

**IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA**

Case No: 10252/08

In the matter between

Musawenkosi Joshua Gwala

Plaintiff

versus

Road Accident Fund

Defendant

JUDGMENT

Delivered on: 23 October 2009

STEYN J

[1] In this action the plaintiff claimed damages in the sum of R1 628 000,00 arising from a road accident that occurred on 7 August 2004 at 15h35 on the Bulwer/Boston Main Road, when the plaintiff's vehicle, registration number JWK 003EP, collided with the insured driver's vehicle, to wit a Combi, with registration number NIM406.

[2] Plaintiff averred in the particulars of claim that the accident was caused by the negligence of the driver of the insured vehicle, Mr Mkuswa Mvelase. The alleged principal grounds of negligence that should be attributed to him are:

- “(a) He failed to keep a proper lookout;*
- (b) He failed to keep the insured vehicle under proper control;*
- (c) He failed to apply the brakes of his vehicle timeously or at all;*
- (d) He failed to avoid the collision when, by the exercise of reasonable care and skill, he could and should have done so;*
- (e) He drove at a speed which was excessive in circumstances where it was incumbent upon the insured driver to reduce his speed substantially;*
- (f) He failed to swerve or take the necessary avoiding action, when by doing so a collision could and would have been avoided.”*

[3] At the start of the trial the parties lodged an application that liability and quantum be separated and such order was made in terms of Rule 33(4). The matter proceeded on liability and henceforth the judgment concerns the merits only.

[4] The parties by agreement handed in exhibit A, which is a bundle of documents, that includes *inter alia* photographs of the scene where the collision took place.

[5] Facts

It is common cause that the two motor vehicles were involved in a collision on 7 August 2004 on the Bulwer Road. It is further common cause that the collision occurred near the

intersection at the Eshowe turn off. The issue in dispute is whether either the plaintiff or defendant was negligent in driving their vehicles when the collision took place.

[6] For the plaintiff the following witnesses testified, Mr Musawenkosi Gwala, the plaintiff, and Mr Jabulani Chebekulu.

In brief the version of Mr Gwala is that he was the driver of a Volkswagen Jetta and that he had 4 passengers with him in the vehicle. On the day in question he was a duly licensed driver and sober. The vehicle that was driven by him is a left hand drive vehicle; it being an imported motor vehicle. According to him he was travelling on Bulwer road on 7 August 2004 in the direction of Pietermaritzburg. Shortly before the accident occurred there were five motor vehicles in front of his vehicle and a bus in front of the said vehicles.

In his evidence in chief he explained that he indicated to turn right into the road that leads to Eshowe and as he was executing the turn, he noticed the motor vehicle of the insured driver. He then tried to change gears at that moment because he realised that the insured vehicle, a Combi, was travelling at

a high speed. It is his testimony that the Combi collided with the left panel of his vehicle and the left driver's door of the vehicle.

According to him there is a ditch in the road and he did not see any cars. Mr Gwala's version was that he attempted to avoid the collision by swerving to the left of the road but to his mind the insured driver did the same and hence the collision could not be avoided.

- [7] In cross-examination Mr Gwala stated that he and the occupants in his vehicle had all left for a funeral in the morning at 6 o'clock and that they had bought KFC chicken to eat. According to him only 2 beers were consumed by his passengers, whilst he only had a cold drink to drink. He was asked why he did not accelerate to get out of the way and avoid the collision. In response he answered that he was not able to do so, since he had passengers in his vehicle. He was asked why he never mentioned in an earlier statement to the police that there were other vehicles in front of him and his response was that at the time of making that statement; he suffered from a mental illness and had not fully recovered

from his injuries.

Upon a further question by Counsel for the defendant, he blamed the discrepancy in his earlier version on his inability to recall all the events. According to him his re-collection of the events improved after he had a consultation with his legal representative.

