

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

NOT REPORTABLE

CASE NO: 35741/2003

DATE: 30/1/2008

In the matter between:

JAN HARM BOTHA
PLAINTIFF

And

ROAD ACCIDENT FUND DEFENDANT

JUDGMENT

MOLOPA J

The Plaintiff has instituted an action for damages arising out of a motor collision which occurred on 04 September 2001 between the Plaintiff's motor vehicle with registration letters and numbers CHP 580 MP there and then being driven by the Plaintiff and a bus with registration letters and numbers SD 488 AN there and then being driven by one Richmond Qolani Gwebu ("the insured driver") along the Middleburg-Stofberg Road. The

Plaintiff was apparently driving from Middleburg direction to Stofberg direction.

At outset of the trial and by agreement between the parties the Plaintiff brought an application in terms of rule 33(4) for the separation of merits and quantum, that the matter proceed only on the merits and quantum be postponed sine die, which order I granted.

What remains for me to consider is whether the collision was due to the negligence of the insured driver. Should I hold that there was causal negligent on the part of the insured driver it would further be necessary for me to decide whether there was contributory negligence on the part of the Plaintiff, and if there was, I will be required to apportion the blame between the respective parties.

The evidence of the Plaintiff was that on the day in question he was driving a Corsa bakkie, 2001 model, and light green metallic paint in colour, and he was with his nephew named Gert Botha. The other car with which he collided was a bus, yellow and black in colour. At the time of the collision he was working for Lucas Portgieter Transport based in Steelpoort as a shop manager and an operational manager. That on 04 September 2001 at approximately 19H15 (in the evening) a collision occurred between his motor vehicle and the bus. He had gone to pick up one of their vehicles which had capsized, from Bronkhorstspuit and was on his way back to their workshop in Steelpoort.

He was driving in the direction of Stofberg and the collision occurred approximately two and a half to three kilometres (2 ½ - 3km) outside the town of Stofberg. The road was tarred, and had one lane each on the Middleburg and Stofberg directions respectively. The area where the accident occurred has a T junction to/from Belfast. It was already dark at the time, the road was dry. Neither rain nor mist nor dust nor smoke obscured his vision. The road was not lit. The headlamps of his vehicle were on, and the other vehicles which he passed along the road also had their lights on.

Various photographs of the scene of the accident were shown to Plaintiff, pages 31- 35 of Exhibit A (Plaintiff's bundle). He identified the photo on page 31 as depicting the road from Middleburg to Stofberg that the collision occurred on that road. The photo on page 32 depicts the road from Stofberg to Middleburg; the photo on page 33 depicts the T-Junction in the Belfast direction (which is also depicted on the right hand side of the photo on page 32). The photo on page 34 depicts the T-junction from Belfast into the Stofberg – Middleburg road (this is the same T-Junction as the one depicted on the photo on page 33). The photo on page 35 depicts [on the upper side ('bokant')] the road from Stofberg and the T-Junction from Belfast. He was driving on the road depicted on the photo on page 31 of exhibit A, from Middleburg to Stofberg.

He testified that as he was driving from Middleburg to Stofberg, he approached the Belfast T-junction. Approximately half a kilometre before then a motor vehicle from the opposite direction passed him, he put his

lights on dim. That on his left hand side towards the T-junction there is a café/shop, a motor vehicle came out of there, he reduced his speed and he continued past the vehicle from the café/shop since the motor vehicle aforesaid did not proceed further. He thereafter put the lights of his motor vehicle back on bright; he then saw a bus in front of him. He applied his brakes, his motor vehicle slipped he hit the rear wheel of the bus with his bakkie. The right front headlamp/light of his bakkie hit the right rear wheel of the bus. The bakkie, then nailed down the bus, slipped through and stopped against a tree outside the road. The motor vehicle which passed him prior to the accident came from the Stofberg direction, in front of him. The lights of the motor vehicle aforesaid were on and his (Plaintiff's) lights were on dim. After passing the motor vehicle which was on his left side (café' side) he again put his lights on bright, that's when he noticed the bus.

When he noticed the bus, the bus was slanting/sloping right across the road onto the two lanes. The back of the bus was more on the Stofberg direction (his lane of travel) and the nose/front of the bus was actually in the direction of Belfast but as put by his counsel (i.e. from questioning by his counsel) he made a deduction that the nose/front of the bus was nearer in the Middleburg direction. Plaintiff further testified that when the collision occurred he was in his lane of travel. That there is a solid white line on both sides in the area next to the T-Junction, that the point of impact was in the middle of his lane of travel, his vehicle went to the left side of his lane on the gravel road (after the collision) and it came to a standstill. The bus went onto the Belfast direction it then stopped, and all the people from the bus came out of the bus

and all came to him and asked if he was injured. The driver of the was also there.

