

**IN THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA**

In the matter between:

CASE NO. 2003/2008

SAMESHEN NAICKER

PLAINTIFF

and

SUBRAMANIYAN MOODLEY

DEFENDANT

JUDGMENT Delivered on 14 February 2011

SWAIN J

[1] The evidence before me reveals two mutually destructive versions of how a collision occurred, between two vehicles driven respectively by the plaintiff and the defendant, at the robot-controlled intersection of Higginson Highway and the off-ramp- from the N2 Freeway, Durban, on 27 May 2006.

[2] The claim advanced by the plaintiff is for payment of the agreed quantum of the loss suffered by the plaintiff, as a result of the damage caused to the plaintiff's vehicle. The agreed costs of the repairs to the plaintiff's vehicle were R164,961.95, as well as the agreed towing costs incurred by the plaintiff, in the sum of

R2,050.00. Mr. Combrinck, who appeared for the plaintiff, advised me that no agreement had been reached with regard to a further claim of the plaintiff for the costs of hiring another vehicle, but no evidence was led by the plaintiff to establish this claim and consequently need not detain me any further.

[3] Although the defendant's vehicle was damaged beyond economical repair, no counter claim was advanced by the defendant for his loss, the reasons for which I will deal with in due course.

[4] It is clear that "where there are two mutually destructive versions the plaintiff can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not, the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however, the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false"

National Employers General Insurance v Jagers
1984 (4) SA 437 (E) at 440 D – G

"It is only where a consideration of the probabilities fails to indicate where the

truth probably lies, that recourse is had to an estimate of relative credibility apart from the probabilities”.

Jagers *supra* at 441 A

[5] As regards the relative credibility of the plaintiff and the defendant, Mr. Combrinck and Mr. Naidoo, who appeared for the defendant, agreed that there were no grounds for impugning the credibility of either of the parties. No glaring contradictions or inconsistencies were revealed by their evidence. Consequently, the issue of whether the plaintiff has discharged the onus resting upon him of proving that his version is true and accurate and that of the defendant false or mistaken, depends upon an assessment of the plaintiff's allegations against the general probabilities.

[6] The version of the plaintiff was that he drove off the N2 Freeway and stopped at the intersection because the robot was red. He waited in the right hand lane to enter the intersection and turn right into Higginson Highway. When the light turned green he proceeded into the intersection and saw no vehicles near the line at which vehicles approaching the intersection from his right hand side, would be required to stop. The defendant's vehicle then collided with his vehicle from the right. The vehicles stopped after the collision at right angles to each. The plaintiff emerged from his vehicle and asked the defendant how could he “shoot” the red robot, to which the defendant replied that he did not have his glasses on and said to the plaintiff that the plaintiff's insurance could claim from

him.

[7] The defendant's version was that he stopped at the first intersection, where vehicles were able to turn left to travel on to the N2 Freeway, in the second lane from the left, as the robot was red. When it changed to green he took off and travelled towards the intersection where the collision occurred, the lights of which were green in his favour. He explained that he travelled through these intersections frequently and was able to say that the phasing of the robots was such that when the lights of the first intersection turned green, those of the second intersection did likewise. As he reached the second intersection, he saw a black Mercedes Benz vehicle approaching from the left and he therefore applied his brakes and swerved to the right, but the left front of his vehicle collided with the right front of the plaintiff's vehicle.

[8] The first thing he did was to look for his glasses because they had come off in the collision and fallen into the car. He found his glasses, got out of his car and the plaintiff came to him and said that he had "shot" the red robot. The defendant denied this and said that the robot was green in his favour. The defendant said he was unable to drive without his glasses, and produced his temporary driver's license, because his license was recently lost, which was endorsed to the effect that he was only licensed to drive with glasses.

[9] On considering these conflicting versions I am unable to find

that the version of the plaintiff is more probable than that of the defendant. Why is it inherently more probable that the defendant drove through a red robot, while travelling along Higginson Highway, than that the plaintiff drove through a red robot after travelling off the N2 Freeway, wishing to turn right into Higginson Highway?

[10] Mr. Combrinck however submits that there are a number of aspects of the evidence, as to what happened after the collision, which taken together, tip the balance of probabilities in the plaintiff's favour.

