



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

6/11/13

Case No. 30265/12

In the matter of:

D H BARNARD

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

JUDGMENT

KEIGHTLEY AJ:

1. In this matter the plaintiff, David Hermanus Barnard, claims damages from the defendant, the Road Accident Fund, arising out of a motor vehicle accident that occurred on 3 March 2008.
2. The parties have agreed on a separation of issues, and I am called upon only to rule on the merits of the case. The question of quantum will be determined at a later date.
3. There is much that is common cause in this matter. The place, time and date of the accident are all common cause. It is also common cause that the collision occurred between the vehicle driven by the plaintiff, a four-wheel

quad bike, and a yellow Toyota Stallion vehicle owned by the defendant's sole witness, Mr Makua. These were the only two vehicles on that section of the road at the time. The road is a public, gravel road, in a rural, farming area. It is wide enough to accommodate two vehicles, side by side. Alongside the road is a grass verge. On the stretch where the accident occurred, the road is straight. It was daylight when the accident occurred and general visibility was good.

4. The evidence of the plaintiff is that he was travelling to work at a nearby farm on the morning of the accident at approximately 7am. He was not in a hurry to get to work. He also knows the road well and has been using the quad bike as a means of transportation for a relatively long time.
5. None of this is contested. Unfortunately, however, this is where the plaintiff's version of the accident and that of the defendant part ways. The difference between the two versions is stark.
6. According to the plaintiff, he was travelling at approximately 60km/h on the straight stretch of road. He was driving on his side of the road, and saw the Toyota Stallion clearly about 300m to 400m ahead of him. When he first saw the vehicle, it was stopped in the road but towards the left hand side. It appeared to be picking up or dropping off passengers. As the plaintiff approached the vehicle to pass it, the driver pulled off directly into the plaintiff's path. The plaintiff testified that he collided with the Toyota Stallion and that the point of impact was on the back, right-hand side of the vehicle, between the back wheel and the fender. The plaintiff demonstrated the point of impact on his counsel, Mr Mulligan's, cell phone, which played the useful role of the Toyota Stallion for purposes of proceedings in court.

7. The plaintiff lost consciousness as a result of the accident and does not remember what happened subsequently. He only regained consciousness much later, in hospital. He did not speak to any police officers on the scene, nor did he later give any statement to them.
8. The defendant's version of the collision is less straightforward, and it only became apparent what the full conspectus of this version was when the defence witness, Mr Makua, took the stand. Unfortunately, the defendant failed to comply with the practice directive of this court in providing its version of the accident in advance of the hearing. The pre-trial minutes filed indicate that the defendant undertook, on two occasions, to provide its version of the accident, but failed to do so. It obtained an accident assessment report from Becker Mzimela Investigations in May 2013, but this report was only made available to the plaintiff shortly before proceedings commenced, and it was only made available to the court after proceedings had commenced.
9. The defendant's conduct in this regard is regrettable. The practice directive is there to ensure that both parties and the court know well in advance how the plaintiff's and defendant's versions of the relevant collisions may differ, in order to aid the finalisation of these matters. The defendant's failure to comply with the practice directive put the plaintiff and the court and, indeed the defendant itself, at a disadvantage in this regard.
10. Returning to the defendant's version. Mr Makau was adamant in his evidence that his vehicle was at a standstill throughout the incident, and that the plaintiff had collided with his vehicle while it was stationary. This much had been apparent from Mr Van Vuuren's cross-examination of the plaintiff.

What was not apparent until Mr Makau gave his evidence, however, is that the defendant's ultimate version was that the Toyota Stallion was completely off the road, and parked on the verge when the incident occurred.

11. Mr Makau consistently stuck to this version of events, and confirmed it under cross-examination with the aid of a graphic sketch drawn up by Mr Mulligan during the course of cross-examination and handed in as exhibit C. There can be no doubt at all that Mr Makau's version (and hence the version the defence relies upon) was that his vehicle was off the road in its entirety when the accident occurred.
12. Accordingly, I accept Mr Mulligan for the plaintiff's submission that there were two mutually destructive versions of the accident before the court, and that I am thus required to consider the probabilities of each.
13. It is correct, as Mr van Vuuren for the defendant pointed out, that the plaintiff's recollection of the incident is not one hundred percent as a result of the injuries he sustained. It is also correct that the plaintiff may have been less than clear on some of the details, such as exactly what speed he was travelling at when the accident occurred.
14. However, on the material issues, the plaintiff was clear and consistent: he did not stray from his version that the Toyota Stallion was at a standstill when he first sighted it, but that it pulled off and moved into his path without warning as he came up to it. Mr van Vuuren did not question the plaintiff's evidence to the effect that the Toyota Stallion had been in the road, to the left hand side before it pulled off. Nor did Mr van Vuuren put it to the plaintiff

that the defendant's version was that the Toyota Stallion was completely off the road, on the verge, at all times and that, as Mr van Vuuren later suggested in argument, the plaintiff may have swerved off the road to collide with it.

