IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number: 66435/2017

DELETE WHICHEVER IS NOT APPLICABLE

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

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In the matter between:

HLORISO VICTOR MARIBE **Plaintiff**

And

ROAD ACCIDENT FUND **Defendant**

JUDGMENT

MOTHA J

INTRODUCTION

1. Following a road accident which happened on the N1 highway, the plaintiff instituted these legal proceedings against the Road Accident Fund. Before this court is the question of liability, as the issues have been separated in terms of Rule 33(4) of the Uniform Rules of Court. The plaintiff, therefore, seeks to hold the Road Accident Fund 100% liable for his damages. The Road Accident Fund, on the other hand, opposes this action and maintains that the plaintiff's negligence was the sole cause of the accident.

2. In 2019, this matter was adjourned to afford the defendant an opportunity to secure the attendance of its witnesses. Despite this court's indication that it was willing to hear the defendant's witnesses, the defendant decided to proceed without calling them. This court takes a dim view at the lack of proper preparation of this matter despite the ample time available to both the parties. This court was neither furnished with any detailed sketch plan, nor any measurements of the road. Not to mention the pictures or road traffic signage, nothing. Under these circumstances, it is the court that is on trial.

FACTS

3. The plaintiff's case pivots around his evidence and that of his friend, Mr. Marumo. First to take the stand was the plaintiff. His version is that on 3 April 2015, at approximately 21h00, he was driving a black Opel Corsa from Pretoria to Moria for a church service, in Polokwane, and the road was busy. He was in the company of three passengers, Mr. Marumo, who was seated on the passenger's seat; and two passengers at the back, to whom he had given a lift.

4. The road had four lanes, two lanes to the north and two lanes to the south. Two yellow lines separated the roads. In short, a dual carriageway. Driving on the fast lane on this tarred, flat, straight, and dark road, without streetlight, he decided to switch on his bright lights. He does not know the speed at which he was travelling, but it was less than 120 kilometers per hour, the legal speed limit on that road.

5. Within a few kilometers after driving through the Nyl Plaza tollgate, he saw a motor vehicle on the opposite side of the road flickering its lights at him. His immediate reaction was to dim his bright lights. However, the car did not stop flashing the lights. He remarked that the opposite car was, to quote him: “making me not to see clearly”.

6. It is also his version that he reduced his speed as the motor vehicle continued to flicker it's light at him. He, again, did not know the speed he was travelling at after the deceleration. Suddenly, he saw a dark object lying horizontally on the road, and he tried to swerve but it was too late. Mr. Marumo shouted “Phoofolo!”, meaning animal.

7. He collided with a wildebeest, as they later found out. Their motor vehicle rolled three times. He sustained serious injuries for which he was treated at Mokopane hospital and later transferred to Military hospital.
8. In his statement in terms of s19(f) of the Road Accident Fund Act, 56 of 1996, he did not mention that the other motor vehicle continued to flicker its lights.

He stated that during the time when his lights were dimmed, he could not see the animal lying on the fast lane until he was too close to it. He also stated that the animal was black in colour and difficult to see in the darkness.

9. When asked about this, he testified that his statement was just a general overview of the matter, hence, he did not mention the details. Under cross-examination he did not want to commit himself about how far he could see without the bright lights on. He just said not far. Upon being asked about his failure to move to the slow lane after reducing his speed, he testified that he did not see the need to do that. This answer was not satisfactory since he had testified that there was nothing preventing him from occupying the slow lane.

10. Upon being requested by the court to estimate the time it took from when the two vehicles drove past each other and the collision with the animal, he was evasive and tangential. Nonetheless, he confirmed that when his passenger shouted “Phoofolo” the flickering car had already driven past his vehicle.

11. Next to take the stand was Mr. Marumo. He corroborated the common cause facts such as the number of lanes on the road, number of passengers in the car and where they were headed. In essence, his testimony is that he was chatting on his phone when the plaintiff remarked that the approaching car was flickering its headlight. He moved his eyes from his phone onto the road and saw the flickering of lights. It is his testimony that the plaintiff at that moment complained that the car was blinding him. Strangely, he testified that he went back to his phone to chat.

