REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED

08/05/2015
DATE

SIGNATURE

8/5/2015

CASE NO: 13020/2014

JOHNSON, DANIEL JAMES **PLAINTIFF**

and

ROAD ACCIDENT FUND **DEFENDANT**

JUDGMENT

THOBANE AJ,

[1] The plaintiff in this matter issued summons against the Road Accident Fund, the defendant, for damages arising out of a motor collision that occurred on the 22nd January 2013, in Waverly Pretoria, Gauteng Province.

[2] The defendant defended the matter and denied all forms of negligence. The defendant further pleaded, over and above denial of negligence, in the alternative, that should the court find that the insured driver contributed to the collision, apportionment be applied in accordance with the provisions of the Apportionment of Damages Act No. 34 of 1956.

[3] At the commencement of proceedings, the parties advised that they had agreed on a separation of issues in terms of the provisions of Rule 33 (4) of the Rules of Court. The matter accordingly, proceeded on the question of liability only and the question of quantum was held over for later adjudication.

[4] The crisp issue for determination is where does negligence lie.

(a) Was the insured driver negligent,

(b) Was the plaintiff negligent,

(c) Apportionment of negligence, if any.

[5] The version of the Plaintiff is that he was on a motor cycle traveling from west towards the east. The insured driver, so the Plaintiff testified, had been driving from the east towards the west. This means both the motorcycle as well as the insured vehicle were traveling in opposite directions. When they were about to pass each other, the insured vehicle simply turned in front of the motorcycle without indicating. The motorcycle then collided with the left side of the vehicle. He ended up on the road.

[6] During cross examination plaintiff confirmed his version that when he saw the insured vehicle approaching he had reduced speed from 60km/h to 50km/h as he suspected that the insured vehicle might turn after he had passed it. The defendant's version was put to him so that he could comment on it. It was put to him that the version of the insured driver was to the effect that both the motorcycle and the insured vehicle had been traveling in the same direction and that the plaintiff decided to simply overtake on the left hand side, which was clearly negligent. He indicated that the insured vehicle had not been stationary as he approached it prior the impact. It was further put to him, in view of his admission that he did not a have a license to drive the motorcycle, that his actions were clearly unlawful. Pertinently, it was put to him that the defendant had an independent witness who would confirm, thus corroborate the defendant's version that he, plaintiff, overtook the insured vehicle on the left hand side.

[7] The insured driver Mr Jansen Van Rensberg testified that he was a driver of some 15 to 20 years experience and that on the day of the collision, he was traveling from west to east on the single carriage road. As it was his intention to turn left, he put on his indicators. While turning, the motorcycle driven by the plaintiff collided with the left hand side of the insured vehicle. The plaintiff was flung off his bike onto the side of the road the road between two trees. The insured vehicle on the other hand was damaged on the left door up to the the fender which was consistent with a "side swipe like" collision. He further indicated that he had observed the motorcycle a few blocks back but prior the impact he did not see it. When invited to comment on the version of the plaintiff he indicated that he is certain that both vehicles had been traveling in the same direction and that since his vehicle was fitted with a tracking devise he would be able to back up that claim. According to him the plaintiff was fully responsible for the collision.

[8] During cross examination he indicated that he had not been aware of the plaintiff when he turned and that he had already turned a bit when the collision occurred. He confirmed that he had checked his rear view mirror but not the left hand side mirror prior to turning. He was not forthcoming when it was put to him that, on his version, had he looked into the left hand side mirror, he would have seen the plaintiff and therefore would have acted differently. He denied that the insured vehicle as well as the motorcycle had been traveling in opposite directions.

[9] In their respective addresses both parties were in agreement that there were two mutually destructive versions before court. On the one hand, it was submitted on behalf of the plaintiff that the evidence of the plaintiff, to the effect that the insured driver turned in front of him, was clear and is to be believed. That if the insured driver had kept a proper lookout as would be expected of a driver of his experience and as required by law, the collision would not have happened, irrespective of where the plaintiff came from. Finally that the collision was caused by the sole negligence of the insured driver. In the alternative it was submitted that should apportionment be applicable, then in that event the percentage to be applied was 30/70 in favour of the plaintiff. On the other hand it was submitted on behalf of the defendant that in instances where there were two mutually destructive versions, as *in casu*, absolution from the instance should be granted with costs. It was submitted that the version of the plaintiff should be rejected, for the plaintiff was an inexperienced driver without a license, therefore would not have had the diligence of an experienced driver such as the insured driver. Further, that the impact as described would have been possible only if the vehicles had been traveling as explained in the version of the insured driver, i.e. traveling in the same direction. Finally, that there was no reason for the insured driver to look to his left as the road was a single lane carriage road.

