**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA**
**GAUTENG LOCAL DIVISION, JOHANNESBURG**

**CASE NO: 36670/2017**

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

..... .....
DATE SIGNATURE

In the matter between:

**MATHEWS MATOME MAHLOKOANE** Plaintiff

and

**ROAD ACCIDENT FUND** Defendant

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**JUDGEMENT**

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**RAMAPUPUTLA, AJ**

**INTRODUCTION**

[1] The Plaintiff instituted a claim for personal injuries against the Defendant on the basis that on 25 November 2015 the insured driver negligently caused a collision which resulted in him suffering injuries and subsequently suffering damages. Liability was separated from quantum in accordance with Rule 33(4) of the Uniform Rules of Court.

**FACTS OF THE CASE**

[2] On the 25th November 2015, at about 17h45, the plaintiff was driving on the N14, (R511) Mulderdrift, Randburg, driving from south to north, from the garage where he had fixed a fridge.

[3] A little while of entering the N14 a collision occurred when his motor vehicle was rear-ended by the insured motor vehicle. After that collision his motor vehicle landed on the right lane of the road. The plaintiff suffered a fracture to his right arm and was thereafter taken to Milpark Netcare Hospital where he received medical treatment for his injuries.

[4] The following facts are common cause:

> [4.1] This action arises as a result of a collision of the 25th November 2015 between motor vehicles bearing registration […] GP driven at the time by the plaintiff and […] GP driven by the insured.

[4.2] In terms of the Road Accident Fund Act[1] the defendant is liable to handle claims and compensate claimants for damages arising out of the negligent driving of a motor vehicle.

[4.3] The collision occurred on the N14 north bound carriageway. N14 is a dual carriage road and has a speed limit of 120 km/h. The collision occurred at around 17H45 in the afternoon. The collision occurred during daytime and visibility was clear. The plaintiff had just joined the N14 roadway from a slipway exiting a petrol station located alongside the N14.

[4.4] The parties admitted into evidence a "photo plan and key" with 13 photos depicting the N14 road surface.

**ISSUES TO BE DETERMINED BY THE COURT**

[5] The court is seized with the determination of liability. In particular, the court is tasked with a determination of who is responsible for the accident. The court is further requested to determine whether there was any contributory negligence, if so, its extent.

**REASONS FOR JUDGMENT**

[6] The plaintiff testified that on 25 November 2015 at about 17h45 he was driving on the N14 from south to north, from the garage where he had fixed the fridge. He drafted a sketch plan which was marked as "Exhibit C" depicting the direction of his travel and the position of the vehicle he was driving and marked its position before the collision as 'A1' and after the collision as 'A2'. He testified that there are no road signs between the on-ramp and the N14 but he was aware that he must stop and ensure that there is no traffic/vehicles before entering the N14.

[1] 56 of 1996 as amended by Act 19 of 2005.

[7] He stopped at the on-ramp and entered as he did not see any vehicles on the N14 at the time. He was driving at 40 km/h from the garage to join the N14 from the left lane and he observed there was no car and subsequently entered the highway. He drove a little while after entering the N14 and was rear-ended by the insured vehicle. There is a steep hill towards the south of the N14 which impedes visibility of north bound oncoming traffic but the insured driver could see his vehicle. He disputed the depiction of his motor vehicle and the description of the accident on the accident report. He testified that the insured driver is responsible for the collision because he was rear-ended by him and the latter could have avoided the collision but failed to see the vehicle in front of him.

[8] Counsel for the defendant argued that the insured driver had a right of way. Under cross-examination the plaintiff conceded that the insured driver had a right of way. This cannot be disputed but the right of way is not absolute.

[9] The duties of a driver executing a turn to the right and those of following and oncoming drivers have been authoritatively stated in *Sierborger v South African Railways and Harbours*[2] as follows:

> "The heavy flow of urban traffic would be seriously interfered with if, on each occasion when a signal is exhibited by a motorist intending to turn across the line of traffic, such traffic were required to come to a stop or slow down. Such signal is of course a notification to following and oncoming traffic that the driver intends to turn across the line of traffic, but equally implicit in it is that he intends to do so at an opportune moment and in a reasonable manner. It is also, more particularly, a signal to following traffic that the driver in question intends to move over towards the middle of the road preparatory to choosing the opportune moment to cross over on to that half of the road being used by traffic coming in the opposite direction. A driver of a vehicle proceeding in this latter direction does not, with reference to a vehicle whose driver has signalled an intention to turn across his path and who is directing his vehicle towards the middle of the road preparatory to doing so, incur an obligation to stop or slow down. Certainly he must keep such vehicle under observation and as soon as it is clear that, despite the inopportuneness of the moment, it intends to cross in front of him, he must take all reasonable steps that may be necessary to avoid colliding with it."

