IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NUMBER: 7390/2012

DATE: 27/6/2014

In the matter between:

PETRUS JACOBUS STRYDOM PLAINTIFF

and

ROAD ACCIDENT FUND DEFENDANT

JUDGMENT

TLHAPI J

[1] The plaintiff instituted action against the defendant for damages arising out of a collision on the 20 February 2011. The collision occurred on the NI North Highway between a motor vehicle driven by the plaintiff with registration numbers F[…] and a bus driven by the insured driver with registration numbers T[…].

[2] The plaintiff Mr Strydom ('Strydom') testified that on the 20 February 2011 he attended a function with his wife and because they travelled in separate vehicles he

travelled with a friend from that function at about 24h00. The Highway was separated by a bush about 5metres in width, which was the divide between the two lanes going north in the direction of Polokwane and the two lanes going south in the direction of Pretoria. He was travelling north in the fast lane at a speed between 120km and 130 km per hour. The tarmac was dry and there were no street lights and no vehicles on the road. When he was about 500metres from the Wallmannsthal off-ramp bridge, he saw something and later realized that it was a bus come out bush onto the road on his right hand side. He applied breaks and the collision occurred, the point of impact being on the dividing line of the two lanes and his vehicle making impact with the bus on its left back wheel. His vehicle was damaged in front on the right bumper, the right fender and the bonnet and grill were also damaged. An orange coloured mark extended towards the back on the right hand side of the vehicle and he maintained that the orange colour was the orange paint of the bus. He referred to a photo album and indicated that the point of impact was about 500m from the bridge.

[3] Mr Du Plessis, plaintiff's companion testified that he did not see the bus come out of the bush because his phone rang and he had bent down to pick it up when he looked up it was too late. the collision occurred and his head collided with the from of the dash board. When he came to, he was bleeding from the head and he managed to pull Strydom out of the vehicle. When they were transported to hospital the police had not as yet arrived at the scene and he did not see the bus.

[4] Mr Martins Strydon a brother of the plaintiff went to the scene after the accident. On his inspection of the scene of accident he noticed that the point of impact was about two hundred metres away from where the plaintiff's vehicle came to a standstill. He saw two short break marks about 10-15 km long and , glass on the right lane towards the centre of the road. In the plaintiff's vehicle he found a purse, GPS, 2 golf bags and did not see any beer cans or bottles. On his way back home he came across the bus which had driven past the bridge and it was stationary. He noticed the point of impact on left bus on the left rear panel and left rear wheel. .

There were no police vehicles at the scene. He testified further that the black marks appearing on plaintiff's vehicle were those of the rubber of the defendants wheel.

[5] Mr Nong the insured driver testified that he lived in Alexander and was employed by PUTCO bus services at Dobsonville. . He collected a group of the Zion Christian Church congregants from Alexander Township en route to MORIA. They left Alexander at 22h30. He kept to the left lane and was driving at a speed of 80km per hour. The front and back lights were on as well as the lights inside the bus. Towards midnite or about 100metres after the Wallmannsthal bridge he was hit from behind by a vehicle. He did not notice the vehicle coming behind him. The bus swerved from left to right and he struggled to control the bus until it came to a standstill. He testified that when he was trying to control the bus he slightly saw the plaintiff's vehicle when it landed in the ditch. His first stop was after the collision occurred about a 100 metres where the plaintiff's vehicle stopped.

[6] He went to inspect the bus and discovered that it had been hit squarely at the back, that is in the middle. He reported the accident to his employers to send a replacement bus and within no time the breakdown and emergency vehicles were at the scene and the police also arrived. On arrival at the point where the plaintiff's vehicle came to a standstill he was advised by the Netcare person who was alone not to go near the other vehicle and that he had called for back-up. Two police officers arrived, then the ambulances and fire-fighters. He testified that the point of impact was in the middles of the left lane and he saw glass and soil. The driver and his companion were trapped in the vehicle and had to be assisted out. He noticed that the occupants were drunk and there were beer cans in the vehicle.

[7] Mr Nong denied that he came onto the road from the right hand side of the bush dividing the four lanes. He testified that he gave a statement to the police, and it was read back to him but he did not sign the statement. He was also not the author of the accident report and did not sign it. It was put to him that the sketch on page 48

of the bundle showed that the vehicles were driving in the right lane and he drew attention to the fact that only one lane and not two lanes were depicted on the sketch plan. He denied that the bus was hit on the left rear wheel. He testified that he examined the bus and it could not move because the bumper had come lose and was dragging on the surface of the road. He could not remove the bumper because that would go against PUTCO rules who were responsible for removing their vehicles after a collision. He also disputed that the black marks on the bonnet and right hand side of the plaintiff's vehicle were rubber marks caused by the bus tyre. He testified that he was at the scene of accident for three hours. The replacement bus arrived to take his passengers away and the police gave him permission to leave. They would contact him to give further details on the collision.

[8] The issue to be determined is whether there was negligence on the part of the insured driver.

