REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)
Case No: A 519/2016

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~ / NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.
(3) REVISED.
DATE ~~26/03/2019~~ 09-05-2019
SIGNATURE

In the matter between:

Dharini Sivakumar — Appellant

And

Thomas William Bester — Respondent

JUDGMENT

Maumela J.

1. This is an appeal against a judgement of the honourable acting Judge Thobane, delivered on the 23rd of July 2015. In the judgement the judge held the appellant liable to compensate the respondent for damages incurred subsequent to a motor vehicle collision.

BACKGROUND.

2. On the 20th of April 2010 a collision took place between the respondent's vehicle and the vehicle driven by the Appellant. The Respondent issued summons against the Appellant claiming damages suffered as a result of the collision. The Respondent claimed damages at an amount of R 185 264.44. He contended that the damages to his motor vehicle were caused by negligence on the part of the Appellant. The Plaintiff, who is an advocate, testified in his own case. He also called his son who was a passenger in his vehicle on the day of the incident. The appellant instituted a counterclaim for R 73 545-72 for the damage to her vehicle. The appellant is a lecturer. She testified in her own case, but she called no witnesses.

3. The respondent alleged the following grounds of negligence in the alternative on the basis of which he imputes liability against the appellant:
   (a). That the appellant failed to keep a proper lookout;
   (b). That the appellant drove at an excessive speed;
   (c). That the appellant failed to apply her brakes timeously alternatively effectively when it was reasonably expected of her;
   (d). That the appellant failed to exercise adequate alternatively proper control over the vehicle she was driving; and
   (e). That the appellant failed to avoid a collision when by the exercise of reasonable care and skill she could and should have done so.

4. The parties agreed that there is consensus between them concerning the following:
   4.1. Their respective *locus standi* of the parties;
   4.2. The date, place and time of the collision;
   4.3. The description of their respective motor vehicles;
   4.4. Ownership of their respective vehicles;
   4.5. The direction in which their motor vehicles were traveling when the collision occurred.
   4.6. That a map from Google Earth, which depicts the scene of

the collision at the intersection of Eastwood and Arcadia Streets, Sunnyside, entered as exhibit A, is a true depiction of the area in which the accident occurred; and

4.7. The quantum of damage to each respective party's motor vehicle.

POINT OF DISPUTE

5. The dispute between the parties is about who, between them is to blame for the collision. Both parties allege negligence against one another. Both deny having been negligent. They both contend that the other one is to blame for the collision.

6. Pursuant to trial proceedings before this court, the Honourable Acting Justice Thobane granted an order holding the Appellant liable to compensate the Respondent for 80% of the damages agreed to between the parties. Appellant was also ordered to pay the costs. The Appellant filed her application for leave to appeal on 14 August 2015 against the whole judgement and the order handed down. The Respondent opposed the application for leave to appeal without any counter appeal. The court *a quo* dismissed the Appellant's application for leave to appeal on 3rd of September 2015.

7. The Appellant petitioned the Supreme Court of Appeal. On the 4th of July 2016 the Appellant was granted leave to appeal to the Full Court of the Gauteng Division of the High Court, Pretoria. The costs order of the court *a quo* in dismissing the application for leave to appeal was also set aside. It was ordered that the costs of the application for leave to appeal in this court and the court *a quo* shall be costs in the appeal. It was also held that in the event where the appellant does not proceed with the appeal, she shall pay the costs.

8. On the 20th April 2010, the respondent set out to take his son to school at Pretoria Boys High School. He stated that the traffic was at peak level as he travelled in an East-Westerly direction

along Arcadia Street. He approached the intersection of Arcadia and Eastwood Streets. He told court that the intersection is controlled by a stop sign, only for vehicles traveling along Arcadia Street. He stated that as he approached the intersection, the vehicle ahead of him stopped at the stop street.