12. Suddenly, he felt the car swerving. He shifted his attention onto the road and shouted “Phoofolo!”. Under cross examination he confirmed that he was the plaintiff’s friend and colleague. When their vehicle’s head lights were dimmed, he could see up to 50 or 60 meters ahead of the car. He estimated the distance to be about 1 kilometre or 1.5 kilometres between their motor vehicle and the flickering car when he first saw it.

13. Contrary to the plaintiff’s testimony, he stated that there was a car in front of them on the slow lane, and another car behind them. He confirmed that the plaintiff reduced his speed and dimmed the lights. When he felt the motor vehicle swerving, he saw the animal which was about 10 metres away and shouted “Phoofolo!”. When asked about the reason he continued on his phone despite the danger, he said he was chatting on his WhatsApp. In answer to the question if there was anything that prevented the plaintiff from occupying the slow lane, he answered that he could not tell.

The Law and analysis

14. The test for culpa is well-captured in *Kruger v Coetzee.*[1] The court, through Holmes JA, formulated the test as follows:

> *“For the purposes of liability culpa arises if -*
>
> *(a) A diligens paterfamilias in the position of the defendant*

[1] 1966 (2) SA 428 (A)

(i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and

(ii) would take reasonable steps to guard against such occurrence; and

(b) the defendant failed to take such steps."[2]

15. The plaintiff's testimony was punctuated with doubts. He was non-committal on several material aspects, such as the speed at which he was traveling before he saw the opposite car and after the deceleration, the distance between his motor vehicle and the vehicle on the opposite end and the distance he could see with his lights on dim. This is in sharp contrast to Mr. Marumo's testimony. Mr. Marumo was forthcoming with information and willing to make guesstimates. I found the plaintiff to be very guarded in what he was saying, almost like someone who had been coached. He did not take the court into his confidence. Furthermore, he never testified about applying his brakes to avoid the accident. He only reduced his speed. I did not find him to be a credible witness.

16. I found Mr. Marumo reliable, from his testimony, the court was able to glean various distances. Fair enough he did not see the speed at which they were travelling. However, he confirmed that the plaintiff reduced the speed when the opposite car was flicking its lights. Since they were driving on a two-lane

[2] Supra page 430 para E-F

road, he could not tell why the plaintiff failed to move the vehicle to the slow lane, following the reduction of the speed and since there were cars behind them.

17. It is clear to me that on the date in question there was a motor vehicle on the opposite end which flicked at the plaintiff's motor vehicle. It is probable that the flicking was meant to warn the plaintiff of an imminent danger that was literally lying ahead. Indeed, it is reasonable that the plaintiff thought that the approaching vehicle was flicking its lights for him to dim his bright lights.

18. Despite the plaintiff's attempt to obfuscate, the court, through the testimony of his witness, knows that the distance between the two cars when the flicking started must have been at the very least a kilometer, if not more. Thence, when this flicking did not stop, the plaintiff reduced his speed. Having reduced the speed, in my view, a reasonable driver would have driven the vehicle from the fast lane onto the slow lane. Especially, against the background of the plaintiff's testimony that there was nothing that hindered him from occupying the slow lane, and that the road was busy. By this simple action he could have avoided the accident in *toto*.

19. However, this court is mindful of the possibility that the insured driver, in his or her effort to alert the plaintiff of the danger, could have inadvertently caused the plaintiff not to see properly. Even though the court's evaluation is hampered or made more difficult by the plaintiff's inability to estimate the speed at which he was traveling, this court takes into consideration that the

scene was fluid and fast. Furthermore, the court is mindful that it is neither the Solomonic wisdom nor chameleonic caution expected from the plaintiff.