That should apportionment be applied, the plaintiff should be penalized by awarding him only 20% of proven damages.

[10] Despite an indication on behalf of the defendant that there was corroboration of the insured driver's version by an independent witness, such a witness was however not called. There was also no expert evidence led which could have assisted in establishing how the collision occurred, in view of the mutually destructive versions.

[11] In dealing with the mutually destructive versions, the approach to be application was clearly spelt out in the matter of ***National Employers General Insurance Co Ltd v Jagers 1984 (4) SA 437 (E)*** at 440E-441A, where Eksteen AJP said:

> *"It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily be discharged by adducing credible evidence to support a 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 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 credibility of the witness will therefore be inexplicably 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.

This view seems to me to be in general accordance with the view expressed by COETZEE, J in ***Koster Koöperatiewe Landboumaatskappy Bpk v Suid-Afrikaanse Spoorwee en Hawens*** *(supra) and* ***African Eagle Assurance Co Ltd v Cayner*** *(supra). I would merely stress, however, that when in such circumstances one talks about a plaintiff having discharged the onus which rested upon him on a balance of probabilities one really means that the Court is satisfied on a balance probabilities that he was telling the truth and that his version was therefore acceptable. It does not seem to me desirable for a Court first to consider the question of the credibility of the witnesses as the trial Judge did in the present case, and then, having concluded the enquiry, to consider the probabilities of the case, as though the two aspects constitute separate fields or enquiry. In fact, as I have pointed out, it is only where a consideration of the probabilities fails to indicate where the truth probably lies, that recourse is heard to an estimate of relative credibility apart from the probabilities."*

[12] The Supreme Court of Appeal has given guidance as to the technique to be applied in circumstances where a trial court is faced with two irreconcilable versions. ***Stellenbosch Farmers' Winery Group Ltd and Another v Martell Et CIE and Others 2003 (1) SA 11 (SCA)***, where the following is stated at 14I-15G:

"The technique generally 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. As to (a) ***[credibility]****, the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness'[s] candour and demeanour in the witness-box; (ii) his bias, latent and blatant; (iii) internal contradictions in his evidence; (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extra curial statements or actions; (vi) 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 (vi) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality and integrity and independence of his recall thereof. As to (c)* ***[probabilities]****, this necessitates an analysis and evaluation of the probability or 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 the 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 court's credibility findings compel it in 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." [Words in square brackets and emphasis added.]*

[13] In considering the credibility of the two factual witnesses that gave testimony, I can not, on the evidence before me, find that one was more credible than the other. Both witnesses gave good accounts of their respective versions. Unfortunately the versions as

put by them can't both be true. For starters, their respective accounts of how the vehicles were traveling, immediately prior the collision, is problematic. Plaintiff was adamant that the vehicles were traveling in opposite directions facing each other, whereas the insured driver was emphatic that they were traveling in the same direction. The plaintiff is of the view that the insured driver turned the insured vehicle in front of him on the one hand and on the other, the insured driver testified that plaintiff sought to overtake on the wrong side of the road just as he was turning, hence the collision. Both versions can not be reconciled. What is helpful however, is the point of impact which the parties indicated was common cause and which the plaintiff pointed out on photo 1, by making of a mark, and to which the defendant did not have a problem. I shall return to the point of impact later when assessing probabilities.

[14] As to reliability, the versions of both the insured driver and the plaintiff appear to be reliable. It is only when one considers whether any of them had a good and proper opportunity to observe that the scales tilt, in my view, in favour of the plaintiff. If is significant that it was put to the insured driver whether he looked to his left prior to executing a turn. Generally a driver has a duty to at all times keep a proper lookout. He has to be at all times alert more especially when turning. On his own version, the insured driver failed to observe such a duty. He failed to look to his left before turning to the same side. It was argued on behalf on the defendant that there existed no law to the effect that the insured driver ought to have looked to his left. The insured driver himself testified that there was no danger on the left hand side, that necessitated him looking in that direction. The duty of care however, required of the insured driver to look to his left given that he was going to execute a turn to the left. When considering the question as to whether which of the versions is more reliable, I find the version of the plaintiff to be more reliable.

