

SOUTH AFRICA / JUDGMENT

Bester v Sivakumar (15542/2013) [2015] ZAGPPHC 597 (23 July 2015)

[2015] ZAGPPHC 597

COURT

North Gauteng High Court, Pretoria

BEFORE

S A Thobane

CASE / FILE NUMBER

15542/2013

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED✓

23 July 2015 ____

DATE SIGNATURE

23/7/2015

CASE NO:15542/2013

THOMAS WILLIAM BESTER

PLAINTIFF

AND

DHARINI SIVAKUMAR

DEFENDANT

JUDGMENT

THOBANE AJ,

INTRODUCTION

- [1] The plaintiff instituted an action against the defendant for damages to his vehicle which were a consequence of a motor collision that occurred between his motor vehicle and a motor vehicle driven by the defendant.
- [2] The plaintiff, who is an Advocate, testified in his own case and called his son, who was a passenger on the day of the collision, as his witness. The defendant, a lecturer, testified in her own case and called no other witnesses.
- [3] The parties indicated at the commencement of proceedings that the question of quantum was not up for determination as they had agreed thereto and that the issue to be determined was liability. It was further indicated that the plaintiff had no specific interest in the matter as his claim was settled by his insurers and that he was before court on the basis of subrogation. The following issues were common cause;
- The date, place and time of the collision,
 - Locus standi of the plaintiff,
 - The direction in which both vehicles were moving before the collision,
 - The parties' respective quantum of the damage,
 - The point of impact and,
 - A map from Google Earth depicting the intersection.

PLAINTIFF'S CASE

- [4] Plaintiff testified that on the 20th April 2010 he was traveling on Arcadia Street at about 7:00 AM, taking his son to Pretoria Boys High School. He was traveling from East headed Westwards on Arcadia Street approaching the intersection of Arcadia and Eastwood Streets. At the time it was peak hour traffic. The intersection is controlled by a stop sign only for vehicles traveling on Arcadia Street. There was a vehicle ahead of him that had stopped at the stop street. Due to the volume of traffic, so he testified, motorists on Eastwood Street clear the intersection from time to time to allow vehicles traveling on Arcadia Street to cross over or join the procession on Eastwood Street. The vehicle ahead of him was permitted, by those vehicles on Eastwood Street, to drive through which it then did.
- [5] 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. While crossing, a Toyota vehicle overtook vehicles which had stopped to allow him to pass through, on the left hand side and collided with his motor vehicle. The Toyota, driven by the defendant, was traveling from South to North on Eastwood Street. The weather had been clear on the day and the road surface was dry. Nothing obstructed his view in the vicinity however he would not have been able to see a vehicle overtaking the stationary vehicles on their left. This was due to the stationary vehicles that allowed him to pass through, which had blocked his line of vision.

The “nose” of his vehicle had been about three quarters of the way through on the North bound lane, “the empty lane”, when the collision occurred. 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.

- [6] After the collision he exchanged details with the defendant who indicated that she will report the collision to the police. He was at the time concerned that his son be taken to school timeously, so he arranged that the tow truck do so. 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 defendant’s motor vehicle. He denied that he did not stop at the stop street and that he drove negligently on the day.
- [7] During cross examination it was put to him that he had an interest in the matter in that should he succeed with the action it could have an impact on his insurance premium. He indicated that he had not given that any thought and that he was was not aware of the benefit. He further 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 carrying two sets of motor vehicles in each direction. He stated that traffic was heavy on the day and that as a result traffic had been heavily backed up. Further, that at the intersection of Francis Bard and Eastwood, due to the volume of traffic, vehicles had formed two lanes. He agreed that motor vehicles traveling on Eastwood Street had right of way. He stated that after he had stopped at the stop street he proceeded slowly at a speed of between 5 to 10km/h. It was put to him that at that speed the damage on his motor vehicle would have been a small bump. He indicated that the vehicle driven by the defendant had been traveling fast. He did not see the defendant’s vehicle go out of its lane and thereafter proceeding to overtake other vehicles. He noticed it shortly before the collision. He denied that the road surface was wet on the day in question and that it was drizzling. It was put to him that the defendant could not have been traveling at more than 50km/h

which he accepted. He denied that he crossed the intersection traveling at about 50 to 60km/h and described it as sheer madness and that it would have been suicidal of him to do so.

