IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE HIGH COURT: MTHATHA

CASE NO: 1714/07

Heard on : 08 06/11

Delivered on : 10/06/11

In the matter between:

TOBISILE MANQWAMBE **Plaintiff**

and

ROAD ACCIDENT FUND **Defendant**

JUDGMENT

NHLANGULELA J:

[1] On 18 April 2007 and on the R61 Road in Ngojini Location, Ngqeleni a motor vehicle collision occurred between two motor vehicles whilst being

driven by the plaintiff and one Mr Lulama Quinton Witbooi respectively. Mr Witbooi's motor vehicle, registered as BNN 657 B, was insured by the defendant in terms of s 17 (1) of the Road Accident Fund Act No. 56 of 1996. As a result, the plaintiff sustained injuries for which he brought this action claiming damages in the sum of R360 000,00.

[2] I ordered, by consent between the parties, that the issues of the *merits* and *quantum* be separated such that the trial proceeded for the determination of the issue of liability only.

[3] The plaintiff testified together with Mr Ndiphiwe Gqwetha, the Warrant Officer in the SAPS attached to Ngqeleni Police Station. The defendant did not testify but it called Mr Witbooi to testify on its behalf. No other witnesses were called to testify.

[4] The issue for decision is whose negligent driving, if any, between the plaintiff and Mr Witbooi caused a collision which resulted in the injuries to the plaintiff.

[5] The following facts are common cause. On 18 April 2007 and at about

16H30–17H00 the plaintiff was driving motor vehicle DNN 869 EC from Port St Johns to Mthatha. As he was travelling on the R61 Road in Ngojini Location, Ngqeleni a collision occurred between his vehicle and the insured vehicle. The surface of the road was wet as it was drizzling and misty. The vehicle driven by Mr Witbooi, registered BNN 657 B, emerged from the opposite direction. A barrier line separated the paths on which the vehicles were being driven. After the collision both vehicles landed on the left hand side of the road, the correct side of travel for the plaintiff's vehicle. On exhibit "A26", the Sketch Plan, Mr Gqwetha marked the points of landing as "C" and "D". Both vehicles faced the Mthatha direction after landing there. There is shown on this exhibit point X^1 and point X^2. Mr Gqwetha described point X^1 as the point of impact as shown to him by Mr Witbooit. Point X^2 was described as a point of impact as shown by the plaintiff.

[6] On the date of the collision Mr Gqwetha visited the scene of collision where he found out that the plaintiff and Mr Witbooi had been transferred to Ntlaza Hospital due to the fact that they had sustained injuries. At the time he scanned the road surface and saw a concentration of debris at point X^2 which indicated to him that an impact between the two vehicles took place on the correct path of travel of the plaintiff's vehicle. Points "C", "D" and X^2 are

concentrated in the area where he found the debris. He observed that the collision damage to the plaintiff's vehicle was on the driver's side. The evidence of Mr Gqwetha was not disputed by the defendant.

[7] The plaintiff testified that he was driving up-hill when he saw the insured vehicle approaching, travelling at a high speed and showing signs that it was not under control of its driver. He alleged that he was driving at 80km per hour. Disturbed by the on-coming vehicle he swerved out of the road towards the left and drove on until he stopped near a ditch which was just on the other side of the yellow line. Then the insured vehicle came straight to his vehicle and collided with it, turned to face the Mthatha direction and landed just in front of his vehicle. He confirmed that the point of impact is X^2 and that "C" and "D" represent places where both vehicles landed after the collision. The plaintiff stated that the cause of the collision was the negligent driving of the insured vehicle BNN 657 B by Mr Witbooi.

[8] Mr Witbooi gave two versions which are both diametrically opposed to the version of the plaintiff. He stated that on 18 April 2007 he had accompanied his colleagues from Mtontsasa Police Station, Lusikisiki to Mthatha. He left Mthatha at 16H00 to return to Lusikisiki. He drove on R61

Road towards Port St Johns. The road he was driving on just before the collision took place was a down-hill. According to him the collision took place on a curve. He saw the plaintiff's vehicle coming from the front at the foot of the down-hill. He was at a distance of 60 metres away when he saw the plaintiff's vehicle approaching at an excessive speed and travelling on the incorrect side of the road. He had seen it encroaching his path of travel. At the time he was driving at 80 km per hour, but reduced speed when he realized that he was in danger. Mr Witbooi testified that the plaintiff's vehicle proceeded straight to the insured vehicle and collided with it at point X^1.

[9] Mr Witbooi stated further that he saw the plaintiff's vehicle driven fast, leaving its path of travel and crossing the centre line. In response, Mr Witbooi quickly swerved the insured vehicle to the right hand side but, notwithstanding that evasive action, a collision occurred at point X^1. He stated that upon collision he lost consciousness until he regained it when he was being attended to by the ambulance medical staff in preparation for his transfer to the hospital. He regained full consciousness in the hospital.

