shops and parking areas on either side of the road. The road consists of a double road with two different lanes, crossing each other from either side. He was driving approximately at 30 km per hour before the collision.

3.2 He reached a four way stop intersection at which point he had to turn right into Hans Strydom Street. A collision happened near the Engen garage.

3.3 As he turned right into Hans Strydom Street, he saw the insured driver on the right side of the road turning left into the sane road of the four way stop, at the bottom of the road. The insured driver turned left approaching the plaintiff from the opposite direction. There were no on coming motor vehicles in front of him at the time.

3.4 At that point, the insured driver, who was then closer to the plaintiffs 125CC Suzuki motorcycle, indicated her intention to turn right into the Engen Garage. A sketch plan was then handed to the witness to throw light on his travel direction[4]. He stated that his motorcycle was travelling on the left side of the road, while the insured driver emerged from the right side of the road, from the eastern direction, going towards the western direction.

3.5 He further stated that after the insured driver stopped her vehicle, she turned into her right side in front of the plaintiffs motorcycle. That was when he “slammed on my brakes” and tried to swerve to his right side to get past her vehicle, and his motorcycle skidded and collided with her motor vehicle. Before the collision occurred he was driving his motorcycle at 30 km per hour.

3.6 When the motor cycle swerved and skidded to the right side, the plaintiff then realised that the insured driver had stopped in the middle of the road parallel with him, and he could not get past her as she was close to him.

3.7 He further testified that she executed her turn into plaintiffs left lane of the road, where after he glided into the left side of the car, in particular, collided with the left front door of her vehicle. That, in a nut-shell was the evidence in-chief for the plaintiff, where after cross-examination ensued.

3.8 He stated under cross-examination that the insured vehicle was moving - clearly executing a right turn, while he was heading towards the western side on a straight line.

3.9 After she turned into Hans Stryjdom towards the eastern direction, opposite the plaintiff, that was when she stopped her vehicle, she then indicated to turn right. The witness turned right at the four way stop.

3.10 He stated that after skidding, he knocked the vehicle midfront of it. He indicated that he collided the insured driver’s vehicle while stationery at 30km per hour.

During re-examination, plaintiff again conceded that while his motorcycle was skidding, her vehicle had stopped in the middle of his left lane, and when she stopped at or near the Engen garage she was still stationery.

That being said, was the conclusion of cross-examination and so was also the plaintiffs case.

[4] <u>THE DEFENCE’S VERSION:</u>

4.1 The defence witness, Ms Faith Mahamba, testified that she was driving her motor vehicle a Volkswagen Polo, negotiating a turn to get into a filling station from Hans Stryjdom Street on the day in question.

4.2 Before she could turn into the garage, she slowed down, and from the distance she saw a motorbike and then turned into the Engen Garage. She then heard a collision against her vehicle.

4.3 By that time, the front part of her vehicle was already within the premises of the said garage.

4.4 She stated that it took her 2-3 minutes signalling before she attempted to execute a turn as she wanted to make it safe before she could turn.

4.5 She stated further that where the collision took place was a high accident area as the road was busy.

4.6 She stated further that when the collision occurred, she was already into the left lane depicted as point of impact on the sketch plan.

4.7 According to her, plaintiff’s motorbike collided against the left passenger door as the front part of her vehicle was already inside the premises of the garage.

4.8 Before the collision, she did not hear any hooter signalling that she was in a wrong lane of travel.

[5] This was briefly the evidence in chief for the witness, which also spelt closure of the defence’s case.

The witness was exposed to cross-examination at length, and the gist of her evidence was briefly the following:

5.1 That the impact of the collision was in the middle as the two doors of her vehicle were damaged.

5.2 She could not recall the distance from where the plaintiff s motorbike emerged as it was moving fast, and could hardly say if she saw it before or after the intersection that was even farther from where she had stopped. She estimated it about 100 metres away.

5.3 Before she could turn into the right lane, she indicated her intention to turn, then stopped while the indicator was on.

5.4 Before turning into garage, some time had passed-by before the collision occurred, and the time when she first saw the plaintiffs motorbike (“the bike”)

5.5 She stated that while observing the bike coming from the opposite side, it could be moving at a speed of 80 - 100 km per hour in a build up area. She based the estimation of high speed in relation to the damage to her car.

[6] FACTS WHICH ARE COMMON CAUSE:

What follows are a summary of the facts which are common cause:-

6.1 A collision between the motorcycle driven by the plaintiff and a motor vehicle driven by the insured driver bearing registration numbers and letters J[...] took place along Hans Stryjdom Street, eMalahleni on 23 June 2012 at about 11H45.

6.2 According to the Sketch Plan depicted on bundle 7 page 7 thereof, the said collision, being the point of impact, occurred in the right lane of the road as the insured driver attempted a right turn towards the Engen garage.

6.3 That the point of impact projects that the insured motor vehicle had already entered into the left lane when the plaintiff’s motorbike collided with her motor vehicle.