- [8] Dylan Pattison, the plaintiff’s son, testified that he was a passenger in the vehicle driven by the plaintiff and that they were on their way to drop him off at school. He was at the time 18 years of age. He observed that traffic was heavily backed up all the way through to Schoeman Street. They were traveling on Arcadia Street and at the stop street after they had stopped, cars traveling on Eastwood Street stopped and waved them in to cross and pass through. He went on to say that although Eastwood is a single lane street it is wide enough to carry two sets of vehicles in each lane. They were crossing the road when a vehicle overtook other vehicles on the left and crashed into the vehicle in which he was a passenger. He did not see the vehicle approach until the very last moment before the collision. He indicated that his recollection was that the weather was clear on the day in question. He disputed that his father had been traveling at about 50km/h.

- [9] During cross examination he reiterated that there was heavy traffic. He stated that he observed his father stopping at the stop street and that thereafter they were waved in by other vehicles which had created space for them to pass through. He could not remember the car in front of them passing through the intersection as testified to by his father. He did not see the defendant's vehicle coming as their view was obscured by other vehicles up until the moment of impact. He disputed that the lane in which the collision occurred was being used as a second lane on the day of the collision. He disputed the version put to him that the defendant had not been overtaking but that she was simply driving on the left hand side which was being used as the second lane. He further disputed that they did not stop at the stop street or that they had driven in rolling stop manner.

DEFENDANT'S CASE

- [10] The defendant testified that on the day in question visibility was clear. She indicated that the previous night it was raining and that shortly before the collision it was drizzling. On the day she had dropped her son at school and was on her way to the fresh produce market. She was familiar with the road and she used it frequently. Traffic was heavy on the day but it was not backed up. The cars were not standing still, they were moving slowly. She was driving towards Pretorius Street on the left lane which she did frequently on that stretch of road. Near Arcadia Street as she was approaching she looked ahead. She had right of way and she proceeded to drive through. The next thing a car collided with her. She didn't see it approaching. She indicated that she could not have avoided the collision. After the collision her vehicle spun some 360 degrees. She could not tell where the plaintiff's vehicle came to a stand still after the collision although she reluctantly estimated that the vehicles could have been three meters apart. The damage on her vehicle was to the drivers door towards the front of the vehicle. They exchanged details and she proceeded to the police station to report the collision. On the day of the collision both the North-South and the South-North lanes were used as dual carriage lanes.
- [11] She was cross examined about her international driving permit. She conceded that it did not state the period of validity as it was supposed to. She stated further that she was not aware that in terms of South African law a license is not valid if not signed, like hers. With regard to the collision, she explained that there were two sets of cars in both directions on Eastwood Street but that traffic was heavier on the lane of cars traveling towards Schoeman Street. Cars were moving slowly in a stop start manner. She indicated that the plaintiff did not stop at the stop street but came like a bullet. She was referred to the accident report which was deficient in some respect relating to how she reported the collision to the police. She was probed as to why she did not tell the police that the plaintiff had failed to stop at a stop street as this was a central pillar of her case, to which she replied that it was her first accident and that she was in shock. After the collision she asked the plaintiff why he did not stop, to which the plaintiff replied that people had waved for him to pass through.

[12] It was agreed that the parties would submit written heads of argument. A time line was agreed to which spelled out such submission. The heads were detailed and very helpful.

CLOSING ARGUMENTS

[13] It was argued on behalf of the plaintiff that the court was faced with two mutually destructive versions and that in such circumstances

the court should take one version and reject the other. It was further submitted that the defendant had simply failed to deal with

certain important aspects in her testimony, her evidence was improbable and that she could not or she refused to answer certain

questions and/or respond to reasonable propositions put to her.

