IN THE HIGH COURT OF SOUTH

AFRICA GAUTENG DIVISION, PRETORIA

CASE NUMBER:88540/2014

12/10/2017

In the matter between:

LEKABE KAGISO SA PLAINTIFF

And

ROAD ACCIDENT FUND DEFENDANT

JUDGMENT

TLHAPI J

[1] The plaintiff instituted action against the defendant under the Road Accident Fund Act, Act 56 of 1996, and is claiming damages sustained in a motor vehicle collision. It was agreed and ordered that only the issue of liability is to be determined at this stage.

[2] The plaintiff pleaded:

"The collision was *caused as* a *result of the sole negligence and wrongfull driving of the insured driver who was negligent in one and/or more and/or*

all of the following respects:

5.1 He failed to keep a proper lookout;

5.2 He drove at a speed that was excessive having regard to the circumstances prevailing at the time of the collision;

5.3 *He failed to apply the brakes of the insured motor vehicle timeously or at all, at a stage and/or time when he could and/or should have done* so;

5.4 *He failed to take evasive action or to keep his vehicle under proper control at* a *stage when he could and should have done* so;

5.5 He failed to avoid a collision when by exercising reasonable care he could and should have done so;"

[3] The defendant pleaded to the above as follows:

5.1 The defendant denies the allegations contained in these paragraphs, specifically pleads that the collision did not occur, either as *alleged or at all and that the plaintiff was not involved in* a *motor vehicle collision either* as *alleged or at all;*

5.2 Alternatively, and in the event of the above Honourable court finding that a *collision did occur and that the plaintiff was involved in* a *motor vehicle collision either as alleged or at all, which* is *denied, then and in that event only, the defendant pleads that the collision was caused solely as a result of the negligence of the plaintiff who* was *negligent in one or more or all of the following respects:*

5.2.1 He failed to keep a proper look- out

5.2.2 He failed to exercise proper control of the vehicle he was driving;

5.2.3 He travelled at an excessive speed in the circumstances;

5.2.4 He failed to utilize the brakes of his of his timeously, adequately or at

all;

5.2.5 *He failed to avoid the collision when the the exercise of* a *reasonable care he could and should have done so;*

5.2.6 *He entered the road at* a *time and place when it* was *dangerous and inopportune to do so;*

5.2.7 7 *He crossed or remained in the path of travel of the insured driver at* a *time when it was dangerous and inopportune to do* so;

5.2.8 *He failed to give adequate warning of his presence to other road users and more particularly the driver of the insured motor vehicle;*

5.3 *Further alternatively, and in the event of the above Honourable Court finding there was* a *collision, and that the plaintiff* was *involved in the motor vehicle collision, and that the insured driver* was *negligent and that such negligence contributed to the collision, all which is denied, then and in that event the Defendant pleads that the plaintiff was contributory negligent in relation to the aforesaid collision in one or more of the respects as set out in 5.2 above and requests the Honourable Court to apportion the plaintiffs damages in accordance with the provision of the Apportionment of Damages Act, Act 34 of 1956, as amended.*

[4] The collision occurred on 18 January 2013 at approximately 12h00 on the road between Phella and Tlokweng Villages in the North West Province, between a white Ford Ranger LDV vehicle with registration numbers [….] driven by the plaintiff and, another vehicle with registration numbers [….] driven by the insured driver. The road was tarred with a single lane of travel in either direction and the road was divided by a white dotted line with a yellow line on the edge of the road. The plaintiff testified that he was travelling with his wife who had fallen asleep by his side and they were Swartruggens on their way to Phella Village. It was a cloudy day, it had stopped raining just before the collision, and visibility was very good. There was nothing that obstructed his view and he was travelling at a speed between 60 - 70 km per hour. He was being followed by two other vehicles.