[15] Drivers on the road have a duty to keep a proper lookout. Such a duty, means more than looking straight ahead. It includes awareness of what is happening in one's immediate vicinity. A driver should have a view of the whole road from side to side and in the case of a road passing through a built-up area, as well as the pavements on the side of the road. See ***Diale v Commercial Union Assurance Co of SA Ltd 1975 (4) SA 572 (A).***

[16] When considering probabilities, I find the version of the plaintiff to be more credible. The plaintiff was invited to make a mark of the point of impact on a photo which was part of Exhibit "A". As indicated, the point of impact is not in dispute. The mark made by the plaintiff is located in the middle of the road on the east bound lane in photo 1. For the point of impact to be there, on the version of the insured driver, meant that the insured vehicle would have had to first move and encroach on coming lane, partially, before turning left. There was no evidence that such a maneuver was executed. The probabilities are that if the insured vehicle did not move inwardly prior to turning, then the point of impact would have been more towards the left, in that the plaintiff would have sought to pass next to the pavement. The undisputed point of impact, the damages on the insured vehicle coupled with the position as to where the plaintiff landed, on his version, after the collision, point to the probability that the insured vehicle turned in the face of the motorcycle suddenly, hence the collision. In this regard, it has been repeated in a long line of cases that to turn across the line of oncoming or following traffic, is an inherently dangerous maneuver and that there is a much more stringent duty upon a driver who intends executing such a maneuver to do so by properly satisfying himself that it is safe and choosing the opportune moment to do so. See ***AA Mutual Insurance Association LTD v Nomeka 1976 (3) SA 45 (AD) at 52E.*** In this regard I find therefore, that the version of the plaintiff, as to how the collision occurred, is more probable.

[17] The defendant pleaded apportionment. It was submitted in the alternative that the plaintiff contributed to the collision. The onus of establishing such negligence rests with the defendant. See ***Solomon and Another v Mussett and Bright Ltd 1926 AD 427 at 435.*** The defendant should on its part adduce or elicit sufficient evidence to support a finding of negligence on the part of the plaintiff as well as a causal connection to the collision if it is to succeed with establishing contributory negligence. The submission that the plaintiff did not have a license and that he was less experienced than a diligent driver is not helpful in that endeavor. The defendant's pleaded case regurgitates the normal grounds of negligence without necessarily pointing to how it is alleged that the plaintiff was negligent and specifically the causal connection.

[18] The duty of care however applies to all road users, which include the plaintiff. The plaintiff testified that as he approached the insured vehicle he reduced speed from 60km/h to 50km/h. Visibility was clear and the road surface did not present any challenges. If the plaintiff had kept a proper lookout he would have observed that the insured vehicle had slowed down. On his own version he thought the insured vehicle was going to turn after he had passed it. It means that the plaintiff was aware of the possibility of the insured driver turning. In my view, his failure to take evasive action, points to the fact that he did not act as would have been expected of a reasonable driver. This means that he failed to keep a proper lookout, failed to exercise reasonable care and failed to take reasonable steps to avoid colliding with the insured driver.

[19] While I find that the plaintiff has discharged the onus resting on him to prove negligence on a balance of probabilities, I am also of the view that there is contributory negligence on the part of the plaintiff and the degree of negligence therefore has to be apportioned between the plaintiff and the defendant.

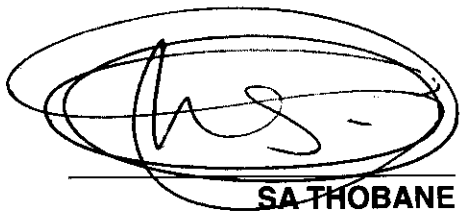
[20] In the result, I assess the insured driver's blame at 80% and that of the plaintiff at 20%.

[21] There is no reason why the defendant should not be ordered to pay the costs of the action.

[22] I therefore make the following order;

[22.1] The defendant is liable for 80 percent of the plaintiff's proven or agreed damages,

[22.2] The defendant is ordered to pay the plaintiff's costs.



SA THOBANE

ACTING JUDGE OF THE HIGH COURT

Counsel for Plaintiff: Adv. Van Eeden

Counsel for Defendant: Adv. Keet

Date heard: 7th May 2015

Date of Judgment: 8th May 2015