[14] A further submission was that the defendant was a single witness and that her testimony was without corroboration. It was therefore argued that her version should be rejected as not reasonably possibly true. Further, that it was apparent that she had executed a dangerous maneuver when she overtook on the wrong side of the road.

[15] It was submitted that the defendant did not have a valid driver's license on the day of the collision. That she had a legal duty to keep a proper look out which included not overtaking on the wrong side of the road and also ensuring that she observed what was taking place in her surroundings, which she failed to do.

[16] Finally, it was submitted on behalf of the plaintiff that the version of the defendant should be rejected and a finding be made that she was the sole cause of the collision. Alternatively, that she contributed 80% to the collision and that negligence be apportioned accordingly. Lastly, that should her version be accepted, an apportionment of 50% be applied.

[17] The legal representative of the defendant argued that the versions before court were not necessarily mutually destructive version. He argued that;

"Subjective perception of the same event does not render such perceptions mutually destructive specifically where the facts not in dispute, exhibits and circumstances favour a specific version."

[18] It was further argued that due regard should be given to the inherent probabilities and improbabilities in the respective versions. That if that were to be done, then the version of the Defendant will be found to be more probable and will be in line with the exhibits.

[19] The fact that the license of the Defendant was not signed, does not render her to be negligent in terms of the reasonable man test, so it was argued. Further, that there is a duty on a vehicle to drive on the left and to pass or overtake on the right and that on the day in question the Defendant was not in the wrong.

[20] The Defendant's legal representative was of the view that the Plaintiff failed to keep a proper look out on the day of the collision and that he entered the intersection at high speed.

THE LAW

[21] It is trite that the plaintiff always bears the onus of proving negligence on the part of the defendant on a balance of probabilities. See *Arthur v Bezuidenhout and Mieny* 1962

(2) SA 566 (AD) at 576G; *Sardi and Others v Standard and General Insurance Co Ltd* 1977

(3) SA 776 (A) at 780C-H and *Madyosi and Another v SA Eagle Insurance Co Ltd*

[1990] ZASCA 65; 1990 (3) SA 442 (E) at 4440-F. In determining whether the plaintiff has succeeded in discharging this onus, the court has to view the entire evidence which was led during the trial in its entirety.

[22] To the extent that there are two mutually destructive versions, the manner of handling such versions is trite. In dealing with the mutually destructive versions, the approach to be adopted was clearly spelt out in *National Employers General Insurance Co Ltd v Jagers* 1984 (4) SA 437

(E) at 440E-441A, where Eksteen AJP said:

“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 a 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 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 credibility of the witness will therefore be inexplicably 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’s, 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.

This view seems to me to be in general accordance with the view expressed by COETZEE, J in *Koster Kooperatiewe Landboumaatskappy Bpk v Suid-Afrikaanse Spoorwee en Hawens* (supra) and *African Eagle Assurance Co Ltd v Gayner* (supra). I would merely stress, however, that when in such circumstances one talks about a plaintiff having discharged the onus which rested upon him on a balance of probabilities one really means that the Court is satisfied on a balance probabilities that he was telling the truth and that his version was therefore acceptable. It does not seem to me desirable for a Court first to consider the question of the credibility of the witnesses as the trial Judge did in the present case, and then, having concluded the enquiry, to consider the probabilities of the case, as though the two aspects constitute separate fields or enquiry. In fact, as I have pointed out, it is only where a consideration of the probabilities fails to indicate where the truth probably lies, that recourse is had to an estimate of relative credibility

apart from the probabilities.”

[23] The technique to be applied when confronted with mutually destructive versions was spelled out by the Supreme Court of Appeal when it gave the guidelines below, Stellenbosch Farmers’ Winery Group Ltd and Another v Martell Et CIE and Others 2003 (1) SA 11 (SCA), where the following is stated at 141-15G:

“The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised 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. As to (a) [credibility], 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 and blatant; (iii) internal contradictions in his evidence; (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extra curial statements or actions; (v) 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 or observe the event in question and (ii) the quality and integrity and independence of his recall thereof. As to (c) [probabilities], 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 the 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.” [Words in square brackets and emphasis added.]

