REPUBLIC OF SOUTH AFRICA 29/9/17

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: **15101/2014**

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

29/9/2017
SIGNATURE DATE

In the matter between:

MORRIS KWENA MOABELO PLAINTIFF

and

ROAD ACCIDENT FUND DEFENDANT

J U D G M E N T

VAN ONSELEN AJ

A. *IN LIMINE*:-

1. At the outset counsel for the plaintiff advised that he wish to raise a point *in limine* on which a ruling would be sought.

2. In a nutshell the point *in limine* related to the pleadings exchanged and in particular the contents of the defendant's plea. The pleadings to be read in conjunction with paragraph 14.2 of the pre-trial minute of 25 July 2017 in which plaintiff requested defendant to disclose a version relating to the collision and the defendant replied in manuscript that it was single vehicle collision and the plaintiff was the sole cause of the collision resulting in a repudiation of the plaintiff's claim.

3. Counsel for plaintiff argued that a ruling was sought whether or not the defendant would be permitted to lead any evidence and/or make any positive assertions relating to this version given the contents of the defendant's plea. In paragraph 3 of the particulars of claim the plaintiff, *inter alia*, alleges a collision between a vehicle he was driving and an unknown/unidentified insured vehicle. In paragraph 3 of the plea, the defendant denied these allegations. In paragraph 4 of the particulars of claim and subparagraphs, the plaintiff alleges the grounds of negligence of the unidentified insured driver. In paragraph 4 of the plea the defendant again repeats the general denial contained in paragraph 3 of the plea and then in subparagraphs pleads in the alternative that should the Court find that the collision occurred as alleged by the

plaintiff and if found that the insured driver was negligent as alleged, that such negligence was not causally connected to the collision. Further in the alternative, the defendant pleaded contributory negligence on the part of the plaintiff again on the premise of the Court finding the collision occurred as alleged by plaintiff and that the insured driver was negligent in one or more of the grounds relied upon.

4. Counsel for the plaintiff's argument was that the defendant was obliged to have amended its plea to specifically include the positive assertion made at the pre-trial conference that the collision was caused by the sole negligence of the plaintiff and that there was no other vehicle involved. The argument was that without such an amendment and read in conjunction with the allegations made in the plea, that this version would be mutually destructive to the plea.

5. After listening to argument from both counsel I provided my view and ruling that the defendant would be entitled to put forward a case by way of evidence and/or cross-examination that there was not an unidentified vehicle involved in the collision as the defendant in the plea in paragraphs 3 and 4 positively denied the allegations made by the plaintiff in paragraph 4 of the particulars of claim, which paragraph refers to the involvement of an unidentified insured vehicle. Simply put, the plaintiff alleges the involvement of such a vehicle and the defendant denied same. Counsel could not refer me to any authority which clearly states that a defendant in such matters is required to positively plead a detailed version of how a collision occurred. Further, my understanding

of the requirement to provide a version in a pre-trial minute is pursuant to Practice Directives issued by this Court and not in terms of the rules of Court and/or any legislation.

B. INTRODUCTION:-

6. Pursuant to the aforementioned ruling, counsel advised that the matter would then proceed to trial.

7. Upon request a ruling was made that the issue of liability and quantum were separated in terms of Rule 33(4) and the quantum was postponed *sine die*.

8. Counsel advised me that bundles had been prepared and that during the evidence the bundles would be referred to and that certain documents would be tendered into evidence. The bundles contained, *inter alia*, certain photographs depicting damage to a vehicle and both counsel advised that these photographs were common cause and reciprocally admitted. I was further advised by counsel for the defendant that the defendant conceded that the plaintiff was involved in a collision as alleged, which was initially denied in the plea.

C. EVIDENCE BY THE PLAINTIFF:-

9. The plaintiff was the only witness who testified during the trial. He testified that on 17 September 2011 at approximately 18h30, he was involved in a collision. He was on his way back from work at a certain mine and was going home. It was getting dark, but was not raining or

cloudy. He was travelling on a tarred road and at a certain stage a road intersected with the road on which he was travelling from his right hand side. He noticed a vehicle at this T-junction and after he proceeded past the T-junction, this vehicle turned right and proceeded to travel behind him in the same direction. At a certain stage he turned left off the tar road onto a gravel road and the vehicle behind him also turned. The two vehicles proceeded along the gravel road into a ravine and then the road proceeded uphill. As he approached a village he reduced speed and indicated his intention to turn to his right. He began a gentle turn to the right and then the front side of the following vehicle, which he then described as a black Opel Corsa, collided with the right tail light area of his vehicle upon which his vehicle lost control and flipped over onto the left hand side. He was attended to at the scene by certain persons and was transported by ambulance to hospital. He also referred to a blank state after the collision, which is presumably a reference to a state and/or level of unconsciousness.