[11] The first of these is the evidence of Inspector Chetty who said he "believed" he had gone to the scene, because his signature and details appeared on the official accident form, which appeared at pages 22 – 25 of Exhibit "A". He frankly conceded that he could not remember the collision, which is not surprising, as it happened almost five years ago. He said it was his normal practice to interview both drivers, but he was unable to recollect whether he did so in this case. If their versions were contradictory, he would reflect both versions in the report. The significance of this lay in the fact that the "brief description of the accident" was consistent with the plaintiff's version. The defendant said he had given his version of events to a policeman at the scene, of which there were a number, but was unable to say whether it was the witness. As regards the sketch the witness made of the positions of the vehicles after the

collision, he said he did this the next day, from memory. Nothing turns on this however because both parties said the sketch was more or less accurate. Under cross examination the witness said he could not dispute the defendant's denial that the defendant had admitted travelling through a red light. As regards the description he gave of how the accident occurred, which commences with the words "its alleged", he was unable to explain why he had used these words, if the description accorded the agreed view of both drivers, other than to say that this was how they were trained to record the description. In my view, in light of the fact that the witness has no recollection of the accident, no weight whatsoever can be placed upon his contention, that the description of the accident records the view of both drivers.

[12] The next aspect relied upon by Mr. Combrinck, is that it is common cause that the plaintiff immediately after the accident accused the defendant of ignoring the red light. Having had the benefit of seeing both parties in the witness box, I do not believe any inference as to the validity of the plaintiff's accusation can be drawn from this conduct, simply because the plaintiff is quite clearly a confident assertive individual, whose confidence at times bordered on arrogance, when giving evidence. The defendant is in contrast, a much older reserved person.

[13] Mr. Combrinck also refers to the plaintiff's description of the accident, contained in the claim form submitted to his insurers,

which apart from recording that the defendant did not stop at the red robot, contained the following statement

“His reason for not stopping at the red robot was that he did not have his glasses, he apologised and said I must not worry cause my insurance company can claim from him”.

This evidence was clearly inadmissible, being a previous consistent statement by the plaintiff, which was not relevant, as no allegation had been made by the defendant, that the plaintiff had recently fabricated this evidence. The mere fact that the defendant denied making the statement, is insufficient to render the statement admissible.

State v Burgh
1976 (4) SA 857 (A) at 867 G

Mr. Naidoo did not however object to the admission of this evidence. After the plaintiff had closed his case, I asked Mr. Naidoo whether it was correct that he had no objection to the admission of this evidence, on the ground that it was a previous consistent statement. He answered that he did not. The fact remains however that the primary reason for it not being admissible, effects the weight to be attached to this evidence. The fact that a story has been repeated, and the witness has been consistent, does not have sufficient evidential value, to prove the assertion made.

Burgh's case *supra* at 865 G – H

[14] In this regard the plaintiff was asked by Mr. Combrink in re-examination if he recalled whether the defendant had glasses. His reply was that “probably” when the defendant got out of the vehicle, he did not have glasses. The defendant however maintained that the first thing he did after the collision was to find his glasses, which had come off in the accident, and put them on. It seems to me improbable that the defendant, who quite clearly wears glasses, and is only licensed to drive whilst wearing them, would drive without them. In addition, what would his purpose be in saying that his glasses had come off in the accident, when the plaintiff never alleged he had seen the defendant in the vehicle, without his glasses?

[15] Mr. Combrinck also refers to the letter of demand sent to the defendant, which the defendant received but never replied to. His argument was that if the defendant was innocent of any wrong doing, he would have replied rejecting the false accusations made against him. The defendant’s response to this was that maybe it was wrong not to have replied to the demand, but he believed he was in the right because the robot was green. In my view it is impermissible to draw such a conclusion, when regard is had to the fact that the defendant is a layman, who was faced with a letter of demand from the legal department of the plaintiff’s insurers. When he was served with the summons he then retained the services of his attorneys.