[5] He saw a white vehicle with red number plates approach. It was common cause that this vehicle was driven by the insured driver. Before the collision he saw the insured driver's vehicle approach from a curve. Plaintiff testified that when the two vehicles were about to cross each other, the one driven by the insured driver suddenly swerved towards his side and its wheels were on the white line. He tried to evade the accident by giving way but the wheels of his vehicle skidded into the lane of the insured driver and a collision occurred. His right front wheel collided with the right front wheel of the other vehicle and the collision took place in the lane in which he was travelling, that is, the left lane. The insured driver's vehicle was halfway in his lane and the other half in its lane. He tried avoid the accident, by swerving to the left hand side but the vehicles were too close to each when they collided. He also testified that the insured driver was travelling at high speed.

[6] During cross examination the plaintiff testified that he wished to avoid the collision by moving to his extreme left but he did not succeed. He was questioned on the statement he made to the police and he confirmed that he had informed the police officer who took down the statement that he could not recall what happened and that it was his wife who related the incident to him. The insured driver's version was put to him and he denied that his wife informed the insured driver that she was asleep when the collision occurred. He further testified that the point of impact in the sketch plan and the accident report differed from his testimony. He did not know anything about the sketch plan as he was not present when it was drawn. He was cross examined on his payment of an admission of guilt fine and on the charges of reckless and negligent driving. He denied that he had appeared in court on those charges. He admitted to paying an admission of guilt fine, but explained that the police officer who came to take down the statement advised him to do so because he had collided with a Government vehicle and that he was obliged to pay.

[7] I caused the recording to be replayed because I had recorded that the plaintiff had testified that his vehicle skidded into the lane of the insured driver before the collision, and I caused the interpreter to re-interpret the testimony of the plaintiff where he had testified about his vehicle "gorelela" (Tswana) =

skidding English = gly (Afrikaans). The plaintiff was questioned by Mr De Waal on this aspect and he denied that his vehicle skidded into the lane of the oncoming vehicle. He was asked what was not correct in this version as interpreted and he explained that it was because his vehicle was straddling the yellow line in his attempt to evade the collision. He was asked of his understanding of the word "gorelela" and he explained that it meant when he turned his vehicle fast.

[8] Mr Malokwane, the investigating officer, testified that he went to see the plaintiff at his home to take his statement. He did not attend the accident scene. The case docket had been allocated to him for investigation. The plaintiff had suffered injuries and was in a wheel chair. The plaintiff informed him that he was travelling from Swartruggens to Phella Village. He had seen the vehicle of the insured driver in his lane and he did not know what happened thereafter. He reduced the statement to writing and presented it to the prosecutor, who gave instructions that the plaintiff pay an admission of guilt fine. When asked if he had explained what the fine was for, Mr Molokwane testified that he explained that the plaintiff could reclaim his money.

[9] The insured driver testified that he was travelling to Zeerust to deposit a cheque and there was another vehicle following him. The speed limit on that road was 120km per hour and he was driving at 80km per hour and it was drizzling. He drove past Phelia Village and having driven past a curve he noticed two vehicles in the opposite lane approaching and travelling in the opposite direction. The vehicle in front came into his lane of travel, he flickered the lights and hooted. When he realized that the oncoming vehicle was not heeding his warning he moved a little to his left and the two vehicles collided with each other. His vehicle was hit along his right hand side towards the back and the plaintiff s vehicle came to a standstill behind his vehicle. He alighted from his vehicle and approached the plaintiffs vehicle. He found a male and female inside. He enquired from the driver, 'the plaintiff what the problem was and the plaintiff said he was asleep, he did not see anything.