9. Quantum was agreed. The parties agreed that the present proceedings be for purposes of determining liability. It was further indicated that the Respondent had no specific interest in the matter as his claim was settled by his insurers. Therefore, he was before court on the basis of subrogation.

10. The Respondent testified that due to the volume of traffic, motorists on Eastwood Street clear the intersection from time to time to allow vehicles traveling along Arcadia Street to cross over or join the procession on Eastwood Street. The vehicle ahead of him was permitted lee-way, by those travelling along Eastwood Street. He testified that he stopped at the stop street and the vehicles to his right and left, traveling on Eastwood Street cleared the intersection to allow him to go through.

11. The respondent further testified that while he was crossing, a Toyota vehicle overtook vehicles which had stopped to allow him to pass through on their left hand side and collided with his motor vehicle. The Toyota, driven by the appellant, was traveling from South to North on Eastwood Street. He stated that the weather was clear on the day and the road surface dry. According to him, nothing obstructed his view. He stated however that he would not have been able to see a vehicle overtaking the stationary vehicles on their left side.

12. He pointed out that the stationary vehicles allowed him leeway to pass through. These vehicles also blocked his line of vision. He said that the "nose" of his vehicle was about three quarters of the way through on the North bound lane, "the

empty lane", when the collision took place. He further indicated that Eastwood Street is a single carriage lane in both directions; however the lanes are wide enough to accommodate two vehicles on each side.

13. After the collision he exchanged details with the appellant who indicated that she will report the collision to the police. At the time he was under pressure to take his step-son to school in time. For that reason, he arranged for the tow-truck to take his step-son to school. He testified that his motor vehicle was damaged on the front left hand side ahead of the left front arch of the fender. He did not observe the damage on the Appellant's vehicle. He denied that he did not stop at the stop street and that he drove negligently on the day.

14. Under cross examination he denied that his version of events on the day of the accident is motivated by his endeavour to avoid premiums for his vehicle insurance escalating in the event where fault is attributed to him for the accident. He testified that he was not even conscious of such a consequence, i.e. the escalation of his premiums as a result of his liability for the accident. He disputed that he stood to benefit. He stated that the trial was a huge inconvenience to him. He conceded that Eastwood Street was a broad street, capable of accommodating two sets of motor vehicles in each direction. He stated that traffic was heavy on the day and that as a result it was heavily backed up.

15. The respondent stated further that due to heavy volumes, the traffic formed two lanes at the intersection of Francis Baard and Eastwood streets. He agreed that motor vehicles traveling on Eastwood Street had the right of way. He stated that after he stopped at the stop street, he proceeded slowly at a speed of between 5 to 10km/h. he made the point that although he was travelling at a snail's pace, considerable damage was occasioned on his vehicle because the Appellant's vehicle was traveling fast. He said that he did not see the defendant's

vehicle dislodging from its lane and thereafter proceeding to overtake other vehicles. He noticed it shortly before the collision when there was nothing he could do to avoid the accident. He denied that the road surface was wet on the day in question and that it was drizzling. He conceded that the defendant could not have been traveling at a speed of more than 50km/h. He denied that he crossed the intersection traveling at about 50 to 60km/h. He argued that for him, under the circumstances to travel at the speed suggested would have been sheer madness, much as it would have been suicidal.

16. The Appellant testified that the respondent failed to stop when he should have at the crossroad. She also alleged that the pace at which the Respondent was driving was overly fast. She told court that shortly before the collision, it drizzled. She told court that she is well familiar with the road at the spot where the accident took place. However, she conceded that she did not tell the police at the scene that the respondent failed to stop at the crossing. She told court that after the accident she questioned the respondent's manner of driving whereupon the respondent told her that other drivers beckoned for him to enter the crossing.

