"IN THE HIGH COURT OF SOUTH AFRICA"
NORTH WEST DIVISION, MAHIKENG

CASE NUMBER: RAF11/2017

In the matter between:-

THAPELO MALATSI Plaintiff

And

ROAD ACCIDENT FUND Defendant

JUDGMENT

GUTTA J.

A. INTRODUCTION

[1] Plaintiff instituted an action against the Road Accident Fund for damages in the amount of R8 000 000.00, arising from a motor vehicle collision which occurred on 4 February 2016. Plaintiff was a pedestrian at the time.

[2] The trial proceeded on merits only as there was an agreement to separate quantum and merits.

[3] The issues for consideration are:

a) whether the driver of the insured vehicle was negligent;

b) whether there was contributory negligence.

B. PLEADINGS

[4] Plaintiff in its particulars of claim alleged that:

"[4] On the 4th February 2016 at approximately ±13:30, along Kroondal road, Rustenburg, North West Province, an accident occurred between on the one hand a motor vehicle with registration numbers and letters HBP 034 MP (*hereinafter referred to as the insured motor vehicle*) which was there and then being driven by Mutambirwa (*hereinafter referred to as the insured driver*) and the plaintiff who was a pedestrian at the time.

[5] The aforesaid collision was caused by negligence on the part of the insured driver of the motor vehicle with registration numbers and letters HBP 034 M) who was negligent in one or more or all of the following respects:

5.1 He failed to keep a proper lookout;

5.2 He failed to apply brakes timeously or at all;

5.3 He unreasonably placed himself in a situation of sudden emergency and subsequently failed to act in accordance with such situation;

5.4 He travelled at an excessive speed under the circumstances;

5.5 He failed to avoid the accident when with the exercise of reasonable care and skill he both could and should have done so;

5.6 He failed to maintain any or alternatively sufficient control over the insured motor vehicle;

5.7 He drove the insured motor vehicle whilst to his knowledge or he could have reasonably established and known that it had defective breaks or it was in an unroadworthy condition;

5.8 He failed to give any warning of approach of the insured motor vehicle;

5.9 He encroached onto the path of travel of the plaintiff;

5.10 He disregarded the interests of other road users more particularly those of the plaintiff".

[5] Defendant pleaded *inter alia* as follows:

"4.1 The defendant denies each and every allegation therein contained as if specifically traversed and puts the plaintiff to the proof thereof. In particular it is denied that the driver of motor vehicle bearing registration HBP 034 MP ("the insured driver") was negligent either as alleged or at all:

4.2 *Alternatively*, and in the event of it being found that

(a) a collision occurred as alleged by the plaintiff; and
(b) the driver of the insured vehicle was negligent in one or more or all of the respects alleged by the plaintiff,

all of which is still denied, then the defendant pleads that the negligent driving of the driver of the insured vehicle did not contribute to the collision as alleged by the plaintiff.

4.3 In the *further alternative* to paragraph 4.1 above and only in the event of it being found that:

a) a collision occurred as alleged by the plaintiff;

b) the driver of the insured vehicle was negligent in one or more or all of the respects alleged by the plaintiff; and

c) the negligent driving of the driver of the insured vehicle did contribute to the collision as alleged by the plaintiff,

all of which is still denied, then the defendant pleads that the plaintiff negligently contributed to the collision in one or more or all of the following respect:

(a) He failed to keep a proper look-out;

(b) He failed to take any, alternatively sufficient cognisance of the presence, the actions and the visibly intended and/or probable further actions of the driver of the insured vehicle;

(c) He failed to avoid a collision when by the exercise of skill and care he could and should have done so;

(d) He failed to have any alternatively adequate regard for vehicles on the road, in particular to the vehicle driven by the insured driver;

(e) He ventured onto the road surface when it was unsafe to do so".

C. <u>EVIDENCE</u>

[6] Plaintiff, Thapelo Malatsi testified that he is 26 years of age, residing in Caltonville, Thembisa. He said on the 4 February 2016 he was travelling on foot to town. He was walking on the left side of the road facing oncoming traffic which was on his near side. He saw a truck which was approximately 100m away and observed that it was safe to cross the road. Before he crossed, he did not see any vehicles coming from the opposite direction. While crossing the road, the truck collided into him in the middle of the road. He was hit on the right front side of the truck.

