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IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

CASE NO: 23235/2005
DATE: 17/8/2006

UNREPORTABLE

In the matter between:

Edwin Mogajane **Plaintiff**

and

Road Accident Fund **Defendant**

JUDGMENT

BOSIELO, J

[1] The plaintiff is suing the defendant for damages suffered as a result a motor collision. It is common cause that plaintiff and the insured driver were involved in a collision on 17 April 2001 on a public road in Mabopane in the district of Pretoria. Furthermore it is common cause that both plaintiff and the insured vehicle were driving in the same direction at the material time. What is pertinently placed in dispute is who caused the collision. I interpose to state that by mutual

agreement between the parties, I made an order in terms of Rule 33(4) of the Uniform Rules separating the issue of merit from quantum. The issue of quantum was postponed sine die.

[2] I find it necessary to state that both plaintiff and defendant called one witness each to testify on the merits. Both were the drivers of the respective vehicles involved in the collision at the material time. Before evidence was led, plaintiff handed in a document described as Index to Bundle: Merits, which was marked “Bundle A”, as well as a photo-album containing seven photographs, which were marked “exhibit B”. Furthermore it was expressly agreed by both counsel that the photographs in “exhibit B” depicted the scene where the collision occurred.

[3] Plaintiff testified that it was approximately 18h00 on 17 April 2004 when he was driving his vehicle, to wit, a Nissan Sentra on a public road in Mabopane as clearly depicted on “Exhibit B” photographs 1-7. According to plaintiff, dusk was falling and he had his headlamps on dim. As he had intended to turn into a side junction to the right, he put his car indicators on to demonstrate his intention. After he had satisfied himself that there were no vehicles coming from the opposite direction, he then looked into his rear-view mirror to ascertain if there were no vehicles following him. He noticed only one vehicle which had been following him all along. He realised that in response to his

indication to turn to his right, the vehicle following him applied its brakes and veered to the left side of the road. On being satisfied that it was safe for him to turn to his right, he turned to the right into a side junction, clearly shown on “Exh B” photographs 2, 3, 4, 5, 6 and 7. He testified that when his vehicle had already encroached into the other lane, all of a sudden and unexpectedly, the insured vehicle emerged from his right hand side of the road and collided into his vehicle. The insured vehicle rammed into the right front part of his vehicle and ripped off his right front wheel. He testified further that as a result of the impact, the insured driver was flung out of the insured vehicle. The insured vehicle came to a stop well outside the tarred road. Plaintiff was adamant that the insured vehicle is not the vehicle which had been following him all along. At all times before the collision he was never aware of the insured vehicle behind him. He only noticed the insured vehicle some seconds before it collided into his vehicle. As a result he was unable to adopt any reasonable steps to avoid this imminent collision.

[4] On the other hand, the insured driver testified to the contrary. The essence of his evidence is that he had been following the plaintiff for some ten meters before the collision. He was driving a VW Jetta VR6. He was not in a hurry to get home. He estimates his speed at the time to have been approximately 40 to 50 km p\h. Whilst he was approaching plaintiff from behind, he saw plaintiff vehicle moving to

the left and into the emergency lane. He thought that the plaintiff was conceding the right of way to him. He proceeded to pass plaintiff's vehicle on its right hand side of the road. He maintained that at all material times, he was driving on his correct lane. All of a sudden, plaintiff then swerved back from the emergency lane into his line of travel. At this stage the front part of his vehicle had just passed plaintiff's right front door. He testified that he tried to swerve to avoid this collision but all in vain. This is because plaintiff's manoeuvre was so sudden and unexpected that he did not have adequate time to avoid the collision. According to the insured driver, he lost consciousness after the collision.

[5] [5.1] Mr Bezuidenhout appearing for the plaintiff argued, correctly in my view, that as this matter presented the court with two mutually contradictory versions by one witness on each side, I have to resort to the credibility of the witnesses and the probabilities of the case to determine which version is more probable than the other one. He submitted with vigour that, as compared to plaintiff, the insured driver was a bad witness whose evidence is inherently improbable. He criticised the insured driver for refusing to reply to many questions which were relevant. He also criticised the insured driver for being evasive and hesitant in responding to crucial questions. He also pointed out that the insured driver tried to dispute issues which

were never put in dispute by his own counsel, thus contradicting his own counsel.

[5.2] I pause to observe that Mr Leopeng appearing for the defendant conceded that he could not defend the credibility of the insured driver as a witness. Of more importance, he conceded that he finds it difficult to argue on the version proffered by the insured driver. Instead, he preferred to argue on plaintiff's version.

[5.3] Mr Bezuidehout submitted that plaintiff's version is logical, coherent and the most probable. He contended that on plaintiff's version, it is clear that the insured driver was negligent and further that his negligence is the sole cause of the collision. He submitted that based on plaintiff's version, it is clear that there was no chance for him to avoid this collision.

[5.4] I have alluded to the fact that Mr Leopeng preferred to argue on plaintiff's version. He argued that, based on plaintiff's own version, plaintiff was negligent in that he failed to keep a proper lookout. He submitted that if plaintiff had kept a proper lookout, he would have seen the insured driver's vehicle as he was overtaking. Based on the aforegoing, he submitted that I should find plaintiff to have been 20% negligent.