17. The respondent denies the appellant's allegations. His step-son, Dillon Trafford Patterson testified under oath. He told court that at the time of the accident, he was 18 years of age and he witnessed the accident. He confirmed that the traffic was backed up all the way to the intersection at the time the accident took place. He stated that a driver yielded in favour of his stepfather. This witness could not remember the number of lanes provided on each side of the road. He corroborated the respondent's version to the effect that while his father drove slowly entering the intersection, appellant's vehicle approached at a fast pace whereupon it overtook stationary vehicles on the left side before it collided with the vehicle his stepfather was driving.

18. He told court that when his father entered the intersection other drivers had beckoned, thereby allowing his father lee-way to cross. He was adamant that the appellant overtook stationary vehicles from the left-hand side. He conceded that in all practicality the North-bound lane of Eastwood Street is used as double lanes. He told court that the backed up vehicles obscured the view of the North bound lane. As a result, in order to cross, his stepfather needed to be beckoned upon by other drivers

THE TEST.

19. It is trite that in civil suits, for the plaintiff to succeed, he or she has to prove his or her case on the balance of probabilities[1]. This court is to determine whether or not the court *a quo* was correct in finding against the Appellant when it attributed the liability for the accident to her, (the Appellant).

20. The onus rested on the Respondent to prove on a balance of probabilities the negligence of the Appellant. As such, this court has to decide whether on all the evidence, taking into consideration probabilities and inferences the respondent discharged the *onus* of proof on a preponderance of probabilities.

21. It is trite that in order to make this determination the court has to consider the applicable test which is about how a reasonable driver would have acted under the same specific conditions as those that prevailed at the time of the collision this case. See Minister of Defence v African Guarantee and Indemnity Co Ltd[2].

22. In the case of Kruger v Coetzee[3], the court stated the following about negligence:

"For the purposes of liability culpa arises if:

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[1]. See RAF v Mgweba 2005 (1) All SA 464 (SCA).
[2]. 1943 AD 141 at page 150.
[3]. 1966 (2) SA 428 (A) at page 430 E-F.

(a). A diligens pater familias 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
(b). The defendant failed to take such steps."

23. The question in this case is whether or not the Respondent fulfilled the required standard of proof when all the evidence, circumstances and conditions are considered.

EVALUATION.

24. The court *a quo* took note of the fact that the versions of the Appellant and the Respondent are diametrically opposed and therefore mutually exclusive against one another. To that end, the court *a quo* heeded the pronouncements in the case of Stellenbosch Farmers' Winery Group Ltd and Another v Martell *et cie* and Others[4].

25. In that case the court stated that where the versions of the parties are mutually exclusive to one another, the following applies: *"To come to a conclusion on a disputed issue a court must make findings on:*
(a). The credibility of the various factual witnesses;
(b). Their reliability; and
(c). The probabilities.
Where it concerns (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance such as:
(i). The witness's candour and demeanour in the witness box;
(ii). His bias, latent or blatant;
(iii). Internal contradictions in his evidence;
(iv). External contradictions with what was pleaded or put on his behalf, or with established facts or with his own extra curial statement or actions;

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[4]. 2003 (1) SA 11 (SCA) at page 14I-15D.

(v). The probability or improbability of particular aspects of his version; and

(vi). The calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events.

As to (b), a witness' reliability will depend, apart from the factors mentioned under (a) (ii), (iv) and (v) above, on (i) the opportunities he had to experience and observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

26. The respondent's stepson testified without contradicting himself. Except for minor details that are not material, his account of what happened leading up to, during and after the collision corroborated the respondent's version of the collision. His version regarding the volume of traffic, the manner in which each driver drove, the side of the road along which each of the drivers drove and the response of other road users to each of the two drivers corroborated that of the Respondent. His version on the speed at which each of the drivers drove corroborated the respondent's evidence on the same issues.

27. In the case of National Employers General Insurance v Jagers[5] Eksteen AJP expressed the following view concerning instances where opposing versions are mutually destructive: *"It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily 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*

[5]. 1984 (4) SA 432 (C), at page 440 D-G.

onus rests on the plaintiff 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 accepted, 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 courts 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 true. If however, the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case anymore 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".

