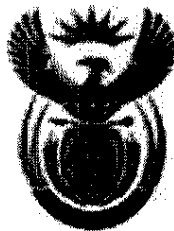


IN THE HIGH COURT OF SOUTH AFRICA
[GAUTENG DIVISION, PRETORIA]



CASE NUMBER: 23537/2013

In the matter between :

(1)	REPORTABLE: YES <u>NO</u>
(2)	OF INTEREST TO OTHER JUDGES: YES <u>NO</u>
(3)	REVISED.
<u>4/9/15</u> DATE	
<u>[Signature]</u> SIGNATURE	

KUNENE PHILANE SISONKE

PLAINTIFF.

and

ROAD ACCIDENT FUND DEFENDANT

JUDGMENT

- [1] On 16 October 2011 a collision occurred on the Mabopane Highway, Rosslyn, Pretoria at approximately 20h30 to 21h00 between a white Kia Picanto motor vehicle that was at the time driven by the Plaintiff and a

grey BMW with registration number [...] (hereinafter referred to as "the insured vehicle") and then and there driven by Mr Meshack Sipho Skosana Malaza (hereinafter referred to as "the insured driver" or as "Malaza"). As a result of this motor vehicle collision the Plaintiff instituted action against the Defendant for damages arising from the bodily injuries that the Plaintiff sustained as a result of the collision.

- [2] Mr Leballo appeared for the Plaintiff and Mr Ferreira for the Defendant. At the inception of the trial Mr Leballo informed me that the motor vehicle registration numbers are common cause and that the only dispute to be adjudicated upon for the moment are the merits. These facts Mr Ferreira confirmed. Mr Leballo further referred me to the minutes of two pre-trial conferences.
- [3] In the pre-trial minutes no reference are made to the status of the documents in the trial bundle for purposes of the merits, which consists of a set of indexed documents under an index called "Index to Merits" and that is marked Exhibit "A". I was then informed by the parties that the documents in Exhibit "A" are what they purport to be, secondly that the truth of the contents of the documents are not admitted and thirdly that I may have regard to all the documents in the bundle.
- [4] With these preliminaries out of the way I made a formal order of separation of issues in terms of Rule 33(4) namely that only the merits of

the dispute are adjudicated upon and that all other issues are postponed *sine die*.

- [5] In conformance with the ordinary approach to this type of matter, the question of merits concerns whether the collision took place as a result of the negligence of the insured driver. This is accordingly the only dispute to be adjudicated upon.
- [6] The grounds of negligence pleaded by the Plaintiff are set forth in paragraph 5 of the particulars of claim. The Defendant filed a special plea, which is not relevant for these purposes. The Defendant also filed a plea on the merits and in terms thereof the grounds of negligence as pleaded by the Plaintiff are disputed in paragraph 3 of the plea. The contents of paragraph 3 of the plea is of importance, further, as there were no grounds of negligence pleaded as against the Plaintiff. The question whether the Plaintiff was negligent and whether such negligence contributed to the occurrence of the collision, are not pleaded at all.
- [7] I am not satisfied that the question of whether the Plaintiff was negligent in any respect was canvassed properly and fully in the circumstances where there was no plea of contributory negligence. In argument at the end of the evidence, both parties referred to contributory negligence but Mr Leballo's submission was that in his view the insured driver was 100% negligent or if not, then at least 90%. Mr Ferreira left it in my hands to

determine whether there were such negligence proven. The evidence was not in my view directed towards negligence on the part of the Plaintiff and I cannot be satisfied that any issue of contributory negligence on the part of the Plaintiff was fully canvassed. For me to make a finding in that regard, would require that I must be satisfied that the issue was fully canvassed in evidence. As I am not so satisfied I will desist from making an apportionment of negligence.

See: *AA Mutual Insurance Association Limited v Nomeka* 1976 (3) SA 45 (A) at 55E – 560

Gibson v Berkowitz 1996 (4) SA 1029 (W) at 1051D – E.