10. The plaintiff was referred to various photographs in bundle A on pages 288 to 293. He testified that these photographs depicted the vehicle he was driving at the time of the collision and the damage to the vehicle as a result of the collision.

11. Counsel for defendant cross-examined the plaintiff. In essence the cross-examination revolved around highlighting discrepancies and contradictions between the plaintiff's evidence in chief and certain documentation, namely:-

11.1. Firstly, the plaintiff was referred to bundle B, page 47 to 51, being the plaintiff's statutory affidavit lodged with the defendant in terms of Section 19(f) of the applicable RAF legislation. The plaintiff was referred to paragraph 3.2 of the affidavit on page 48 of bundle C and asked to explain why the insured vehicle was described as *"unknown"* as opposed to the plaintiff's evidence that this vehicle was a black Opel Corsa. The plaintiff testified that he did not notice the description *"unknown"* as the case was a so-called hit and run collision. Counsel on this aspect also referred the plaintiff to bundle C, page 34, being an answer to a request for further particulars and particularly paragraph 10, where the defendant requested the plaintiff to indicate the make, model, colour and registration number of the alleged insured motor vehicle. The reply to the request for further particulars was referred to in bundle C, page 39, paragraph 10, where the reply to the question was that the plaintiff confirms that the insured driver is unknown and a further reference to the particulars of claim. The plaintiff confirmed these documents and answered that the vehicle was a black Opel Corsa. The plaintiff gave no explanation as to why this information was not contained in the reply to the request for further particulars.

11.2. Secondly, counsel referred the plaintiff to bundle B, page 49, being a sketch annexed to the statutory affidavit depicting the collision. It was put to the plaintiff that the sketch depicts a non-

displaced rear-end collision and the impact at the rear of the plaintiff's vehicle and not the right rear tail light as testified by the plaintiff. The plaintiff conceded that the sketch incorrectly depicted a linear rear-end collision which was different to his testimony that the impact was on the right rear of his vehicle.

11.3. Thirdly, the plaintiff was referred to paragraph 6 of his statutory affidavit in bundle B, page 48, where a description of the collision was given. The description does not contain any reference to the plaintiff intending to turn right and/or executing such turn immediately prior to the impact. Plaintiff testified that it was his intention to turn right and that he had just begun executing the manoeuvre when the impact occurred. The plaintiff did not explain why this was omitted in his statutory affidavit.

12. Pursuant to the aforementioned discrepancies and/or contradictions it was put to the plaintiff that this was a single vehicle collision and that no other vehicle was involved. The plaintiff denied this.

13. The Court posed certain questions to the plaintiff. The plaintiff confirmed that the photographs of his vehicle were taken by his wife after the collision, but prior to any repairs having been effected to the vehicle. The Court questioned the plaintiff regarding his observations of the vehicle which collided with him and which was following him prior to the impact. He was questioned regarding looking in his consol mounted

rearview mirror and side rearview mirror prior to beginning his right hand turn manoeuvre. The plaintiff testified that he did at some stage see the vehicle in his rearview mirror just prior to the collision and that it was coming at a high speed.

14. The plaintiff then closed his case. The defendant intended calling a SAPS official to testify. After the lunch adjournment counsel for both parties advised the Court that the necessity for the witness testifying had been negated by an agreement that the defendant's counsel could record that such official would testify that he arrived at the scene and observed only one vehicle present and thereafter completed the SAP collision report accordingly. Counsel advised that I could accept those facts as if testified and common cause.

D. ANALYSIS OF THE EVIDENCE BEFORE COURT:-

15. During closing argument counsel for the plaintiff approached the factual matrix of the collision on the basis of the plaintiff being in the process of executing a right hand turn manoeuvre when collided with from the rear by the insured vehicle. Counsel also handed up extracts from certain literature dealing with the duties of such a driver, which I will refer to later. Counsel for plaintiff also conceded that the insured vehicle could not have been a considerable distance behind the plaintiff immediately prior to the collision and/or travelling at a speed differential much higher than the plaintiff immediately prior to impact as was testified by the

plaintiff. Counsel for plaintiff conceded that a degree of contributory negligence on the part of the plaintiff would be applicable with specific reference to the plaintiff's apparent failure to keep a proper lookout and observe the actions of the vehicle following him prior to beginning the right hand turn manoeuvre.

