REPUBLIC OF SOUTH AFRICA

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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 62204/2013

EDWARD ALBERT VORSTER PLAINTIFF

And

ROAD ACCIDENT FUND DEFENDANT

JUDGMENT

KHUMALO J INTRODUCTION

[1] The Plaintiff instituted an action against the Defendant, the Road Accident Fund as a statutory insurer in terms of s 17 of the Road Accident Fund Act 56 of 1996, as amended, for damages he suffered as a result of personal injuries that he sustained from a motor vehicle collision which occurred on 19 October 2011. The appellant alleged in his particulars of claim that at about 8h30 on that day he was driving a motorbike with registration number [F…….] on Vander Street in Middleburg, when a collision occurred between his motorbike and an Audi motor vehicle with registration number [B……..] ("Audi") driven by one J Mtsweni (the "insured driver"). He further alleged that the sole cause of the said collision was the negligence of the insured driver in the respects alleged in his particulars of claim, inter alia, that he turned right in front of the Plaintiff motorbike at a dangerous and inopportune moment.

[2] The Defendant in its plea, save for admitting to the citations of the parties, its locus standi and the collision having taken place, denied liability, putting Plaintiff to the proof of all its allegations as per the particulars of claim. It prayed in the alternative that if any

damages are awarded to the Plaintiff they be reduced in terms of the Apportionment of the Damages Act, no 34 of 1956. The matter was set down and allocated for trial on 29 July 2015.

[3] On the date of trial, the Defendant's attorney instructed Counsel at roll call to seek a postponement, on the basis that he did not arrange for the Defendant's witness from Mpumalanga, the insured driver, to be at court as they did not anticipate that the trial would proceed since there was likelihood of the parties reaching a settlement on the day. The postponement was refused, Defendant was however not in a position to proceed with its case. Hence when the parties approached in Chambers, the attorney who was not fully robed solicited the standing down of the matter (in essence, a postponement since the matter was set down for only that day) until the next day so that he can get his witness to come to court. The endeavour was challenged by the Plaintiff. I refused to adjudicate on any issue relating to a postponement, as it was already decided upon.

[4] At the beginning of the trial, I accordingly made an order as it was greed between the parties that the issues of liability will be separated from that of quantum, postponing the issue of quantum sine die, for later determination.

Evidence

[5] The only version upon which the court was to decide the issue of liability was that of the Plaintiff, he being the only witness to have led evidence. According to him the collision occurred at about 9h00 in the morning on a road in Middleburg, on a very clear open day. The road has a double lane on each of the opposite direction with a middle solid white line that demarcates the lanes of traffic to each direction and was in a good condition. He was driving in the right hand lane between two intersections approaching a robot at the next intersection when an approaching motor vehicle travelling in the opposite direction suddenly turned into his lane in front of him to go into the municipality offices. At the point of impact there is a white broken line, for vehicles turning to go into the Municipality offices that were on his left. He did see the insured driver approaching coming closer without indicating or warning that he intended turning right he was at a distance of about 15 to 20 meters away from him before he actually turned into his way. He applied his brakes and his motorbike swerved to the left into a motor vehicle travelling on his left lane, hitting the front wheel of the vehicle on the left. He thinks there was no way of avoiding the collision in its totality. He sustained a few bruises that have now healed, injuries on his right leg and a broken knee.

[6] His evidence under cross examination was that the speed limit on that road was 60km/h. He could not have been driving fast because he was wearing short pants and a t- shirt without the protective gear. He said he was travelling between 2 robots at an estimated speed of between 50 and 55 km/h and on his way to the next robot when he noticed the insured vehicle approaching. The driver did not indicate so he did not anticipate a turn. He tried to avoid the collision by swerving and applying brakes at a speed that he was travelling on, that is 50-55km/h. The insured motor vehicle started making a turn at about 15 to 20 meters away that is where he noticed that it was going to turn. There was nothing he could do whilst driving at a speed of 55 km/h.