That when he noticed the bus slanting/sloping across the two lanes on the road it (the bus) looked like it was moving backwards, that he assumes that it was moving backwards so that it could get straight onto the Belfast direction. He does not know if it was moving or standing when the collision occurred.

That after his vehicle had come to a standstill he could not come out of his door, he came out of the left side door. He was injured in the collision but he could still walk after the collision.

He further testified that he called the police, they (police) came. They all (i.e. the driver and others from the bus) stood at the side of his bakkie and spoke to the police. He heard the driver of the bus (the insured driver) tell the police in Zulu that they had passed/went past the T-Junction and they pushed the bus back so that they could get back onto the Belfast direction.

That he (Plaintiff) is not well conversant in Zulu, but he can speak it a little but not much, he could not understand everything when the insured driver spoke to the police but could understand what they said had happened.

Under cross examination he stated that after the other motor vehicle referred to above went past him (Plaintiff) he (Plaintiff) did not put his lights on bright immediately, only after a while did he put his head lamps back on

bright and that's when he saw the bus. He can't say how far the bus was from him when he saw it for the first time. That he applied the brakes of his vehicle because the bus was in his way. His vehicle slipped and he hit the bus. He was driving at approximately 85km/ph. That he hit the bus because he had lost control of his vehicle.

He further stated that he discovered that the bus was yellow and black before he hit it. He was referred to the photo on page 31 which shows a board indicating that the speed limit on that road is 80 km/ph. He was also referred to the discrepancies between his statement (pages 11-12 of Exhibit A) and his testimony, as for example not mentioning in his statement what he mentioned in his testimony in court that he came across other vehicles on the road in question prior to the collision.

He further stated that when he saw the bus he tried to avoid the accident by swerving to the left side but that his bakkie kept slipping towards the bus. That after the other vehicle from the Stofberg direction had passed him there was nothing in front of him obstructing his view. That on the night in question he did not see the bus earlier otherwise he would have stopped.

Still under cross examination the Plaintiff stated that to his recollection two police officers arrived at the scene of the accident. None of them spoke to him, he had told them that he was not feeling well, that he told them he wanted to go/leave, they (the police) said that he must come and make a statement at the police station at a later stage.

He further stated that he (Plaintiff) cannot say that the conversation between the police and the insured driver was in Zulu, that he does not know the difference much, but that was what he heard, i.e. that the insured driver had passed the T-Junction, he reversed/pushed the bus back [“hy die T-insluiting verbygegaan het en het terruggestoot”] he does not know if the insured driver said this in Zulu: all the guys from the bus standing around the insured driver also spoke before the insured driver and some of them spoke in English as well. They were all speaking to the police, including the insured driver.

The Plaintiff then stated (still under cross examination) that he thinks that the insured driver can only speak Swazi, that he (Plaintiff) knows the language differences, he worked in many places in his life and he got a word here and there and maybe he mixes it up. That he learnt a bit of Swazi when he worked in Piet Retief.

He further stated that all the police officers in that area actually speak Pedi, “all of them are Pedi”. That they were speaking in Pedi. He then changed his version and said that he is not sure if they were speaking Pedi, he does not know the languages.

He stated that the police told him to come to the police station to make statement because they all knew him. That he was at the scene of the accident throughout when police when the police were talking to the insured

driver, they were all at the scene for approximately fifteen to twenty (15-20) minutes, they (police) wrote down what the insured driver told them. The insured driver filled the form, thereafter they all left more or less at the same time. He later stated that the police did not take a statement from him then because they knew him, [‘no longer that because he had told them (police) that he wanted to leave when they arrived because he was not feeling well’]. That actually he waited, [after the bus had already gone] for a bakkie from their yard which was another approximately 80/85/90 km away from where he was, to come and pick up their stuff so that the breakdown could take/tow his bakkie away.

When put to him by Defendant’s counsel that the insured driver says that he (the Plaintiff) came to the bus, he saw him through the mirror and that two people from the bus went out and attended to him, he (Plaintiff) stated that he approached towards the bus, people from the bus were already approaching him, they were many, not only two, they asked him if he was hurt and he told him that he was fine.