[7] In cross examination he admitted that contrary to the particulars of claim, he bore no knowledge regarding defective brakes on the insured driver's vehicle or that the insured driver (Mr Mutambirwa) was driving at an excessive speed. He also did not know the speed limit on the road. He however denied that Mr Mutambirwa was driving at 40 – 50 km per hour because he said "at the moment I thought the truck was far and in the short time, it was where I was". He also said if he was travelling at 40 – 50 km per hour he would not have sustained the injuries he did.

[8] He denied that he jumped into Mr Mutambirwa's lane of travel when Mr Mutambirwa was a distance of 5m away from plaintiff. He also denied that Mr Mutambirwa applied his brakes and saw plaintiff fall. He reiterated that he was in the middle of the road when the vehicle hit him and he was hit on the right side of the truck.

[9] Under re-examination he said Mr Mutambirwa did not hoot or swerve to avoid the collision and only applied brakes after the truck hit him.

[10] The Court, in order to understand and get clarity of where on the road the accident occurred and where the parties were before the collision, requested plaintiff to draw a sketch plan. According to the sketch plan, plaintiff was walking in the opposite direction to the direction in which Mr Mutambirwa was driving and the point of impact was in the centre of the road on Mr Mutambirwa's lane of travel.

[11] Defendant called Mr Mutambirwa. He was driving a Volvo Side Tipper truck, a horse with 2 trailers which is 22 meters in length. It loads 34 tones. He is employed as a driver with a code 14 licence. He said on the 4 February 2016, he was driving to a mine. He had passed Kroondaal and approximately 500m from Kroondaal there is an informal settlement where he was looking for someone to ask directions to the mine. He was 100m away when he observed a man (plaintiff) who walked on the gravel. He was travelling in the opposite direction to the direction he was travelling on. He thought of stopping to ask plaintiff directions to the mine. As he was about to pass plaintiff, who was a distance of 2.5m from the road, plaintiff turned his head back and ran and jumped in front of the truck and fell in front of the truck. He got out of his vehicle and took a photograph. A white man approached him and said he can be a witness to the accident. The ambulance arrived and took plaintiff away. Mr Mutambirwa then went to the police station and made an accident report.

[12] Mr Mutambirwa said he was travelling at a speed of 40 – 50 km per hour as he didn't know where he was. The speed limit on that road was 60km. The load of the horse and 2 trailers are 21 ton/21000 kg unloaded and loaded 56 000kg. At the time of the accident it was not loaded. He said when he first saw plaintiff he thought of stopping to ask him for directions to the mine. He decided not to stop because he saw a green sign board up ahead. The impact was on the left side, that is, the passenger's side. He was asked the following questions:

"Q what did you do when you saw plaintiff jump into your lane of travel?
A I used my retarder and foot brake to reduce the impact.
Q what does the retarder do?
A Breaks the horse and load".

[13] He said the truck stopped 3m after the impact. It did not stop immediately because of the breaking distance. He said there was no way to avoid the collision as he couldn't move to the left or the right sides and the only option was to apply brakes. If he turned to the right he would have collided with oncoming traffic and if he turned

to the left, that is the direction plaintiff was coming from and he would have hit him. There were no defects in the truck's brakes. He has been driving the vehicle and trailer for 5 years.

[14] In cross examination he was referred to his written statement. When asked to point out in the statement where he said he applied brakes, he said nobody asked him when he applied brakes. He reiterated that he applied his brakes before he collided with plaintiff and that is what saved plaintiff.

[15] Counsel for plaintiff put it to him that the only probability was that he was speeding and didn't keep a proper look out as he was focusing on the green sign and didn't focus on plaintiff's movement and realized too late that plaintiff was crossing the road that is why he did swerve. Defendant denied that he was speeding or that he failed to keep a proper lookout. He said when he was about to stop he saw the green sign board and he saw plaintiff looking back and run across the road.

[16] The next witness for defendant was Willem Petrus Steyn. He is a fleet and maintenance manager at a civil construction company. He said on 4 February 2016, he was on his way from the mine to Kroondaal. As he was approaching Kroondal he saw a truck, approximately 300m in front of him. He was approximately 100m from the point of impact. He saw a pedestrian on the side of the road jump in front of the truck. He applied brakes and stopped next to the road where plaintiff was hit. When the driver of the truck got out of his vehicle, he approached him and gave him his number and told him that he could contact him. He took the details of the driver's company and contacted them and requested them to send assistance.

