THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NUMBER: 16420/2013

DELETE WHICHEVER IS NOT APPLICABLE

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

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DATE SIGNATURE

In the matter between:

MJ VAN DER MERWE **PLAINTIFF**

and

ROAD ACCIDENT FUND **DEFENDANT**

JUDGMENT

MOSEAMO AJ:

[1] Plaintiff instituted an action against the defendant claiming payment of R2 177 319.10. The action arises from an accident in which the plaintiff was involved

on the 11th October 2009. At the commencement of the trial the parties indicated that there was an agreement between them that the trial should proceed on the basis the defendant was at fault in causing the accident that occasioned the damages being claimed by the plaintiff.

[2] The parties also agreed on quantum of R2 050 569.16 made up as follows:

Past hospital, medical and related expenditure	R69 108.16
Past loss of earnings	R 5 393.00
Future loss of earnings	R1 676 068.00
General damages	R300 000.00

[3] The parties also agreed that the defendant shall furnish the plaintiff with an undertaking of 100% in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996, for the plaintiff's costs of future accommodation in a hospital or nursing home or treatment or rendering of service or supplying of goods to him arising from injuries sustained by him.

[4] The only issue before me is whether apportionment should apply.

[5] Plaintiff testified that on the 11th October 2009 he was travelling to work on the Kriel road. It was at night and he was going to work night shift which was to start at 22h00. He was fresh as he had slept earlier that day. There was traffic behind him and there was traffic travelling in the opposite direction. The weather was good, there was no moonlight and the road was dark. Prior to the collision he was blinded by an oncoming vehicle which had its bright lights on. He was driving with dimmed lights at the time. He was at all material times looking in front of him and did not see anything except for the vehicle that was going in the opposite direction. After he went past that vehicle he put his bright lights on and he saw a stationery truck in his lane of travel. He was a few metres away when he first saw it, he applied his brakes but he still collided into the rear of the truck as the distance was too short. He did not

swerve to the left as he could have gone off the road and he did not swerve to the right either as there was oncoming traffic. The only thing he could do under the circumstances was to apply brakes.

[6] During cross-examination he admitted that he drove on that road regularly and he was aware there was a road turning to the right. He denied that it was foreseeable that there could be vehicles entering the road from that side road as the road is a gravel road leading to a power station with a gate that is always closed. He conceded that prior to the collision he was not aware that the gate to the power station is always closed. He said he did not see any reflectors on the truck. He indicated that he could not swerve to avoid the collision as he was too close to the truck and there was therefore no time to swerve. It was put to him that he failed to keep a proper lookout, which the plaintiff denied.

[7] I found plaintiff to be a reliable witness. He gave evidence in a cogent manner and made concessions where necessary.

[8] Defendant closed its case without calling any witnesses.

[9] It is submitted on behalf of the plaintiff that he could not have done anything to avoid the collision other than to apply the brakes. It is further submitted that *Res ipsa locitur* is not applicable in this matter as the truck was not illuminated. Plaintiff's counsel referred me to Seemane v AA Mutual Insurance Limited 1975 (4) 767 AD.

[10] It is contended on behalf of the defendant that the truck is big and the plaintiff could have avoided collision if he had kept a proper lookout and if he had not been driving at a high speed. It was further submitted that the plaintiff did not take any decisive steps to avoid the collision.

[11] The defendant in this case had to show on a balance of probabilities the plaintiff was negligent in not avoiding the accident. In Hoffman v South African Railways and

Harbows 1955 (4) SA 476 at 478 A-E Schreiner ACJ dealt with proper legal approach to cases where a motorist collided with an unlighted obstruction at night. He quoted a passage by De Villiers J at the hearing of the matter in the court *a quo*. 'If the crown proves that a pedestrian or cyclist or other object with which the motorist collided was visible so that a person keeping a proper look-out or driving at a reasonable speed in the circumstances ought to have seen the obstruction in time to avoid the accident then the inference of negligence can be drawn. But where the evidence does not show that the person with whom the car collided was visible in that sense then there is no ground for drawing the inference of negligence.' See Rex v Ysel 1945 TPD 235

[12] In this case the question is whether the plaintiff could with exercise of reasonable care have seen the truck and avoided the collision.

[13] I would firstly like to deal with the contention that the speed at which plaintiff was driving contributed to the collision. There is no evidence before me that the plaintiff was driving at an excessive speed under the circumstances. I find that this contention is not supported by any facts before me and as such it is rejected.

[14] Secondly, the defendant's counsel contends that the truck is so big that had the plaintiff exercised reasonable care he have would seen it and avoided the collision.

[15] There is no evidence led to show that the truck was visible, so that a person keeping a proper lookout in the circumstances could have seen it in time to avoid the collision. I accept the plaintiff's evidence that (a) the road was dark and unlit; (b) the truck had no lights, no reflectors and did not indicate to show that it was turning to the right; (c) plaintiff was blinded by the lights of an oncoming vehicle prior to the collision; (d) plaintiff had his eyes on the road at the time and only saw the vehicle going in the opposite direction.