[24] Every driver must keep a proper look out when driving. This standard, of keeping a proper lookout, is even greater for a driver who is driving on the main road with intersections than a driver who is driving on a road without intersections. Marie and Trade Insurance Co. Ltd v Biyasi 1981 (1) SA 918 (A).

[25] In circumstances where there is a stop street, the driver on the through street, with a right of way, is still required to keep a proper lookout, drive at a reasonable speed and to take all reasonable steps to avoid a collision. See Guardian National Co Ltd v Saal 1993 (2) SA 161 (C); Van Zyl v Gacie 1964 (2) SA 434 (T); and SA Eagle Versekeringsmaatskappy v Harford

[1992] ZASCA 42; 1992 (2) SA 786 (A).

[26] There is also an established duty of a driver to keep a proper lookout when approaching an intersection. Such a driver is enjoined

to, when approaching an intersection, have regard to traffic coming from a side street. He must take and exercise reasonable care to avoid colliding with vehicles entering the intersection from a side street. The fact that a driver has right of way does not diminish the duty to keep a proper lookout. *Van der Westhuizen v SA Liberal Insurance Co. Ltd* 1949 (3) SA 160 (C) at 172.

[271] Regulation 296 of The Road Traffic Act 93 of 1996 reads as follows”

296. Vehicle to be driven on left side of roadway

- (1) Any person driving a vehicle on a public road shall do so by driving on the left side of the roadway and, where such roadway is of sufficient width, in such manner as not to encroach on that half of the roadway to his or her right: Provided that such encroachment shall be permissible -
 - (a) where it can be done without obstructing or endangering other traffic or property which is or may be on such half and for a period and distance not longer than is necessary and prudent and provided that it is not prohibited by a road traffic sign; or
 - (b) in compliance with a direction of a traffic officer or a road traffic sign.
- (2) The provisions of subregulation (1) shall not apply in the case of a public road which is restricted to traffic moving thereon in one direction only.

[281] Further, Regulation 298 provides as follows;

298. Passing of vehicle

- (1) Subject to the provisions of subregulation (2) and (4) and regulation 296, the driver of a vehicle intending to pass any other vehicle proceeding in the same direction on a public road shall pass to the right thereof at a safe distance and shall not again drive on the left side of the roadway until safely clear of the vehicle so passed: Provided that, in the circumstances as aforesaid, passing on the left of such vehicle shall be permissible if the person driving the passing vehicle can do so with safety to himself or herself and other traffic or property which is or may be on such road and -
 - (a) the vehicle being passed is turning to its right or the driver thereof has signalled his or her intention of turning to his or her right;
 - (b) such road is a public road in an urban area and –
 - (i) is restricted to vehicles moving in one direction; and
 - (ii) the roadway is of sufficient width for two or more lines of moving vehicles;
 - (c) such road is a public road in an urban area and the roadway is of sufficient width for two or more lines of moving vehicles moving in each direction;
 - (d) the roadway of such road is restricted to vehicles moving in one direction and is divided into traffic lanes by appropriate road traffic signs; or

- (e) he or she is driving in compliance with the directions of a traffic officer or is driving in traffic which is under the general direction of such officer, and in accordance with such direction:

Provided further that in no event shall any passing referred to in paragraph (a), (b), (c) or (d) be done by driving on the shoulders of the roadway or on the verge of the public road concerned.

[29] Driving on the shoulder of a road is not prohibited but is permissible under certain circumstances. Regulation 298A provided as follows;

298A. Prohibition on driving on shoulder of public road, except in certain circumstances

- (1) Subject to subregulation (2) and regulation 298(1)(e), no person shall drive a motor vehicle on the shoulder of a public road.
- (2) Notwithstanding subregulation (1), the driver of a motor vehicle may, during the period between sunrise and sunset, drive such motor vehicle on the shoulder of a public road which is designated for one lane of traffic in each direction -
 - (a) while such motor vehicle is being overtaken by another vehicle; and
 - (b) if he or she can do so without endangering himself or herself, other traffic, pedestrians or property on such public road;
 - (c) if persons and vehicles upon a public road are clearly discernible at a distance of at least 150 metres.