[10] From this I conclude that even if the Plaintiff entered the N14 at an inopportune moment, the insured driver failed to take reasonable steps that were necessary to avoid colliding with the Plaintiff's motor vehicle. This I readily

[2] 1961 (1) SA 498 (A) at 505A-C.

conclude because the insured driver who was outside court did not come inside the witness box to testify what he had done to avoid the collision.

[11] The Defendant's counsel argues that the Plaintiff did not see the insured motor vehicle and could not explain its presence. He explained that the steep hill was very far from the point of impact. The Defendant's counsel further argues that there is no impediment to a proper lookout being maintained to the road where the insured driver had been travelling and that Plaintiff ought to have seen the insured driver's vehicle. He argues that failure to see the insured's vehicle does not absolve the Plaintiff from his duty to keep a proper lookout and ensure that it was safe to join the N14.

[12] It is argued that the failure by the Plaintiff to keep a proper lookout and entering the N14 as he did, was the cause of the accident. It is argued that he should have foreseen that this action could endanger other road users and he was therefore negligent. This argument is flawed because the plaintiff had already testified that he stopped at the on-ramp and entered as he did not see any vehicles on the N14 at the time. He was driving at 40 km/h from the garage to join the N14 from the left lane and had observed no vehicle and subsequently entered the highway.

[13] I conclude that he could not have foreseen that his action could endanger other road users and there were no road users at the time he acted. If anything, he might have misjudged his action. The Plaintiff's misjudgement cannot be regarded as culpable in the absence of evidence to the contrary. In *Steenkamp v Steyn*[3] it was stated that the plaintiff misjudged the situation and that was an error of judgement, but unless such judgement was culpable, in the sense that a reasonable careful driver would not have been guilty of it, it was not negligence.

[3] 1944 AD 536.

[14] It is trite that a driver who collides with the rear of a vehicle in front of him is *prima facie* negligent unless he or she can give an explanation indicating that she or she was not negligent.[4]

[15] It is further argued that Plaintiff failed to discharge the onus placed on him to prove the insured driver's negligence. Counsel for the Defendant relied on *De Maayer v Serebro and Another,*[5] the SCA continues and refers to another judgment of *Milton v Vacuum Oil Co* 1932 AD 197 where it is stated that:-

> "…[T]urn[ing] across the line of oncoming traffic…is an inherently dangerous manoeuvre and a driver who intends executing such a manoeuvre to do so by properly satisfying himself that it is safe and choosing the opportune moment to do so".

However this quote does not end there. It further goes on to say "This rule, however, does not create a general presumption of negligence since each case has to be considered on its own special facts and circumstances. It does not confer on a throughdriver an absolute right of way". A throughdriver has to be vigilant and in appropriate circumstances reduce his speed to accommodate a driver who turns across his path of travel. There is no evidence from the defendant that he reduced his speed to accommodate the plaintiff. The only evidence before us is that the plaintiff entered the road cautiously by driving at a speed of 40 km/h from the garage to join the N14 from the left lane and he observed there was no car and subsequently entered the highway. He did not see the insured motor vehicle nor know from where it had come.

[17] Although the Plaintiff looked before entering the road, he erred in concluding that it was safe to enter the N14. Although with hindsight the plaintiff made an error of judgement, this should not be visited with negligence given there is no evidence to suggest that he had been negligent.

[18] Before court there is only one version, that of the Plaintiff. There is no factual evidence of any negligence attributable to the Plaintiff and consequently

[4] H B Kloppers *The Law of Collision in South Africa* 7th Ed page 78.
[5] [2005] 2 All SA 553 (SCA) 557.

the version of the Plaintiff remains uncontested. The Plaintiff had discharged the onus of proving on a balance of probabilities that the driver of the insured vehicle was solely to blame for the collision.

