IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED

DATE: .....

SIGNATURE: .....

Case No. 72894/2015

In the matter between:

SS MONDLANE **PLAINTIFF**

And

ROAD ACCIDENT FUND **DEFENDANT**

JUDGMENT

MILLAR, A J

1. The Plaintiff instituted an action for damages against the defendant for damages suffered by him in a motor vehicle collision which occurred on 18 March 2012. The defendant is the statutory body established for the purpose of dealing with such actions.

2. The plaintiff applied at the commencement of the proceedings for an order separating the determination of negligence from the other issues in terms of rule 33(4) of the Uniform Rules of Court. The application was supported by the defendant. I made the order sought and the trial proceeded.

3. It was common cause between the parties that on Sunday 18 March 2012 and at midday, on a road known as “Back Road” in the vicinity of the Kriel and Matla power stations, Mpumalanga Province, a minibus driven by the plaintiff left the road and rolled. The vehicle was extensively damaged, and the plaintiff injured.

4. In issue was the cause of this occurrence.

5. There were only two witnesses called to testify, one for the plaintiff and one for the defendant.

6. The plaintiff testified. He did so in isiZulu and was assisted by an interpreter. He testified that on the day in question he had been on duty for his employer EC

Construction. He was employed as a driver who had to go and fetch co-employees at the Kriel power station in the company minibus whose shift had ended. He knew the road well having driven on it many times. It was a straight road with one lane of traffic in each direction with a broken white line which permitted overtaking when it was safe. The speed limit on that road was 100 km/h. It was a Sunday and the road was clear.

7. He had been driving at approximately 65 km/h when he had seen a coal truck travelling in the same direction as he was in front of him. The truck was travelling slowly and as he approached it he had moved to the right lane and increased his speed to 70 km/h. His intention had been to overtake the truck.

8. When he was about 1m from the back of the truck, the front of the truck had moved into the right lane in front of him and the trailer had begun to follow. He had applied brakes and swerved left to avoid a collision. The vehicle had moved onto the gravel verge and he had lost control. The vehicle began to roll. His next recollection is waking up in hospital. He never saw the vehicle again. He testified that he had sustained an injury to his hand, had broken ribs, an injured hip and bruises on his head.

9. The safety officer of his employer had come to see him in hospital a few days later and that was the first time he recalls telling anyone what happened. He subsequently after his discharge made a statement to the Police.

10. The defendant called Police Officer Qasha to testify. He testified in English. He was on duty in the CSC (Customer Service Centre – Charge Office) on the day in question. A report of an incident had been received and he had driven to the scene with a colleague. On arrival, they had found an ambulance and the damaged minibus. He had proceeded to gather information about the incident so that he could complete an “Accident Report” and had also prepared a sketch plan of the scene. His colleague had gone to control the traffic and took no part in gathering information. He had only attended 12 accident scenes in his career up to that time and had received no formal training in accident investigation.

11. When he had arrived at the scene, the plaintiff had already been removed from the minibus and was inside the ambulance lying on a gurney. The paramedics were attending to the plaintiff. He spoke to the plaintiff for an estimated 20 minutes and it is from him that he had obtained the version recorded in the accident report that the plaintiff had lost control of the minibus and that it had left the road and overturned. He was referred to photographs of the minibus which showed extensive damage and confirmed it was the vehicle he had seen on the day.

12. He testified that the plaintiff had obviously been in pain and that he had the impression that he had difficulty with his chest. He also saw bruises on the plaintiff's head. The plaintiff had been able to communicate with him and had furnished him with all the particulars sought such as his name and address etc. He was adamant that he had not told him that there had been a truck which had caused him to lose control. When it was put to him that the plaintiff had no recollection of speaking to him, he was adamant that he had spoken to him.

13. He had gone back to the station and completed the accident report, his sketch and had made a statement.

14. In response to a question by the court he testified that the plaintiff had been lying on a gurney in the ambulance when he spoke to him. The plaintiff's head had been inside the ambulance nearest the front and so he had had to climb into the ambulance to speak to the plaintiff. The paramedics were also inside the ambulance attending to the plaintiff at the same time.

15. The cause of the collision and the plaintiff's subsequent report of it are the two issues to be decided that emerge from the evidence.

16. The challenge to the plaintiff's version was that he had not given his full version to Officer Qasha while he had been interviewing him in the back of the ambulance. The argument was advanced that the statements made in the back of the

ambulance were part of the *res gestae*[1] and that the failure to disclose the involvement of the truck was because there had in fact been no truck. It was argued for the defendant that had there been a truck then the plaintiff would have mentioned it to Officer Qasha.