[6.1] I agree with both Mr Bezuidenhout and Mr Leopeng that the insured driver was a bad witness. He did not impress me as an honest, truthful

and reliable witness. What is worse, he proferred a version which was never put forward by his own counsel. Clearly, I am of the view that Mr Leopeng took a wise decision by not relying on the insured driver's version. In simple terms, his version is seriously improbable. I want to believe that I am not being discourteous by describing him as plainly mendacious. Of crucial importance, the insured driver conceded that it would have been absurd and illogical for the plaintiff if he had intended to turn to the right, to swerve to his left. The most obvious and logical thing for any driver who intends to turn to the right to do, which plaintiff insisted he did, is to indicate timeously and move his vehicle to the centre of the road and not to the left. Clearly this would allow all traffic following him/her to pass him/her safely on his/her left.

[6.2] It is clear to me from the proven evidence that the insured driver was negligent and further that his negligence caused the collision. It is clear from the evidence that he did not keep a proper lookout. Secondly and crucially, I find that he drove his vehicle at an excessive speed in the circumstances. This resulted in him being unable, at the time when plaintiff turned to the right, to apply his brakes timeously to avoid the collision. I am fortified in my view by the crucial fact that as a result of the impact the plaintiff's right front wheel was ripped of his vehicle. Furthermore, the insured driver was flung out of his vehicle by the impact of the collision. In my view,` such events can only be attributed to the fact that the insured driver was travelling at a high speed at the

time of impact. It is important to note that the insured driver never testified that he applied his brakes to avoid the collision. Clearly, this amounts to negligence on his part.

[6.3] Concerning the alleged contributory negligence by the plaintiff, I am not in agreement with Mr Leopeng's submission. It is abundantly clear that there is no factual basis for a finding of any negligence on the part of plaintiff. Even if I were to find, as contended for by Mr Leopeng that he had to keep a proper lookout, this still begs another question. Given the facts of the case, is there any acceptable evidence that there was an avoiding action which plaintiff could have undertaken to avoid the collision. I pointed out to Mr Leopeng during argument that there is no evidence as to the kind and size of the vehicle which was following plaintiff. That vehicle could have been a bus, a truck or even a horse and trailer which could have effectively obscured his vision of the insured vehicle before the collision. As this aspect was never investigated during cross examination, I am loathe to speculate on behalf of the insured driver. However, a perfect answer to this vexed question is to be found in Guardian National Insurance Co Ltd v Saal 1993 (4) SA 161 (CPD) at p163 C-G where the Full Bench stated the following:

"The trail court found that

'there was no impediment to a proper lookout being maintained by Maasdorp to his right across the then open, flat sandy terrain to at least half of the course of Stoffel Street'

'and concluded that Maasdorp was not keeping a proper lookout at the time of the collision. This finding, however, is not sufficient to render the defendant liable. Respondent (plaintiff) had to prove that Maasdorp's failure to keep a proper lookout was causally connected with the collision, the critical question being whether Maasdrop 'ought reasonably to have become aware thereafter, at a stage when effective avoiding action could still be taken, that the (bakkie) was not going to stop.' (Bay Passenger Transport Ltd v Franzen 1975 (1) SA 269 (A) at 277B-C.) The plaintiff had to prove that had Maasdrop 'reacted when reasonable man would have reacted, the collision would probably not have occurred.' (Diale Commercial Union Assurance Co of SA Ltd 1975 (4) SA 572 (A) at 578F.) On Maasdorp's version of the collision, and because plaintiff suffered from amnesia, the precise speed at which the vehicle was travelling when it entered the intersection and at what stage he intended doing so cannot be established. Unless these facts can be established on a balance of probabilities, the Court cannot find that if Maasdorp had reacted as a reasonable man would have, the collision would not have occurred.(See AA

Onderlinge Versekeringmaatskappy Bpk v Mantjie 1980 (1)SA 655 (A) at 661C-D.) In my view the facts prove, inferentially, no more than a reasonable possibility that the collision may have occurred. This is not sufficient."

With respect I find myself in agreement with this dictum which in my view, is dispositive of defendant's claim to contributory negligence on plaintiff's part. I am unable to find that plaintiff was negligent in any manner whatsoever.

Having given this matter careful consideration and for the reasons set out above, I hereby make the following order:

(a) The insured driver is declared to have been negligent andfurther that his negligence is the sole cause of the collision aforesaid. As a result, the defendant is declared to be liable to the plaintiff for all his proven or agreed damages emanating from the collision which occurred on 17 April 2005.

(b) The defendant is ordered to pay plaintiff's costs in respect of the determination of liability;

(c) The costs shall include the costs of Senior Counsel for 23 and 24 May 2006.

L.O. BOSIELO
JUDGE IN THE HIGH COURT

FOR THE PLAINTIFF: ADV. F BEZUIDENHOUT
INSTRUCTED BY: MESSRS MALULEKE MSIMANG & ASSOCIATES
FOR THE DEFENDANT: ADV. P. LEOPENG
INSTRUCTED BY: MESSRS SEKATI MONYANE & PARTNERS
DATE OF JUDGMENT:
HEARD ON: