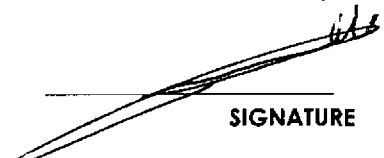


IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NO: 68444/09

11/3/2013

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/ NO
(3)	REVISED.
<u>11 March 2013</u> DATE  SIGNATURE	

In the matter between:

OUTSURANCE INSURANCE COMPANY LIMITED

PLAINTIFF

AND

SIPHO A. MKHIZE

DEFENDANT

JUDGMENT

MAVUNDLA, J.,

[1] On the night of 18 April 2009 the insured vehicle, a 2005 Mercedes Benz E 200K with registration number RZV478GP was damaged

in a collision whilst being driven by the defendant. As the result of the accident the plaintiff processed defendant's claim on the 14 May 2009 and paid a total amount of R227, 328. 97.

[2] The plaintiff processed the aforesaid payment as the insurer of the aforesaid vehicle, consequent to an oral agreement it entered into with the defendant on 18 November 2005. In terms of the oral agreement the aforesaid insured motor vehicle was added to the contract of insurance, in terms of which the plaintiff undertook to indemnify the defendant in respect of the insured vehicle against risks mentioned in the policy, subject to conditions and exclusions set therein.

[3] The oral agreement of insurance was subsequently reduced into writing in the form of facility document and schedule of insurance. These documents were attached to the plaintiff's particulars of claim as annexure "B1" and "B2". One of the exclusionary clauses excluded the plaintiff's liability in the event the vehicle was damaged whilst the being driven by a person who was under the influence of alcohol or drugs; or has a concentration of alcohol in

the blood exceeding the legal limit or fails a breathalyser test or refuses to give a breath or blood sample.

[4] The plaintiff's claim against the defendant is premised on alleged breach of the terms of the insurance policy in that defendant at the time of the accident drove the vehicle whilst under the influence of alcohol or intoxicated, or had consumed liquor, and failed to so disclose to the plaintiff as he was duty bound to. The plaintiff further alleged that the defendant was not entitled to be indemnified for the damages arising from the collision, because of the aforesaid breach and non-disclosure as the result of which the plaintiff *bona fide* and mistakenly believed that the defendant was entitled to be indemnified in the sum of R227, 328. 97 which amount it paid out. The plaintiff is now claiming this amount from the defendant. The defendant denied that he was intoxicated at all.

[5] The only issue in this matter is whether the defendant was drunk or under the influence of liquor at the time of the accident, the rest of the other issues being common cause.

- [6] The plaintiff called two witnesses to prove its case, namely Mr. Buti Wilson Mntambo and his niece Ms Frencionnett Twala. The defendant also testified in his defence without calling any witness.
- [7] The plaintiff relies on the evidence of these two witnesses to prove that the defendant was drunk at the time of the accident. The reason why Mr. Mntambo alleged in his testimony that the defendant was drunk was because the defendant: overtook his vehicle at high speed; almost caused an accident with him; had red eyes; smelt of brandy; sat slumped on his driver's seat; admitted and told him that he was drunk; disappeared from the scene of the accident.
- [8] According to Ms. Twala defendant was drunk because: passed their vehicle at high speed; collided with another vehicle; was unable to operate his phone; had to provide her with telephone numbers for her to assist him in phoning; another vehicle came and took the defendant away.

[9] The defendant denied that he was drunk. He said that on that day, he had been busy since in the morning. He was politically involved in election campaign and attended various errands in Gauteng, resulting in him living for home at night. He drove at high speed because he had earlier seen a 4x 4 vehicle following him at high speed; it was at night and during the period of elections, was not certain of the intentions of the vehicle following him at high speed; after colliding with the other vehicle his airbag was activated and knocked him in the face and he was dizzy as the result; he saw a 4x4 stopping at the scene and thought it was the same vehicle that had been following him at high speed; the people who milled at the scene were hostile towards him and he ran away from the scene towards the plots. He was taken away in a vehicle that arrived at the scene. Because his wife was not at home and his house keys were left at the scene, he was then dropped off at the neighbour's place; his wife later gave him tablets for his headache; he did not seek medical attention because it was already late at night; reported at the police station in the morning after church and informed that the Road Accident Report forms were not available and returned later to report.

[10] On behalf of the plaintiff it was submitted that the Court must make a factual finding premised on the evidence of both plaintiff's witnesses, that the defendant was drunk. It was further submitted that an inference of the defendant's state of insobriety should be made from the fact that he had to be assisted to make a telephone call; on coupled with his own admission and disappearance from the scene and that on the preponderance of probabilities he was drunk.

[11] It was submitted on behalf of the plaintiff that the Court should make a factual finding premised on the evidence of the two witnesses. It was further submitted that these two witnesses were impartial, credible and have no interest in the outcome of the case. It was further submitted that the Court should have regard to the admission of the defendant that he was drunk, also smelt of liquor, his actions were uncoordinated and was unable to operate his cell phone, and run away from the scene.

[12] On the other hand it was submitted on behalf of the defendant that the plaintiff has not discharged the *onus* resting on it to show

that the defendant was drunk. It was further submitted that the two witnesses contradicted themselves, in particular with regard to what they had recorded in their statements to the police and their testimony in Court. It was further submitted that it is questionable that they made statements to the police only in June when the accident occurred in April.

[13] It is trite that the plaintiff bears the *onus* of proving that the defendant was drunk or drove the vehicle having taken liquor. In this regard the plaintiff relies on the evidence of Mr. Mntambo and Ms. Twala. Mr. Mntambo said that the defendant was drunk because he found him slumped on his seat; admitted that he was drunk; smelt of brandy; had red eyes; had overtaken him earlier at high speed almost causing a collision.

[14] Ms. Twala's evidence is supposed to corroborate Mr. Mntambo that indeed the defendant was inebriated. The relevant aspects of her evidence are that the appellant overtook them at high speed, was involved in an accident, and was unable to operate his cell phone.

[15] In my view, travelling at high speed and getting involved in a collision is not axiomatic of a state of inebriation. Fatigue or momentarily loss of or slight absence of concentration or detraction may result in an accident, the possibility of which might be accentuated by driving at night in a dark and unlit area.

[16] It was submitted that Mr. Mntambo and Ms. Twala were impartial witnesses who had nothing to gain in this matter and therefore their evidence should be accepted as being reliable. I do not agree. Mr. Mntambo on arriving at the scene, confronted the appellant about the manner he was driving and accused him of almost colliding with him and or forcing him off the road in an effort to avoid a collision. In my view, this confrontation was purposeless, when it was obvious that defendant was already involved in a collision. The probabilities are, in my view that the confrontation was as the result of anger on the part of Mr. Mntambo. Mr. Mntambo could therefore certainly not be regarded as an impartial witness because of his earlier encounter with the defendant and the fact that he was probably angry and therefore

biased towards the defendant. His evidence cannot therefore be accepted without scrutiny.

[17] It is common cause that there were no lights at the scene of the accident and therefore it must be accepted, as I do, that it was dark. There was no evidence that there was any illumination from the vehicles directed towards the vehicle of the defendant. The Court cannot be expected to venture into speculation. I therefore accept that none of the vehicles' lights illuminated around and or in particular inside the defendant's vehicle, otherwise both Mr. Mntambo and Ms. Twala would have said so. Mr. Mntambo said the eyes of the defendant were glazed and red. Ms Twala also spoke to the defendant but said nothing of his eyes being red. In my view it would have been impossible in that darkness to have seen whether the defendant's eyes were glazed, or red. The difference between the evidence of Mr. Mntambo and Ms. Twala in respect of the colour of the eyes of the defendant is, in my view, material and brings the impartiality and credibility of Mr. Mntambo in doubt. Assuming for a moment that it was possible to see a person's eyes in that darkness, the fact that Ms Twala said nothing of the defendant's eyes being red, it follows that, on her

version the eyes were not red. On the other hand, Ms. Twala does not seem to have embellished her evidence and I therefore accept her evidence and conclude on her version that the defendant's eyes were not red.

[18] Mr. Mntambo has further stated that the defendant smelt of brandy. Ms Twala who spoke to the defendant said nothing of smelling liquor from the defendant, let alone brandy. She must have been very close to the defendant when she spoke to him and asked him to give her telephone numbers to phone on his behalf. If indeed the defendant was reeking of brandy, surely Ms Twala would also have smelt liquor, let alone brandy, permeating from the defendant. On deductive reasoning, I conclude that on Ms Twala's evidence, the defendant was not reeking of any liquor smell. There is therefore once more a further material difference between the evidence of Ms. Twala and Mr. Mntambo.

[19] It was submitted on behalf of the plaintiff that it does not require any scientific expertise to form a conclusion that the defendant was drunk. I disagree with this submission. Mr. Mntambo should

at least have informed the Court what his authority is which qualified him to conclude that whatever smell that permeated from the defendant, if any, was that of brandy. Regard being had to the fact that Mr. Mntambo's say-so statement of the smell of brandy finds no corroboration from the evidence of Ms. Twala, it would be dangerous to accept his evidence on this aspect and reject that of Ms. Twala. The plaintiff's case stands or falls on the totality of the evidence of all his witnesses. This must be so because of the strict measures the plaintiff's evidence must be approached with because of the fact that he seeks to avert its liability as an insurer, on a disclaimer clause in the policy, as stated herein below.

