



REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA, CAPE TOWN
WESTERN CAPE HIGH COURT

Case no: 2963/2010

In the matter between:

COLIN AUTHUR EDWARD WEIR

PLAINTIFF

AND

JAMES SAVAGE

DEFENDANT

Heard: 04 February 2013

Delivered: 27 February 2013

JUDGMENT

BOQWANA AJ

Introduction

- [1] This is an action for damages arising from a collision between two motor vehicles, a Land Rover Discovery with registration number CA 608513 owned and driven by the plaintiff and the defendant's vehicle, a Ford Focus with registration number CA 54668, driven by the defendant. The collision occurred on 13 March 2008 at Tokai Road in the Tokai area at approximately 23h00. The plaintiff alleges that this collision was caused solely by the defendant's negligent driving.

- [2] The parties agreed to separate the merits from the quantum. The issue to be decided by this Court therefore is whether the defendant acted wrongfully and whether the collision was caused by his negligence.
- [3] An aerial map of the Tokai area and photographs of the accident scene were provided to me at the trial. It is common cause that the Land Rover was travelling in an easterly direction down Tokai Road, approaching Dalmore Road on its left hand side, whilst the Ford Focus was travelling in a westerly direction, approaching Perth Road on its left. Dalmore Road was on the right of the Ford Focus' direction and a few metres before Perth Road. As Tokai Road approaches Perth Road from the westerly direction it splits into two lanes, with one lane for vehicles proceeding straight and turning left into Perth Road and with the other lane indicating a right turn for vehicles preparing to turn right at Dalmore road. At the corner of Dalmore and Tokai Roads is a petrol station. It is common cause that Tokai Road is a reasonably flat road with a speed limit of 60 km per hour.
- [4] It is also common cause that the defendant left his lane and collided with the plaintiff's vehicle on the plaintiff's side of the road. The defendant alleges that, as he was approaching Perth Road a vehicle turned in front of his vehicle, without indicating, causing him to swerve right towards the third lane and colliding with the plaintiff's vehicle. He confirmed that there were three lanes on that road altogether.
- [5] The plaintiff testified that he had been driving towards the filling station at Dalmore Road and his intention was to put petrol to his vehicle. He had been travelling very slow as he was preparing to turn left into Dalmore Road when he heard the screeching of tyres which was followed by a tremendous collision with the defendant's vehicle hitting his own vehicle on the front right hand side. Both cars were severely damaged. His vehicle was in fact considered uneconomical to repair. As regards the defendant's vehicles he could vaguely remember that its engine section was taken off the vehicle.
- [6] The plaintiff testified further that the collision occurred at the Tokai sign appearing on the aerial map, next to where Spar was situated. This Tokai sign

is just above Dalmore Road from the direction of the Land Rover. The plaintiff also testified that he could not remember where the defendant's vehicle landed after the collision. Furthermore he could not do anything to prevent the accident. According to him the screeching of the tyres was an indication that the defendant's vehicle was travelling at a high speed.

- [7] Mrs Pamela Patterson ('Patterson') testified as a witness for the plaintiff. Her evidence was that she had been driving down Tokai Road next to the Spar, behind a Land Rover and was not driving very fast. She heard the vehicle coming fast up Tokai Road. She testified that she could hear the engine revving very fast before she even saw the vehicle. She then saw the vehicle coming up fast with bright headlights on the opposite side of the road. The vehicle left its lane and collided with the Land Rover. This vehicle bounced right up to the Spar which was quite far off the road. Patterson then stopped her vehicle to check if the person in the Land Rover was alright. She testified that the Road was well lit at the time.
- [8] Patterson testified that the accident occurred just above Dalmore Road. She pointed the Tokai sign in the aerial map as the point of impact. This aspect of Patterson's evidence was not challenged during cross examination.
- [9] The defendant testified that he had a conversation with the plaintiff after the accident and the plaintiff told him that he saw the vehicle that swerved in front of him, a yellow Mercedes Benz with an Eastern Cape registration number. The plaintiff did not recall such a conversation on seeing such a vehicle. Patterson could also not recall seeing such a vehicle. She however stated that if there was such a vehicle she would have definitely seen it.
- [10] The defendant denied that the collision occurred at the Tokai sign in Tokai Road. According to him the point of impact was between Perth and Dalmore Roads. He stated that this was so because he was going to turn right at Dalmore Road as he was intending to fill petrol at Dalmore Road. He therefore had already slowed down in preparation for a right turn. He accordingly disputed that he was travelling fast. He also disputed that his vehicle ended by the Spar after the collision. According to him, his vehicle became stationery at

the Tokai sign depicted on the aerial map. He conceded that both cars were extensively damaged.