- [8] The Plaintiff was then called to testify. He testified that he came from a wedding ceremony that took place in Qwa-Qwa and was driving from Qwa-Qwa to Soshanguve on the 16th October 2011. At the time of the collision he was on the Mabopane Highway also known as the R80 and it was approximately between 20h30 and 21h00. It is a dual carriage highway with two lanes in each direction. He was driving on the south to north carriage way. He was driving at approximately 100 to 115 km per hour and the permissible speed was 120 km per hour. He was driving in the left hand lane. He noticed a grey BMW driving in the same direction and it drove next to him in the right hand or fast lane and cut in front of him. The Plaintiff tried to apply brakes and to swerve to the left but could not avoid a collision and the Plaintiff's vehicle ran into the BMW. The impact on the Kia motor vehicle driven by the Plaintiff was on the right

hand front of the vehicle in the area where the right hand headlights are. The impact on the BMW was on the left hand back of the BMW in the area where the left hand tail-lights of the BMW are situated.

[9] For sake of clarity it is necessary to point out that the Plaintiffs evidence was that he was all along driving in the left hand lane (in other words the slow lane) of the Mabopane Highway and the insured vehicle was driving on the right hand lane and then moved over from the right hand lane to the the left hand lane cutting in front of the Plaintiff's vehicle.

[10] After the collision the Plaintiff's Kia which was a brand new rented Kia from Europcar rolled over the metal barriers on the left hand side of the road and landed at the bottom of the embankment on its roof.

. [11] . I divert here to point out that in Exhibit "A" there is a sketch plan and photo's and an explanation of what the photo's intend to convey. However, no witness was called to explain the contents of these documents, the markings such as the purported point of impact and both Plaintiff and Malaza gave very little evidence with reference to these documents. The veracity of the contents thereof were not proved, certainly . not insofar as the point of impact and other markings are concerned. A point of impact is for instance indicated as well where the insured vehicle ended up and where the Kia ended up. In view of the evidence of the Plaintiff and the insured driver the areas where the

vehicles ended up can be regarded as not an issue. But the area where the collision is alleged to have taken place according to the sketch plan, is in the right hand fast lane of the south to north dual carriageway of the Mabopane Highway. This is clearly in dispute and on the set of photographs it does not in any event appear as if there are any markings on the road and in any event nobody testified or indicated any particular markings that are featured in the photographs or in the legend with the exclusion of the final resting place of the Kia. On photograph 7 the Plaintiff marked the area where the Kia motor vehicle landed on its roof on the left hand side of the embankment. That fact I can accept. Accordingly for purposes of determining the issues in the matter I do not further take cognisance of the specific features that might have been intended to be conveyed by the sketch plan as drawn up by the SAPD. It is useful only in the sense that it is clearly common cause between the parties that the collision took place on that section of the highway and it can be accepted that the position where the Plaintiff's vehicle came to a standstill on its roof is fixed in view of the evidence. In other respects I can take no cognisance of the contents of these documents.

- [12] The Plaintiff regained consciousness in the Wonderpark Netcare Hospital. He was in evidence in chief questioned about the version of Mr Malaza that he (the Plaintiff) was driving in the right hand lane. This the Plaintiff disagreed with. The contents of the insured driver's statement as it appears in Exhibit "A" was raised with the Plaintiff by Mr Leballo and he

disagreed and disputed the contents of that affidavit insofar it alleges that the Plaintiff was driving in the right hand lane. The Plaintiff's reaction was that on the insured driver's version the impact should have been on the right hand side of the BMW and not on the left hand side as is stated in the affidavit of Mr Malaza in Exhibit "A".

[13] The Plaintiff conceded that there were beer cans in the Kia. He denied that he drank any liquor on the day. In fact he denied the allegation in the statement of the insured driver that he was under the influence.