15. I find nothing improbable in the plaintiff's version.
16. On the other hand, the defendant's version is a different kettle of fish. Without taking into account any other facts, it is of course plausible that the plaintiff may have swerved off the road and collided with the Toyota Stallion while it was parked off the road, on the verge. Unfortunately for the defendant, however, there are other relevant facts in this case that militate against this.
17. To begin with, Mr van Vuuren's failure to put this version to the plaintiff is inexplicable and detracts fundamentally from its credibility. In addition, the accident report form completed by the South African Police Service provides an entirely different version of the accident to that given by Mr Makau and relied on by the defendant. The sketch included in this report clearly shows that the vehicles were both on the road at the time. While Mr Makau denied that he had given this version to the police, the fact remains that the plaintiff's uncontested evidence was that he never gave a statement to the police at all. Accordingly, Mr Makau, who confirmed that he spoke to the police at the scene of the accident, could have been the only source of the information contained in the accident report, which was completed only some 2 hours after the accident occurred. Unfortunately, the police officer that completed the form was not called as a witness, and the defendant did not offer any motive for the police including a false version of events in its

accident report. In the circumstances, the plausibility of the defendant's version is once again in doubt.

18. The absence of any available witnesses to corroborate Mr Makua's version is also telling, as is the absence of any photographs of the damage inflicted on the Toyota Stallion. The defendant's version was that, consistent with the vehicle being stationary at the time of the accident, the point of impact was at the rear of the Toyota Stallion. Mr Makau testified that his vehicle still bears the scars of the accident, and that he showed the damage to the investigator from Becker Mzimela Investigations when they came to take photographs of the scene. However, the investigator did not include a photograph of the damage in its report. It is fair to conclude that if the damage indeed supported the defendant's version, viz. that the point of impact was at the rear of the vehicle, consistent with it being stationary, then such a photograph ought properly to have been included in the report relied on by the defendant. The absence of such corroborating evidence (when it was available without much effort) supports the conclusion that the defendant's version cannot be sustained.
19. For all of the above reasons, I find that the defendant's version is improbable, and I accept the plaintiff's version as being more probable.
20. Mr Mulligan for the plaintiff conceded up front that his client was to some extent negligent and that an apportionment of blame would have to be effected between the parties. Therefore, I must consider an appropriate allocation of fault between the parties. Mr Mulligan suggested an apportionment of 80-20 or 70-30, as between the defendant and plaintiff respectively. His reasoning was that on plaintiff's version, Mr Makau moved

into the stream of traffic, and accordingly should bear a proportionately greater share of the blame. Mr van Vuuren suggested that a 50-50 proportionality between the parties would be more appropriate.

21. It is well established in this Division that a driver who turns into a stream of traffic bears a duty not only to clearly signal such intention, but also to ensure that other drivers in approaching traffic have heeded the signal and are responding to it. See in this regard R v Cronheim 1932 TPD 86; R v Miller 1957 (3) SA 44 (T); S v Swart 1976 (4) SA 348 (T); Bata Shoe Company Limited (South Africa) v Moss 1977 (4) SA 16 (W); and Brown v Santam Insurance Company Ltd 1979 (4) SA 370 (W).
22. The plaintiff was undoubtedly negligent in driving a vehicle without a hooter, which he conceded. It is also possible (but this was never properly canvassed due to the plaintiff's loss of memory about the finer details of the incident) that he should have slowed down more when he saw the Toyota Stallion in the distance loading or off-loading passengers, and that perhaps he should have made allowance for a greater passing distance between the vehicles.
23. On the other hand, however, on the version of the accident that I have accepted, Mr Makua turned into the road without any warning. Critically, even on Mr Makua's own version, (for he conceded this), he never checked his mirrors or the road at the critical time. In fact, Mr Makua was clear in his testimony that he did not see the plaintiff's quad bike at all until after the impact. Any driver pulling off into a road must keep a proper lookout. In particular, they must keep a close eye on any traffic that may be bearing

down on their vehicle. Failure to do this is a fundamental act of negligence, and such a driver must bear the bulk of the blame for any accident that occurs as a result.

24. In the circumstances, I find that the appropriate apportionment of fault between the parties is 75% in respect of Mr Makua, and 25% in respect of the plaintiff. Any damages that ultimately are awarded to the plaintiff must be reduced accordingly.

25. I make the following order:

(a) The plaintiff's claim on the merits succeeds, provided that the amount of damages to be awarded to plaintiff shall be reduced in terms of section 1 of Act 34 of 1956 by 25%;

(b) The defendant is directed to pay the plaintiff's costs.

A handwritten signature in black ink, appearing to read 'R.M. Keightley', written over a horizontal line.

R.M KEIGHTLEY

ACTING JUDGE OF THE HIGH COURT

DATE OF THE JUDGMENT : 06/11/2013

PLAINTIFF'S ATTORNEYS : TSEBANE MOLABA INC

DEFENDANT'S ATT : EDELING VAN NIEKERK INC