Evaluation

- [11] The defendant does not dispute that the accident occurred but he denies that he was the cause of the accident. He also does not deny that the accident occurred on the incorrect side of the road. His explanation is that a vehicle swerved in front of him causing him to swerve into oncoming traffic on the third lane.
- [12] Once it is proven that a vehicle was on the incorrect side of the road at the time of the collision that gives rise to an inference of the driver's negligence. Such proof casts an evidential burden of rebuttal on the defendant. The defendant must adduce evidence sufficient to rebut the inference of negligence.
- [13] In his book, *The Law of Collision in South Africa*, ¹HB Klopper states that 'If there is irrefutable proof of a collision on the incorrect side of the road, such collision constitutes *prima facie* negligence on the part of the driver who was found to be on his incorrect side of the road at the time of the collision. Once the plaintiff has established that the collision did in fact occur on his side of the road, the defendant has to explain his presence on the defendant's incorrect side of the road. If the explanation is insufficient to dispel the inference of negligence arising from his presence on the incorrect side of the road, the defendant will be held negligent.'²
- [14] Negligence should be proven on the balance of probabilities. Plaintiff's counsel argues that it is improbable that a yellow Mercedes Benz existed. This is because both the plaintiff and Patterson do not recall seeing the yellow Mercedes Benz and Patterson testified that she would have definitely seen it if it was there. The plaintiff on the other hand was concentrating more on the left as he was preparing to turn to Dalmore Road. Furthermore on the plaintiff's

¹ 7th ed 2003 at page 78

² Klopper at page 78

version, which was supported by Patterson's is that the collision occurred before he could turn to Dalmore Road. Patterson's evidence in this regard was not challenged under cross examination.

[15] It is highly unlikely that the collision occurred between Perth and Dalmore Roads as the defendant alleges. The plaintiff would not have passed Dalmore Road. His intention was to turn left into Dalmore Road, which is on the opposite direction before Perth Road. This aspect of the plaintiff's evidence was also not seriously challenged under cross examination. The plaintiff's version on the point of impact is crucial in that, if correct, it means the defendant must have already passed Perth and Dalmore Roads when the accident occurred, which would cast some doubt as to the existence of the Mercedes Benz and his version that he was going to turn right into Dalmore Road before the accident happened.

[16] The plaintiff's version that he was travelling slow and had been intending to fill his vehicle at the petrol station was also not strongly challenged. Both Patterson and the plaintiff appeared to be credible witnesses and did not contradict each other. Whilst the plaintiff did not recall certain details around the incident, he however recalled specific details of how the accident occurred, which details were in most parts confirmed by Patterson in her testimony.

[17] In light of that evidence, the version that there was a Mercedes Benz obstructing the defendant's way is most questionable.

[18] Even if the Mercedes Benz was there, swerving into oncoming traffic should have been the last resort in my view. In *President Insurance Company Limited v Tshabalala and Another*³ it was held that a driver of a motor vehicle who is faced with an oncoming vehicle which has swerved and entered its incorrect lane of travel, and an impending collision must, as a general rule, avoid swerving to its incorrect lane as his primary course of action. The Court went

³ 1981(1) SA 1016 (A) at 1020 C

on to say that it is important that each case be judged on its own merits. Cases must be seen in the context of their own facts.

- [19] It was put to the defendant during cross examination that there were two lanes as he was approaching Perth Road and that he could have swerved on the second lane still on his side of the road instead of choosing the lane of the oncoming traffic. The defendant conceded that he could have done so but stated that he was faced with sudden emergency. He saw headlights, had no time to react and swerved to the right to avoid colliding with a vehicle that was coming to him. He admitted that his decision to swerve to the third lane was 'perhaps' a poor one but he thought he was doing his best to avoid the collision.
- [20] It must be remembered that the standard of care is that of a reasonable man and not of the defendant's instincts. It is trite that a driver who is faced with sudden emergency is required to exercise reasonable care and use reasonable skill to avoid imminent danger.⁴
- [21] A person faced with emergency must act reasonably even if by a justifiable error of judgement he does not choose the very best course of action to avoid the accident as events would show afterwards.⁵ Each case must however be treated on its own merits.
- [22] In *Ntsala and others v Mutual and Federal Insurance Co Ltd*⁶ the court held that:

'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

⁴ See Cooper's Delictual Liability in Motor Law, 1996 at page 275

⁵ Cooper supra: See also SAR V Symington

⁶ 1996 (2) SA 184

before he acts and surely cannot be blamed for exercising the option which resulted in a collision.⁷ (own emphasis)

- [23] In my view a reasonable man would not have acted in the way the defendant did. On the face of an emergency, with a vehicle coming in front, in a road that has two lanes, well lit, at approximately 23:00, driving slowly, he would choose the safer option, which is to get into the second lane, which had no vehicles, than to cross over to the lane of the oncoming traffic.
- [24] Secondly, if the defendant had already slowed down with the intention of turning right into Dalmore Road as he alleges, he would have already been preparing to be on the second lane turning right to Dalmore road anyway. In this regard he could have reasonably been able to manoeuvre the vehicle at that critical time. It must be remembered that the road splits into two lanes before the left turn to Perth.
- [25] Indications are that the defendant was driving fast. This is not only from the plaintiff and his witness' version but it can also be deduced from the defendant's own version. The distance between the point of impact as alleged by the defendant and the point where his vehicle landed were on the face of it (at least as appears from the aerial map) some distance apart. At first the defendant conceded under cross examination that the distance between the two points was 100 metres but when he was re-examined he testified that it could be less than 35 metres because he had walked 30 paces between the point of impact and where his vehicle had stopped. He pointed to the Tokai sign on the map as the point where his vehicle became stationary. I do not expect the defendant to give accurate distances as no scientific calculations were done apart from what is reflected on the map. However taking into account factors which I deal with below, the version that the defendant's vehicle stopped far from the impact point seems to be more reasonable.

⁷ *Ntsala and others supra* page 192 at para F - G

- [26] Mr Cuyler seemed to suggest that in the absence of expert evidence on speed the Court cannot attach too much weight on the evidence given by Patterson on the speed issue. In *S v Maseko*⁸, the Court remarked that ‘the time has come when one must surely recognise the ability of the average motorist to say, in ordinary circumstances and certainly when testifying to events witnessed by him in broad daylight, whether a car is going too fast or fast or slowly or at medium speed.’⁹ In that particular case a witness had testified that the appellant was driving very fast. Similarly in this case Patterson testified about what she observed. She was not expressing an opinion on the negligence of the defendant but was simply stating that the vehicle was driving very fast and she could even hear the engine revving. There is no reason why the Court should not accept that evidence and come to a conclusion that in these circumstances the defendant was driving at a high speed.
- [27] In my view the only reasonable inference to be drawn from the screeching of the tyres, revving of the engine, the point at which the defendant’s vehicle landed and the extensive damage on both vehicles is that the defendant was driving at a high speed, which meant he could not reasonably bring his vehicle under control and when faced with the emergency.
- [28] As opposed to the defendant, the plaintiff drove on his side of the road, was driving slowly and preparing to turn left at Dalmore Road and could not do anything to avoid the collision. The plaintiff’s version was corroborated by Patterson in many respects and the plaintiff was not seriously challenged in that regard.
- [29] The defendant did not have a witness testifying for him. He relied on the motor vehicle accident form that he completed the day after the accident, which recorded that the driver of the 4x4, presumably the plaintiff, confirmed that

⁸ 1983 (4) 882 NPD

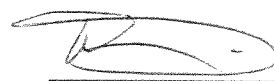
⁹ *S v Maseko supra* at paras E –F

there was a vehicle turning in front of him with Eastern Cape licence plates. I have already dealt with the plaintiff's and Patterson's responses on this issue.

[30] I therefore find that on the balance of probabilities the plaintiff has been able to show that the collision was caused solely as a result of the defendant's negligent driving.

[31] In the result I make an order in the following terms:

1. The defendant's negligent driving on 13 March 2008 was the sole cause of the collision between a Land Rover Discovery, registration number CA 608 513 and a Ford Focus, registration number CA 54668 at Tokai Road, in Tokai.
2. The defendant is to pay to the plaintiff damages caused as a result of the collision to the plaintiff's motor vehicle, Land Rover Discovery, registration number CA 608 513.
3. The defendant is to pay costs on a party and party scale.



BOQWANA AJ

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

APPEARANCES:

FOR THE PLAINTIFF: Adv L N Wessels

INSTRUCTED BY: Michael Matthews & Associates,
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FOR THE DEFENDANT: Adv D Cuyler

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