Under **re-examination** the Plaintiff stated that he cannot remember when he again put his head lamps back to bright, but that when he put them on bright the bus was much closer to him. That although the sign boards on the road in question, from Stofberg to Middleburg direction was more visible during day light, that even at night they were still visible. That if a bus or truck was coming from Stofberg entering the Belfast T-Junction and it went over the lane in which he was travelling (i.e. Middleburg-Stofberg direction), he for

sure reduce his speed. That concluded the Plaintiff's evidence. No other witnesses were called by the Plaintiff. On a question from the court that when he applied the brakes of his motor vehicle his vehicle slipped before he hit the bus, he answered in the positive and confirmed that when he slammed the brakes his vehicle slipped/skidded and went and hit the bus.

That was the case for the Plaintiff.

For the defendant, the insured driver testified.

He (the insured driver) confirmed that on 04 September 2001 at approximately 19H15 next to Stofberg a collision occurred between the bus he was driving and the Plaintiff's motor vehicle.

He testified that they were coming from the church in Pietersburg (Zion Church) and they were on their way to Swaziland. He confirmed that they were travelling on the road depicted on the photo on page 31 of exhibit A. That as he was driving as stated above they saw a board which indicated that in order to get to Belfast they must keep left. He then indicated and reduced his speed.

That as he was turning at the corner, before he could completely turn to be straight to his turn he heard a sound. He then stopped the bus at that time. Two members of the Zion Christian Church ("ZCC") who were passengers in the bus got out of the bus and went in front of the bus to inspect what was

happening. He was still seated inside the bus, had not yet alighted out of the bus. As he looked to his right side mirror he saw a person coming, and the people who had alighted out of the bus went around and met with that person, they had a conversation outside the bus. He did not hear what the conversation was all about because he was still inside the bus.

After they had conversed they all went behind the bus, he (the insured driver) then got out of the bus and went to the left side of the bus. As he was busy looking at the bus, after just about five (5) minutes they phoned the police. The police arrived. The bus was damaged on the right rear wheel.

On arrival the police ordered them to pull the bus out of the road, to park it on the side of the road. After they had parked the bus on the side of the road the police then took the particulars of the bus he was driving i.e. his licence, the permit and the post box number.

The insured driver disputed what the Plaintiff had stated that he (the insured driver) spoke to the police and told them that he had actually missed the road/turn off. He stated that when the police arrived at the scene they did not ask him about that.

He also disputed what the Plaintiff said that it looked like he was reversing the bus. He stated that they were turning at the corner towards the left hand side.

He agreed with the sketch plan on page 10 of Exhibit A that that is how he saw the collision as reflected on the sketch plan. He does not know who drew the sketch plan. He disputed what was depicted by the Plaintiff on Exhibit B as the position of the motor vehicles at the time of the collision. He also disputed the point of impact which was depicted by the Plaintiff on Exhibit B as being in the middle of his (Plaintiff's) lane of travel.

He further testified that as he was turning to the left, since it was a sharp curve/corner, he was in gear number two (2) and was driving at roughly twenty (20) kilometres per hour.

Under **cross examination** he stated that the bus which he was driving carried sixty five (65) passengers, it is approximately nine (9) metres long. The colour of the bus was yellow and orange; there was no black colour on the bus. It was not the first time that he was driving on that road, it was the third (3rd) time that he was travelling on that road. That he did not need someone to assist him i.e., to show him which road to follow or where he must turn off, there was no one who was assisting him. That the statement that was put to the Plaintiff that the members of the ZCC know the road very well and he had someone in front directing was incorrect.

He stated that when he negotiated the turn to the left he did not take a wide turn into the lane of oncoming traffic. That he did not see the lights of the Plaintiff's vehicle before the collision. That there was no car before he executed a turn. He was facing the direction of where the bus was facing. He

did not see how the Plaintiff's vehicle collided with the bus; he just heard a sound/thud. At the time of the collision the bus was still turning, it had not yet completed turning, it was at an angle as if still turning to Belfast, i.e. he was still turning to the T-Junction he had not yet completed the turn, hence the bus was still at an angle, it was not yet straight forward into the Belfast road.

He reiterated that he does not agree with the point of impact as indicated by the Plaintiff on Exhibit B, i.e. in the middle of Plaintiff's lane of travel.

He indicated on Exhibit C where according to him was the point of impact, that he saw that place (point of impact) where the vehicles collided. And he also pointed that to the police officials and told them that that was the place where the vehicles collided with each other. The police made some markings on the side way. He saw the place where the vehicles collided with each other when the police were taking statements.