[17] When questioned what Mr Mutambirwa could have done to avoid the collision he replied "He was driving at a low speed. It happened in a short while. Don't think he could have done anything". He said if Mr Mutambirwa swerved to the right he would have hit the vehicle in front of him and if he swerved to the left, he would have hit plaintiff. He said he is travelling this area for 8 years. It is built up area and there is a

school in the area. He agreed that he would be vigilant in the area because he would expect people to cross the road. He said the road he was travelling on was slightly downward and he was able to see what happened in front of him. He said plaintiff jumped and hit the truck between the grill and the windscreen on the passenger side.

D. THE LAW

[18] On the evidence there are two contradictory versions. The approach, when facing mutually destructive versions was set out in the case of *National Employers General Insurance Co Ltd v Jagers*[1], by Eksteen AJP when he 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."

[19] The duty of this Court therefore is to establish, on the balance of probabilities, which of the two versions is more probable and more likely. The procedure to be adopted in such a case has been aptly set out in ***Stellenbosch Farmers' Winery Group***

[1] 1984(4) SA 437 (E) at 440 D - G

Ltd & Another v Martell et Cie & Others[2], where the Court stated as follows:

"The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarized 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."

[20] In ***Santam Bpk v Biddulph***[3], the Court stated that:

"However, the proper test is not whether a witness is truthful or indeed reliable in all that he says, but whether on a balance of probabilities the essential features of the story which he tells are true."

[21] The principles extracted from these two cases are that when there are mutually destructive versions before court, 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 plaintiff's version is true and that of defendant is false, in order for plaintiff to succeed in discharging his *onus* of proof, is only applicable in cases where there are no probabilities one way or the other.

E. <u>EVALUATION</u>

[22] Mr Mutambirwa did not contradict his evidence in examination in chief and in cross examination. He spoke confidentally and remained consistent with his version of events. He made a good impression on the Court. I am of the view that he is a credible witness.

[23] Mr Steyn was an independent witness who observed the motor collision. After the collision he gave Mr Mutambirwa his number in the event that he was needed to

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[2] 2003(1) SA 11 (SCA), National Employer Mutual General Insurance Association vs Gany 1931 AD 187 at 199

[3] 2004(5) SA 586 (SCA) at paragraph (10)

explain what he observed. Mr Steyn did not contradict himself in cross examination. He is a credible witness. Mr Steyn testified that he was able to observe clearly what transpired as he was travelling downhill. Hence the probabilities are that he was able to give an accurate account of what transpired.

[24] Mr Steyn corroborated Mr Mutambirwa's evidence in the following material respect:

1. He observed a truck passing a settlement;

2. He saw plaintiff who was a pedestrian on the side of the road;

3. He saw plaintiff jump in front of the truck;

4. Plaintiff hit the vehicle on the passenger's side;

5. Mr Mutambirwa was driving at a low (slow) speed;

6. He said if he was in Mr Mutambirwa's position there was nothing he could have done to avoid the collision. If he turned to the right he would drive into oncoming traffic and if he turned to the left he would have hit plaintiff.

[25] Plaintiff did not make a good impression on the Court. He was often evasive and hesitated when giving his answers. When confronted with his case in his particulars of claim, namely that, Mr Mutambirwa had defective brakes or that he was driving at a high speed, he admitted that he bore no knowledge of the condition of the brakes or the speed limit in the area. He however disputed that Mr Mutambirwa drove at a speed of 40 – 50km per hour because he said he could not have sustained the injuries he had if he was driving at that speed. As stated *supra*, plaintiff did not call any expert witnesses regarding the speed correlation between the type of vehicle and the injuries sustained.

[26] Plaintiff did not adduce any evidence of what the speed limit was on the road or that Mr Mutambirwa was driving at an excessive speed. Mr Mutambirwa's evidence that he was travelling at a speed of 40 – 50 km is unchallenged and more probable when considering the following:

1) He was driving a big truck, a horse with 2 trailers measuring 22 meters;

2) He did not know the area and was intending to stop plaintiff and ask directions to the mine;

3) He observed a green sign board up ahead;

4) He was able to apply his brakes when he observed plaintiff jump in front of the truck which prevented plaintiff from sustaining more severe injuries.

5) Mr Steyn said Mr Mutambirwa drove slowly.

