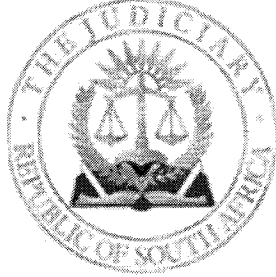


IN THE HIGH COURT OF SOUTH AFRICA



GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 2017/15116

DELETE WHICHEVER IS NOT APPLICABLE

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

In the matter between:

KUDJOANE, POTH

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

Heard: 15 October 2018

Delivered: 17 October 2018

Summary: (Claim for damages – vehicle collision – liability only – no contributory negligence established)

JUDGMENT

LAGRANGE, J:

Background

[1] The plaintiff is claiming delictual damages from the plaintiff arising from a motor vehicle collision in which he was the driver of one vehicle. The driver of the other vehicle is unknown having fled the scene of the accident after it happened. By agreement between the parties the sole issue for determination in these proceedings is the issue of liability. Only the plaintiff testified.

[2] The collision took place at about 23:30 on 26 April 2014. The plaintiff was traveling on the N12 dual carriageway towards Carltonville and was approaching the stop street at the intersection of the N12 in the road from Randfontein to Westonaria. Before reaching the intersection, his vehicle was struck by a car driven by the unidentified driver which was crossing the N12 from a stop street entering the N12 from the left of the plaintiff's direction of travel.

[3] The plaintiff was traveling on the right hand lane of the westbound side of the dual carriageway. According to his evidence, he was passing a petrol tanker in the left-hand lane when he was struck on the left-hand side by the vehicle coming from the other direction which caused his vehicle to roll. He agreed with the summary description on the accident report form, though he did not say when the report was compiled. On the face of the report it appears to have been written up by the constable concerned nearly an hour and a half after the accident at 00:50 on 27 April 2014. The very summary description of the accident compiled by the constable read:

'It is alleged that M/V A was traveling straight [at/on?] N12 when M/V B came from Waterpan road joining N12 bumped vehicle A on the left side.'

[4] It was put to the plaintiff that the accident report indicated that the vehicle which struck his was turning left, but he was adamant that it was going 'straight to Johannesburg'.

[5] To explain the accident better the plaintiff drew his own rough sketch of the accident which showed that the other vehicle had struck his vehicle while he was traveling in the right-hand lane. Although he had said in evidence in chief that the accident occurred when he was passing the tanker, he explained that it occurred just after he had passed the tanker and the vehicle struck his vehicle on the left-hand side.

[6] He testified that there was no opportunity to brake, but he had swerved to try and avoid the other vehicle. He testified that it all happened so fast that it would not have made any difference if he had braked. He did not even know there was a stop street where the vehicle entered the N12. Contrary to the suggestion in the accident report that the collision was a 'sideswipe' his recollection was that the other vehicle was moving directly across his line of travel. When it was put to him that the accident took the form of a sideswipe of his vehicle, he insisted that 'the car was crossing to the Johannesburg side', which appears to have been a reference to the vehicle attempting to cross the N12 to get to the eastbound side of the dual carriageway going towards Johannesburg, which would have entailed crossing the westbound lanes in which the tanker and plaintiff were traveling.

[7] He claimed he did not see the other vehicle until just after he had passed the tanker. There was no time to slow down as the vehicle was very close. He also testified he was decelerating in anticipation of the main intersection he was approaching. There was no suggestion he was speeding.

[8] In his occupational therapists account of what he told her of the accident, she records him as saying that the other car was joining the road when it collided with his vehicle causing his vehicle to capsize. Similarly, the clinical psychologist recorded his version as being that whilst he was passing the truck in the right hand lane,

'... A car saw the truck and wanted to turn in front of the truck only to find Mr Kudjoane in his lane. Mr Kudjoane swerved and the car drove into him. He was wearing a seatbelt. He lost consciousness and he only became aware of his environment in hospital.'

The plaintiff could not explain why the experts would have recorded his version as they did, even though he was the only possible source of information about the accident.

