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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION PRETORIA**

CASE NO: A311/2023

DOH: 02 MAY 2024

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED.

SIGNATURE

DATE: 23/7/2024

In the matter between:

MMAPULA HERMINAH SEKHU

APPELLANT

and

THAMI NATHANIEL MAKHATHINI

FIRST RESPONDENT

TRUMP TYRES CC

SECOND RESPONDENT

This Judgment was handed down electronically and by circulation to the parties' legal representatives' by way of email and shall be uploaded on caselines. The date for hand down is deemed to be on 22 July 2024.

JUDGMENT

Mali J

- [1] This is an appeal against the judgment of the Magistrate's Court for the District of Tshwane North held at Pretoria North (trial court). The appeal concerns the claim for damages arising out of motor vehicle collision (collision), between the motor vehicles driven on behalf of the appellant and motor vehicle driven by the first respondent. The collision occurred on 30th July 2021 along R566, Onderstepoort, near the N4 on/off ramp in Pretoria.
- [2] The appellant Ms Mmapula Herminah Sekhu (Ms Sekhu) was the plaintiff in the trial court. Mr Thami Nathaniel Makhathini (Mr Makhathini) is the first respondent who was the first defendant in the trial court. He was driving in his capacity as an employee of the second respondent, Trump Tyres CC (Trump) who was the second defendant in the trial court.
- [3] It is common cause that when the collision occurred, the appellant's motor vehicle with registration number and letters H[...] 9[...] G[...], Toyota RAV 4 (RAV 4) was driven by Mr Malose Sekhu (Mr Sekhu) whilst the appellant was the passenger. Mr Makhathini was driving the motor vehicle with registration number and letters H[...] G[...], Toyota Hilux (Hilux).
- [4] In the trial court the evidence of the appellant and Mr Sekhu was that in a single carriage road near the off/ on ramp to the N4, the Hilux approached from the N4 off ramp where it was stationary. It went over the left lane into the right lane of R566, in the process it collided with the RAV 4 on the left front wheel, thereby causing the RAV 4 to collide with a steel balustrade and thereafter the RAV 4 overturned.
- [5] The evidence of Mr Makhathini was that he was travelling towards eastern direction along R566 from Soshanguve to Pretoria. He stopped for the RAV4 which had a right of way. According to him he was stationary at the stop sign, nevertheless during cross examination he stated that there was no stop sign, he stopped as the driver of RAV 4 had a right of way. The driver of the RAV 4

swerved to the right closer to his side and later collided with the Hilux on the front bumper grill. He further testified that when he asked the appellant about the incident, she informed him that she did not witness anything as she was asleep. In essence his evidence was that it was the RAV 4 which bumped into the Hilux.

- [6] In his judgment, Mr Mokome, the presider in the trial court amongst other evidence had the evidence of inspection in loco.¹ An inspection in loco assists the court in achieving two purposes, namely, it enables the court to follow the oral evidence including observing real evidence which is additional to the oral evidence.² The trial court made a finding on the layout of the scene of collision. It found that R566 was a dual carriage road at the point of impact. The R566 then was divided into two; for vehicles travelling west and for vehicles traveling east. It further stated,

“The east and west routes are separated by a steel balustrade and grassy island in between. The off-ramp and the on-ramp to the N4 run side by side. There is a stop street on the N4 off-ramp. Plaintiff’s vehicle came to rest 10 metres away from point of impact on the grassy island on the right side of the road. Defendant’s vehicle came to rest in the right lane of along R566, facing the N4 on/off-ramp. There is a slipway on the N4 off-ramp which allows traffic from the N4. There are no stop streets or road signs in between the broken island where the Hilux was allegedly stationary.”³

- [7] In adjudicating the case the trial court found that there were two mutually irreconcilable versions by the parties. The decision was made on the following basis; that neither the version of the appellant nor the version of Mr Makhathini could be rejected as untruthful. Furthermore, that none of the drivers was, according to their respective evidence driving at an excessive speed and that no independent witnesses testified in respect of the alleged negligence of the respective drivers. Finally, that Mr Sekhu was travelling on the through road

¹ Para 25 Judgment from the trial court [002-163] caselines.

² R v Mokoena 1932 OPD 79 at 80.