ANALYSIS

[30] On one hand the plaintiff had a duty to stop at the stop street and to enter the intersection only when it was safe to do so. On the other hand the defendant is entitled to assume that vehicles approaching the main road with the intention of entering it, will do so when it was safe to do so.

[31] The general rule for driving on South African roads is trite namely, “keep left pass right”. Vehicles may be passed on the left hand side in circumstances provided for in Regulation 298 and 298A. The version of the defendant is not to the effect that she was passing vehicles as permitted by regulations. Her version is that vehicles had formed two processions and that she was part of the procession that was on the left.

[32] Having regard to the versions before me and considering the evidence tendered, I am of the view that the version of the plaintiff is more probable than that of the defendant for the following reasons;

32.1. There was heavy traffic on the day, more specifically on Eastwood Street.

32.2. The plaintiff approached a stop street and stopped there at. I find the version by the plaintiff that had drivers on Eastwood Street not waved them in or created space for them to cross over or to even join the procession either way, that they would have had to wait for a long time, to be in line with logic and common sense and therefore more probable. All those who testified were in

agreement that there was heavy traffic on Eastwood Street and the evidence that they were waved in, was not placed in dispute. In fact the defendant testified that on speaking to the plaintiff after the collision he said to her that they had been waved in by other motorists.

32.3. Given the fact that traffic was heavily backed up, the defendant's contention that the plaintiff entered the intersection "like a bullet", without stopping, at the stop street. is in my view improbable. There most probably would have been three other sets of cars, or processions, on her version, to contend with. There would have been two sets of vehicles, side by side, traveling from North to South. There also would have been a single procession to the right of the defendant, traveling South to North. Having regard to all those variables and the version by the plaintiff that another vehicle, ahead of him, had been allowed to cross over, which version was not disputed, I can not see how the plaintiff would have been able to simply drive through the intersection "like a bullet". The plaintiff's response to such postulation to the effect that that it would have been "suicidal" and "madness" to do so, is in my view not without justification.

32.4. The plaintiff's vehicle had been three quarters of the way into the intersection when the collision occurred. The point of impact, which is not in dispute and which was shown to be on the left of the vehicles traveling South to North on Eastwood Street, points to the fact that the defendant passed vehicles to their left, which vehicles had stopped to allow the plaintiff to pass through. The version of the defendant to the effect that the vehicles to her right were moving slowly is not supported by the dictates of simple common sense. If it were true, then those vehicles would have collided with the right of the plaintiff's vehicle alternatively, plaintiff would have collided with any of them as he entered the intersection "without stopping" while "driving like a bullet". The version of the defendant, on this aspect, is rejected as improbable.

32.5. During cross examination, the defendant was quizzed about the fact that a version was put to the plaintiff to the effect that she had been traveling at 50km/h. In response she said she had been traveling between 40 and 50 km/h. It was thereafter put to her that the version of the plaintiff was that 40 km/h was a dangerous speed to travel at in circumstances where traffic was backed up and vehicles traveling in a stop and go manner. To this she responded that she couldn't say that it was 40 to 50km/h but that her motor vehicle may have been in second gear. Probed further she relented and said she wasn't sure about speed. In my view this was the undoing of her version to the effect that she had been driving at acceptable speed on the day. I therefore find that she was driving fast on the day in question, in relation to and in comparison with the vehicles that were to the right of her on the same lane, with the aim of passing them.

32.6. The damage to the defendant's motor vehicle is not consistent with the version that the plaintiff was traveling at high speed. The version of the defendant is therefore rejected as it does not accord with the probabilities.