[14] Under cross-examination it appeared that the wedding festivities took place from the previous Friday until the morning of Sunday the 16th 09 October 2011. The festivities ended early on Sunday morning so as to enable the guests to go home. The Plaintiff denied that he had any alcohol on the day of the 16th and pointed out that him being the driver of the Kia vehicle he did not partake in alcohol and secondly he was the master of ceremonies during the marriage festivities. He thus remained sober. He was then cross-examined about the fact that there was the smell of alcohol in the vehicle after the collision as well as in the hospital record there is also reference to the smell of alcohol. (The hospital records are filed under the general documentation and not in Exhibit "A"). However, no witness from the casualty room was called to come and testify about the sobriety or not of the Plaintiff at the time of his arrival at hospital. It is common cause on the evidence that there were cans of

beer some of which were still closed and other that were open and partly used in the Kia after the collision. The Plaintiff however emphatically denied having partaken of it on the day. In fact his evidence was that there were a number of people who drove with him in the Kia. He first dropped them off in Johannesburg and then drove on to Soshanguve that would be his end destination on the night of 16 October 2011. In the evidence it also came out that the driving time from Qwa-Qwa is approximately 4 to 5 hours and the collision occurred approximately after 5 hours of driving which included driving through Johannesburg. The Plaintiff managed to drive all the way from Qwa-Qwa and through the busy Johannesburg without any incident.

- [15] Plaintiff was also cross-examined on a report by one Sandra Moses, one of the experts whose report forms part of the court file and who would be called in the quantum part of the trial, should that occur some time in future. Sandra Moses writes in her report that the Plaintiff informed her that he was dismissed from Transnet because of the use of alcohol and also that the Plaintiff relies on alcohol in order to be able to sleep. The Plaintiff pointed out that these problems arose as after effects of the very collision giving rise to his claim and not prior to the collision. He was criticised for the way he answered questions with regard to the alcohol use and specifically about the fact that he initially on a very broadly put question about alcohol, did not refer to the facts that appear from the report of Sandra Moses. I do not regard his answers in this respect as

detracting from his credibility. He gave a perfectly good explanation for the way he answered these questions. The Plaintiff was heavily cross-examined regarding his alcohol usage and whether he was drunk on the day in question. He admitted having had a drinking spree on the Friday of the weekend of the 16¹¹ October 2011 but denied touching any drink on either Saturday or Sunday. He explained that he was the master of ceremonies at the wedding on Saturday. Guests arrived on Friday but the actual wedding ceremony only started on Saturday where he then presided as the master of ceremonies.

[16] It needs to be pointed out here also that when Mr Malaza, the insured driver, later on testified, he withdrew his allegations of drunkenness on the part of the Plaintiff. He admitted that his view of the Plaintiffs sobriety might have come from the smell of the liquor that could have spilled upon the Plaintiff as a result of the collision. He conceded that his involvement with the Plaintiff was not on such a level that he could honestly say that the Plaintiff was drunk when Mr Malaza pulled him out of the overturned Kia and laid him next to the road in anticipation of the arrival of the Police and the ambulance.

[17] The Plaintiff was cross-examined about the speed he was driving and it was alleged that for the vehicle to have overturned, the Plaintiff must have had driven much faster than a 115 km per hour. The Plaintiff maintained his evidence. At this point I need to point out that there was

no expert evidence to support this line of cross-examination and I cannot make a finding of the nature suggested in the cross-examination in this regard on the available evidence. It was put to the Plaintiff that Mr Malaza had no reason to take the off-ramp and thus had no reason to move over from the right hand lane to the left hand lane of the Mabopane Highway in order to take the off-ramp in the area where the collision took place. The Plaintiff's version was that he assumed that the insured driver wished to take the off-ramp and that that was the reason why Malaza moved from the right hand lane and cut across the line of travel of the Plaintiff resulting in the collision.

[18] It was common cause that on the Sunday night the road was not busy and for all intents and purposes only the Plaintiff's vehicle and the insured vehicle were on that section of the road at the time when the collision took place.

[19] A misunderstanding occurred in the cross-examination which was conceded by Mr Ferreira, namely there was some reference thereto that the insured driver cut in front of the Plaintiff and then applied brakes. The Plaintiff denied ever saying that the insured driver applied brakes.

[20] The Plaintiff closed his case on this part of the matter after finalisation of the evidence of the Plaintiff. Mr Malaza was then called as the only witness on behalf of the Defendant.