Legal framework

[7] As the facts stand I was implored by the Plaintiffs Counsel to decide the matter on the basis of the Res ipso loquitur principle that involves the presumption of negligence. He referred to the statement in the leading decision on that principle in the matter of Milton t/ Vacuum Oil Company of SA Ltd 1932 AD 197 at 205 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 of travel and that they would not suddenly and inopportunely turn across the line of traffic. A person travelling on one direction can assume that one travelling in the opposite direction will continue his course, but he may only assume that until he is shown a clear intention to the contrary. When a clear and undoubted warning is given, then there is no longer any room for the assumption that the person will continue in his former course."

Counsel therefore submitted that even though the Plaintiff carries the onus to prove on a balance of probabilities the liability of the Defendant, on the facts as per Plaintiffs uncontested version, Defendant is presumed to have been negligent when he did not continue on his line of travel as expected and turned into Plaintiffs path of travel. So, he argued that the Defendant carries the onus to rebut the presumption (burden of rebuttal) and in the absence of evidence contradicting the Plaintiffs version, the presumption prevails.

[8] Simply, what is inferred by the presumption is that since it is evident that the accident happened on the side of travel of the Plaintiff, the Plaintiff is presumed to have been correct and prima facie established the insured vehicle's negligence. The principle was clearly enunciated in Solomon and Another v Musset and Bright (1926) AD 427 on p433 that:

"The general rule under such circumstances is that persons using the road upon their proper side have the paramount right and are entitled to preference, so that, in case of danger of a collision, it is the duty of those on their wrong side to give way first".

[9] It is so that although the onus of proving Defendant's liability remains with the Plaintiff till to the end, the establishment of prima facie inference of negligence on the part of the insured driver places the burden on the defendant to adduce or tender evidence in rebuttal that negates the prima-facie inference of negligence.

[10] On the other hand the Defendant's attorney being not able to lead Defendant's evidence to rebut the presumption, attempted to persuade the court that even though there is no evidence led on behalf of the Defendant, the facts that are alleged to establish the presumption are less probable and therefore the presumption non-existent and also to illustrate that the Plaintiff's evidence indicated some degree of negligence on his side as well. Mr Sekgopela attempted as a result to illustrate from the Plaintiff's version that the Plaintiff was also negligent even absent the Defendant's testimony.

[11] Even though that was possible there being no legal prohibition to do so, in such instance, where the Plaintiff has succeeded to establish prima facie negligence on the part of the insured driver, proving or establishing some form of negligence on the part of the plaintiff would not discharge the Defendant from liability or negate the presumption of prima facie negligence or assumption of guilt of the insured driver entirely but might affect the Defendant's extent of liability. In that any measure of negligence proven against the Plaintiff might benefit the Defendant by reducing the extent of liability of the Defendant. Whilst the burden of disproof of the presumption apply to the defendant until the end of the case, placing the insured driver's whole conduct under scrutiny.

[12] Also the fact that the Defendant did not call any witnesses does not necessarily affect his ability to discharge the onus that lies upon him. As an onus can of course be discharged without the party on whom the onus lies presenting evidence. It is confirmed by Frank AJ in Shiimi v Mutual and Federal Insurance Company of Namibia Ltd (Case no (P) I 2269/2007) [2008] NAHC 109 (28 July 2008) by referring to the statement Davis AJ.A. made in Pillay v Krishna and Another 1946 AD 946 at 953 that reads:

"it (the onus") may have been completely discharged once and for all, not by any evidence what

has been led, but by some admission made by his opponent on the pleadings (or even during the course of the case), so that he can never be asked to do anything more in regard thereto;..."
Further, he on [24] stated that:

"From this I gather these admissions may stem from formal admissions by the opponent or his lawyer but it can also emanate from the evidence presented by the opposing party."

"with this admission on record it is the submission on behalf of the Defendant that he "can never be asked to do anything more in regard thereto."

Analysis of the evidence

[13] The evidence of the Plaintiff was very clear, forthright and articulated without any hesitation. I did not sense any lack of confidence in any of the statements that he made. He was all the way honest, even pointing out that he was not wearing any protective gear at the time and that although a solid line seemed to have delineated the two opposite lanes however at the locus where the accident occurred, the middle line breaks to allow the cars travelling to the opposite direction that are turning into the Municipality offices on the right, to do so past/ crossing their lane of travel. I find his evidence credible and in that sense very reliable.

