IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NUMBER: 79588/15

12/10/2017

In the matter between:

ORAELENG EDWIN SEKGORO PLAINTIFF

And

ROAD ACCIDENT FUND DEFENDANT

JUDGMENT

TLHAPI J

[1] The plaintiff instituted action against the defendant for damages suffered in respect of personal injuries sustained in a motor vehicle accident. It was agreed that only the issue of merits had to be determined and in the opening statement it was mentioned that the court was to determine whether there was contributory negligence.

[2] The collision occurred on 17 November 2012 at about 4:00, on the N12 road between Warrenton and Kimberley. The plaintiff was the driver of a Toyota hi-lux bakkie with registration numbers [….] and Mr J H Hagglund, ("the insured driver"), was the owner of a Freightliner truck with registration numbers [….].

[3] The plaintiff pleaded the following:

“The sole cause of the accident was due to the negligent driving of the insured driver who was negligent in one or more of the following aspects:

4.1 he failed to keep a proper lookout for other road users;

4.2 he drove too fast *under the circumstances:*

4.3 he failed to apply the brakes of the insured vehicle timeously if at all;

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

4.5 he drove without consideration for the safety of other road users;

4.6 he failed to keep the insured vehicle under proper control;

4.7 he drove his vehicle on the wrong side of the road in the way of oncoming traffic;"

[4] The defendant's plea to the above stated:

"4.1 The allegations contained herein are denied as *if specifically traversed and in particular the defendant denies that the said insured driver, JF Hagglund was negligent either* as *alleged or at all.*

4.2 The defendant avers that the collision was caused by the sole negligence of the plaintiff who was negligent in one or more of the following aspects:

4.2.1 he failed to keep a proper lookout;

4.2.2 he drove at an excessive speed in the circumstances;

4.2.3 he failed to keep his vehicle under control;

4.2.4 he failed to apply the brakes of his vehicle timeously or at all;

4.2.5 he failed to pay due regard to other road users and in particular the said insured motor vehicle;

4.2.6 he failed to avoid the collision when, by the exercise of reasonable care, he could and should have done;

The defendant's plea to paragraphs 5, 6, 7, 8 and 9

"5.*3 Should the above Honourable Court find that the Plaintiff did sustain bodily injuries, either as alleged or at all for which the defendant* is *liable (which is denied), then the Defendant pleads that the Plaintiff was contributory negligent in failing to utilize his/her safety belt and that this was a cause for the damages suffered by the plaintiff in that he would not have sustained any injuries or would have sustained injuries of a lesser nature, had he utilized his/her safety belt. Accordingly any claim which the plaintiff may have should be reduced in accordance with the provisions of the Apportionment of Damages Act 34 of 1956* as *amended*

[5] The N12 is a tarred public road, with one lane of travel in either direction and the road has a shoulder on each side demarcated with a yellow line. The plaintiff testified that he slept over in Kimberly on the night preceding the date of collision. He travelled back to Taung where he lived with his parents, at about 3:00 in the morning. It was dark and there were no street lights. The speed limit on the road was 120km and he was travelling at about a 100km per hour. His lights were working properly and he had them on and the visibility was good. He had been on the road for about 45 minutes when he noticed a truck approaching from the opposite direction at a distance of about 300 meters. He could see that it was a truck because the lights were higher up, brighter and bigger. The plaintiff testified that he thought that the trucks lights were bright. The truck had two

headlights and four sp9t lights between the head lights

[6] The oncoming truck was about 50 meters from him when he flashed his lights two times, in order to alert the truck to dim. Instead of dimming the insured driver put his bright lights on. When he realized that he was being ignored he kept to his lane and travelled at the same speed he had been travelling , while remaining to his side of the road. He looked downwards and concentrated on the dividing dotted line... He was blinded by the lights as he got closer to the truck. The truck driver did not hoot or dim his lights. The fact that he was looking down wards did not help because after going past a slight curve and when he passed the truck he was completely blinded by the lights and he later collided with the truck which had two trailers.

