REPUBLIC OF SOUTH AFRICA

IN THE SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 11/21384

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

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DATE SIGNATURE

In the matter between:

PRINSLOO, LIZETTE Plaintiff

and

ROAD ACCIDENT FUND Defendant

J U D G M E N T

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[1] The plaintiff instituted an action claiming damages from the defendant arising from the bodily injuries sustained during a motor vehicle collision that occurred on 12 January 2009.

[2] When the matter came before court the parties had on an earlier date agreed to an isolation of merits from quantum. The court subsequently ruled in favour of the separation in terms of Rule 33(4) of the Uniform rules. Accordingly, the matter proceeded on merits only.

[3] It is an established principle in our law that, with one or two exceptions, the plaintiff always bears the *onus* of proving negligence on the part of the insured driver on a balance of probabilities.

See: *Arthur v Bezuidenhout and Mieny* 1962 (2) SA 566 (AD) at 576G;

Sardi and Others v Standard and General Insurance Co Ltd 1977 (3) SA 776 (A) at 780C-H; and

Madyosi and Another v SA Eagle Insurance Co Ltd [1990] ZASCA 65; 1990 (3) SA 442 (E) at 444D-F.

[4] The issue for determination is whether the insured driver was on a balance of probabilities negligent or not. If she was, can the resultant damages suffered by the Plaintiff be causally linked to such negligent driving.

[5] The court is presented with two versions that are considerably poles apart and are mutually exclusive at least on whether or not the Plaintiff gave a clear signal of her intention to change lanes, whether or not it was safe for her to have moved from the one lane to the other when she did and the degree of negligence of the Plaintiff and/or the insured driver.

[6] Counsel for the Defendant referred to the case of *National Employers General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (E) at 440E-G, which sets out the approach that should be adopted when faced with two mutually destructive versions. Eksteen AJP stated:

> "… *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.*"

[7] The approach on mutually destructive versions as delineated above obtained a stamp of approval from the Supreme Court of Appeal in 2003 in the case of *Stellenbosch Farmers Winery Group Ltd and Another v Martell Et Cie and Others* 2003 (1) SA 11 (SCA) at 14I-15E, where the court restated the law as set out in the National Employer General Insurance co. Ltd case *supra*.

[8] The principles extracted from these two cases are that when there are mutually destructive versions before court, the plaintiff's *onus* of proof can only be discharged if he proves his case on a preponderance of probabilities

and that the prerequisite that a court must 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).

[9] The insured driver denies that she drove negligently and that such negligence was the cause of the ensuing damages now claimed by the Plaintiff. She states that she was confronted with a situation of sudden emergency and had to make decisions that were apt for the prevailing moment.

[10] For the Defendant to be liable for the damages of the Defendant on the basis of negligence the Plaintiff will have to demonstrate that:

10.1 a reasonable person in the position of the defendant –

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

10.2 the defendant failed to take such steps.

See in this regard the case of *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430 E-G.

[11] After leading the evidence of the Plaintiff and her son, with whom she was travelling at the time of the accident, the Plaintiff's legal team closed its case. The insured driver was the only witness which testified in support of the Defendant's case. The Plaintiff took the stand and testified that:

11.1 On the morning of 12 January 2009 she and her son were riding a motorbike. She was taking her son to work and the son was running late;

11.2 She was travelling on the left hand side lane behind a bus that was moving fairly slowly, stopping and starting as there was traffic;

11.3 In preparation to swap lanes she moved to the periphery of the two lanes.

11.4 She signalled her intention to switch over to the right hand side lane;

11.5 She looked into her rear view mirror to check if there was any traffic approaching from behind;

11.6 She also turned her head to the right and then to the left and again to the right to ascertain that she did not miss anything in her blind spot;

11.7 Having established that it was secure to change she moved to the right lane and increased her speed;

11.8 She was then bumped by the insured driver from behind;

11.9 Her son (sitting behind her) flipped backwards and fell back onto the right of centre of bonnet of the motor vehicle and then bounced back onto the bike;

11.10 In cross-examination, she was uncertain of this version but subsequently stated that it was the correct one;

11.11 Immediately after the hump she tried to control the motorbike but failed;

11.12 She lost consciousness between the moment the insured driver hit her motorbike from behind and when her head came into contact with the ground surface;

11.13 Upon hitting the ground she gained her consciousness and told her son to clear the road;

11.14 At no stage did she talk to the insured driver;

11.15 The insured driver did not hit the bike at high impact; and

11.16 She could not have avoided the collision occurring.

[12] Sarel Prinsloo also took the stand and testified as follows:

12.1 On the morning of the 12th of January 2009 he was conveyed on the back of a motorbike to work by the Plaintiff;

12.2 He noticed that his mother was planning to change lanes and that she looked to her right and then to her left before she could do so;