[16] A further aspect relied upon by Mr. Combrinck was that it was common cause that the plaintiff had asked the defendant at the scene, to acknowledge in writing on a piece of paper, that he had ignored the red robot. The plaintiff said his father had told him to do this, when he had telephoned him from the scene. The argument was that the plaintiff would never have asked the defendant to do this, if he had not already admitted his negligence. In my view, the mere fact that the plaintiff asked the defendant to admit in writing that he was at fault, does not justify such an inference being drawn, because there may be a number of equally plausible explanations for the plaintiff's conduct. One which readily springs to mind is that if the plaintiff in his telephone call to his father maintained that the accident was caused by the defendant, it would be a natural response of his father, to tell the plaintiff to obtain such an acknowledgment from the defendant. The plaintiff would thereafter be obliged to attempt to do so, otherwise the credibility of the assertion he made to his father, would be seriously undermined.

[17] A further aspect relied upon by Mr. Combrinck, was that the defendant had failed to counter-claim for the value of his car, and would have done so if he was not to blame. The defendant however explained that his vehicle was a 1986 model, which he had bought the year before the accident for R4,000.00. The vehicle was sold for scrap for R1,000.00 and he therefore did not believe it was worth spending money on trying to recover this small amount. When Mr. Combrinck asked him why he nevertheless did not

counter-claim for this amount, he said his attorneys would have to be asked about this. In my view, no adverse inference can be drawn against the defendant, in this regard.

[18] Considering all of the above, I remain unable to find that the version of the plaintiff is more probable than that of the defendant. On all of the evidence, I do not know whether it was the plaintiff or the defendant, who failed to respect the red light at the intersection, which caused the collision.

[19] Mr. Combrinck however submitted in the alternative, that the defendant on his own version, was at least contributorily negligent in relation to the collision for the following reason. The defendant acknowledged that he had a clear view of the vehicles travelling on the off ramp from the N2 Highway and approaching the intersection as the plaintiff did. The defendant said that his attention was however focused ahead of him, looking at the intersection and the green light. Mr. Combrinck submitted that if the defendant had been keeping a proper look out, he would have seen the defendant's vehicle approaching the intersection at an earlier stage and would have been able to avoid the collision.

[20] I however agree with the decision in

Joseph Eva Ltd. v Reeves

[1938] 2 All E R 115

where the following was said

“Nothing but implicit obedience to the absolute prohibition of the red – and indeed of the amber, subject only to the momentary discretion which it grants – can ensure safety to those who are crossing at the invitation of the green. Nothing but absolute confidence in the mind of the driver invited by the green to proceed, that he can safely go right ahead, accelerating up to the full speed proper to a clear road in the particular locality, without having to think of the risk of traffic from left or right crossing his path, will promote the free circulation of traffic which, next to safety, is the main purpose of traffic regulations. Nothing again will help more to encourage obedience to the prohibition of the lights than the knowledge that, if there is a collision in the cross-roads, the trespasser will have no chance of escaping liability on a plea alleging contributory negligence against the car which has the right of way. Finally, nothing will help more to encourage compliance with the summons of the green to go straight on than the knowledge of the driver that the law will not blame him, if unfortunately, he does have a collision with an unexpected trespasser from the left or right”.

Consequently, the driver of a vehicle entering the crossing when the traffic lights are in his favour, owed no duty to traffic entering the crossing in disobedience to the lights, beyond a duty that if he saw such traffic he ought to take all reasonable steps to avoid a collision.

The Law of Collisions in South Africa 6th Edition

Leveson pg 51

This decision was approved and followed by Millin J in the case of

Serfontein v Smith

1941 WL 245

where he said the following

“The person seeing the green light is in the same position as if there were a policeman waving him on. Not only has he then the right to on, but in the interest of traffic circulation and general safety it is his duty to go on”.

On the defendant’s version, as soon as he saw the plaintiff’s vehicle he did take all reasonable steps to avoid the collision.

In the result the order I make is the following:

- (a) The defendant is absolved from the instance.
- (b) The plaintiff is ordered to pay the defendant’s costs.

K. SWAIN J

Appearances /...

Appearances:

For the Plaintiff : Mr. P. J Combrinck

Instructed by : Alex Bosman Attorneys
C/o Livingstone Leandy Inc
Durban

For the Defendant : Mr. D. D. Naidoo

Instructed by : C K M G Attorneys
C/o Vinay Yetwaru Attorneys
Durban

Date of Hearing : 09 February 2011

Date of Filing of Judgment : 14 February 2011