16. Counsel for defendant contended that with reference to the discrepancies and/or contradictions referred to earlier in this judgment, that on the strength thereof the plaintiff's version and evidence was irrational, implausible and highly improbable. Counsel for defendant contended that these contradictions should have the effect of rejecting the plaintiff's version in it's entirety relating to the involvement of the unidentified insured vehicle. I will deal with these aspects individually as follows:

16.1. Firstly, I do not agree with the contention that the failure to have stated in his statutory affidavit that the vehicle was a black Opel Corsa and that this only surfaced during his evidence is destructive to his version and highly relevant. In his statutory affidavit the plaintiff refers to the other vehicle as *"unknown"*. This affidavit was obviously not prepared by the plaintiff himself. Plaintiff correctly in my view described this reference as a reference to a hit and run case and that it did not seem important to him that the description of the vehicle was not given. Unknown could simply be a word used instead of unidentified.

16.2. Secondly, the reference to the discrepancy between the plaintiff's evidence and the sketch which is an annexure to his affidavit, is in my view not as fatal as contended by counsel for defendant. It is correct that the sketch differs from the plaintiff's evidence, and the plaintiff verily conceded that the sketch is not totally correct. The sketch does not show the plaintiff's vehicle having begun a right hand turn manoeuvre and being at an angle at the point of impact and also depicts a linear rear-end collision. In essence, these are not destructive versions but rather differences of a similar type of collision. This Court attaches more weight to the plaintiff's *viva voce* evidence which remained the same throughout regarding the detail of how the collision occurred.

16.3. Thirdly, and in my view the most relevant discrepancy referred to was that of the plaintiff's statutory affidavit not referring to his intention to and executing of the right hand turn at point of collision. The plaintiff readily conceded that the affidavit was silent on this aspect. By testifying that he intended turning right and in fact began this manoeuvre when the collision occurred was not beneficial, but detrimental to the plaintiff's case. This evidence opened the door for contributory negligence to be applicable as was conceded by plaintiff's counsel. I am of the view that by giving the *viva voce* evidence the plaintiff did, it strengthened the veracity of that version as opposed to the

statutory affidavit which is much less detailed and probably not prepared by the plaintiff. In other words, it is highly improbable that a witness would give evidence detrimental to his case if such evidence was not true.

17. There are a plethora of authorities which deal with the rejection of a witness' evidence. The authorities are clear that certain portions of testimony can be rejected and/or found improbable without a finding that the entirety of the evidence be rejected. In my view the plaintiff was a good witness and made a favourable impression. His version remained the same throughout evidence in chief, cross-examination and on questions posed by this Court. He readily made concessions regarding the contradictions between the evidence and certain of the documentation and did not attempt to explain away how these discrepancies and/or contradictions occurred. He was a reliable witness and no evidence was placed before this Court indicative of his version being a fabrication or being wholly improbable. The photographs of damage to his vehicle contained in bundle A, page 288 also to a degree corroborate the plaintiff's version. Particularly the photo on page 288, although not very clear and taken at an angle which is difficult to discern precise detail, does show damage to the boot alignment, rear tail light, bumper and in particular panel damage slightly forward from the rear tail light. Similarly, the photographs depict damage to the left hand side of the plaintiff's vehicle as it flipped and landed on it's left hand side. The photos depict no such damage to the

right hand side of the vehicle, save for the damage on page 288 at the right rear.

18. I therefore cannot agree with the submissions made by counsel for the defendant that the plaintiff's version should be rejected with the nett result that it was a single vehicle collision which would disentitle the plaintiff to claim from the defendant.

E. CONTRIBUTORY NEGLIGENCE ON THE PART OF THE PLAINTIFF:-

19. The remaining aspect for consideration is contributory negligence on the part of the plaintiff and more specifically the degree of such contributory negligence. As previously stated, counsel for the plaintiff conceded this aspect during argument.

20. Upon a consideration and analysis of the evidence and taking the probabilities into account, I am in agreement with counsel for the plaintiff that the matrix of the collision must be approached on the basis of the plaintiff executing a right hand turn and the insured vehicle probably attempting to overtake the plaintiff. Even though the plaintiff on a direct question from the Court did not agree that the insured driver was attempting to overtake, the testimony must be seen against the fact that the plaintiff was not focusing his attention or observing the actions of the insured driver immediately prior to the collision, save for a last minute fleeting glance in his rearview mirror. Unfortunately, neither counsel questioned the plaintiff as to how far he was from the

side road he intended to turn into when he engaged his indicator of his vehicle to warn of his intention to do so. The plaintiff also did not apply his brakes but merely took his foot off the accelerator pedal and reduced speed as he was moving up an incline. This gradual reduction in his speed probably caused the insured driver to decide to overtake the plaintiff as he was obviously unaware that the plaintiff intended to turn to his right. Interestingly, the insured driver never tried to pass the plaintiff for a considerable distance on route prior to the collision.