[27] Plaintiff testified that he was walking 20m from the tarred road and when asked in Court to give an indication of 20m from where he was standing, he pointed to a table which was only 5 – 6 m away. Hence, plaintiff's evidence regarding distances is not accurate and I cannot attach much weight to his evidence that he first observed Mr Mutambirwa when he was a distance of 100m away. On probabilities Mr Mutambirwa must have been closer to him than he realized. Plaintiff's evidence that he was in the middle of the road when he was hit and that the damages to the truck was on the right side is inconsistent with both Mr Steyn and Mr Mutambirwa's evidence that the damage to the truck was on the left side. When considering the aforegoing, Mr Mutambirwa's evidence that as he was about to pass plaintiff he observed plaintiff look back and then run and jump in front of the truck is more probable.

[28] The submission that Mr Mutambirwa failed to keep a proper look out because he was looking at the road sign is without merit and merely speculation. Mr

Mutambirwa's evidence is clear, namely that plaintiff was a distance of 2.5m from the road when he was about to pass him. Road users have a responsibility to keep a proper lookout not only for vehicles on the road but also road sign and other road users such as pedestrians. There is no evidence that Mr Mutambirwa failed to keep a proper lookout. On the contrary, Mr Mutambirwa's evidence is that he in fact observed plaintiff on the side of the road and that he was driving at a speed of 40 – 50 km with the intention of stopping and asking plaintiff directions to the mine.

[29] The statement made by Mr Mutambirwa lends further support to his version of events in that he states that:

1) He was travelling at a speed of 40 – 50 km per hour;

2) There was a pedestrian travelling on the left hand side of the road from the opposite direction, approximately 2.5 meters from the road;

3) The first time he observed the pedestrian he was approximately 100m away;

4) When he was approximately 8 meters away the pedestrian looked to the side and jumped in front of his vehicle;

5) He collided with the pedestrian as he was close by and he fell to the ground;

6) He applied brakes to prevent the vehicle from running over him.

[30] For defendant to be liable to pay plaintiff's damages on the basis of negligence, plaintiff had to demonstrate that:

a) a reasonable person in the position of Mr Mutambirwa –

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

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

b) Mr Mutambirwa failed to take such steps

[31] When considering the approach formulated in respect of mutually destructive versions in the cases cited *supra*, I am of the view, when considering the plaintiff's version against the general probabilities, that plaintiff failed to persuade this Court on a preponderance of probabilities that his version of events is the truth. On the other hand Mr Mutambirwa was a credible and truthful witness and his evidence was corroborated by Mr Steyn in all material respect. Mr Mutambirwa's testimony is a more probable reflection of the events surrounding the collision on that day.

[32] In *Ntsala and Others v Mutual & Federal Insurance Co Ltd*[4] Els J stated the following at 192G - H:

*"*Where a driver of a vehicle suddenly finds himself in a situation of imminent danger, not of his own doing, and reacts thereto and possibly takes the wrong option, it cannot be said that he is negligent unless it can be shown that no reasonable man would so have acted. It must be remembered that with a sudden confrontation of danger a driver only has a split second or a second to consider the pros and cons before he acts and surely cannot be blamed for exercising the option which resulted in a collision*".*

[4] 1996(2) SA 184 (T)

[33] Mr Mutambirwa found himself in a precarious situation, which was one of sudden emergency as plaintiff elected to look back and run across the road in circumstances where it was not safe to do so as Mr Mutambirwa was approaching. Both Mr Mutambirwa and Mr Steyn testified that Mr Mutambirwa could not have in the circumstances avoided the collision. The only probable and reasonable explanation, for reasons stated *supra*, for the cause of the collision is the explanation proferred by both Mr Mutambirwa and Mr Steyn. Accordingly, I am of the view that plaintiff failed to discharge the *onus* of proving on a balance of probabilities that Mr Mutambirwa was negligent.

F. ORDER

[34] In the result,

a) Plaintiff's claim is dismissed with costs.

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N. GUTTA
JUDGE OF THE HIGH COURT

APPEARANCES

DATE OF HEARING	: 12 FEBRUARY 2018
DATE OF JUDGMENT	: 22 MARCH 2018
ADVOCATE FOR PLAINTIFF	: ADV C De AGRELLA
ADVOCATE FOR DEFENDANT	: ADV GDM DUBE

ATTORNEYS FOR APPLICANT	:	GURA TLALETSI INC (Instructed by Chueu Attorneys)
ATTORNEYS FOR RESPONDENT	:	MAPONYA INC.