- [21] Mr Malaza agreed that the collision took place approximately between 20h30 and 21h00. He came from Midrand to his home in Soshanguve. At approximately 20h30 just before the off-ramp to Rosslyn and just before a bridge, Mr Malaza looked in his rear-view mirror and he saw a
- . white vehicle coming on very fast. Malaza himself was driving at approximately 120 km per hour and in his view the oncoming vehicle that was also in the right hand lane as he was; was driving much faster than Mr Malaza. Malaza then moved to the left hand lane because he thought that at the speed with which the white motor vehicle was coming on they were bound to have an accident. In chief he then said that before he could "relax" in the left hand lane, there was an impact and he saw the Kia motor vehicle flying past him on the railway line side of the road (that is the left hand side of the road). He was questioned on where precisely his vehicle was at the time of the collision, namely whether the car was entirely in the left hand lane or not. He testified that he could not tell the positioning.
- [22] He then testified that the impact was on the back of his car and his motor vehicle then hit the concrete wall on the left hand side of the road at the bridge and then spun across the road and came to a standstill on the right .hand side (that would be the eastern side) of the Mabopane Highway facing backwards in the southern direction from where both vehicles were coming before the collision took place. The damage on the

insured vehicle was on the left front and at the back at the boot area. At the back and the boot area the whole of the boot had damage but the major part of the damage, according to his evidence in chief, was on the right hand tail-lights area of the BMW motor vehicle. He was then referred to his statement in Exhibit "A" that says that the damage was on the left hand back of the boot area of the BMW. He then reiterated that the damage was more on the right hand back of the BMW, thereby indicating that the impact as such between the Kia and the BMW took place on the right hand back area of the BMW.

[23] He testified that he saw the Kia flying over the barriers towards the railway line. After the collision he removed the Plaintiff from the overturned Kia and took a gym bag and used it as a pillow for the Plaintiff who was unconscious. He then called the Police and ambulance. When he dragged the Plaintiff from the vehicle there were cans of Black Label beer that had spilled and he at the time thought that the Plaintiff could have been drunk. One can was empty and there was another with a substantial amount of beer still in it. It spilled all over and the Plaintiff smelled like he was drinking. He could not tell whether the Plaintiff was drunk or not. He only made an inference on the abovementioned facts.

[24] Mr Malaza did not intend to take the Rosslyn off-ramp as he would be driving straight on towards Soshanguve. There were only two vehicles

on the road, namely the Plaintiff's vehicle and the insured vehicle at the time of the collision.

[25] He then again referred to the fact that he (Mr Malaza) moved over to the slow lane and on this occasion said that he actually "relaxed" in the slow lane whereafter the collision occurred. He testified that he suspected that the Plaintiff changed lanes. In cross-examination Mr Leballo questioned him about his sobriety. Mr Malaza said he did not partake of any alcohol on the day. He confirmed that Exhibit "A" pages 20 to 24 is his signed affidavit. He was referred to the fact that the evidence in the statement is that the BMW vehicle was impacted on the left hand back by the Plaintiff. He was also referred to the fact that the statement indicated Mr Malaza was driving in the right hand lane, saw a vehicle approaching at very high speed and then put on his indicators and began moving over to the left hand lane. The statement then says that when "the right back of my car was about in the middle of the right lane the other vehicle bumped me from behind". He conceded in cross-examination that this statement would mean that the whole of his vehicle would still be in the right hand lane at the time when the collision took place. He then reiterated that the insured vehicle was in the left hand lane when the collision took place. He qualified his statement saying that it is safe to say that the BMW vehicle was partly in the left hand lane. He said that the version in Exhibit "A" is incorrect and incorrectly captured. His evidence in court was setting forth the correct set of facts. He then reiterated that the insured

vehicle was hit on the back more on the right hand side thereof. He said this was the position as he himself inspected the damage on his vehicle.

[26] His explanation for the incorrect contents of the affidavit was that he did not pay attention to what was written and that his focus was more on the fact that the insured vehicle was hit from behind. He also thought that it could have been an error from the assessor who took the statement. He however confirmed that he did read the statement before signing it and then said that he thinks it is a mistake on his part.