- [19] It is trite that generally, the Courts have accepted that slurred speech, lack of coordination in walking and other physical manifestations, such as gate are symptoms of intoxication. It is also true that people immediately after an accident would suffer from shock and have all sorts of temporary abnormalities or symptoms such as being dazed, highly dilated eyes or red eyes, be confused, disoriented, physical incoordination. The presence of these symptoms is, in my view, not axiomatic to intoxication. Neither is a collision occurred indicative of the state of inebriation

on the part of the drivers involved in that collision, especially in the absence of evidence excluding fatigue on their part; *vide Mondi Paper Company v Dlamini* 1996 (4) ALL SA 92 (N) at 93C-F. Each case must be decided on its own peculiar circumstances.

[20] The version of the defendant was that the airbag hit him in the face and he was dazed. He does not remember speaking to anyone at the scene of the accident. Even if it were to be accepted that his eyes were red and blood shot, the probability of this being as the result of being struck in the face by the airbag cannot be excluded. Any incoordination on the part of the defendant comes from the evidence of Ms Twala. According to her, she had to help the defendant to phone because he could not do so himself. It is remarkable that she could speak normally with the defendant, without perceiving any slurred speech or smell of liquor on his part. Therefore the inability to handle the phone is not indicative of inebriation.

[21] Where there are mutually destructive versions, the Court should decide the case on the preponderance of probabilities, bearing in

mind, *inter alia*, credibility and where the *onus* rest. The defendant's version of having been struck by the airbag and having been dazed cannot be out ruled as a figment of his imagination. It is in my view more probable than not that he was dazed shortly after the accident. The defendant's version finds credence in the discovered photos which showed a deflated airbag. His alleged admission made shortly after the accident while he was in the post accident traumatic state, assuming that it was made, cannot be accepted and I reject it. The reason for this is because the credibility and impartiality of Mr. Mntambo is, in my view, suspect.

- [22] The plaintiff, in essence, in seeking damages against the defendant wants to rely on a disclaimer. In my view, insurance companies generally, just like the plaintiff, profess: "*We do not hassle we pay.*" But come paying time they change the tune and sing: "*We don't just pay we hassle.*" Rightly or wrongly so, that is not the issue. However, the Courts have said that where the insurer seeks to avoid its liability to paying by resorting to a disclaimer clause, he must then attract the *onus* in order to

escape his liability and stricter approach should be adopted; *vide Mondi Paper Company v Dlamini* (supra).

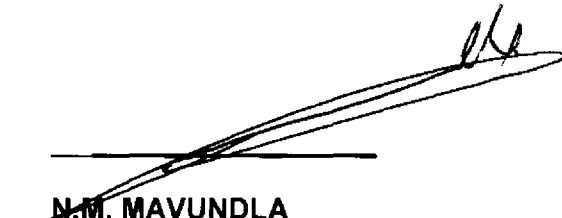
[23] I deem it not necessary for purposes of this judgment to chronicle all the contradictions in the evidence of the plaintiff's witnesses and in their statements made to the police almost two months after the accident, because these are on record. I do bear in mind that the *onus* rest on the plaintiff to prove that the defendant was drunk. On the other hand, it cannot be said that the version of the defendant on a balance of probabilities is improbable. I am of the view in the totality of the all the evidence led, I have no reason not to accept the version of the defendant that he was neither drunk nor having taken liquor on the day in question and conclude as such. I further conclude that on a balance of probabilities, the plaintiff has failed to acquit itself of the *onus* resting on it. *vide SFW Group ITD & another v Martell ET CIE & Others* 2003 (1) SA 11 (SCA) at 14I-15D.

[24] It needs mention that the fact that the defendant, either on his own version or that of the plaintiff, left the scene, does not assist

the plaintiff in discharging its onus because an adverse inference cannot be drawn thereon.

[25] In the premises, I conclude that the plaintiff has failed to prove that the defendant was drunk or drove the vehicle after having taken liquor and that its case therefore stands to be dismissed with costs.

[26] In the result the plaintiff's action is dismissed with costs.



N.M. MAVUNDLA
JUDGE OF THE HIGH COURT

DATE OF HEARING : 08/ 03/ 2013

DATE OF JUDGMENT : 11 / 03/ 2013

PLAINTIFFS' ATT : DE KLERK EN MARAIS INGELY

PLAINTIFFS' S ADV : ADV. A. BOTHA

DEFENDANTS' ATT : RADINGOANA ATTORNEYS

DEFENDANTS' ATT : ADV. R. LIPHOSA