[7] The bakkie lost control, he swerved to the left then again to the right and the bakkie collided for the second time with wheels of the truck. A sketch plan was availed where he identified the positions of the vehicles after the collision although he could not identify where the point of collision was. The truck came to a standstill on the shoulder of the road about a 100 meters from the point of collision. He testified that he thought that the collision was possibly caused when the truck got into his lane, because he at all times kept to his side of the road. After the collision his vehicle came to a standstill on the gravel on his side of the road and the vehicle was facing in the same direction he was travelling. The insured driver came to speak to him and commented that the plaintiff should thank God that he was still alive.

[8] During cross examination he testified that he was in parallel position when he crossed the truck before he lost his vision after being blinded by the lights. He did not slow down but he kept his speed and he did not apply breaks. He denied that the collision took place at a curve. The plaintiff was confronted with his statement prepared by his attorney, which he allegedly signed without reading. The contents and parts thereof were read into the record. He disputed his version therein that he slowed down and moved to the far left of his lane towards the edge of the road. Further, he stated therein that when the insured vehicle passed him the said vehicle collided with his right side, thereby disputing that the insured driver moved into his lane; that the insured driver was the sole cause of the

accident. He disputed the insured driver's version on how the collision took place, and that the truck had two spot lights and not four as he testified. The plaintiff testified that he had travelled to Kimberly frequently, that he was a driver for ten years before obtaining his driver license about 15 days before the collision.

Sergeant Mokoraone, although not the investigating officer travelled to Cape Town to obtained a warning statement from the insured driver. He confirmed that the two sketch plans made available did not show where the point of impact was.

[9] The insured driver testified that he was travelling towards Kimberley in his truck which was a Freightliner Ergosy 500. The truck consisted of a horse and trailer which had ten wheels, two normal lights, two spot lights. It did not have fog lights. The spot lights came on when the head lights were turned on. The spot lights are adjusted at his employers workshop and when lit they shine for 60 meters ahead. He was travelling at 80km per hour. He saw a vehicle approach him and at the time it was about 50/60 km away from him. He saw the oncoming vehicle encroached onto his side of the road and he warned the oncoming vehicle by flickering his lights and he moved the truck to his left.

He flickered again and hooted the vehicle was still approaching his vehicle on his side of the road. At the time he had reduced his speed and when the vehicle was about 30 meters away, he noticed that two of the wheels of the oncoming vehicle had crossed the white line. He slowed down and moved more towards his left and he denied that the plaintiff flickered his lights. At that point he started to apply his breaks which he did 4 times and that he applied the breaks in this fashion to avoid the vehicle from sliding. In his type of vehicle it was not possible to apply breaks immediately or in one move because the vehicle would slide. The plaintiffs vehicle collided with his twice. He brought his vehicle to a standstill about 10-12 meters from the point of impact.. He testified that if he had not given way by moving to the side, the plaintiffs vehicle could have collided with his head- on or landed under the truck. He denied that plaintiff had kept to his kept to his lane. He testified that the collision took place in his lane.

[10] During cross examination the insured driver testified that when he saw the plaintiffs vehicle he was busy taking a curve which was not a sharp one. It was put to him that it was never put to the plaintiff that his vehicle had encroached onto his side. He stated that he flickered when he realized that the plaintiff was encroaching onto his side of the road. He was not aware that the use of spotlights were prohibited. He denied that he was the sole cause of the accident, he testified that he had done everything to avoid the collision.

[11] The plaintiff bears the onus to prove on a balance of probabilities that the insured driver was negligent and the court considers the evidence, the probabilities and inferences as a whole and not in a piecemeal approach in order to determine whether such onus has been discharged: *Arthur v Bezuidenhout and Mieny* 1962 (2) SA 566 (AD) *;Sardi and Others v Standard and General; Insurance* Co.1977(3) SA 776 (A); *Madyosi and Another v SA Eagle Insurance Ltd* 1990 (3) SA 442 (E).

[12] It was submitted for the defendant that reliance on the Apportionment of Damages Act 34 of 1956 must be pleaded and that the plaintiff had not provided a basis for the exercise of such discretion in its plea. Furthermore, that the plaintiff had testified differently from the case put forward by his counsel in respect of liability, that he seemed to claim absolute liability while it was submitted on his behalf that he seeks partial liability to be apportioned in terms of the Act.