³ Above (1)

and thus had a right of way and that Mr Makhathini was approaching from a side street, irrespective of whether he approached from the left or the right.

- [8] On appeal the appellant's case is that the trial court erred on the following grounds: The appellant has not established any, alternatively the proverbial 1% negligence on the part of the first respondent having regard to the common cause fact that the driver of the appellant's vehicle enjoyed the right of way and that the first respondent wanted to cross the flow traffic in which the appellant's vehicle was approaching.
- [9] Another ground of appeal raised by the appellant is that the trial court erred in concluding that the probabilities do not favour the appellant; whilst it has been found that the version of the appellant was largely corroborated by the driver of the appellant's vehicle. It is further said that the trial court erred in finding that the appellant's version cannot be rejected as false or untruthful despite the appellant and the driver of the appellant's driver having confirmed that the first respondent proceeded over the R566 from the appellant's left side.
- [10] Furthermore, the trial court without evidence found that driver of the appellant's vehicle was travelling at a speed higher than 80 kilometres per hour, alternatively at an excessive speed. Also, without evidence the trial court found that the driver of the appellant's vehicle was travelling at a speed higher than 80 kilometres per hour, alternatively at an excessive speed. That the driver of the appellant's vehicle had a lapse of concentration and that he was not keeping a proper look-out, when the evidence was that the driver of the appellant's vehicle and the appellant saw the first respondent when he was stationary at a stop sign on the left side of the road. In not finding that the first respondent's version he made to his insurer that that his motor vehicle was stationery at a stop sign, whereas the inspection in loco exercise proved that the was only one stop sign the one on the appellant's left side where the appellant's driver was stationary.
- [11] Moreover, in concluding that the appellant was asleep during cross-examination when that version was not put to her during evidence in chief.

Also in concluding, without the expert evidence that the first respondent had to cross from the appellant's right side when having regard to the damages on the appellant's vehicle, and the common cause fact being that the appellant's vehicle overturned after colliding with a balustrade and ended up on the island separating the R566. The onus was upon him the appellant to call expert.

[12] According to the appellant the trial court could have concluded, given the concession of the first respondent that where the appellant's vehicle came to a rest after the collision, that the initial point of impact was on the left of the appellants vehicle. This has already been addressed by the possibility that Mr Sekhu was driving at a speed higher than 80 km/per hour and that the trial court had an opportunity to observe the scene of collision.

[13] The trial court could also found that the appellant had established in the alternative the proverbial 1% negligence on the part of the first respondent having regard to the common cause fact that the driver of the appellant's vehicle enjoyed the right of way, and that the first respondent wanted to cross the flow traffic in which the appellant's vehicle was approaching.

[14] In the case of two mutually destructive versions, it is trite that the litigant upon whom the onus of proof rests must discharge such onus before the judgment can be granted in his /her favour. The courts have provided guidance about how to resolve cases such as the present one. For example, in *National Employers' General Insurance Co Ltd v Jagers*⁴, when dealing with two mutually destructive versions, the court said:

"It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a

⁴ 1984 (4) SA 437 (E)

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."

[15] Similarly, in *Stellenbosch Farmers' Winery Group Ltd. and Others v Martell & Cie and Others*⁵, the court held as follows:

"On the central issue as to what the parties actually decided there are two irreconcilable versions, so too on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally 5 1984(4) 437 (ECD) 440 D-G. See also Stellenbosch Farmers' Winery Group Ltd. and Others v Martell & Cie and Others 2003 (1) SA 11 (SCA) at para 5. 5 employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities...in the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus succeeded in discharging it".

[16] In *National Employees Mutual Insurance Associated v Gainy* ⁶ the court held:

⁵ (427/01) [2002] ZASCA 98; 2003 (1) SA 11 (SCA).

⁶ 1931 AD at 199.

“Where there are two stories mutually destructive, before the onus is discharged, the Court must be satisfied upon adequate grounds that the story of litigant upon whom the onus rests is true and the other story is false. It is not enough to say that the story told by Clarke is not satisfactory in every respect. It must be clear to the court of first instance that the version of the litigant upon whom the onus rests is the true version, and that in this case absolute reliance can be placed upon the story as told by A. Gany...”