[9] The plaintiff and the insured driver gave two mutually destructive versions on how the accident occurred, and although the plaintiff called two additional witnesses they did not witness how the accident occurred. In as far as Mr Strydom's evidence was concerned this referred to his observations at the scene of the accident a couple of hours after it occurred. There is further reliance on the photographs of the vehicle and those taken in reconstruction by the plaintiff after the accident. No evidence was provided as to the dates on which they were taken. There is again the accident report. No measurements were taken and reliance was had to the estimations given by the witnesses.

[10] The principles to be applied when dealing with two mutually destructive versions were stated in African Eagle Life Assurance Co. Ltd v Cainer 1980 (2) SA 234 (W) at 237 D-H and as set out in National Employees General Insurance Association v Gany 1931 AD at 187:

"*Where there are two stories mutually destructive, before the onus is discharged the court must be satisfied that the story of the litigant upon whom the onus rests is true and the other 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 that the version of the litigant upon whom the onus rests is the true version."*

In Stellenbosch Farmers' Winery Group ltd and Another v Martell et Cie and Others 2003 (1) SA 11 SCA the following was stated:

"To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the courts findings on the credibility of a particular witness will depend on the veracity of subsidiary factors, not necessarily in order of importance, such as, (i) the witnesses candour and demeanour in the witness box, (ii) his bias latent and blatant, (iii) internal contradictions in his evidence, (iv) internal contradictions in his evidence (v) external contradictions with what was pleaded or put on his behalf or with established fact or with his own extracurial statement or actions, (vi) the probability or improbability of particular aspects of his version, (vii) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c) this necessitates an analysis and evaluation of the probability and improbability of each party's version on each of the disputed issues. 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 of proof has succeeded in

discharging it. The hard case, which will doubtless be the rare one, occurs when a courts credibility findings compel it is one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail"

[11] It was common cause that both vehicles were north bound, the plaintiff on his way to Dinokeng and the insured driver to Moria in Polokwane and these versions were common cause. The issue to determine is the of the probability of a bus full of passengers travelling to Moria U-turning from the dividing island on the right hand side of the two lanes north bound and, into the right lane or turning into the right lane from the side of the road. If the bus was u –turning, then the only conclusion would be that it was travelling south towards Pretoria and it made a u-turn across the dividing island to join the north bound lanes or that it was stationary on the right hand side of the two northbound lanes. The insured driver testified that his lights were on so in either of the situations the plaintiff should have seen the lights of the bus because he was driving facing north.

[12] The plaintiff testified that as a result of this manoeuvre by the bus a side swipe collision between his vehicle and that of the insured driver took place. The insured driver testified that the impact was in the centre at the back which caused the bumper of the bus to partially detach. The impact caused the bus to swerve on the road from left to right and he tried to control the bus till it came to a standstill.

[13] In my view that part of the bus or any other vehicle which first moves from the side of the road onto the tarmac, would not be the rear back but the front at an angle. In order for the plaintiff's vehicle to have impacted on the rear left wheel even as a side swipe, the bus would have had to be at a certain angle on the road or the plaintiff's vehicle would have had to be on the left hand side for the side swipe to have occurred . The plaintiff relied on photographs B2 and B3 to show the damage

to his vehicle which is seen to be on part of the bonnet, the right fender, the right bumper and the tip of the bulbar which is in front of the grill. This damage in my view does not depict a side swipe collision, but in all probability a direct collision with a part of the bus. It was not disputed that the bus swerved from side to side after the collision, this is consistent with a collision to the rear of the bus as it was travelling straight and as testified to by the insured driver. Furthermore, the evidence on behalf of the plaintiff that the black marks on the plaintiff's vehicle were tyre marks does not help to prove how the accident occurred.

[14] On the other hand if it was a side swipe as the plaintiff would want the court to believe, then the problem I have is that on his own version, he was driving at a speed between 120-130 km in the fast lane when there were no vehicles and on a road which had no street lights and there being no reason for him to do so, to drive in the fast lane, which is normally done when over taking. In his own words that was his usual manner of driving. The plaintiff in my view drove as if no obstructions in his path way were possible. The insured driver testified that his lights were on. This was not disputed, the bus was orange in colour it could visible from a distance because its lights were on. If indeed the insured driver encroached onto the right lane as testified to by the plaintiff the head lights of the bus would have shone on the tarmac giving extra visibility to the plaintiff. At a distance of 80 metres from the bus having applied his breaks, thereby reducing his speed, he could have notice the bus in good time. A manoeuvre to the left lane could have avoided the collision. The only conclusion I can reach is that the plaintiff was negligent.

[15] Mr Du Plessis did not see how the collision occurred. Mr Strydom came long after the accident occurred and his evidence does not assist me in determining liability. The police officer who drafted the accident report was not called as a witness by the plaintiff, therefore what is depicted on the report cannot be used to determine liability on the part of the plaintiff or the insured driver.

I cannot find that the plaintiff has discharged his onus that the insured driver was negligent.

[16] In the result the following order is given:

1. The plaintiff's claims is dismissed with costs.

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TLHAPI V.V

(JUDGE OF THE HIGH COURT)

MATTER HEARD ON	:	29 MAY 2014
JUDGMENT RESERVED ON	:	29 MAY 2014
ATTORNEYS FOR THE PLAINTIFF	:	ROUX VAN VUUREN ATT
ATTORNEYS FOR THE DEFENDANT	:	AP LEDWABA ATT