6/7/17

REPUBLIC OF SOUTH AFRICA

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

CASE NO: 94051/2015

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

6/7/2017 AHMahalelo
DATE SIGNATURE

In the matter between:

CORNELIUS PETRUS LOURENS Plaintiff

and

ROAD ACCIDENT FUND Defendant

J U D G M E N T

MAHALELO, AJ:

[1] The plaintiff instituted action against the defendant for damages arising from certain bodily injuries he sustained in a motor vehicle collision which occurred on 29 July 2011 at the intersection of R554 and N1 North, Eikenhof, Johannesburg.

[2] At the time of the collision the plaintiff was the driver of motor vehicle Nissan Sentra with registration number CMC 841 GP which was involved in the collision with a Nissan truck with registration number YWZ 011 GP and a trailer with registration number DWZ 249 EC(" *the insured vehicle*") driven by Prince Hlope ("*the insured driver*").

[3] The parties agreed to have the merits and quantum of the action adjudicated separately in terms of Rule 33(4) of the Uniform Rules of Court. The court ordered that the merits and quantum be separated. The issue the court had to determine was the merits only.

[4] The plaintiff, Mr Lourens was injured in a motor vehicle accident which took place in the early hours of the morning of 29 July 2011 around 03:30 am. His motor vehicle collided with the insured vehicle. In the plaintiff's particulars of claim it is alleged that the collision was solely due to the negligence of the insured driver in one or more or all of the following respects:

4.1 He did not keep a proper lookout and/or failed to take any alternative sufficient cognisance of the presence and the actions by the plaintiff;

4.2 He failed to avoid the collision by taking reasonable and proper care when he both could and should have done so;

4.3 He failed to apply the brakes of the insured vehicle at all or alternatively timeously and/or sufficiently;

4.4 He failed to maintain any alternatively sufficient control over the insured vehicle;

4.5 He drove the insured vehicle in the wrong lane namely the lane of oncoming traffic in which lane the plaintiff was driving.

[5] The defendant denies that the insured driver was negligent as alleged by the plaintiff and claims that the accident was solely due to the negligence of the plaintiff in one or more or all of the respects set out in paragraph 3.3 of his plea. This Court is therefore called upon to determine whether the insured driver was negligent in one way or the other.

[6] Two witnesses testified in support of the plaintiff's case namely, the plaintiff himself and Mr S.S Bezuidenhout, an expert forensic collision constructionist. The defendant led the evidence of the insured driver.

[7] The plaintiff's testimony in this court was brief. He testified that on the morning of the accident he was awakened by the sound of his dogs barking. He went outside the house in an attempt to establish why the dogs were barking. He noticed a vehicle and an image of someone walking towards the vehicle. Because he and his neighbours have experienced

incidents of theft in their premises in the past, he decided to turn back to his house to fetch his car keys in order to follow the vehicle. He drove on the R554 in a Westerly direction following what he believed to be the red rear lights of the vehicle which he earlier spotted. At some point, when he descended the bridge, he lost sight of the vehicle and he decided to turn around and go back home. After turning around, he was now heading home and was travelling in an Easterly direction. He noticed the lights of a motor vehicle approaching from the opposite direction. As this motor vehicle was approaching, he could see that it was heading in his direction and when it was close he noticed that it was a truck. According to the plaintiff he was driving in the middle of his correct lane of the road. He was not certain if he swerved. The next moment the collision occurred on his side of the road. He woke up some time later and noticed emergency personnel outside his vehicle. He asked if he could be of assistance to them but they informed him that they were there to help him. Thereafter he woke up after some time in hospital. He was injured. He attributed the collision to the negligent driving of the insured driver.