The second witness for the plaintiff, Mr Chebekulu, is related to the plaintiff. He is the cousin of Mr Gwala and was a passenger the vehicle. He sat in the front passenger seat on the right hand side of the car. According to this witness he had a better view than Mr Gwala to see the oncoming traffic and he only noticed the Combi when they were executing the turn into the Eshowe Road.

In cross-examination he contradicted Mr Gwala on the time that they had left for the funeral, the food they had to eat and the amount of alcohol consumed. These contradictions may appear to be insignificant because it refers to aspects other than the cause of action. In my view they remain relevant since it impacts on the credibility of the witness. He also

stated that the vehicles that had travelled in front of them were far ahead of them and not close, as the plaintiff stated.

Upon further questions he insisted that whilst Mr Gwala executed the turn, he kept on looking at the road towards Pietermaritzburg. Mr Chebekulu never explained why there was a need for him to keep on observing this road if it was clear at the time when they turned into the Eshowe road.

After this evidence, plaintiff closed its case.

- [8] For the defendant Mr Mvelase, the driver of the insured vehicle, and Ms Zuma, a passenger in the said vehicle testified.

Mr Mvelase's testimony was that he is a taxi driver. He confirmed that he was involved in an accident on 7 August 2004. He stated that on the day he was coming from Pietermaritzburg, travelling towards Impendle on the Bulwer road. The road is well known to him and as he approached the intersection he reduced speed. There were no vehicles ahead of him. He observed, however, a vehicle travelling in the

opposite direction. He expected this vehicle, which turned out to be the plaintiff's vehicle, to go straight but against those expectations it turned suddenly in front of him. At this moment he was almost on top of this vehicle and he could only apply his brakes before colliding with this vehicle. In his taxi there were also passengers.

According to him he, his speed prior to the collision was 60km/h but when he came nearer the intersection his speed was less, because he had reduced his speed.

In cross-examination he conceded that there is a steep blind rise in the road and that visibility is not good until a person gets to the top of this rise, which is at the intersection. This rise is clearly depicted in photos 15 and 16 contained in exh "A".

He also conceded that the collision occurred not far from the blind rise. He was confronted by counsel for the plaintiff that he was travelling at a higher speed as stated by him. He vehemently denied this proposition and spontaneously stated that what he expected to happen, is that the plaintiff would

have stopped since he (the defendant) had the right of way. He also denied that he swerved to any side. It is his version that the conduct of the plaintiff driver was unexpected and when he turned in front of him, he only had time to apply the brakes. Mr Mvelase indicated in court that he was +- 4 metres away from the plaintiff's vehicle when it turned in front of him.

Ms Zuma was an independent passenger in the taxi of Mr Mvelase, and was seated directly behind the driver. It is her version that where she was seated she had a clear view of the road ahead. Her evidence corroborated that of Mr Mvelase and I do not find it necessary to repeat it.

This concluded the evidence of the defendant.

- [9] Mr Chetty on behalf of plaintiff submitted that there are two mutually destructive versions before the Court. He urged the Court to consider the probabilities and in his view, the probabilities favour the version tendered by the plaintiff. Accordingly he asked that this Court finds the insured driver liable and finds in favour of the plaintiff.

Mr Nirghin on behalf of the defendant argued that the credibility of the defendant's witnesses far outweighed the version tendered on behalf of the plaintiff, and asked the Court to accept their version with regard to how the accident occurred as being correct and true. Henceforth it was asked that the plaintiff's claim be dismissed with costs.

[10] In *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et cie and Others* 2003 (1) SA 11 (SCA) at para [5] Nienaber JA redefined the techniques generally to be applied by a court in dealing with two irreconcilable versions before it as follows:

"To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities 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."

(Also see *Dreyer and Another NNO v AXZS Industries* 2006 (5) SA 548 (SCA) at para 30 for approval of the said approach).

[11] In my view there is an onus on the plaintiff to prove on a balance of probabilities that the defendant was negligent. This

can only be done having regard to all the evidence adduced, and having done so, determining whether it on a balance of probabilities proved the negligence averred by the plaintiff.