[19] I was informed by the Defendant's counsel that the insured driver was outside the court but was not called to come and testify despite his presence in court. The Defendant's failure to call the driver of the motor vehicle to testify may play an important if not decisive role in the determination of liability.

[20] In *Galante v Dickinson*[6] the defendant opted not to call witnesses including the insured driver. It was found to be fair (at all events) to say that in an accident case where the defendant was himself the driver of the vehicle the driving of which the plaintiff alleges was negligent and caused the accident, the court is entitled, in the absence of evidence from the defendant, to select out two alternative explanations of the cause of the accident which are more or less equally open on the evidence that one which favours the plaintiff as opposed to the defendants.

[21] The Plaintiff is a single witness. Judgement may be given in any civil proceedings on the evidence of any single competent and credible witness.[7] The Defendant did not put the insured driver's version to the Plaintiff. The Defendant's counsel did not cross-examine the Plaintiff on the version that his motor vehicle was rear-ended by the insured motor vehicle. In the case of *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*[8] the court made it clear that the institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact

[6] 1950(2) SA 460 (A) 465.
[7] Section 16 of the Civil Proceedings Evidence Act 25 of 1965 ("CPEA").

[8] 2000 (1) SA 1 (CC) at 5.

by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct.[9]

[22] In the absence of the Defendant's evidence to rebut the Plaintiff's evidence, I conclude that the Plaintiff has discharged his obligation to adduce evidence that gives rise to an inference of negligence on the part of the insured driver. The version by the Defendant that the Plaintiff entered the left lane and went into the fast lane when it was unsafe to do so is not supported by evidence and therefore not before the Court. Before me is one version which is not controverted.

[23] The plaintiff was not an impressive and good witness. There are inconsistencies and/or contradictions in his testimony. According to the assessor's report the distance from the point of impact towards the peak or uphill estimation is 111.25 meters. The Plaintiff however said he estimated the distance to be about three cars. He conceded the accident occurred on the flat portion of the road. It is further argued according to the photographs, there is no impediment to visibility for a distance of 111.25 meters and therefore the Plaintiff ought to have seen the insured driver's vehicle.

[24] I, however, find that the Plaintiff's inconsistencies and/or contradictions are more of a reflection of his intellect that his integrity. The inconsistencies and/or contradictions do not insult the evidence that enables the Plaintiff to discharge the burden of proof incumbent on him.

[9] Ipid 36-37 para 61.

[25] The Defendant pleaded in the alternative that the Plaintiff's claim be reduced in terms of the Apportionment of Damages Act[10]. Section 1(a) provides where any person suffers damage which is caused partly by his own fault and partly by the fault of any other person, a claim in respect of the claimant but the damages recoverable in respect thereof shall be reduced by the court to such an extent as the court may deem just and equitable having regard to the degree in which the claimant was at fault in relation to the damage. There is to my mind no evidence to suggest that the Plaintiff was himself negligent. In this instance I am satisfied that Plaintiff has discharged the onus of proving on a balance of probabilities that the driver of the insured vehicle was solely to blame for the collision. Apportionment is not applicable in this case.

[26] I conclude that the Plaintiff has on balance of probabilities established the *prima facie* case that the insured driver negligently rear-ended the vehicle he was driving. As a result he suffered personal injuries. The Defendant is therefore the sole cause of the collision.

[27] Wherefore I make the following order:

1. The Defendant is wholly liable for the Plaintiff's agreed or proven damages.
2. Judgement is entered in favour of the Plaintiff with costs.

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N.E. RAMAPUPUTLA
Acting Judge of the High Court,
Gauteng Local Division

For the Plaintiff: Adv M J Sethunya

Instructed by: Sepamla Attorneys

[10] Section 1(a) of Act 34 of 1956.

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| | 7th Floor, Carlton Centre<br>150 Commissioner Street<br>Johannesburg |
| For the Defendant: | Adv P. Mashishi |
| Instructed by: | Nozuko Nxusani Inc<br>69 Jan Smuts Avenue<br>Johannesburg |
| Date of hearing: | 26 October 2018 |
| Date of delivery: | 28 November 2018 |