[13] It is trite that the material facts a plaintiff seeks to rely upon, should be set out in the particulars of claim in a concise and clear manner. There was indication in the opening statement that the court would have to determine whether there was any contributory negligence on the part of the plaintiff and the insured driver. It seems that counsel for the plaintiff left the issue at such preliminary stage and that having heard testimony on both sides failed to amend its particulars of claim by in entering an alternative plea to paragraph 4 of the particulars of claim to cater for what the plaintiff relied upon initially as a case of contributory negligence. The parties are bound by their pleadings and where

there is evidence during the trial to suggest the need for an amendment to be made, such amendment should be applied for and if granted it forms part of the particulars of claim. Having said this, I take into consideration the fact that the defendant at paragraph 5.3 pleaded to paragraphs 5,6,7,8 and 9 of the particulars of claim by addressing the issue of contributory negligence. Therefore, in analyzing the evidence consideration shall be given to this aspect.

[14] In this matter we also have to deal with the fact that the versions are mutually destructive and the approach when dealing with this aspect is to have regard to the principles laid down in *National Employers General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (E) at 440E-441A:

> "... *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 the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and if the balance of the probabilities of the case 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"* (my underlining)

[15] It was submitted for the plaintiff that his evidence could not be criticized; that he did not contradict himself except in as far as his affidavit, which was drafted by his attorney was concerned, as at paragraph 5 thereof, as not reflecting his version of the incident. It was submitted that the court should accept

that the plaintiff was ignorant of the applicable law relating apportionment of damages and that it was irresponsible of him to sign the affidavit without reading it. I disagree. The affidavit was signed before a commissioner of oaths who acknowledged that the plaintiff knew and understood the contents of the affidavit which was probably read back to him, or read by the plaintiff or explained to him.

[16] The affidavit drafted by plaintiff s attorney could be said to confirm the alleged negligent conduct of the insured driver as pleaded in the particulars of claim where in the affidavit is stated:

> *"4. I was driving the motor vehicle. A vehicle approached in the opposite lane with its lights on. The approaching vehicle did not dim its lights. When the vehicle passed me I felt it colliding with the right side of the vehicle.*
>
> *5. When I noticed the approaching vehicle, did not dim I slowed down my vehicle and moved over to the far left side of the road to the edge of the road.*
>
> *6. The approaching vehicle moved over to my lane and collided with my vehicle in my lane.*
>
> *8. The sole cause of the accident was due to the negligence of the insured driver as he drove his vehicle in a reckless and negligent manner and did not keep proper control of the vehicle.*"

The submission that the plaintiffs signing of the affidavit was irresponsible, cannot be entertained.

[17] During cross examination the plaintiff denied that paragraphs 5 and 8 quoted in the affidavit reflected his version. He testified that he did not slow down or reduce his speed, he did not move his vehicle to the far left and he did not say that the insured driver was the sole cause of the accident. There is no explanation as to why this version has changed. This denial in my view goes to

the credibility of the plaintiff .

[18] The plaintiff gave a guess or was uncertain as to how the accident occurred. When asked what caused the collision he testified that the only possibility was that the insured driver encroached into his lane. In cross examination he denied that he had encroached onto the lane of the insured driver, he testified that he was at parallel positions with the truck when he drove past it, a moment before the collision. In my view, if he was parallel to the truck as he passed it, then the truck could not have been in his lane or the cause of the collision. In all probability the collision took place in the lane of travel of the insured driver.

[19] The plaintiff testified that as a result of the bright lights which he noticed at a distance of 300 meters, he decided to 'look down and focus on the dotted line', not having reduced his speed, which he maintained at 100km per hour. Looking downwards and not ahead meant that he was no longer being blinded by the truck's light and, if they blinded him when he drove past this could only mean that he raised his head and that it was too late to evade the collision. So for a considerable distance the plaintiff was not looking ahead in order to have a full view of the road ahead, and to the right and to the left.. He knew at all times that the vehicle approaching was a truck and by focusing on the white line he disregarded the possibility that he might cause a collision. He took no precautions to evade the collision by moving to the left towards the yellow line and the edge of the road.

[20] According to the insured driver, he turned the horse to his left towards the yellow line and the first impact was the petrol tank. If he had not turned in that manner, a head on collision would have occurred. The plaintiff testified that he never took his hands off the steering wheel and that after the first impact his vehicle bounced back to collide with the truck a second time at its wheels, then it bounced back to come to a standstill off the road facing the direction in which he was travelling . There must have been a lot of room on his side of the road for the movements of the plaintiffs vehicle.