[16] Thirdly, It is submitted that the plaintiff could have avoided the collision by swerving. Plaintiff testified that (a) he could not have swerved to the left as he could have gone

off the road and he could not have swerved to the right as there were oncoming vehicles; (b) he saw the truck after the vehicle that had blinded him had gone past and he had switched on his bright lights; (c) he was too close to the truck when he first saw it and applied brakes.

[17] In Manderson v Century Insurance Co Ltd 1951 (1) SA 533 AD at 544 para B-D 'In assessing the likelihood of a collision with an unlighted obstruction he was obliged to take into consideration his ability to avoid it by swerving. He knew that his lights would be dimmed only until he passed the oncoming car. Can it reasonably be expected of him to have anticipated that within the very short distance over which he would have to drive with dimmed or rather dipped lights he would meet with an unlighted motor-car practically in the middle of the road and at the very point that he would meet an oncoming car so that he would be unable to swerve? In my opinion the answer to that question is in the negative.'

[18] Applying the test applied in the Manderson case, I find that it cannot be reasonably expected of the plaintiff to have anticipated that there would be an unlighted motor vehicle in the middle of the road at the time that he had just driven past an oncoming vehicle that had blinded him.

[19] The defendant referred to the case of Thornton and Another v Fismer 1928 AD398 at 407 where Solomon CJ stated

'….the defendant is on the horn of dilemma for either he was not keeping a proper look out or else he was driving at an excessive speed, and in either event he would be negligent.'

[20] In Seemane v AA Mutual Insurance Association Ltd 1975 (4) SA 767 AD at 769 A-B Hofmeyer AJ stated as follows:

'But there is no rule of law to the effect that collision with a stationary or receding object at night demonstrates negligence in the sense that the driver was either travelling too fast for his range of visibility or that his look-out was inadequate in the

circumstances: in other words there is no dilemma (as a matter of law) facing a driver involved in such a collision, which necessarily places any kind of *onus* on him: it is for his adversary to prove his negligence.

[21] In Seemane v AA Mutual Insurance Association Ltd it was held that the question was not whether the driver could have avoided the accident if he had driven at a lower speed and had kept a sharper look out. It was held that the test is whether a reasonably careful driver would not have been entitled to drive in the manner in which the plaintiff drove his vehicle on the night in question.

[22] In the present case the evidence of the plaintiff regarding the manner in which he was driving is clear. He testified that he was driving along on a dark road and had his eyes on the road at all material times. He was blinded by an oncoming vehicle and only saw the truck after that vehicle had driven past and he had switched on his bright lights. He was too close and could only apply his brakes in an attempt to avoid the collision.

[23] The defendant has not established that the plaintiff should have foreseen the possibility of an unlighted object in the middle of the road. It has neither been established that a reasonable driver in the plaintiff's position could have driven in a manner enabling him to avoid the collision, particularly at a lower speed or swerving to the left or to the right under the circumstances.

[24] In my view there was no acceptable proof that plaintiff could have been reasonably expected to avoid the collision. I therefore find that the defendant has failed to prove on a balance of probabilities that the plaintiff was negligent. Therefore the plaintiff is entitled to his full damages.

[25] I have incorporated the draft order as handed up by plaintiff's counsel except paragraph 3.3. The said paragraph is excluded because there were no witnesses.

In the result I make the following order:

1. The defendant is ordered to pay to the plaintiff on or before 28 May 2015 the sum of R2050 569.16 which amount shall be paid to the credit of the trust account of the plaintiff's attorneys of record, Marais Basson Inc, Witbank, whose trust details are as follows:

   Marais Basson Incorporated Trust Account

   Standard Bank – Witbank

   Account Number : […]

   Branch Code : 052750

   Ref : Mr DA Venter /svs / VA0485

2. The defendant is ordered to furnish to the plaintiff an undertaking of 100% in terms of section 17(4)(a) of the Road Accident Fund Act, 56 of 1996, for the plaintiff's costs of future accommodation in a hospital or nursing home or treatment or rendering of a service or supplying of goods to him arising from the injuries sustained by him in consequence of the motor vehicle collision on 11 October 2009 on the Kriel / Kinross Roads after the costs have been incurred and on proof thereof.

3. The defendant is ordered to pay the plaintiff's taxed or agreed party and party costs, which costs shall include:

   3.1 The costs consequent upon the employment of senior junior counsel, inclusive of the costs of appearance on 28 April 2015 and of attending the pre-trial conferences;

   3.2 The costs of obtaining the reports (addenda thereto, joint reports and RAF 4 reports where applicable) of and the reasonable taxable preparation, reservation (if any) and / or qualifying fees of the following expert witnesses:

   Orthopaedic Surgeon Dr Louis Marais

Occupational therapist	Ms Corlien MacDonald
Industrial Psychologist	Dr D Schreuder
Actuary	Dr RJ Koch
Clinical psychologist	Dr Kobus Truter
Plastic Surgeon	Dr JD Erlank

4. If the amount owing as set out in paragraph 1 is not paid on the due date and the amount as set out in paragraph 3 is not paid on presentation, the outstanding amount shall bear interest at the rate of 9% per annum from the due date of payment.

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PD Moseamo

Acting Judge of the High Court, Pretoria