IN THE HICH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NUMBER: 20363/09

20/3/2015

In the matter between:

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.
20/3/2015 .... DATE .... SIGNATURE

JOHN WILLIAM WESSELS **PLAINTIFF**

and

ROAD ACCIDENT FUND **DEFENDANT**

JUDGEMENT

<u>TLHAPI:</u>

INTRODUCTION

1] The plaintiff claims damages arising from a motor vehicle accident which occurred on 12 April 2004 between Modimolle and Vaalwater in the Limpopo Province. The collision was between two vehicles, one with registration PGG 319 GP driven by Mr Wessels, the plaintiff, and the other DNS 032 N driven by Mr Pretorius, the insured driver.

Although I had initially refused an application on behalf of the defendant for a separation of issues, after hearing the evidence of the plaintiff I recalled the ruling and ordered that the matter proceed on merits only. It is also important to mention that the basis for the application was that it had always been the stance of the defendant to have a separation as was evident in previous pre-trial hearings. Another reason was that the defendant had withdrawn the mandate of the previous attorneys and only appointed the present on the Friday before the hearing and that in view of the updated reports received by the defendant as late as the 10 March 2015, on the assessment of newly appointed counsel the defendant might need review such updated reports by appointing its own experts. The application was opposed on basis that the defendant had not in the past engaged any experts or filed any such reports for consideration, that the call was unwarranted and would lead to delay in finalizing a long outstanding matter.

[2] The plaintiff pleaded as follows on negligence of the insured driver:

"*5.1 He failed to keep any, alternatively, any proper lookout;*

5.2 He drove at an excessive speed under the prevailing circumstances;

5.3 He failed to keep his motor vehicle, of which he was the driver, under any alternatively, any proper control;

5.4 He failed to apply the brakes of his motor vehicle of which he was the driver timeously or at all;

5.5 He failed to avoid the collision when, by the exercise of reasonable care, he could and should have done so;

5.6 He failed to pay due regard to the rights of the other users of the road and in particular the rights of the plaintiff;

5.7 He failed to exercise the care of a reasonable man would have *exercised under the circumstances;"*

The insured driver in denying negligence pleaded on the negligence of the plaintiff as follows:

"*5.4.1 He failed to keep a proper lookout;*

5.4.2 He failed to take any, alternatively, sufficient cognisance of the presence of the insured motor vehicle;

5.4.3 He failed to avoid the collision when by taking reasonable and proper care, he should and could have done so;

5.4.4 He failed to take the rights of other road users and more in particular of the insured driver into account;

5.5 In the alternative and in the event of the above Honourable Court finding that the insured driver was negligent, as alleged or at all, and that such negligence contributed to the collision, all of which are still denied, then and in that event the defendant pleads that the plaintiff was also contributory negligent in relation to the aforesaid collision in one or more of the respects as set out in paragraph 5.4 above and request the above Honourable Court to apportion the plaintiff's damages....."

BACKGROUND

Common Cause Facts

[3] It was common cause that both drivers knew the road very well. The collision occurred on a gravel road that was not in good condition; the road surface was dry

and the weather clear and that the collision occurred in the afternoon; the collision occurred on the curve of the road, with the plaintiff travelling uphill and the insured driver downhill; according to both drivers the approach of any oncoming vehicle at the curve was obscured by vegetation growing on either side of the road, in particular on the right hand side of the road in the plaintiff's line of travel and on the left hand side of the insured driver's line of travel.

For the Plaintiff

[4] The plaintiff was 64 years old when the accident occurred. He was a builder by profession and earned at the time an amount of R25 000.00 per month from his business. Ten years after the incident he still continued in his trade. On 20 April 2004 he was travelling from his workplace with four of his employees who were seated at the back of an open van. The insured driver was also driving a van and he was returning from a visit to his sister in the company of his girlfriend.