[14] In testifying that he was travelling straight on his side of the road when the insured vehicle turned in front of him Plaintiff prima facie established the negligence of the insured. However his testimony that the road allows or indicates that the cars travelling on the opposite direction wanting to go to the other side may turn into his side of the road placed a duty of care upon him as well. As it has been pronounced that in establishing the negligence required to determine liability in civil actions a simple test that involves the standard of care and skill that would be observed by a reasonable man applies, which also depends on the atypical circumstances of each individual case; see Flanders v Trans Zambezi Express 2008 ZASCA 152. In carrying out this judicial analysis the following factors, inter alia will be decisive:

[14.1] If the Plaintiff as a reasonable driver adhered to his ongoing obligation to keep a proper lookout in all the circumstances.

[14.2] If he kept a reasonable speed (within the range of his vision) immediately before the collision.

[14.3] If the Plaintiff as a reasonable driver met the duty to anticipate a reasonable apparent risk and take appropriate precautions.

[14.4] The time of day at which the accident occurred, the location of the collision, the speed involved?

[14.5] Did alcohol, drugs or other types of impairment maybe play a role to deprive the driver the ability to avoid the collision.

[15] The upshot of this inquiry, in order to exonerate the Plaintiff completely from any form of liability for his own loss should therefore indicate that, after careful consideration of his whole evidence, the Plaintiff could not have avoided the accident even by exercise of reasonable care and that he did not, by his conduct, contribute in any material way to the accident.

[16] Considering the Plaintiffs evidence as a whole, the question arises if his testimony indicates that he indeed adhered to his obligation to keep a proper lookout in the circumstance where he was aware of a possibility of cars turning from the opposite side to pass through his way of travel to go into the municipality, keeping a reasonable speed given the circumstances thus meeting the duty to anticipate a reasonable apparent risk and taking appropriate steps.

[17] Plaintiff was driving at a domestic area with a very low speed limit of 60km/h at 55km/h and did notice the car approaching and noticed when it started turning at a distance of 15 to 20 meters. He did not reduce speed but applied the brakes and swerved to avoid the accident. Now taking into account that this was in an area where there should be an anticipation of cars turning since the road allows that, a reasonable person would have slowed down or travelled at a speed that would have allowed him to stop in anticipation of these cars, especially when there was indeed a car approaching. His testimony instead was that he nevertheless did not anticipate a car turning. He did not slow down but tried to stop when the accident happened as a result collision occurred with him veering to the left lane and therefore sustaining his injuries. It therefore means he was caught off guard.

[18] At the end of the case the Defendant had not discharged the onus of rebuttal as per the established prima facie negligence inferred from the Plaintiffs evidence (which was the whole evidence) in that he could not adduce evidence to the contrary. As a result Plaintiff had in that regard succeeded in discharging the onus upon him in connection with the issue of insured's negligence consequently the Defendant's liability. However the evidence indicate also some measure of negligence on the part of the Plaintiff contributing to the damages suffered as well, when he failed to anticipate a reasonable apparent risk and to take appropriate precautions by keeping a reasonable speed immediately before the collision, that would have allowed him to do something to avoid or minimize the possibility of an accident occurring. He is therefore liable to a portion of his loss at an apportionment of at least at 15%. The negligence is therefore apportioned between the Plaintiff and Defendant at a percentage of 15/85 respectively.

[19] Under the circumstances I make the following order:

[19.1] The Defendant is liable to pay 85 % of the Plaintiffs proven or agreed damages.

[19.2] The Defendant is ordered to pay Plaintiff's costs to date.

N V KHUMALO J

JUDGE OF THE HIGH COURT

GAUTENG DIVISION: PRETORIA

On behalf of the Plaintiff: Adv Du Plessis Instructed by: Riette Oosthuizen Attorneys

On behalf of the Defendant: Mr Sekgopela Instructed by: T M Chauke Attorneys