17. Whether or not the failure to mention the truck was material or not depends upon whether the version of Officer Qasha is to be accepted *in toto*.

18. The test to be applied in evaluating the evidence presented is set out in Eksteen JP in National Employer's General v Jagers[2], as follows:

"*It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless 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 satisfied 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*

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[1] See S v Moolman 1996 (1) SACR 267 (A)

[2] *National Employers' General Insurance v Jagers* 1984 (4) SA 437 (E) at 440D. See also *Stellenbosch Farmers' Winery Group Ltd v Martell et cie* 2003 (1) SA 1 (SCA) para 5 and *Dreyer v AXZS Industries (Pty) Ltd* 2006 (5) SA 548 (SCA) at 558E-G.

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'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."

19. The plaintiff has no recollection of speaking to Officer Qasha and so his evidence as to the interview stands alone. Qasha must have spoken to the plaintiff so on this aspect his evidence is accepted. I have difficulty in accepting uncritically his evidence that the plaintiff was in a position to be properly interviewed in the circumstances that prevailed in the back of the ambulance. In his own statement, made later that day he recorded "*stays at Witbank unknown address because he cannot speak properly*".

20. This to my mind serves to confirm that the plaintiff was not in a position to be properly interviewed. His failure to mention the truck while in the back of the ambulance in the immediate aftermath of the collision is in the circumstances to my mind not material and does not detract in any way from the evidence given by

him in court. I find that as a probability the collision occurred as testified to by the plaintiff.

21. *"Negligence (culpa) is the failure to exercise the degree of care and skill the reasonable man (bonus or diligent paterfamilias) would have exercised in the circumstances. The standard by which a driver's conduct is to be judged is an objective one. In applying this standard, the court must, to the best of its ability, place itself in the position of the driver at the time of the occurrence and judge whether he exercised the care which the reasonable man in his position would have exercised in the circumstances"* [3]

22. The action of the truck driver in moving his vehicle into the path of travel of the plaintiff, who was about to overtake, was negligent. The defendant led no evidence on this aspect and was unable to seriously challenge or disturb the plaintiff's evidence in this regard. However, the defendant argued that on the plaintiff's own version, had he been keeping a proper lookout and driving at the speed he said he was, he ought to have been able to slow down and avoid the collision without losing control. On this basis so the argument went, the plaintiff was also negligent.

23. The plaintiff's own evidence was that the road was clear, but for the truck moving into his path of travel and that he had not yet drawn parallel with the truck (although he almost was). The plaintiff and a reasonable driver in his position

[3] Motor Law, Cooper Vol. 2, Juta 1987 page 48

could have reduced speed without swerving to the left in the manner that he did and still avoided the collision. The decision to swerve, when in the circumstances it was not necessary for him to do so, in the manner that he did, caused him to lose control of the minibus and led to the collision. He must have swerved from the right lane in which he was driving across the left lane and off the surface of the roadway[4] when all that he needed to have done was apply the brakes. For these reasons the plaintiff was to my mind also negligent.

24. In considering the respective degrees of negligence and for the reasons set out above, I am of the view that the driver of the truck and the plaintiff contributed equally to the cause of this collision.

25. In the circumstances I make the following order:

25.1 The defendant is found to be liable for 50 % of such damages as the plaintiff may have suffered as a result of the collision on 18 March 2012.

25.2 The defendant is ordered to pay the plaintiffs costs to date.

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[4] *Ntsala and others* t/ *Mutual and Federal Insurance Co Ltd* 1996 (2) SA 184 (T) the court held that:

'Where a driver of a vehicle suddenly finds himself in a situation of imminent danger, not of his own doing, and reacts thereto and possibly takes the wrong option, it cannot be said that he is negligent unless it can be shown that no reasonable man would so have acted. It must be remembered that with a sudden confrontation of danger a driver only has a split-second or a second to consider the pros and cons before he acts and surely cannot be blamed for exercising the option which resulted in a collision

25.3 The determination of the quantum of damages is postponed *sine die*.

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A MILLAR
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

HEARD ON:	23 APRIL 2018
JUDGMENT DELIVERED ON:	26 APRIL 2018
COUNSEL FOR THE PLAINTIFF:	ADV P VENTER
INSTRUCTED BY:	VZLR INC.
REFERENCE:	MR GRIMBEEK
COUNSEL FOR THE DEFENDANT:	ADV L PRETORIUS
INSTRUCTED BY:	MARIVATE ATTORNEYS
REFERENCE:	MR MASHAU