[10] *Mr Msindo,* the attorney for the plaintiff, submitted that the irreconcilable versions of the witnesses who testified for the two sides call for

the Court to make findings on the credibility of witnesses, reliability of the versions given and probabilities of the versions in order to decide who between the two parties is truthful. He referred to the case of *Stellenbosch Farmers Winery Group Ltd and Another v Martell et Cie and Others* 2003 (1) SA (SCA) II at 14I-14J and contended, based thereon, that Mr Gqwetha is a credible witness whose evidence was not disputed by the defendant; especially with regard to the debris having been found at point X^2. This evidence was confirmed by the plaintiff. He contended that both the plaintiff and Mr Gqwetha displayed good demeanor in the witness box, were not shaken under cross examination and their evidence is straight forward and consistent in all material respects relevant to the issue of liability. He contended further that, assuming that both drivers were driving at 80km per hour, it is not probable that Mr Witbooi's driving speed down the hill could have matched that of the plaintiff who was driving up the hill. He also contended that point X^1 could not have been the place of impact if one has regard to the versions, of Mr Witbooi which are contradictory that the insured vehicle was hit head-on in the path of travel of the insured vehicle and that the same vehicle was hit whilst travelling on the centre line of the road. Further, *Mr Msindo* contended that points "C" and "D" reinforce the plaintiff's version that the point of impact was on the left hand side, the correct path of travel of the plaintiff's vehicle, and not on the path of travel of the insured's vehicle. He argued that on Mr Witbooi's own evidence point X^1 was not even on the centre line. Yet it was put to the plaintiff during cross examination that the collision took place on the centre line of the road. It was also argued by *Mr Msindo* that the inference is inescapably that Mr Witbooi drove the insured vehicle at an excessive speed driving down the hill and being in a rush to clock-off from work. On the question of demeanor, it was submitted that Mr Witbooi did not give a good impression to the Court as he kept his eyes on the ground throughout the time when he testified and often gave answers which did not relate to the questions asked during cross examination.

[11] *Mr Luzipho,* counsel for the defendant, submitted that the Court should find that the plaintiff was solely responsible for the collision because Mr Gqwetha testified that point X^2 cannot be the point of impact. It was submitted further that the cause of the collision was due to plaintiff's cutting of the curve. If it is found that Mr Witbooi drove negligently, the Court should apportion the blame for the collision to both drivers equally, so the argument went.

[12] In my view the approach of *Mr Msindo* to the facts of the case is a correct one. I agree fully with the manner in which he dealt with the facts of

the case. The conflict of versions of the parties requires the Court to make probability findings in terms of the test that was adumbrated by the Supreme Court of Appeal in the case of *Stellenbosch Famers Winery,* case, *supra*. The assessment of the probabilities is an exercise which is tied to the legal *onus* that is thrust upon the plaintiff to prove that, on a balance of probabilities, Mr Witbooi's negligent driving caused the collision which occasioned damages for which compensation should be paid as sought against the defendant. The Court needs only to decide if the version of the plaintiff is true and the contradictory versions advanced on behalf of the defendant are false. This exercise involves testing of the allegations of the witnesses against the general probabilities. The estimate of the credibility of the witnesses who testified will therefore be inextricably bound up with a consideration of the probabilities of the case. Such is the proper approach as propounded in the case of *National Employer's General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (E) at 440D-H.

[13] *Mr Msindo* succeeded to highlight the improbabilities inherent in the versions advanced by Mr Witbooi. The contradictory versions presented by Mr Witbooi when he testified and the inherent improbabilities in each of those versions destroy his credibility as a witness and, inevitably, the reliability of

his defence. Mr Witbooi's unreliably evidence regarding the point of impact and his concession of the plaintiff's case that the plaintiff's vehicle swerved towards the left and stopped near a ditch render his own versions implausible. Mr Gqwetha did not say that X^2 is not a point of impact. He said that the concentration of debris at point X^2 compelled him to believe that X^2 could be the place where the vehicles collided. Be that as it may, the evidence of Mr Gqwetha and the plaintiff is that the collision took place on the correct side of the plaintiff. Mr Gqwetha said this based on reasonable grounds. I believe him. The plaintiff's version that the collision took place on a straight surface (not in a curve as it was put to him) was never challenged. It is therefore to be accepted as true. In the circumstances, there can be no room for the argument that the plaintiff cut the curve because there was no curve at the point of collision. The acceptance that the motor vehicles landed on points "C" and "D" is predicated on the cogent narrative of the plaintiff. The defendant proffered no explanation with regard to those places.

[14] The submission that there is a possible contributory negligence on the part of the plaintiff is baseless.

[15] Consequently, I am satisfied that the plaintiff has proved on a balance of probabilities that the negligent party is Mr Witbooi. Therefore, the defendant

is vicariously liable to compensate the plaintiff for the injuries sustained by him in the collision aforesaid.

[16] In the result the following order shall issue:

1. **The defendant be and is hereby held liable to compensate the plaintiff for such amount of damages as may be proved by him during the proceedings on the issue of *quantum*.**

2. **The defendant to pay the costs relating to the hearing on the *merits* of the case.**

Z. M. NHLANGULELA

JUDGE OF THE HIGH COURT

Attorney for the plaintiff : Mr V.V. Msindo

c/o V.V. Msindo & Associates

Mthatha.

Counsel for the defendant	:	Adv. Luzipho
Instructed by	:	Mnqandi Inc.
		Mthatha.