[17] In *Prins v Road Accident Fund*⁷, it is stated:

“It is common cause that a passenger needs only to prove the proverbial 1% negligence on the part of an insured driver in order to get 100 % of damages that he is entitled to recover from the Fund.” In dealing with rear end collisions the law is set out by *H B Kloppers in The Law of Collisions in South Africa (7th Edition)* as follows:

“A driver who collides with the rear of a vehicle in front of him is prima facie negligent unless he or she can give an explanation indicating that he or she was not negligent.” This Court’s view is that the dictum regarding *“proverbial 1%”* negligence is applicable to Road Accident cases in particular when the plaintiff’s motor vehicle has been rear ended. In the present case it is common cause that the RAV 4 was hit from the front, therefore the argument about the *“proverbial 1% proof”* seems to be misplaced.

[18] In the event that the witnesses corroborate each other, it is not a given that the case has been proven. The court is still enjoined to exercise value judgment. During cross-examination the trial court established that when Mr Sekhu was asked to confirm whether the vehicle that was stationary on the stop street is the same vehicle he collided with; he said he became aware of that fact when Mr Makhathini came to render assistance. He earlier did not observe any vehicles approaching from his side. It is on these bases that the trial court

⁷ 21261/08 (2013) ZAGPJH106.

applied the law as stated in W.E Cooper⁸, that amongst other duties, a driver has two logically related duties, namely, to keep a proper look-out and to drive at a reasonable speed.

[19] In *Nogude v Union and South West Africa Insurance Co. Ltd*⁹ it is held *“the duty to keep a proper look-out entails’ a continuous scanning of the road ahead, from side to side, for obstructions or potential obstructions.”*

[20] The trial court did not refer to the speed as a matter of fact, it stated that it was possible that the RAV 4 was travelling at a speed higher than 80km/h. The possibility is inferred from the probability that if the RAV4 was travelling at a speed of 70-80 km/h, it would not have lost control after the impact and still went on to collide with the balustrade and land on the grass island. It must be remembered that the trial court was privy to the real evidence, the inspection in loco.

[21] On the issue of lack of concentration on the part of Mr Sekhu, the trial court concluded in the manner it did, because Mr Sekhu could not explain why he only observed the Hilux at 10 meters away from the point of impact despite having testified that he saw it stationery at 250 metres and that he had a clear view.

[22] Another ground of appeal is that the trial court erred in concluding, without the expert evidence that the first respondent had to cross from the appellant's right side when having regard to the damages on the appellant's vehicle. The common cause fact being that the appellant's vehicle overturned after colliding with a balustrade and ended up on the island separating the R566.

[23] The trial court could have concluded that, given the concession of the first respondent that where the appellant's vehicle came to a rest after the collision, that the initial point of impact was on the left of the appellants vehicle. It is trite

⁸ “Delictual liability in Motor Law”, revised edition, 1996, at page 133

⁹ 1975(3) 685 (A) at 688 A-C

that the onus is upon the plaintiff to prove its case, in the present case, it was the duty of the appellant to render expert evidence.

[24] Further ground of appeal is that the trial court did not place sufficient weight on the affidavit of the appellant. In the said affidavit she rectified the incorrect statement contained in the accident report that when all the witnesses testified, they provided their versions to the officers at the scene. Despite that the witnesses were not present when the accident report and sketch plan was completed, therefore the accident report was not reliable. The inspection in loco cured the complaint of the appellant regarding the accident report.

[25] From the evidence it is apparent that Mr Sekhu did not only fail to keep a proper look-out, but he also made manoeuvres that contributed to the collision by swerving to the right whilst the Hilux was stationary. In conclusion it is found that the trial court was correct in its finding that the accident was not attribute to Mr Makhathini's negligence. In the result the appeal cannot succeed. The following order is granted.

ORDER

The appeal is dismissed with costs.

N P MALI
JUDGE OF THE HIGH COURT

I agree
G N MOSHOANA
JUDGE OF THE HIGH COURT

APPEARANCES

For the appellant: Adv. J Moller
janmoller@lawcircle.co.za

instructed by: Messrs Alex Bosman Attorneys
vicky@amab.co.za

For the respondent: Adv. L A Visser
adv.lvisser@outlook.com

instructed by: Van Breda and Herbst
koomcaranc@legalinc.co.za