6.4 Further that, the insured motor vehicle was damaged on the middle left passenger’s side as a result of the collision referred to.

[7] THE FACTUAL MATRIX:

Applying the factual matrix relevant to the present inquiry the following observation become apparent:-

7.1 From the three sets of the Minutes of the pre-trial conferences held, it follows that the police-officers Accident Report (Bundle 7. P4) were at all material times admitted by the defendant’s attorneys of record. These Minutes were not disputed during the trial either.

The plaintiffs version was couched and captured as follows:

> "*Op die 23 Junie 2012, was ek oppad met my motorfiets na my vrou se werk in Klipfontein. Ek was alleen op my motorfiets. Ek het gemerk dat daar 'n rooi VW Polo in die teen oorgestelde rigting staan met flikkerligte aan om regs te draai. Die Polo het skielik begin draai reg voor my. Ek het rem aangeslaan, maar het nogtans met die Polo gebots.*
>
> *Daar was geen manier waarop ek die ongeluk kom vermy nie.* "

7.2 I pause to remark that these pertinent facts, were re-lived by the plaintiff in his evidence during trial on the merits.

[8] <u>APPLICABLE CASE LAW: TO THE FACTS</u>

8.1 There is a plethora of authority laid down by our courts on what conduct is required of a driver turning across the line of traffic as well as conduct exacted of a driver travelling in the line of traffic. In Milton v Vacuum oil S. A,[5] the court held that where there are two streams of traffic in a road in opposite directions, a person in a vehicle proceeding in one direction is entitled to assume that those who are travelling in the opposite direction will continue in their course and that they will not suddenly and in opportunely turn across the line of traffic, until he has shown a clear intention to the contrary. When a person wishes to cross the line of traffic and to turn out into a side street, he must give ample warning of his intention to other vehicles and execute his turn at the right moment and in a reasonable maimer.

8.2 In the present case, the driver of the insured vehicle, on her own version, knew the road to be a busy one in a business build up area. According to her evidence, when the collision occurred her vehicle was already in the left lane opposite on coming vehicles as depicted on the sketch plan referred to. That explains why the damage on her vehicle was more on the left passenger's side, towards the middle of her two left doors. If her version is accepted as true and correct, it then follows logically that when the collision occurred, her vehicle had already crossed the left lane from the opposite line of travel.

8.3 This then raises another question. How far was the plaintiff and at what speed was he driving his motorbike before the collision happened. The witnesses gave two conflicting estimations. The plaintiff alleged that he was driving at 40 km per hour, while the insured driver said his speed to have been between 80 km - 100 km per hour in that urban area.

There is, of course, no scientific evidence to support either of the allegations made in relation to the speed at which the plaintiff was travelling on his bike at the time. To attempt to determine his speed while on the bike, would be a matter of pure conjecture.

8.4 Be that as it may one may, however, draw an inference from the proven facts, which exclude all other reasonable inferences to be drawn in the circumstances that 100 metres from where the driver of the motor vehicle first saw the coming bike driven by the plaintiff, and the point of impact which resulted in the two left side of her vehicle being damaged, it follows logically that the plaintiff travelled in an excessive speed prescribed for build up areas. To hold to the contrary would still beg the question as to why would if he was travelling at a speed of only 40 km per hour, his bike “skid” after he “slammed” on his brakes. His version is, to my mind, not only improbable, but excludes all reasonable vestige of possible truth.

8.5 This view is fortified by plaintiffs own version that before he turned into Hans Strydom Street, he saw the insured vehicle on the right side of the road turning left into the same road of a four way stop, at the bottom of the road. As he approached, she turned right into the Engen garage and a collision occurred. As to why if plaintiff could see the wrongdoer’s motor vehicle from a distance while driving at a speed of 40 km per hour as he alleged, raises eye brows induces even more scepticism.

8.6 In AA Mutual Insurance Association Lts V Nomeka[6] the court stated that:

> “to execute a right turn across the line of oncoming or following traffic is inherently dangerous manoeuvre and there is a stringent duty upon a driver who intends executing such a manoeuvre to do so by properly satisfying himself that it is safe and opportune to do so.”

8.7 In *cam*, the driver of the insured vehicle drove across into the right lane of traffic from the opposite direction, by executing a turn into the right (or call it the left lane from opposite direction) and the plaintiffs bike collided against her vehicle. Before doing so, following the *Nomeka’s* decision, it follows that the wrongdoer acquired a stringent legal duty cast on her to properly satisfy herself that it was absolutely safe and timeous to do so. If not, it is clear that her conduct was negligent in the circumstances.

8.8 On being asked by this court whether part of the road where the collision occurred had a barrier line prohibiting crossing, the driver of the insured vehicle conceded that she crossed the barrieer line and encroached into the lane of driving of vehicles from the opposite direction, and that by so doing, she knew it was unlawful “if it is safe to do so.” Needless to say, the fact that a collision occurred as a result of her having crossed the line of on coming traffic, demonstrates clearly that it could not have been safe for her to have done so, as it was inherently dangerous in the circumstances, and her conduct was not only the cause of the collision, but invariably negligent. But the matter does not end there.