He stated that it might have happened that while he was turning the bus into the Belfast road, to his left side, its back side might have entered into the other lane because it was sharp turn. There was no other car coming from Belfast road, wanting to turn into the Stofberg-Middleburg road depicted on the photo on page 31 of Exhibit A.

He stated that he saw the board which indicated that he would turn left into Belfast about ten (10) metres away from the turn off in question, but it was

not visible on the photos (page 31) it could be further than ten (10) metres. That there were chevrons at the corners [turning to Belfast], there was also a board that indicated where the Belfast turn off (to the left of his lane of travel) would be. The lights of his bus were switched on, shining in the direction of Belfast when the collision occurred as he had already turned into the Belfast direction. The right side of the bus was facing vehicles approaching from Middleburg. The side of the bus is orange in colour; it had small reflectors on, a little bit below on the side.

He stated that he did not see any vehicles on either side of the Middleburg-Stofberg road from the time he saw the board for the Belfast turn off to the time of the collision.

At the time of the collision his vehicle/the bus was moving (not stationery) in the direction of Belfast on the left side of the road.

That when the bus is parked at ninety degrees (90°) angle the two wheels of the bus, both rear and front, can be accommodate on the tarred surface but its body can protrude on the gravel surface on the front and back side.

He stated that when the police arrived they wanted to speak to the driver of the bus, he spoke to them. He spoke in Swazi and they spoke a mix of Nguni languages i.e. mix of Zulu, Swazi, Ndebele and maybe Xhosa languages. They call that “kukuzunda”[mix of Swazi, Zulu, Ndebele, Swazi and maybe Xhosa languages]

He disputed that he overshot/passed the turn of to Belfast that therefore he reversed. He stated that the road regulations do not allow him to reverse on this kind of the road. That that is why as he approached he reduced the speed, indicated and then turned left, he did not reverse. He agreed that the collision occurred on the lane of travel of Middleburg-Stofberg direction because he was executing a turn and not because he was reversing.

There was no re-examination from the Defendant's counsel. That concluded the evidence of the insured driver.

No other witnesses were called for the Defendant. That was the case for the Defendant. That concluded all the evidence before court. Both counsel, for the Plaintiff and the Defendant addressed the court on various issues herein. It is trite that the Plaintiff, in a matter as this one before court bears the onus to prove on a balance of probabilities that there was casual negligence on the part of the insured driver, who testified for the Defendant, i.e. the Plaintiff bears the onus to prove his claim on a balance of probabilities.

On a proper analysis and the totality of the evidence before court it is clear that the version/evidence of the Plaintiff, to a great extent in so far as how and where the collision occurred differs from the version of the insured driver in so far as the material aspects of the collision are concerned, as for example the exact point of impact, whether the bus was slanting right across the two lanes being reversed to the back according to the Plaintiff or that it

never reversed but simply turned to the left into Belfast direction according to the insured driver, whether there were other vehicles along the road, especially the one that passed the Plaintiff from the opposite direction as testified by the Plaintiff or not.

On the point of impact there are in fact three (3) versions, the one by the police officer which is disputed by both the Plaintiff and the insured driver, and the ones by the Plaintiff and the insured driver respectively.

If one were to consider the sketch plan drawn by a police officer, page 10 of Exhibit A, the police officer in question was not called as a witness by either the Plaintiff or the Defendant, the evidence in this regard remains hearsay as it was not confirmed by the police officer who drew the sketch plan, the court will thus not accept such evidence.

The court is now sitting with the versions of the Plaintiff and the Defendant (insured driver) on the point of impact.

Having regard to the Plaintiff's testimony on this issue, if the bus was in the middle of his lane of travel as he alleges he would probably have hit it with the whole front part of his bakkie, however, on his own version he only hit it with his right front/head lamp and he only hit the right rear wheel of the bus. On questioning by this court he stated that he lost control of his vehicle when he applied his brakes, that his vehicle slipped/skidded towards the bus

and it is for that reason (loosing control of his vehicle) that he eventually hit the bus.

According to the insured driver he had already executed a turn to his left when the collision occurred. The bus had reflectors on the side, and the lights of the bus were shining into the Belfast road/direction. Despite the reflectors on the side of the bus, the Plaintiff did not see the bus in time to avoid the collision. He (Plaintiff) drove on a dark road with dim lights, he himself states that after passing a vehicle on his left side he drove with his dim lights for a while and only after some time, he cannot say after how long, did he switch the lights back to bright and that is when he saw the bus. It is very clear that the Plaintiff did not keep a proper look out. It is trite that a reasonable driver should at all times maintain a proper lookout and that he/she must regulate his/her speed in such a manner that he is able to stop timeously.