28. The court *a quo* evaluated all evidence tendered by both sides. It dealt with the divergent versions of the parties which were mutually destructive. It employed the approach provided in the cases of Stellenbosch Farmers' Winery Group Ltd and Another v Martell *et cie* and Others and National Employers General Insurance v Jagers[6]. The court *a quo* found that the version of the respondent is more plausible compared to that of the appellant.

29. The Respondent was corroborated by his son in stating that he was transporting his son to school at the time the collision happened. This court found that the Respondent's ability to observe all other vehicles using the same road as he could have been limited by the heavy traffic that had backed up leading to the intersection where the collision took place. In his own version, the Respondent stated that he did not notice the Appellant's vehicle until it was too late for him to avoid the collision.

30. The Respondent told the court *a quo* that other drivers yielded for him to enter the intersection. As he entered, the Appellant's

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[6]. Supra.

vehicle, which was travelling at a high speed, was also overtaking other vehicles on their left, instead of their right side. Both drivers told court that visibility was clear.

31. Our law provides that drivers who overtake other vehicles have a duty to ensure that it is safe to do so[7]. Regulation 298 of the National Road Traffic Regulations provides that overtaking must always be done on the right side unless it is along a dual carriageway. It is not contested that at the time of the collision the Appellant was overtaking vehicles ahead of her from their left side. This conduct on the part of the appellant was against Road Traffic Regulation 298. It was against the law. It was wrongful.

32. At the same time, the Respondent told the court *a quo* that he did not notice Appellant's vehicle as it approached, driving at a high speed on the left side of the vehicles it was overtaking. The Respondent's conduct in failing to notice the vehicle of the Appellant, a fellow road user at the time, especially when the Appellant in essence had the right of way, also fell short of the manner in which a reasonable driver in the place and position of the Respondent would be expected to drive along a public road. It contributed to the collision that took place.

33. Our law provides that drivers along public roads have a general duty to act reasonably. Such a driver is expected to be able to foresee several probabilities, situations and occurrences[8]. This duty to foresee applies to:
    - Stationary traffic,
    - Fast moving traffic; See Moosa v Hessberg [9],
    - Pedestrians,
    - Animals and
    - Obstructions.

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[7]. See H.B. Klopper: The Law of Collisions in South Africa: 8th Edition, at page 66.
[8]. See H.B. Klopper supra, at page72 to 73.
[9]. 1979 (3) SA 432 (T).

34. Taking into consideration the totality of the circumstances obtaining as explained by both parties, the Respondent was negligent in failing to notice the Appellant's vehicle as it approached at a high speed; albeit driving on the left side of stationary vehicles that it was overtaking. In that way the Respondent also contributed to the collision. In my view, both drivers contributed to the collision. I find that the Court *a quo* was wrong in concluding that the liability is to be apportioned against the Appellant at an 80/20 proportion in favour of the Respondent. In my view both drivers contributed equally to the collision.

35. For the above reasons, I conclude that the appeal against the judgement of the court *a quo* stands to succeed because the conduct of the Respondent contributed equally to the collision. In the result, the appeal against the judgement and order by the court *a quo*, delivered on the 23rd of July 2015, and the corresponding order on costs stands to succeed. Consequently I propose that the following order be made:

ORDER.

1. The appeal is upheld with costs.
2. The order of the court *a quo* is set aside and replaced with the following order:
   (a). The defendant is ordered to compensate the plaintiff for 50% of the plaintiff's agreed damages.
   (b). The defendant is ordered to pay the plaintiff's costs.

T.A. Maumela.
Judge of the High Court of South Africa.

I agree.

J.W. Louw
Judge of the High Court of South Africa.

I agree and it is so ordered.

L.M. Molopa-Sethosa
Judge of the High Court of South Africa.