8.9 Turning to the facts of this particular matter, it is undeniable that the direction of the insured motor vehicle in relation to the point of impact, the nature and extent of physical damage to her motor vehicle (middle left side affecting two doors), the fact that it had already commenced execution into the right lane into Hans Strydom Street encroaching on the path of the west bound traffic, are facts that are common cause. However, the version of the plaintiff and that of the insured driver as to how the collision occurred, are mutually destructive, and remain in dispute.

However, in an attempt to find a resolution of the factual dispute where there are two diametrically opposed versions, the court is enjoined to make the findings of the credibility of the two witnesses, their reliability and inherent probabilities or otherwise. Where all factors are equipoised, the balance of probabilities should, in my view, prevail.

8.10 In this instance, although the insured driver had clearly encroached on the path of oncoming traffic, the plaintiff not expected, the issue of what evasive steps did he or could have take to have avoided a collision in the circumstances is another question. Her evidence was that she slowed sown and stopped and indicated her intention to execute a turn to the right facing on coming traffic, and all of a sudden a collision occurred.

[9] CONTRIBUTORY FAULT

9.1 What remains to be ascertained is whether plaintiff was in fact travelling excessively at the time, such that he could have avoided a collision, particularly that on his own version, the road was busy and the place where the collision occurred was a build up area. Although there is no evidence to negative the plaintiff s version that before the collision he was driving at 40 km per hour, the extent of the damage occasioned by the impact on the insured driver’s vehicle, renders his evidence highly improbable and less creditworthy. A motorbike driving 40 km per hour would not have “skidded” when he applied brakes at the time.

9.2 Furthermore, the insured driver testified that prior to the collision she did not hear any sound of a hooter signalling that she was on the wrong path of drivers from the opposite direction, the plaintiff not expected.

9.3 I addition, and being asked pertinently by the court, whether before the collision had happened, she observed any brake marks from either side of the road, particularly brake marks of the motorbike, she replied in the negative, with a loud 渡o・.[7]

9.4 It is the absence of the brake marks on the road where the point of impact occurred, that renders plaintiff s version that he applied brakes and tried to swerve to his right, but his motorbike “skidded” even more improbable and not worthy of salt. If for a moment one were to accept that indeed it “skidded” after he applied brakes, the only reasonable inference that can be drawn would be that he was travelling excessive speed in the circumstances given that it was a build up area. His conduct cannot therefore, completely exonerate him from contributory fault, the issue being to what degree.

9.5 Following the principles enunciated in Sieborger V South African Railways and Harbours[8], it is not expected a driver of a vehicle proceeding in the line of traffic, with reference to a vehicle whose driver has signalled an intention to turn across his path and who is directing his vehicle towards the middle of the road preparatory to doing so, to incur an obligation to stop or slow down. Certainly he must keep such vehicle under superversion and as soon as it is clear that, despite the inappropriateness of the moment, it intends to cross in front of him, **he must take all reasonable steps that may be necessary to avoid colliding with it. (my own emphasis).** This in my view, is precisely what the plaintiff should or ought to have done, but failed to do so.

9.6 It appears from the totality of the evidence therefore as weighed on a scale of preponderance of probabilities as well as dictates of logic, that the plaintiffs conduct too cannot be held to be free from blame. The plaintiff was also negligent in his conduct, and that such negligence contributed towards the said collision which invariably gave rise to a claim for damages to be reduced in accordance with the relevant provisions of the Apportionment of Damages Act, 1956.

In the result it is held that:

1 The driver of the insured motor vehicle (JMX 337 MP) was negligent in that she was the cause of the collision that occurred on 23 June 2012**.**

2 The defendant is held liable for thedamages to be proven by the plaintiff in due course.

3 The costs are reserved.

M.G PHATUDI

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION

PRETORIA

REPRESENTATIONS:

COUNSEL FOR THE PLAINTIFF: ADV: K STRYDOM

INSTRUCTED BY: EHLERS ATTORNEYS

ZWARKOP EXT 8, CENTURION

COUNSEL FOR THE DEFENDANT: ADV: PP SEKHULA

INSTRUCTED BY: T M CHAUKE INCORPORATE

DATE OF HEARING (MERITS ONLY): 06 FEBRUARY 2015

DATE OF JUDGEMENT: 27 FEBRUARY 2015

---

1 Act 34 of 1956, as amended

2 Pages 1 - 30, indexed bundle (pleadings, notices & documents, dated 23-01-2015)

3 Police officer痴 Accident Report (Bundle 7, pp 3 - 6)

4 Sketch plan - Bundle 7 p.7.

5 1932 AD 197 at 205

6 1976 (3) SA (A) 52F

7 P67 - 68, record.

8 1961 (1) SA 498 (A) at 505 A- D