[10] During cross examination the insured driver was questioned on what he did when he saw the plaintiffs vehicle come into his lane besides hooting and flickering is lights. He testified that he had also slowed down. His attention was

drawn to the fact that he had not testified in chief that he had reduced his speed. He testified that he mentioned this to the police. This allegation was also not in his statement. He testified further that when he moved to the left his left wheels were off the road and on the grass and that he could not go completely off the road because there was a tree. A photograph of the road was shown to him with a vehicle pictured on the side which was completely off the road. He testified that that was not where the collision occurred, that although that was the road, he did not know from which part of the road the photograph was taken, because the tree he testified about was still in the same place as it was on the date of the collision. He was asked if he could have gone off the road but for the tree and he answered in the negative and alleged that he could not have done so because of the holes next to the road.

[11] The insured driver testified that after the collision the plaintiffs vehicle landed behind him, off the road and on his side of the road. He denied that the collision occurred towards or at the center of the road, instead it was the vehicle of the driver who was following him which drove towards the center, allowing plaintiffs vehicle to pass behind him. He testified that while they were at the scene a certain lady arrived and she apparently knew the plaintiff and his wife. No statement was taken from this lady and the insured driver did not communicate to the police officer what had been told about the plaintiff and his wife.

[12] The versions of the witnesses differ and are therefore mutually destructive in the respects following respects:

12.1 whether or not the point of collision was in the middle of the lane on the left and on which the plaintiff was travelling, and whether the insured driver was negligent for which the plaintiff bears the onus; or

12.2 whether the collision occurred in the lane of the insured driver;

12.3 whether there was contributory negligence as pleaded in the alternative by the defendant, for which it bears the onus;

[13] In order to succeed the plaintiff must discharge his onus on a

preponderance of probabilities and his version must be credible and reliable and the probabilities must favour his version above that of the defendant, *Stellenbosch Famers Winery Group Ltd and Another v Martell Et Cie and Others 2003(1)* SA *(SCA).* The analyses of mutually destructive versions should follow the approach in *National Employers General Insurance* Co *Ltd v Jagers* 1984 (4) SA 437 (E) AT 440 d - 441

"...*Where the onus rests on the plaintiff* as *in the present case, and where there are two mutually destructive stories, he can only succeed is he satisfies the court on* a *preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advances 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 plaintfif's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and; is the balance of probabilities favours the plaintiff, the court will accept his version is 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 defendant, the plaintiff can only succeed if the court nevertheless believes him and is satisfied that his evidence is true and that of the defendant's version* is *false."*

[14] The determination of the issues is solely reliant on the evidence of the witnesses since no other evidence was made available. Although sketch plans and an accident report and photographs formed part of the trial bundle no witnesses were called except for a casual reference to them in cross examination. Mr Moeti for the defendant in his submissions. also relied on these documents to substantiate the version of the insured driver, but without testimony from the author who would have been subjected to cross examination, such evidence is not useful.

[15] I first want to deal with whether the payment of the plaintiff of an admission of fine points towards his admission of negligence. I am of the view that the circumstances under which the fine was paid has no relevance in the

determination of whether the parties had discharged their respecitve onuses. It seems that the plaintiff had a different understanding as to why he had to pay. According to Mr Molokwane, he was instructed by the public prosecutor to collect an admission of guilt fine and, it seems that concluded the issue of criminal charges against the plaintiff for reckless and negligent driving.

[16] It was submitted for the plaintiff, that the evidence clearly showed that the insured driver was at fault and that there were no inherent improbabilities in the version of the plaintiff, given the approach on behalf of the insured driver. that the sole cause of the collision was the plaintiff. This was most likely based on his statement to the police that he could not remember what happened. Therefore, the plaintiffs version was not inherently improbable or clearly untruthful.

[17] The insured driver was cross-examined on the steps he took to avoid a collision with the plaintiffs vehicle that had veered into his lane of travel, and Mr De Waal called for a careful scrutiny of what the insured driver told the police, his evidence in chief and his evidence in cross-examination. The criticism against his evidence was that there were allegations in his evidence in chief and in cross-examination which were not in his statement to the police; (i) that it was difficult to reconcile his version that he got out of the road a little bit with his evidence that he was unable to swerve and was unable to get out of the way (ii) he was unable to tell how much time had elapsed after the flashing of light and hooting the collision occurred, that is before he could get away; (iii) that he changed his version and alleged that he had also slowed down.