12.3 He could not tell whether or not she signalled her intention to move over to the right hand lane;

12.4 He did not see the insured driver's vehicle;

12.5 She accelerated as she was changing lanes;

12.6 He fell back onto the bonnet of the insured driver's motor vehicle as the motorbike was bumped by the insured driver;

12.7 After hitting the bonnet of the motor vehicle he bounced back onto the bike;

12.8 Shortly after the accident he, as a manner of comforting the insured driver, hugged and spoke to the Plaintiff and;

12.9 He took her details; and

12.10 The insured driver and the Plaintiff did not speak to each other;

[13] Sarel Prinsloo was the last witness to testify on behalf of the Plaintiff and that concluded the Plaintiff's case. The Defendant then called the insured driver who gave evidence as follows:

13.1 On 12 January 2009 she was the driver of the insured vehicle;

13.2 She was driving in the right hand lane on Malibongwe Drive in Randburg;

13.3 It is a very busy road, worse it was in the morning when most motorists were on their way to work;

13.4 She travelled at approximately 60 km per hour;

13.5 The traffic lights had been red as she was approaching the intersection;

13.6 The traffic lights then changed to green as she got closer;

13.7 There were no vehicles in front of her but traffic was stationary or moving very slowly on the left lane;

13.8 The motorbike ridden by the Plaintiff and her son suddenly emerged from the left lane as she was approaching the intersection to join her path of travel when she was approximately 15 to 10 Metres away;

13.9 The Plaintiff did not indicate that she was changing lanes;

13.10 She suddenly applied brakes but still collided with the Plaintiff's motorbike;

13.11 She could not have done any other thing to avoid the accident;

13.12 A swerve to her right side could have proved more perilous in that her motor vehicle would have mounted the island and possibly have rolled the motor vehicle;

13.13 She could not have veered off to the left as there was a queue of motor vehicles;

13.14 Damage to her vehicle was to the left front light, the left front bumper and the left fender;

13.15 She became emotional after the accident had happened but she still spoke with both the Plaintiff and her son; and

13.16 She recalls asking the Plaintiff why she did not signal that she intended to move over to the right lane whereupon the Plaintiff apologised.

[14] The Plaintiff's cross-examination did not yield any evidence materially different from that which she gave in chief. In essence she stuck to what she stated in her examination in chief but somewhat evasive and often stating that she was carrying a "*precious cargo*" and that "I do not have eyes at the back of my haunches". She also added that she never drove negligently and therefore could not have begun to drive in a manner unbecoming of a mother carrying his only child on that day.

[15] The question that requires closer examination is the Plaintiff's decision to move from the left to the right lane. She is adamant that she looked into her rear view mirror to see if there were motor vehicles approaching and in

addition she also physically turned her head side ways to ensure that she did not miss anything in her blind spot

[16] It is undoubtedly very strange that she did not see the insured vehicle approaching from behind prior to changing lanes. The only reasonable inference, which must be correct, is that she did not look into the rear mirror and she also did not check her blind spot as she alleges. If she did see it then she must have misjudged the speed at which the insured driver was approaching.

[17] It is indisputable that had she seen it or had she not miscalculated the speed of the insured vehicle, she would have refrained to change lanes and accordingly she would not have moved to the right lane when she did. She therefore failed to keep a proper lookout which led her to execute a change of lanes when it was inopportune and dangerous to do so. "*The duty of a motorist to maintain a proper lookout involves not only the physical act of looking, but also a reasonably prudent reaction to whatever might be seen. (See Corpus JurisSecundumvol 60A § 284 (3) – note 47.)*" *Per Nel J in* Bridgman NO v Road Accident Fund [2002] 1 All SA 1 (C).

[18] The Plaintiff's assertion that she lost consciousness when the insured vehicle collided with the motorbike and only regained it upon hitting the ground is specious and improbable. Common sense dictates that she would have lost consciousness upon her head hitting the ground. In view of her

evidence on how she came to change lanes this court is suspicious that she did not signal to other motorists that she was intending to move to the right lane.

[19] The averment that upon impact her son moved backwards and hit the bonnet of the insured vehicle with his head and thereafter bounced back onto the motorbike is highly improbable. It is common cause that the motorbike was humped from behind, the motorbike was in motion and accelerating and that the insured driver applied brakes hence the impact was not as massive as it could have been.

[20] If one accepts the contents of the preceding paragraph then the impact would have propelled the motorbike forward and the Plaintiff's son, Sarel Prinsloo, would have fallen backwards and hit the ground and not the bonnet of the insured driver's motor vehicle.

[21] Sarel Prinsloo corroborated the version of the Plaintiff in so far as the result of the impact of the insured vehicle and the motorbike was on him. For reasons that I have already stated in paragraphs [19] and [20] above this is highly improbable and must be rejected.