32.7. Lastly, the defendant testified that as she approached the intersection she looked ahead. In so far as the duty to keep a proper lookout is concerned, the defendant's conduct, that of looking ahead while approaching an intersection fell short of what was required of her. The duty to keep a proper lookout means more than just looking straight ahead. It includes awareness of what is

happening in one's immediate surroundings. A driver should have a view of the whole road from side to side and in the case of a road passing through a built-up area, as well as the pavements on the side of the road. See *Diale v Commercial Union Assurance Co of SA Ltd* 1975 (4) SA 572 (A).

[33] I hold the view that the plaintiff has discharged the onus resting on him to prove on a balance of probabilities that the defendant was negligent.

[34] The defendant has filed a counter claim. The plaintiff pleaded to the merits thereof and in the alternative pleaded that negligence be apportioned. Side by side the counterclaim is a determination as to whether there was contributory negligence.[35] The counterclaim is premised on the grounds that the plaintiff was negligent in one or more or all of the following respects;

35.1. He failed to keep a proper look out,

35.2. He drove at a speed in excess of the speed limit,

35.3. He failed to keep a proper lookout for other road users,

35.4. He failed to take due regard to driving and road conditions and to drive according thereto,

35.5. He failed to apply brakes timeously, alternatively at all,

35.6. He failed to stop at a stop sign and yield to oncoming traffic that had right of way and entered the intersection when he was not allowed to do so and when it was not safe to do so, and,

35.7. He failed to avoid a collision in circumstances where he could and should have done so.

[36] There was a contradiction between the version of the plaintiff and that of the defendant as to the road surface on the day in question. The testimony of the plaintiff was that the road surface was dry whereas the defendant testified that the road surface was wet. This contradiction was captured in the accident report as well as the testimony of both witnesses. Both parties were however in agreement that visibility was clear. In my view, given the fact that there was no evidence, from either side, that the appearance and condition of the road surface played a role, the discrepancy does not in anyway contribute to the question of negligence by any of the parties.

[37] The other issue that does not contribute to the question of negligence is the license or the international driving permit of the defendant. Some time was spent during cross examination dealing with this aspect. Some effort was also put into addressing it in argument. That it was not signed as required by law and that there was no duration or period of its validity, does not assist this Court, in the circumstances of this case, in making a determination as to negligence. In this regard I agree with the submission made by the defendant's legal representative.

- [38] The duty to keep a proper lookout, as mentioned above, applies to the plaintiff in equal measure. His conduct on the day has to be viewed through that prism. He must be subjected to the same test of a reasonable driver in his position on the day of the collision.
- [39] If the plaintiff had kept a proper lookout, applied his brakes and taken steps to avoid the collision when he was in a position to do so, then the collision would not have occurred. The plaintiff testified that he did not see the defendant's vehicle right up until the moment of collision. I am mindful of his evidence that his view was obscured by the vehicles which were to his left, I however remain of the view that had he kept a proper lookout he would have been able to take some action in an attempt to avoid the collision. The fact that he did not take any evasive action, upon noticing the defendant's vehicle, is in my view indicative of a failure to keep a proper lookout.
- [40] I am unable to find that he drove at an excessive speed nor am I able to find that he failed to stop at a stop street. As indicated above, I hold the view that he did in fact stop at the stop street and was waved through by other drivers. I am therefore of the view that he failed to keep a proper lookout and that he failed to take all reasonable steps, which included taking evasive action, to avoid the collision.
- [41] Consequently, I find that the plaintiff contributed to the collision and that the degree of negligence has to be apportioned between the plaintiff and the defendant.
- [42] In the result, I assess the defendant's blame at 80% and that of the plaintiff at 20%. This blame applies to both the main action and the counterclaim.
- [43] I am also of the view that the costs should follow the result.
- [44] I therefore make the following order,
- 44.1. The defendant is held liable to compensate the plaintiff for 80% of the damages as agreed to between the parties;
- 44.2. The defendant is ordered to pay the costs.

S A THOBANE

ACTING JUDGE OF THE HIGH COURT

Counsel for the Plaintiff: Adv. G. Beytel

Instructed by: Carvalho Attorneys, Pretoria

Counsel for the Defendant: Adv. A.J.Swanepoel

Instructed by: Jay Inc., Pretoria

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