[18] In considering the evidence as a whole I find that the plaintiff contradicted himself on an important issue being the position and/or the movement of his vehicle before the collision. His first version was tha the saw the insured driver's vehicle veering into the lane on which he was travelling, and that the collision occurred in the middle of his lane. The second version was that his vehicle skidded ('gorelela') into the lane of the insured driver. This evidence he volunteered and it cannot in my view be ignored. This coincided with the version of the insured driver that the plaintiffs vehicle came into his travelling lane.

[19] In my view as soon as one used the word skid, what comes to mind is that he testified that it had just rained and the insured driver testified that it was

drizzling. This he said occurred while he maintained a speed of between 60 - 70 km per hour and the insured driver testified that he maintained a speed of 80 km per hour. Without the testimony of the officer who drew sketch plan and who was apparently present at the scene after the collision, it makes it difficult to have an idea as to which version the sketch plan corroborated..

[20] I can only limit the skid to an inference that the plaintiffs evidence in this regard confirms that of the insured driver, that the collision occurred in his lane of travel. Important also is the plaintiffs explanation in re-examination by Mr De Waal. He disputed that his vehicle had skidded into the lane of the insured driver. However, when asked what he meant by use of the word 'gorelela' (into the insured driver's lane) he explained that it meant that his vehicle straddled the yellow line on his side of the road. It is not his evidence that his vehicle skidded on his side to end up straddling the yellow line in his lane. In my view having considered the evidence, I find that the collision took place in the lane of travel of the insured driver, and that the plaintiff s vehicle landed off the road behind the insured driver.

[21] Mr Moeti argued that the inference could therefore be drawn that the plaintiff was negligent and that he had as a result transgressed section 89 of the Road Traffic Act by failing to keep to his lane. Mr De Waal argued that in as far as it would be found that the plaintiff veered into the lane of the insured driver, that the most probable version was that the drivers drove too close to the middle of the road and they collided close to the centre of the road. The one who crossed over would be negligent and the other drive also negligent for failing to take reasonable steps to avoid the accident. I cannot agree with Mr De Waal on the argument that there was as a result contributory negligence on the part of the both drivers.

[22] This ignores the evidence that the insured driver moved a 'little bit to the side', where his left wheels were off the tarmac and that the vehicle following the insured driver was the vehicle that moved towards the centre of the road, in order to make room for the plaintiffs vehicle which passed between these vehicles to land off the road after the collision, behind the insured driver's vehicle. I come to

this conculsion despite Mr De Waal's submission that the insured driver's evidence that he slowed down should not be accepted. Rather, this is an instance where the insured driver was faced with a sudden emergency and the test would be whether he acted reasonably by moving a little to the side, I find that the insured driver acted reasonably in the circumstance and, that I find no contributory negligence to be present : *South African Railways v Symington* 1935 AD 37; *Road Accident Fund v Grobler 2007* (6) SA 230 at para (11] and [12].

I find that the plaintiff was the sole cause of the collision, and his claim should be dismissed. I shall further order that each party pay its costs for the two days where the matter was set down for trial but could not proceed because of the unavailability of a judge to hear the matter.

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

> "The plaintiff s claim is dismissed with costs which exclude costs of the defendant for the two days, on which the matter could not be heard due to unavailability of a judge to hear the matter."

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TLHAPI VV

(JUDGE OF THE HIGH COURT)

MATTER HEARD ON	:	08 SEPTEMBER 2017
JUDGMENT RESERVED ON	:	11 SEPTEMBER 2017
ATTORNEYS FOR THE PLAINTIFF	:	ADAMS & ADAMS INC.

ATTORNEYS FOR THE DEFENDANT : LEKHU PILSON ATT.