[22] The insured driver travelled on the right lane which was completely clear of any traffic. All the other motor vehicles were on the left lane. They were stationary beginning to move as a result of the traffic lights that had just opened ahead. The duty to ensure that it was safe to change lanes was on

the Plaintiff and not on the insured driver. The insured driver could not have foreseen that a motorist on the left lane would swap lanes without giving a signal of her intention to do so. Accordingly, it was not incumbent on her to guard against a remote possibility of a motorist taking on an act that was completely unexpected.

[23] The Plaintiff argues that the insured driver drove at an excessive speed under the circumstances of this case and could have avoided the accident had she swerved further to the right. The insured driver stated that she was driving at about 60 Kilometres per hour nearing a traffic lights controlled intersection when the Plaintiff suddenly moved from the left hand lane to join her path of travel in the right lane.

[24] She suddenly applied brakes but it was too late as she still bumped the Plaintiff's motorbike albeit that she was already moving at a slow speed hence the hump. This is entirely understandable especially because she testified that the Plaintiff switched lanes when she (the insured driver) was about 15 to 10 Metres away.

[25] Given that distance, no matter how any reasonable driver would have applied brakes, he would still have bumped the Plaintiff's motorbike. She said that she could not have swerved to her right for fear of hitting the embankment on her right. Had she done so she believes that the result would

have been more catastrophic in that her motor vehicle could have overturned and rolled upon impact thereby causing more damage and danger to other users of the road.

[26] Equally, a veer off to the left could have turned out to be as devastating because there was a queue of motor vehicles in that lane.

[27[Under cross-examination she admitted that had she swerved to the right more than she already did she could have avoided the collision with the Plaintiff but as stated above that would have meant another accident with more severe consequences. The only evasive measure available to her under those circumstances was to apply breaks, which she did. She thought that she had taken all the measures that any reasonable driver in her shoes would have engaged.

[28] The above constitutes the invocation of the doctrine of sudden emergency being that A driver confronted with a **sudden emergency** is one who has neither the time nor the opportunity to weigh the pros and cons of the situation in which he finds himself. See *Goode v SA Mutual Fire & General Insurance Co. Ltd* 1979 (4) SA 301 (W) at 306G.

[29] Similarly, in *Thornton v Fisher* 1929 AD 398 at 412 the court stated:

> "*In judging the action of the motorist or a pedestrian faced with **sudden emergency** due allowance must be made for a possible error of judgment.*"

See also: *Marine & Trade Insurance Co. Ltd v Mariamah & Another* 1978 (3) SA 480 (A).

[30] The unexpected change of lanes from the left to the right by the Plaintiff certainly gave rise to sudden emergency on the side of the insured driver and she had to act in the best manner possible to avoid the danger. It must be remembered that the insured driver's evidence is that she became aware of the sudden move into the right lane by the Plaintiff when she was approximately 15 to 10 Metres before impact. She cannot therefore be said to have been negligent under the situation. See *Beswick v Crews* 1965 (2) SA 690 (A) where it was held that an unpredicted swerve of a motor vehicle was noted to give rise to a sudden emergency.

[31] I am completely convinced that the insured driver found herself faced with a sudden emergency which required her to employ measures that would be appropriate given the circumstances. Those measures may have included measures which when one observes rationally and under normal situations to have been impetuous. Such actions taken under those circumstances are excused by the doctrine of sudden emergency.

[32] I need to add that the sudden emergency in which she found herself entangled was not of her own creation. Such emergency was created by the Plaintiff who suddenly moved in front of the insured vehicle without any indication that she wanted to do so. In this regard the following is relevant:

> "*However, a party can rely on the doctrine of sudden emergency if and when the sudden emergency is not of his own doing. If his actions were the reason or cause of the sudden emergency he can, for that reason, be found to be negligent. Ntsala and others v Mutual and Federal Insurance Co Ltd 1996 (2) SA 184 (T).*"

The aforegoing passage was quoted with approval by Pakade AJ in the case of *Ngxamani v Road Accident Fund* [2002] 2 All SA 405 (Tk).

[33] In the result I hold that:

[33.1] I am satisfied that on a preponderance of probabilities the Defendant's version is true and accurate and therefore acceptable.

[33.2] The version of the Plaintiff is false and accordingly stands to be rejected;

[33.3] The unexpected change of lanes from left to right without signalling her intention to do so when the insured driver was about 15 to 10 Metres away created sudden emergency for the insured driver;

[33.4] Given the prevailing situation, the insured driver's reaction to apply brakes was the most reasonable response as she could have neither turned to her left nor her right for fear of causing an accident that could have turned out to be more fatal; and

[31.5] The Plaintiff has, on a balance of probabilities, failed to show that the insured driver was negligent and that such negligent was the direct cause of her ensuing loss.

[34] Accordingly, I make the following order:

1. The Plaintiff's claim is dismissed with costs.

B MASHILE
JUDGE OF THE SOUTH GAUTENG

HIGH COURT, JOHANNESBURG

Date Heard: 20/05/2013

Date of Judgment: 15/11/2013

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