HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Not reportable
Not of interest to other Judges

CASE NO: 2953/2016

14/12/17

SHATADI MARY MAHLOBOGOANE Plaintiff

and

ROAD ACCIDENT FUND Defendant

JUDGMENT

MAKGOKA J

[1] This is an action for damages in terms of the Road Accident Fund Act, 56 of 1996, as amended (the Act), pursuant to a motor vehicle accident which occurred on 20 June 2015. The plaintiff, Ms Shatadi Mahlobogoane, was a driver of one of the two vehicles involved in a collision with each other. The other vehicle (the insured vehicle) was driven by Mr Amos Cibi (the insured driver).

[2] The plaintiff suffered head injuries and a fracture of the left leg. She was admitted to a hospital where she was treated for the injuries before being discharged. As a result of the injuries, the plaintiff issued summons against the defendant for payment of a sum of R2 400 000 for general damages and loss of earning capacity.

[3] At the commencement of the trial I made an order in terms of rule 33(40 of the Uniform Rules of Court, separating the issues of liability and quantum. As a result, only liability is to be determined in these proceedings. In the event that issue is determined in the plaintiff's favour, the determination of quantum is to be postponed sine die.

[4] Adv. MS Maibelo appeared for the plaintiff, while the defendant was represented by Adv. MP Ramela. A total of four witnesses testified during the trial. On the one hand, the plaintiff testified and called Ms Mpho Makwala (occupant of in her vehicle); Mr Ngoako Selotola and Ms Rirandzu Makhubele (both police officers who attended the scene after the collision). On the other, the defendant presented the evidence of the insured driver and closed its without calling further witnesses.

[5] The plaintiff's evidence can be summarised as follows. On the day of the incident at approximately 19h00, she was driving along the Modderfontein Road,

from Phomolong towards Kempton Park. The road surface was dry. As it was winter, it was already dark and her headlights were on. The Modderfontein is a two-way carriage road in each direction. She was in the company of her friend, Ms Makwala, who was occupying the front passenger seat, and her then 10-year child, who was seated in the rear seat. She was travelling at the speed of approximately 60 km/h.

[6] There were no vehicles in her lane of travel, either in front or at the back. There was a vehicle in the opposite lane, driving in the direction of Phomolong. Suddenly, the insured vehicle, which was driving in the opposite direction, emerged from behind that vehicle and overtook it, which resulted in a head-on collision with her vehicle. The collision occurred in her lane of travel. Where the accident occurred, the lanes are separated by a solid barrier line.

[7] According to her, there was no way in which she could have averted this collision because on the left side of the road there were road works, and excavations. Had she swerved to that direction, she would have landed into the excavations. However, on the right side of the road (the left of the insured driver) the road was clear without any obstructions. From her observation the insured driver was travelling at a high speed, which she estimated to have been 120-150km/h, because of the extensive damage to her vehicle.

[8] When she saw two vehicles for the first time, she was approximately 25 paces away. The other vehicle that was being overtaken by the insured vehicle went past safely. The plaintiff disputed the proposition put to her during cross-examination that the collision was caused by her when she attempted to overtake a vehicle in front of her.

[9] The evidence of Ms Mpho Makwala, the second witness in the plainitiff's case, largely mirrored that of the plaintiff in every material respect. Constable Selotola is one of the two police officers who were first at the scene of the accident shortly after it had occurred. He also drew the sketch-plan. He testified about the positions of the vehicles as he found them upon arrival at the accident scene. He marked the point of collision in the plaintiff's lane of travel. He determined the point of impact by the oil and water spillage on the road surface.

[10] Constable Makhubele accompanied Captain Selotola. She was responsible for completing the accident report. He also mentioned that they had to divert the traffic on the side of the insured vehicle because on the plaintiff's side there were obstructions in the form of trees. She also confirmed the position (upon arrival) of the vehicles as depicted on the sketch-plan. However, during cross-examination she testified that upon arrival each of the two vehicles was at each least a quarter on the

road surface and three quarter was off the road. She expressed disagreement with the depiction of the positioning of the vehicles in the sketch-plan.

[11] The insured driver, Mr Cindi, testified briefly as follows. On the evening of the incident he was driving from Kempton Park. After he had joined the Modderfontein Road, on a steep, he saw the plaintiff's vehicle approaching from the opposite direction, on the bright lights. Despite that there is a barrier line on that road prohibiting overtaking, the plaintiff was trying to overtake three cars, and it was in his lane of travel and approaching him.