[8] Mr Bezuidenhout testified that he was appointed to investigate the collision which forms the subject matter of this case on behalf of the plaintiff. He commenced with his investigations on 4 December 2016. He was placed in possession of several documents which included the sketch plan, accident report, statements and photographs of the scene. He also visited the scene of the accident where he took further photographs and

certain measurements. He testified further that, from the photographs it is clear that the plaintiff's vehicle was damaged from the front to the rear, along the right side. According to him, it can be clearly seen that the plaintiff's vehicle was damaged by a force that was applied in linear alignment and therefore this suggests that the vehicle was travelling straight when the damage was caused. With regard to the insured vehicle, Mr Bezuidenhout testified that the insured vehicle was impacted on the right front. Both vehicles ended up on the right side of the road. The truck fell over on to its left side and faced the direction from which it came. As a result diesel and oil spilt onto the ground where it had come to rest and the area still displayed dead grass up to this day. Mr Bezuidenhout concluded that all the evidence suggests that the plaintiff's vehicle and the insured vehicle collided on the east bound lane of the road (the plaintiff's lane) resulting in both vehicles veering off the road on the plaintiff's side, thereafter the plaintiff's vehicle rotated to its final resting position and the insured vehicle rotated completely around some 180 degrees to where it rolled over to its left side. According to him the rolling over of the insured vehicle could not have caused damages to the right side and all the evidence further suggests that the insured vehicle rolled over only onto its left side and no further. Mr Bezuidenhout opined therefore that, the collision with the plaintiff's vehicle could not have had a substantial impact on the movement of the insured vehicle. According to him, all the evidence furthermore suggests that the plaintiff's vehicle could not have collided with the right side of the insured vehicle else the plaintiff's vehicle would have

come to rest on the right hand side of the road. Further, the plaintiff's vehicle could not have made contact with any of the wheels of the insured vehicle because there would have been rubber deposit evidence. It was Mr Bezuidenhout's further opinion that the plaintiff's vehicle could not have collided with the insured vehicle before it (the insured vehicle) swerved otherwise the collision would have been a full head- on -collision or the insured vehicle would not have rolled over. Mr Bezuidenhout concluded that all the evidence suggests that the two vehicles collided on the East-bound lane of the road (the insured vehicle being on the lane of approaching traffic) and that would be the only logical conclusion having regard to all the factual evidence.

[9] The insured driver testified that he started work at around 04:00 on the morning of the accident. He was driving a truck travelling in a Westerly direction on R554. At Eikenhof, just over the N1, he noticed a vehicle approaching from the opposite direction. He could not say if the driver was intoxicated or fatigued as the vehicle crossed over to his lane. Upon realising that the vehicle was coming towards him, he swerved away from it but the vehicle kept coming towards him and ended up colliding with him on the right front tyre, diesel tank and right axel tyres. The collision caused the truck's front tyre to burst and the truck lost its balance and rolled over to the East bound lane where it finally came to rest on its left side facing where it came from. According to him, the accident happened on his correct lane of travel. He testified further that, after the accident and on the

same morning he made a statement to the police. He confirmed that the statement is the one attached to the trial bundle on page 39 under subdivision F.

[10] During cross-examination he testified that he also attempted to avoid the accident by blowing his hooter, flashing his lights and applying his breaks. He added that, in fact, the plaintiff zig-zagged two or three times across the road before the accident occurred.

[11] It is trite that the plaintiff bears the *onus* to prove on a balance of probabilities that the insured driver was negligent in causing the accident.

[12] The version of what happened just prior to the collision as tendered by the plaintiff and the insured driver is mutually destructive. In these circumstances, it seems to me that the court must decide the matter solely on the probabilities attendant to this case including the credibility of the witnesses. The estimate of the credibility of a witness will therefore be inextricably bound up with 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 case, the plaintiff can only succeed if the court believes him and is satisfied that his evidence is true and that

the defendant's version is false.[1]

[13] Regarding the credibility of witnesses in factual disputes it is instructive to have regard to the *ratio* in *Stellenbosch Farmers Winery Group Ltd & Another v Martell et Cie SA & others*[2] where it was held:

> "*[5] On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So too on a number of peripheral areas of dispute which may have a bearing on the probabilities. 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), 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 extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (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's reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), 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 a 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."*

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[1] *African Eagle Life Assurance Co Ltd V Cainer* 1980 (2) SA 234 (W).
[2] 2003 (1) SA 11 (SCA).