[21] There is also dispute about the distance the insured driver's vehicle came to a standstill after the accident, the plaintiff testified that it was a 100 meters and

the insured driver 10-12 meters. The sketch plan stated that it was not drawn according to scale and the police officer who drew the sketch was not called to testify, so the evidence of both witnesses is not helpful to the court.

[22] The insured driver denied all the allegations in paragraph 4 of the particulars of Claim. He denied having seen the plaintiffs vehicle flicker its lights. He testified that he made three attempts to avoid the collision which were not heeded by the plaintiff. He testified that had he not moved towards his left the plaintiffs vehicle would have gone under the truck. The following questions were put in cross examination:

> "In your evidence you said the truck driver got into your lane - yes
>
> Did you get to verifying this after the accident - no
> You don't know the point of impact - no"

[23] The flashing of lights by the insured driver as put in cross examination of the plaintiff cannot be viewed in isolation, because it was followed by a question that the plaintiff encroached into his lane of travel:

> *"The insured driver says he flicked his lights 2x in order to make you aware of how you were driving - not true he did not flicker*
> *He was approaching a curve and in order to avoid your vehicle which was coming onto his Jane he drove to the left to avoid you - not true*

The insured driver was also cross-examined on this point.

> *"when did you* see *the plaintiff's wheels in your lane - 30 meters two (2) of his right wheels were over the white line*
> *what happened - I flashed and started moving towards the yellow line*
>
> *From 30m away flashed lights and this did not affect him - he was over the white line and this was a warning*

[24] It is submitted that the version of the insured driver was not put to the plaintiff that he hooted and reduced speed. While indeed the reduction of the insured driver's speed was not put in cross examination, however available to the plaintiff was his statement which mentioned the hooting and in his evidence the insured driver confirmed that he hooted and reduced his speed by applying his breaks. Before the collision he was driving at 80km per hour. On the other hand the plaintiff did not reduce his speed or hoot or moved towards his left, he maintained his line of travel adopted before seeing the truck.

[25] The other issues addressed on behalf of the plaintiff which were not disputed by the insured driver related to the speed limit on the road; the type of vehicle the insured driver was driving whether it had one or two trailers and the number of head lights and spot lights and the how far the insured driver's vehicle came to a standstill after the collision. According to the evidence the speed limit on that road was 120km per hour.

The plaintiff testified that he was travelling at a 100km per hour and did not reduce his speed despite the alleged bright lights he was facing. The insured driver testified that he was travelling at 80km per hour and that he reduced his speed and as already mentioned. The evidence of both the plaintiff and the defendant shows that the insured driver had managed to move the horse (head) and that a head-on collision was avoided. The probability, given the type of truck the insured driver was driving, is that the insured driver's truck must have been at an angle because the first point of impact was the petrol tank which was situated towards the back, on the right just and below the horse;

> "One would have expected his vehicle to hit your vehicle with the front of his vehicle - the tank was the first point of impact which was not high and he also collided with the back right wheels

[26] Before addressing the bright lights. which allegedly blinded the plaintiff, I wish to deal with the submissions on whether there were spot lights fitted to the insured vehicle. Exhibit D1 was not the vehicle driven by the insured driver but a similar one. No evidence was tendered of the model and year of the truck driven

by the insured driver and how similar it was to 01. In an attempt to find out and understand what a spot light was, in order to deal with the submissions on behalf plaintiff, I came across the following in the Arrive Alive website under heading 'lighting, head lamps spot lights on vehicles and rules of the road':

> *"There is often much confusion among vehicle owners about the lights they are allowed to fit on their vehicles. Much of this is uncertainty pertaining to the terminology of what a headlamp is and what* a *spot light would be.*
>
> *Vehicle owners often refer to extra lights attached to the front of the vehicle as spot lamps where they are in fact not spot lights. A spot light is adjustable and can only be attached to the vehicle of* a *doctor.....(as provided in regulation 177 of the Road Traffic Act 93 of 1996)*
>
> As *a general guide where there are extra head lamps .....if they can be adjusted they are not legal. These lamps are* a set *of fixed lamps and* as *long* as *it complies with the headlamp requirement it should be legal, and they are not spotlights.*

Then examples are given of headlamps capable of emitting a main beam and one headlamp capable of emitting a dipped beam. What I could not find out was the meaning of adjustable lights and how these were operated, in order to determine whether the lights testified about were indeed spot lights, which were prohibited. I further went to the website of the Freightliner trucks just to see what sort of lights are fitted to these vehicles and found out that they fitted headlights, fog lights, brake lights, reverse lights, interior lights. I am therefore reluctant without having heard evidence on the type of lights which were fitted to the vehicle, and the model thereof to go by the concession of the insured driver who was an employee and not the owner that the truck he drove was fitted with spot lights.