[12] Recognising that an accident was about to happen, he contemplated swerving to the left to avoid it, but could not because on his left hand there were pedestrians, whom he tried not to collide with. While still trying to swerve past the pedestrians, the plaintiff's vehicle collided with his, in his lane of travel. He never moved out of his lane of travel. As far as the damage to his vehicle is concerned, the insured driver testified that both the driver and passenger seats, the front lights as well as the engine were all damaged.

[13] That concluded the evidence. It remains for the court to determine whether the plaintiff has discharged the onus on the balance of probabilities. It is clear from the evidence of both the plaintiff and the insured driver that the court is confronted

with two mutually destructive versions. The correct approach to be adopted when dealing with mutually destructive versions was succinctly set out in the case of *National Employers General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (E) 440E-G, where Eksteen AJP said:

'... 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 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, 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.'

[14] This approach was approved by the Supreme Court of Appeal in *Stellenbosch Farmers Winery Group Ltd and Another v Martell Et Cie and Others* 2003 (1) SA 11 (SCA) para 5, where Nienaber JA developed the following technique:

'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) [credibility], 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 extra curial statements or actions; (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' [reliability] will depend, apart from the factors mentioned under (a)(ii), (iv) and (vi) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality and integrity and independence of his recall thereof. As to (c) [probabilities], 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 the 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.'

[15] The principle is therefore firmly established that when there are mutually destructive versions before the court, the plaintiff's onus of proof can only be discharged if he establishes his case on a preponderance of probabilities. The corollary principle is also established that the requirement that a court has to be satisfied that the plaintiff's version is true and that of the defendant false in order for the plaintiff to succeed in discharging his onus of proof, is only applicable in cases where there are no probabilities one way or the other (see *African Eagle Life Assurance Co Ltd v Cainer* 1980 (2) SA 324 (W)).

[16] Applying the above principles to the facts of the present matter it is first necessary to consider the credibility of the plaintiff and the insured driver. The plaintiff impressed me as a witness. She answered questions promptly, directly and spontaneously. Her evidence was simple and straight-forward. Despite long and arduous cross-examination, she maintained her clam and dignified demeanour. There were no internal contradictions in her evidence. Her evidence is corroborated by Ms Makwala, who a passenger in the plaintiff's vehicle. I do not lose sight of the fact that Ms Makwala is not an independent eye-witness, but a friend of the plaintiff. Her evidence thus must be cautioned against latent bias. However, I did not gain any impression that there was blatant bias in her evidence.

[17] Her testimony can however, be safely accepted because it is corroborated by the testimony of Constable Selotola. This is especially with regard to the point of impact, as determined by the positioning of the vehicle upon arrival at the scene, and the position of the oil and water spillage on the road surface. According to Constable Selotola, the point of impact was on the path of travel of the plaintiff.

[18] What was said about the plaintiff, cannot be said of the insured driver, whom I found to be wholly unsatisfactory as a witness. He was garrulous, argumentative, obtuse and evasive. He failed to directly answer simple questions. During cross-examination he raised issues that were never put to the plaintiff, creating an

impression that he was tailoring his evidence as the cross-examination progressed. For example, he testified that the plaintiff was trying to overtake three vehicles when the collision occurred. However, during cross-examination, it was put to the plaintiff that there was only one vehicle in front of her, which he tried to overtake.

[19] The insured driver had a great deal of difficulty in explaining his own extra-curial statement. It is highly improbable that the plaintiff would have been driving at a high speed as testified by the insured driver. The plaintiff testified that she was still a 'new' driver who was cautious. There is another aspect. It is this. The insured driver testified that he suffered bodily injuries in the accident. I assume they were serious since it was his evidence that he was trapped inside his vehicle after the accident.

[20] If he was not a party at fault, he surely would have lodged a claim for personal injuries with the defendant. That he did not do so, is a strong pointer of appreciation of his culpability in the collision. The same can be said of his decision not to institute a damages claim against the plaintiff as a result of damages to his vehicle, since his testimony was that it damaged beyond repair. Overall, the insured driver was not a credible witness. His version is not supported by the probabilities. I therefore conclude that the plaintiff has discharged the onus resting upon her.

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

1. The insured driver is declared to be 100% responsible for the motor vehicle collision which occurred on 20 June 2014;

2. The defendant is accordingly liable for, and ordered to pay, 100% of the plaintiff's proven or agreed damages;

3. The determination of the plaintiff's damages is postponed sine die;

4. The defendant is ordered to pay the costs of this portion of the trial.

TM Makgoka
Judge of the High Court

APPEARANCES:

For the Plaintiff:	MS Maibelo Instructed by: Kgadima Kekana Attorneys, Pretoria
For the Defendant:	MP Ramela Instructed by: Rambevha Morobane Attorneys, Pretoria