20. The plaintiff referred to the matter of *Mogoelelwa v Road Accident Fund*[3]. This was an appeal that was before a full court of this division. The facts of that matter are uncannily similar to what this court is confronted with. In that matter, the accident happened when a vehicle on the opposite direction failed to dim its headlights which were on bright despite the appellant's flicking his lights to warn it. As the vehicle drove past, the appellant suddenly saw a cow in front of his car. He applied his brakes, reduced his speed to about 60 kmph and swerved but to no avail. He collided with the cow. As in this case, he stated that there was nothing he could do to avoid the accident.

21. However, that matter is distinguishable from this matter. In this matter the plaintiff had the option of driving onto the slow lane. This was not the case in the *Mogoelelwa* matter. Secondly, the court does not know the speed at which the plaintiff was driving. What this court knows is that he had at least a kilometer between him and the approaching vehicle. Finally, the plaintiff never testified that he applied his brakes to avoid the collision.

22. The defendant relied on the matter of *Flanders v Trans Zambezi Express*[4]*:* in this matter where the court held that:

[3] Case number A332/13 30/5/16
[4] 2009 (4) SA 192 (SCA)

"His failure in these circumstances to stop or to slow down to the extent necessary is a 'crucial factor' in holding that he was negligent. Had he stopped or slowed down sufficiently after dipping his own headlights, the collision would not have happened."[5]

23. It is trite that, on a preponderance of probabilities, the plaintiff bears the onus to prove that the defendant's negligence caused the damages suffered. There is something to be said for the way both the parties ended their heads of argument. They both envisioned an apportionment. The plaintiff submitted that a 70/30 apportionment in their favor would be a correct approach, whilst the defendant argued for an 80/20 apportionment against the plaintiff.

24. Section 1 (1)(a) of the Apportionment Of Damages Act 34 of 1956 reads as follows:

"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 that damage shall not be defeated by reason of the fault of the claimant but the damages recoverable in respect thereof shall be reduced by the court to such 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."

25. This court has a discretion to reduce the plaintiff's claim for damages suffered. Looking at the issue of apportionment in the matter of *South British insurance company Ltd versus Smit,*[6] the court said:

[5] Supra page 200
[6] 1962 (3) 826 A.D.

"From the very nature of the enquiry, apportionment of damages imports a considerable measure of individual judgment: the assessment of "the degree in which the claimant was at fault in relation to the damage" is necessarily a matter upon which opinions may vary. In the words of Lord Wright in British Fame (Owners) v MacGregorv (Owner), 1943(1) A.E.R. 33 at p. 35 (a maritime case; but the principle appears to be equally followed in England in relation to the contributory negligence act):

"It is a question of the degree of fault, depending on a trained and expert judgment considering all the circumstances, and it is different in essence from a mere finding of fact in the ordinary sense. It is a question, not of principle, but of proportion, of balance and relative emphasis, and off weighing different considerations. It involves an individual choice or discretion, as to which they may well be difference of opinion by different minds."[7]

26. In evaluating the evidence as a whole and looking at the circumstances, contradictions, and probabilities, I am in agreement with both counsel that the facts of this case call for an apportionment. With some better preparation and presentation, this court would have been placed in a better position to rule either way. In the circumstances, I am of the view that an apportionment of 60/40 in favour of the plaintiff is appropriate.

[7] Supra page 837 paras F-H

COSTS

27. As already stated at the commencement of this judgment, I was less than pleased with the effort put into this matter, in order to assist the court. The defendant will be liable for 60% of the plaintiff's costs in this matter.

28. In the result, the following order is made:

ORDER

29. The defendant is liable for 60% of the plaintiff's proven or agreed damages.

30. The defendant is ordered to pay 60% of the plaintiff's costs in connection with the determination of merits.

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M. P. MOTHA

JUDGE OF THE HIGH COURT, PRETORIA

Date of hearing: 1 September 2023

Date of judgement: 14 September 2023

APPEARANCES:

ADVOCATE FOR PLAINTIFF: S. HUSSEIN-YOUSUF

INSTRUCTED BY: NGWANE MAMOD INC.

ADVOCATE FOR DEFENDANT: H. SHILENGE

INSTRUCTED BY: STATE ATTORNEY