[27] I have considered the authorities cited in the heads of argument for the plaintiff and am of the view that the facts therein are distinguishable and find no application herein in as far how they dealt with the view of a driver being blinded

by approaching headlights. In order to determine whether any apportionment should be applied, I shall therefore deal with the testimony of the witnesses in as far as they referred to bright lights and, the flashing of lights and of them blinding or not blinding the vision of the plaintiff on the one hand and the encroachment of the plaintiff's vehicle onto the insured driver's lane on the other hand. The test to be applied in determining negligence is that of the reasonable man. What steps were taken on the part of the plaintiff to avoid the collision when he was blinded by the bright lights and did he discharge his onus being proving negligence of the insured driver. Did the insured driver discharge his onus on his counter claim of proving that the plaintiff was negligent. In HB Kloppers book :The Law of Collissions in South Africa 8th edition , at pages 54 and 55 deals with the conduct of a driver when his view is obstructed by approaching lights:

> *"When drivers are approached by lights that may blind them they are obliged to regulate their speed accordingly, take all steps to prevent a collision and if necessary stop"*

The plaintiff by flickering his lights to the insured labored under the belief that he would dim his lights, however where the plaintiff realized that the insured driver was not heeding his call to deem, the plaintiff had a duty to adjust his behavior once it became clear that his assumption is incorrect: SANTAM v Strydom 1977 (4) SA 899 (A)

This is what the plaintiff testified:

> *" I noticed the truck from* a *distances of 300 meters from me, I could see that it was a truck, the lights were brighter. bigger and higher up. Due to the brightness of the light, I thought the lights were bright, I flashed my lights to him to dim and instead that is when he put on his bright lights. I flashed two times, I was 50 meters from the truck, the truck driver put his bright lights on. My initial impression was that his lights were bright,*

On his own observation the plaintiff at 300m away took the view that the lights of the oncoming vehicle were bright. He failed at that point to make adjustments by reducing his speed and moving more towards his left or to stop, instead he decided to look down and focus on the dotted middle line thereby neglecting to have a better view of the road ahead and of its width. An inference can be drawn that the lights of the oncoming truck were actually not on bright until it was 50km from the truck. It is my view that the plaintiff acted negligently by failing to conduct himself as a reasonable person would have in the circumstances.

[28] The insured driver testified:

> *·"I* saw a *vehicle approaching in my lane I flickered it with my lights once or twice to warn him I turned left into the yellow line that is when the vehicle collided with the truck against the diesel tank.....When I saw the vehicle for the first time it* was *50160 away."*

In my view 50/60m is to near a distance to flicker bright lights onto an oncoming vehicle even where plaintiff was in the insured driver's lane and this must have blinded the plaintiff. The hooting and reducing of the speed is all that the insured driver could have done to warn the plaintiff. It was inevitable that a collision would have occurred, because the insured driver was driving a fairly large vehicle consisting of two parts a horse and trailer which could not easily be moved .

[29] I conclude for the reasons above that the insured driver was negligent to a lesser degree than the plaintiff and would order an apportionment of 80/20 against the plaintiff.

[30] In the result the following order is given.

1. The defendant is liable to pay 20% of the plaintiffs proven or agreed damages;

TLHAPI VV

(JUDGE OF THE HIGH COURT)

MATTER HEARD ON	**:**	**7 FEBRUARY 2017**
JUDGMENT RESERVED ON	**:**	**7 FEBRUARY 2017**
ATTORNEYS FOR THE PLAINTIFF	**:**	**J VISSER ATT.**
ATTORNEYS FOR THE DEFENDANT	**:**	**MOLEFE DLEPU ATT.**