[5] The plaintiff testified that he was travelling up a very steep hill at a speed of between 20 to 25 kilometres per hour and besides the steep hill he could not increase speed because of the condition of the road as because he had passengers at the back of his van. One Mr Basson was travelling in a vehicle in the same lane ahead of him. Mr Basson was not available as a witness due to ill health. On the left of the road was a big quarry hole. As he came around the curve he suddenly saw a vehicle approach at a distance of about 40 to 50 metres from his vehicle, in the middle of the road and it was travelling at high speed skidding towards his direction. He applied his brakes and could not veer to the left because of the quarry hole, the said vehicle collided with his, on his side of the road and the impact was on the right front of his vehicle. He sustained a fracture to his ankle, had back pain, suffered of

headaches and was detained for a week at the Steve Biko Hospital. He also developed problems with blood flow on his leg which conditions was treated.. He also made use of the diagram of the road on page 6 of the merits bundle and of the copies of photographs of the scene which were in black and white.

[6] Mr Baleseng was employed by the plaintiff and had been one of the passengers at the back of the van. He testified that he was sitting on the body of the back of the van and not on the floor because of the bumpy road. He could see the road ahead and confirmed the plaintiff's testimony that the insured driver approached at high speed. He testified that the plaintiff was driving slowly. The plaintiff could not avoid the collision because there was a big hole near the road. On impact they were nearly thrown into the hole.

For the Defendant

[7] Mr Pretorius testified that before he reached the curve there was a ditch about 15-20 cm in depth and which ran across the road. It caused him to slow down. As he went around the bend he observed another vehicle travelling at high speed while his vehicle was travelling on the left side of the road, he could not get out of the road save but to swerve. Plaintiff applied his breaks and the two vehicles collided with each other either on his side of the road or more towards the centre of the road. The impact on his vehicle was on the right front. He confirmed that the plaintiff was driving uphill but that it was not as steep as the plaintiff maintained.

The merits bundle

[8] The Accident Report form was used to confirm only the personal details of the

Plaintiff, the diagram therein was not useful instead the plaintiff indicated sketch on page 6 of the merits bundle and also some of the black and white photographs on pages 15 to 29 of the same bundle were used by the parties. There is no indication on the photographs of the date on which they were taken. The diagram on page 6 does not display measurements of the road (e.g. the width of the road in order to determine the position of the point of impact in relation to the centre of the road; or the distance of the quarry to the edge of the road), except that it depicts the position of the vehicles after the collision and the position of the quarry next to the road. The plaintiff and insured driver were referred to photographs on pages 17,18, 21, 22, 23, 24 and 25 of the bundle, with the insured driver making a mark on page 25 as being the point of impact on the road.

EVALUATION

[9] Both drivers evidence differed in respect of the speed at which each vehicle was travelling; on the point of impact and whether the plaintiff was negotiating or driving up a very steep hill. It was further common cause that the surface of the road was in very bad condition and it is probable that these conditions could have resulted in an impediment to both drivers.

Mr Swartz submitted that the plaintiff had discharged his onus on a balance of probabilities and that the collision was caused solely and exclusively by the negligent driving of the insured driver. He argued that the evidence of the plaintiff was the more probable in that he could not have travelled at a high speed thereby endangering the lives of his passengers and that his evidence was supported by his witness. According to him the insured driver's demeanour reflected uncertainty in his evidence, that he had gone as far as fabricating the length of the break marks of the plaintiff's vehicle and this impacted upon his credibility as a witness.

Ms Pienaar submitted that the statements made by both drivers on a previous occasion, which were addressed during evidence in chief and cross-examination also had relevance in the determination of the credibility of the insured driver in particular where he had stated that he had seen the break marks of the plaintiff's vehicle when he went to inspect his condition. She argued that on the authorities she cited there was contributory negligence on the part of both drivers.

[10] I am reluctant to criticize Mr Pretorius demeanour as reflecting upon his credibility. He did not display such trait to me or that there was an attempt to mislead the court. I am also cognizant of the fact that the incident occurred at least 10 years ago and that it was impossible to expect that an accurate account of the incident be given. The onus being on the plaintiff, I shall confine myself to those aspects of the merits bundle that were introduced into evidence, in order to attempt to objectively determine the issue of negligence.