21. It was never to put the plaintiff that he failed to put on his indicator at some stage prior to executing the turn. That testimony is unchallenged.

22. Generally speaking a driver executing a turn is expected to ensure that it is opportune and safe to do so as a right hand turn in an inherently dangerous manoeuvre. Before executing a turn a driver must give a clear and timeous signal of his/her intention to turn and must ensure that other traffic has observed such a signal. This is particularly relevant to traffic following such a driver. The duties of such a driver are enunciated in the decision of **Bata Shoe Company Ltd (SA) v Moss 1977(4) SA 16 (W) at 21 D - H**.

23. In overtaking a vehicle travelling in a same direction, the driver is obliged to keep a proper lookout. Apart from other considerations it seems reasonable to suggest that the driver of an overtaking vehicle will be found negligent should he/she overtake in circumstances where the view is restricted, such as on a blind corner, the crest of a hill, in heavy mist, dust or smoke. See: **Du Plooy v Suid-Afrikaanse**

Onderlinge Brand en Algemene Versekeringsmaatskappy Bpk[1]. In overtaking a driver should allow sufficient berth between his vehicle and the vehicle being overtaken to allow for the possibility of sideways movement of that vehicle. See: **Oosthuizen v Standard General Versekeringsmaatskappy Bpk**[2].

24. In this case the Court must consider the plaintiff's failure to keep a proper lookout and observe the following insured driver before executing the right hand turn manoeuvre against the insured driver's failure to observe the intended actions of the plaintiff and attempting to overtake when it was inopportune to do so. The plaintiff did testify that a certain amount of dust was created by his vehicle as it was travelling on a gravel road. This would have restricted the visibility of the following insured driver. It was also dusk, adding to visibility restrictions.

25. With reference to the general principles and apportionment applied in the **Bata Shoe-case** *supra,* counsel for plaintiff contended that the apportionment of liability should be in favour of the plaintiff and proposed a 70/30 in favour of the plaintiff. Counsel for defendant contended that a similar apportionment should be applied as was in the **Bata Shoe-case** *supra* and that the apportionment of liability should be in favour of the defendant. He proposed a 75/25 apportionment against the plaintiff.

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[1] 1975(1) SA 791 (O)
[2] 1981(1) SA 1032 (A) at 1039 F – H

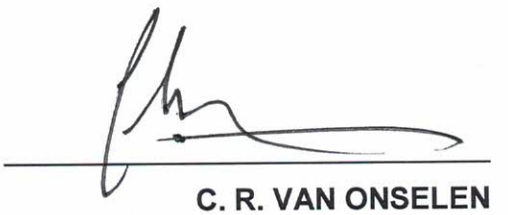
26. The principles enunciated in the **Bate Shoe-case** *supra* serve as a guideline and the starting point to determine the degrees of liability of the drivers in this case. However, these are general principles and the individual facts of each case must be considered separately and weighed against those principles. This Court is of the view that the fact that the collision occurred on a gravel road and at dusk, which would have diminished the insured driver's visibility of the intended actions of the plaintiff due to a dust cloud caused by plaintiff's vehicle and being dusk, are factors which would warrant a deviation from the aforementioned principles and play an important role in deciding on the various degrees of negligence of the drivers. This coupled with the fact that the plaintiff gradually reduced speed and was approaching a side road to his right, and did at some stage before executing the turn engage his indicator, would increase the degree of negligence of the following vehicle in the ensuing collision. After having considered all the evidence and arguments presented, this Court is of the view that there was equal negligence between the plaintiff and the insured driver.

F. <u>CONCLUSION</u>:-

27. In consequence I make the following order:

1. The issue of liability and quantum are separated in terms of Rule 33(4) and the issue of quantum is postponed sine die.
2. The defendant is ordered to pay 50% (FIFTY PERCENT) of the plaintiff's proven or agreed damages.

3. The defendant is ordered to pay the plaintiff's taxed costs on a party and party scale relating to the adjudication of the issue of liability.



C. R. VAN ONSELEN

ACTING JUDGE OF THE HIGH COURT

Counsel for the Applicant:	Adv. J A du Plessis
Instructed by:	RIETTE OOSTHUIZEN ATT.
Counsel for the Respondent:	Mr. T J Dawson
Instructed by:	FOURIE FISMER INC
Date of Hearing:	26 September 2017
Date of Judgment:	29 September 2017