On the issue of the back part of the bus protruding onto the other side, it is not strange and/or negligent that a long object (+_ 9m long) like a bus might slightly protrude to the other side while executing a normal turn. That in my opinion does not make the insured driver negligent. What more could the insured driver have done. It is trite that a reasonable driver should be alert at all times to all situations on the road. On his own version, as already stated, he hit the bus because he lost control of his vehicle after he rammed on to his brakes. The Plaintiff clearly failed to keep his vehicle under proper control.

The version of the Plaintiff that the bus was being pushed back is on all probabilities not true and is rejected in toto, especially when regard is had to the contradictions/discrepancies in his evidence about how he got the alleged information from people allegedly speaking Zulu and/or Pedi and/or Swazi, at some stage he states that he understood Zulu a little, at some stage he does not understand what the alleged people were saying and/or the language that they were using to converse. The Plaintiff is desperately trying to adjust/change his versions to suit his case. This is obviously a made up story.

The insured driver was sure of his facts and he never at any stage contradicted himself in this regard. Sitting with two versions, as already stated, and it being clear and obvious that the Plaintiff is misleading the court and is not putting the correct version, his version is rejected.

The Plaintiff surely had a chance to swerve to the left, yet he did not do that, to avoid the collision. Again here there are material contradictions between his testimony and his statement. In fact in his evidence in chief he never even mentioned that he at any stage tried to swerve to the left to avoid the collision, only under cross examination did he say that he in fact tried to swerve to the left but could not since the bakkie slipped. On a balance of probabilities the Plaintiff did not at any stage try to swerve to the left. In my opinion had the Plaintiff swerved to his left he would have avoided the collision.

There are so many other contradictions in the Plaintiff's evidence as set out in the summary of the evidence here above. I had the opportunity to observe the Plaintiff's demeanour. I was not impressed and/or convinced that the Plaintiff was an honest and reliable witness. It cannot be said that he was a credible witness at all. Even on a simple issue of the colour(s) of the bus instead of maybe stating that he had not seen the colours, he simply states incorrect colours, i.e. yellow and **black** whereas the colour of the bus was yellow and **orange**, this in my opinion he does to create the impression that the bus was simply not visible.

As opposed to the Plaintiff, I found the insured driver to be an honest and reliable witness, making concessions where necessary, unlike the Plaintiff who adjusted his version to suit him when cornered.

Much was also said about the fact that the insured driver had not seen the Plaintiff's and/or any other car which Plaintiff allegedly passed before the collision, that this means that the insured driver did not keep a proper look out and was therefore negligent. I cannot find that he (insured driver) was negligent, even if he had seen the Plaintiff's vehicle prior to turning he surely would not have known/guessed that the Plaintiff would lose control of his vehicle and skid/slip towards the bus.

From all the facts before court it is clear that the Plaintiff is the one who failed to keep his motor vehicle under proper control, he seems on a balance of probabilities to have been driving at high speed, and it is not understandable why he did not steer his vehicle to the left to avoid the collision. On all probabilities he did not see the bus in time because he simply did not keep a proper look out. From a look at the photos in Exhibit 'A' it is clear that the road where the collision occurred is a straight road. On his own version nothing obscured/obstructed his view/vision.

The Plaintiff has failed to discharge his onus of proving on a balance of probabilities that the insured driver was negligent. In fact on the evidence before this court it shows that the Plaintiff is the one who was negligent.

The sole cause of the collision in question is the Plaintiff himself. He was negligent in that on a balance of probabilities he failed to keep a proper look out, he must have been driving at a high speed, he himself in fact states that he was driving above 80km p/h within an area of the 80km p/h speed limit, he even ventured to say that the speed limit in the area was 100km/ph which is not true, obviously he does not want to say specifically what speed (above 80km p/h) was he driving, but the fact remains that he was driving above the speed limit, and on a balance of probabilities it must have been at a much higher speed for him to be unable to control his motor vehicle. In my view 80km/85km p/h is a reasonable speed with which one would be able to gain control of one's vehicle at any given moment.

In the premises, the Plaintiff has failed to prove his case on a balance of probabilities and in fact, on his own version, it is clear that he is the one who was negligent, and the sole cause of the accident in question.

In the result, the Plaintiff's claim is dismissed with costs.

Molopa J

JUDGE OF THE HIGH COURT