]11] The issue of negligence must then be determined on the principles established in the following cases. In *Jadezweni v Santam Insurance Co Ltd and Another* 1980 (4) SA 310 (C) (Headnote):

> "*where a head on collision occurs more or less in the middle of road the Court is entitled to infer both drivers were at fault. If either C of the vehicles was across the centre line at the time of the collision the inference would be that the driver of that vehicle was negligent. If one of the drivers was on his correct side and saw the other was travelling on his correct side, or was about to cross over onto his correct side, it would be negligent on the former driver's*

part if he failed to take all reasonable steps to avoid a collision"

In *Van Staden v Avenant en 'n Andere 1971* (2) SA 456 (NC) (Headnote)

"Where two vehicles pass each other then the danger areas of the two vehicles must not encroach upon each other to such an extent that a collision occurs. If the two danger areas encroach upon each other to such an extent that damage results, then there is negligence on the part of the one or both drivers. In the case of the drivers of motor vehicles the middle of the road is the extreme boundary to which the danger areas of the vehicles concerned extend to the inside, but if the danger area of one vehicle goes over the middle of the road then it does not relieve the driver of the other vehicle of his duty to do everything to avoid the collision"

[12] The first issue to determine is to ask what was the point of impact, was it solely on the side of the plaintiff, in the middle of the road or on the side of the insured driver. I have already alluded to the fact that the diagram on page 6 is without measurements. The road was a gravel one, and from pages 16, 17, 18, 21 and 23 it is clear where the users of the road confined themselves to, because there appears to be room beyond the normal use which vehicles did not use and, from the photographs grass seemed to grow in between the gravel. On page 22 the plaintiff is seen pointing to the quarry which appears to be fenced off.

[13] If I were to rely on the depiction of the vehicles by the plaintiff on page 6, then it would seem that the collision could probably have occurred towards the middle of the road, either in the pathway of the plaintiff, or more towards the centre of the road, that is, having regard to the points of impact on the vehicle, being on the right front of

both vehicles. The depiction of the quarry on page 6 is of no assistance to try and determine its position to the road, so reliance shall be placed on the black and white photographs.

[14] The plaintiff testified that he saw the insured drivers vehicle for the first time at a distance of about 40 – 50 metres when he came around the curve. The insured's vehicle approached at high speed, which version was corroborated by his witness Mr Baleseng. He only applied his brakes. I have already indicated that from the photographs it would seem that there was room to manoeuvre more to the left without falling into the quarry . The insured driver was cross-examined on the contradiction in his statement and testimony relating to the break marks and of the measurements he sought to attribute to them.

[15] While there was a contradiction, what was important was the existence of the break marks which confirmed the plaintiff's testimony about the only attempt he made to avoid the collision. The insured driver on the other hand did not apply his brakes as he saw the plaintiff's vehicle approach or as he testified he could have swerved more to his left to avoid the collision . The same applies to the insured driver regarding what could have been sufficient room to manoeuvre to his left as depicted in the photographs. He did only applied his brakes.

[16] Furthermore I am not satisfied that the plaintiff has proved on a balance of probabilities that the gradient uphill was very steep as he drove towards the point of collision. If he was going uphill it would seem that he had reached a plateau as he approached the curve, and from the photographs this would support the version of the insured driver on this aspect. I conclude that there was contributory negligence

on the part of both drivers.

[17] In the result the following order is given:

1. That there was a contributory negligence on the part of both drivers to a degree of 40% on the part of the plaintiff and 60% on the part of the insured driver.
2. The defendant is to pay the plaintiff's costs in respect of the Merits on party and party scale;
3. The quantum related issues are postponed *sine die;*
4. The plaintiff approach the Registrar for a preferential date;
5. The defendant to pay the plaintiff's wasted costs occasioned by the postponement of the determination on quantum on party and party scale;

TLHAPI V.V

(JUDGE OF THE HIGH COURT)

MATTER HEARD ON	:	**16 MARCH 2015**
JUDGMENT RESERVED ON	:	**17 MARCH 2015**
ATTORNEYS FOR THE PLAINTIFF	:	**BENNETT ATTORNEYS**
ATTORNEYS FOR THE DEFENDANT	:	**DYASON INCORPORATED**