[27] He denied that the Plaintiff was driving at 115 km per hour.

[28] He then confirmed that he could not say that the Plaintiff was drunk.

[29] The version of the Plaintiff and the version of the Defendant differ materially. The Plaintiff's version is that he was driving with a Kia motor vehicle at approximately 100 to 115 km per hour in the left hand lane of the Mabopane Highway whereafter the insured driver came from behind in the right hand lane, and then cut in front of the Plaintiff causing a collision between the right hand front, in the area of the headlights on the right hand side of the Kia with the left back of the BMW insured vehicle in the area where the tail-lights of the BMW are situated. This is the version of the Plaintiff both in his statement to the SAPD and in court.

[30] On the other hand the insured driver's version in his statement was that the damage occurred on the left hand boot area of the BMW. This is in line with the evidence of the Plaintiff. In the evidence in court, however, he stated that the BMW was impacted on the right hand back area of the BMW. In addition in the statement Mr Malaza's evidence, according to his own admission, meant that the whole of the BMW vehicle was still in the right hand lane when the collision took place between the Kia and the BMW. In his evidence in court he said that the BMW was at least partly in the left hand lane.

[31] These discrepancies in the evidence of the insured driver, in the circumstances of the matter where there are scant evidence, apart from the two versions of the drivers, are significant.

[32] On appearance I cannot find that either the Plaintiff or the Defendant was a bad witness.

[33] On the evidence the Plaintiff consistently stuck to his version that he was driving in the left hand lane and that the insured vehicle cut over from the right hand lane into the left hand lane directly in front of the Kia motor vehicle and thereby causing the collision. On Malaza's evidence the collision either would not have taken place or indeed it is more probable that the damage on the BMW would have been on the left hand tail-light area of the insured vehicle.

[34] I find that the damage on the two vehicles were indeed on the right hand front area of the Kia and on the left hand back tail-light area, of the BMW. Thus the accident appears to have occurred as explained by the Plaintiff. The evidence regarding where the damage was situated on the BMW in the statement of Mr Malaza in Exhibit "A", support this version.

[35] On the evidence of Mr Malaza the damage on the BMW was on the right hand tail-light area of the BMW. It is difficult to understand how the two vehicles could have collided in this fashion on the explanation of Mr Malaza. On the version in his disavowed statement in Exhibit "A", the collision ought not to have taken place at all as the allegedly high speeding Plaintiff would have passed in the left hand lane. whilst the insured driver was still in the right hand lane. The alleged damage on the. right hand tail-light area of the BMW is improbable and must thus be rejected.

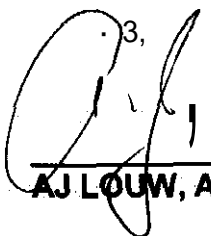
[36] On the evidence and especially having regard to the discrepancies in the evidence as opposed to the contents of the statement of Malaza in Exhibit "A", I find that the collision took place as explained by the Plaintiff. To that extent I am constrained to disbelieve the insured driver's evidence. It is after all also a material deviation from the contents of his affidavit in Exhibit "A".

[37] In the circumstances the insured driver, who executed the dangerous move of moving from the one lane to the other lane in front of the Plaintiff, indeed was negligent. The *prima facie* view that usually applies in situations where a vehicle collides from the back with a vehicle in front of it, and where it is then usually said that the driver of the back vehicle is negligent, cannot apply in these circumstances.

See in general: **Maharaj v Phillips 1955 (2) SA 658 (N).**

[38] In the circumstances I order as follows:

1. It is ordered that the merits are separated from all other issues and all other issues are postponed *sine die*.
2. The collision that occurred on the 16th October 2011 between the Kia motor vehicle with registration number [...] and the BMW motor vehicle with registration number [...] was caused by the negligence of the insured driver, Mr Malaza.

3,

AJ LOUW, A.

The Defendant is ordered to pay the Plaintiff's costs of suit arising from the merits part of the matter.