EVALUATION OF THE EVIDENCE

[14] The plaintiff's version was simply that he saw a vehicle approaching from the opposite direction and immediately realised that it was coming directly on to his lane of travel. Consequently a collision took place. This version clearly states that the collision took place on the plaintiff's correct side of the road. In testifying to these facts the plaintiff appeared to be a truthful and honest witness. He never departed from his version notwithstanding a strenuous cross examination to which he was subjected. The plaintiff's testimony that the collision took place on his correct lane of travel finds corroboration from a set of tyre marks seemingly caused by the insured vehicle. From these marks it could be seen that they follow a trajectory from the West-bound lane across the East-bound lane and off the road. The plaintiff's version of how the collision occurred is further in accordance with the testimony of Mr Bezuidenhout. In my view therefore, the point of impact was on the plaintiff's correct lane of travel. Accordingly it is probable that the insured vehicle left its lane of travel and collided with the vehicle driven by the plaintiff on its correct side of the road.

[15] The defendant conceded that Mr Bezuidenhout was an expert for the purpose for which he was called. Mr Bezuidenhout testified in a straightforward and forthright manner. His expert opinion was in line with all the factual testimony given by both the plaintiff and the insured driver. He did not contradict himself nor were there any external contradictions in

his testimony. Mr Bezuidenhout was an exemplary witness on all accounts.

[16] On the other hand, the insured driver stated exactly the opposite as to how the collision occurred compared to the plaintiff. He was, however, not an impressive witness. He cannot be found to be a credible witness for the following reasons:

16.1 He lied about when the statement on page 39 was made and refused to make a concession that the statement could not have been made on the day of the accident.

16.2 His version was never put to either the plaintiff or Mr Bezuidenhout.

16.3 He changed and tailored his version on several accounts during cross-examination, in that, his version later included that he also attempted to avoid the accident by blowing his hooter, flashing his lights and applying his brakes. He testified that the plaintiff's vehicle crossed over to his lane of travel. Simultaneously he testified under cross examination that the plaintiff zig-zagged two or three times across the road before the accident occurred. This is clearly contradictory to what the insured driver testified about in chief.

[17] The defendant had a duty to put their version to the plaintiff's

witnesses. In the matter of *Small v Smith*[3] Claassen J stated the following:

> *"It is, in my opinion, elementary and standard practice for a party to put to each opposing witness so much of his own case or defence as concerns that witness and if need be to inform him if he has not been given notice thereof, that other witnesses will contradict him so as to give him full warning and opportunity of explaining the contradiction and defending his own character. It is grossly unfair and improper to let a witness' evidence go unchallenged in cross examination and afterwards argue that he must be disbelieved."*

[18] The *dictum* in *Small v Smith supra* was approved in the matter of *Van Tonder v Killian N.O en Ander*[4], and again in the matter of *President of the RSA v South African Rugby Football Union*[5] where the Constitutional Court also approved the principle enunciated by the House of Lords in *Browne v Dunn*[6] where it was held that if a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged testimony of a witness is accepted as correct.

[19] The defendant's counsel has not put the insured driver's version to the plaintiff or Mr Bezuidenhout. Having regard to the above authorities, it would be grossly unfair and improper for the defendant to argue that the plaintiff's witnesses should be disbelieved.

[20] The evidence tendered by the plaintiff accords with the findings of the expert witness and the expert witness' findings were supported by the insured

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[3] 1954 (3) SA 434 (SWA) at 438E-F.
[4] 1992 (1) SA 67 (T) at 72.
[5] 2000 (1) SA 1 (CC).
[6] (1893) 6 R 67 (HL).

driver's in so far as it relates to the damage on the vehicles and their final resting positions.

[21] In my view the probabilities in the whole case favour the plaintiff. I therefore come to the conclusion that the plaintiff succeeded in discharging the onus. Accordingly this court finds that on a balance of probabilities the insured driver was negligent in causing the collision which took place on 29 July 2011 at the intersection of R554 and N1 North, Eikenhof, Johannesburg.

[22] In the result the following order is made:

22.1 The defendant is ordered to compensate the plaintiff for all his agreed or proven damages

22.2 The defendant to pay the costs.

M B MAHALELO
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES:

FOR THE PLAINTIFF:	ADV J F VAN DER MERWE
INSTRUCTED BY:	SPRUYT INC
FOR THE DEFENDANT:	ADV GEDEDGER
INSTRUCTED BY:	TAU PHALANE INC

DATE OF HEARING: 25 MAY 2017