(See *Arthur v Bezuidenhout and Mieny* 1962 (2) SA 566 AD at 574 A-B).

[12] **Analysis of the evidence:**

In looking at the objective facts of this case, it is clear that the plaintiff, is either not telling the truth in his evidence or he is deliberately omitting to explain the exact cause of the collision. In his evidence he failed to clarify why he could not accelerate and get out of the way of the oncoming Combi. It defies logic how he could consider it safe to execute a right hand turn with a left hand vehicle without bringing the vehicle to a halt to observe whether there are oncoming vehicles travelling towards Impendle. According to him there were five vehicles in front of him, excluding the bus in front of these vehicles, so his view was not clear and unobstructed to observe the road ahead. Even on this aspect, the plaintiff contradicted himself. Months after the collision, no mention was made of vehicles

travelling in front of him, and yet he wanted this Court to believe that five years after the collision his memory is better than shortly after the accident. This part of his evidence seems highly improbable and defies any logic.

The objective factors, like the scene of the collision, the surface of the road, the visibility on this day and the area of impact on the plaintiff's vehicle favours the version of the defendant, that the vehicle of the plaintiff unexpectedly turned in front of him. Mr Gwala under cross-examination was at pains not to concede to any suggestion made by the defendant, in circumstances where it was expected of him to concede.

The only plausible version, based on the evidence adduced, is that of the Defendant and his witness, especially when one considers the objective facts. His version as to how he was not able to avoid colliding with the Plaintiff's vehicle is clear and consistent. The defendant and his witness, struck me as honest, competent, truthful persons whose evidence can safely be relied upon. On the other hand the plaintiff and his witness contradicted each other on certain events, and

appeared to be confused about what happened directly before the collision took place. In all probability more alcohol was consumed than admitted and there is a strong probability that it impacted on the witness, Mr Chebekulu's, observation powers. For the reasons stated I have come to the conclusion that the credibility of the plaintiff and his witness had been seriously tarnished. Mr Cebekulu, who is related to the plaintiff showed that he was prepared to help the plaintiff. It did not go unnoticed that when he was asked about what the plaintiff could do to avoid the collision, he used the exact explanation as the plaintiff, namely 'he could not reverse the vehicle'. When the plaintiff delivered his testimony he also stated that he could not reverse the vehicle.

- [13] As regards the probabilities it must be kept in mind that the plaintiff wanted to execute a right hand turn, him being the driver of the vehicle and seated not nearest to the oncoming traffic but further away than his passenger. Given this predicament, the plaintiff did not stop to observe whether it is safe to turn, and whether there are oncoming vehicles, he wanted to convince this court that in his position he could sufficiently make the necessary observations.

In my view the testimony of the plaintiff has some worrying and improbable features.

[14] Given the circumstances of this case, I came to the conclusion that from the evidence as a whole, the deduction can be made that the accident was occasioned exclusively by the negligence of the plaintiff. I have come to this conclusion on the grounds that it is clear that he, did not keep a proper lookout and that he turned into the Eshowe road when it was not safe to do so. Further to this it seems that he did not accelerate to get out of the way of the oncoming traffic but elected to change gears and in so doing he failed to avoid the collision.

Under the circumstances I cannot find that there was attributing negligence to the driver of the insured vehicle. The facts decisively establish that there is no negligence on the part of the defendant's insured driver.

[15] The plaintiff failed to discharge the onus of proving on a balance of probabilities, the negligence as averred against the

defendant.

[16] Accordingly I make the following order:

1. The plaintiff's action is dismissed.
2. Plaintiff to pay the defendant's costs of suit.

Steyn, J

Date of Hearing: 12 October 2009

Date of Judgment: 23 October 2009

Counsel for the applicant: Adv M Chetty

Instructed by: Chetty, Asmall & Maharaj

Counsel for the first respondent: Adv R Nirghin

Instructed by: Shereen Meersingh & Associates