[9] He was asked in evidence in chief if he saw the stop street where the other vehicle entered the N12 and his answer was he did not as it was dark. At the time he was reducing his speed from approximately 80 km an hour because he was approaching the intersection with the Randfontein road.

[10] It was argued but it was not put to the plaintiff that he ought to have seen lights from the other vehicle, which is a proposition that was based on an assumption that the other vehicle's lights were on.

[11] After the accident he was taken to Leratong hospital accompanied by family members who had come to the scene of the accident.

Evaluation

[12] The defendant did not put up an alternative version of the accident, but sought to find flaws in the plaintiff's account in order to at least establish a claim of contributory negligence on his part. The thrust of this attack on his case was that he did not keep a proper lookout, and failed to brake when he saw the other vehicle.

[13] While there were a number of discrepancies between the various forms signed by the plaintiff and the characterization of the type of collision recorded by the medical experts he consulted compared with the version he gave in his testimony, those discrepancies in the description are not so starkly different that they postulate two completely different and incompatible factual scenarios. On an assessment of the probabilities arising from the evidence it is difficult to avoid the following conclusions:

[13.1] The other vehicle had either struck the plaintiff's vehicle because the driver was attempting to cross the westbound lanes in order to enter the eastbound lanes of the N12, or it had turned left onto the N12 in the westbound direction of the traffic, but had not turned into the left-hand lane where the tanker was traveling, but had crossed that lane and entered the right-hand lane where the plaintiff was traveling.

[13.2] On either account, the other vehicle had entered the N12 from a stop street in the path of oncoming traffic which had right-of-way.

[13.3] The plaintiff testified that he did not see the stop street from which the other vehicle entered the N12 because it was dark. It was not put to him that he would have seen it if he had been keeping a proper lookout.

[13.4] The collision took place with virtually no warning and the plaintiff had no reasonable opportunity to brake. There was no evidence that the other vehicle had taken evasive action. The best the plaintiff could do in the circumstances was to swerve to attempt to avoid the collision, which he did.

[14] I was referred to the judgment in case of *Mmeti v Road Accident Fund*¹, by defendant's counsel. In that case contributory negligence of 20 % was attributed to the plaintiff. Unlike in this case, where the insured driver fled the scene of the accident, the insured driver testified. There were a number of factual similarities between that case and this. In particular it also involved a collision in which the plaintiff was travelling on a main road, having right of way, but struck a vehicle which had entered the main road from a stop street. Despite the similarities what stands out as a distinguishing factors are in that *Mmeti's* case:

[14.1] The plaintiff was speeding.

14.2] The plaintiff had a clear view of the stop street from which the other vehicle entered the road he was travelling on.

[15] It is true that even though the plaintiff had right of way a driver has a duty to keep a proper lookout when approaching an intersection and have regard to traffic entering the road from a side street (See *Van der Westhuizen v SA Liberal Insurance Co. Ltd*²). However, there was no evidence that the plaintiff either would have seen the stop street had he kept a proper lookout or ought to have been aware of the existence of the stop street.

Conclusion

[16] In the circumstances I am satisfied that the plaintiff has established on a balance of probabilities that that the insured driver was negligent. I am also satisfied that the

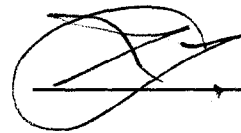
¹ (2038/2008) [2011] ZANWHC 82 (3 February 2011).

² 1949 (3) SA 160 (C) at 172.

defendant has failed to discharge the onus that the plaintiff's conduct evidenced a degree of negligence on his part. Accordingly, there is no basis for making a finding of contributory negligence in this matter.

Order.

1. The defendant is held liable to compensate the plaintiff for 100 % of his damages, the quantum of which remains to be determined in subsequent proceedings.
2. The defendant is ordered to pay the plaintiff's costs.

A handwritten signature in black ink, consisting of a large, stylized 'L' followed by a horizontal line and a small flourish.

Lagrange J

Acting Judge of the High Court

APPEARANCES

APPLICANT:

L Steyn instructed by
McMillan Attorneys

RESPONDENT:

N Adams instructed by
Shereen Meersingh &
Associates