

SOUTH AFRICA / JUDGMENT

Tshitake v Road Accident Fund (434841/2013) [2015] ZAGPPHC 860 (11 December 2015)

[2015] ZAGPPHC 860

COURT

North Gauteng High Court, Pretoria

BEFORE

Jansen

CASE / FILE NUMBER

434841/2013

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IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG DIVISION.
PRETORIA

CASE NUMBER:

43841/2013
11/12/2015
In the matter
between: -
TSHITAKE, TSHIVHULA
REUBEN
Plaintiff
And
ROAD ACCIDENT FUND
Defendant

JUDGMENT

JANSEN J

[1] The matter relates to a collision which occurred on the 4th of April 2012, along Phunda Maria Road, Thohoyandou between a Volkswagen Polo Player driven by the plaintiff Mr Reuben Tshivihulawi Tshitake and a Volkswagen Polo Classic driven by Mr Tefu Sechocho ("the deceased") who died at the scene of the collision and who was unknown to the plaintiff. The registration number of the plaintiff's car was [...] and that of the deceased [...].

[2] The trial was set down for a hearing on the merits only.

[3] The plaintiff testified in chief that at that date his wife was eight months pregnant and they were travelling from Belfast to Thohoyandou. As he was approaching a stop sign he saw three motor vehicles in the opposite lane travelling in his direction. A vehicle travelling behind the other three motor vehicles was driving very fast and began overtaking the three vehicles in front of it. The plaintiff reacted by flickering his lights. It then dawned on the plaintiff that the said vehicle was persisting in overtaking the three motor vehicles as it continued approaching at a fast speed and the plaintiff endeavoured to swerve left. He testified that it is clear from his motor vehicle which was damaged on its right hand side and right passenger side that he had swerved left. He further testified that he lost consciousness and only regained consciousness in the hospital the following day. Both his wife and unborn child died due to the collision

[4] The plaintiff also testified that he had managed to swerve to such an extent that his motor vehicle moved onto the gravel beside the yellow stripe on his side of the road. He said that whilst seeking to avoid the collision he even, in the process, stretched out his one arm protectively towards his wife as he was applying his brakes.

[5] The plaintiff further testified that no collision report was obtained from him and that a statement was only obtained from him three months after the incident. He was then residing at his father's house in Soweto.

[6] During cross-examination the plaintiff stated that he was about 500 metres from a stop sign and was travelling at about sixty to seventy kilometres per hour and was relaxed, as he was close to his home. He further testified that it was unclear to him as to how the collision had occurred. When about 150 metres from the fast approaching motor vehicle said he came to the realisation that the motor vehicle had no intention of slowing down and wished to overtake the three motor vehicles. Upon further questioning, the plaintiff testified that it appeared to him as though the driver of the speeding motor vehicle believed that the other motor vehicles would yield and allow him to pass - apparently in the middle - between the lanes. The plaintiff candidly testified that he did not manage to swerve far left but that he was on the edge of the road.

- [7] The plaintiff further testified that he believed that the driver of the speeding motor vehicle would return to his lane when he realised that the other motor vehicles would not yield and allow him to pass. It was put to him that if he were travelling at 60 kilometres per hour and the other motor vehicle at about 100 to 150 kilometres per hour he would have had about three minutes in which to react to avoid a collision. The plaintiff answered by stating that he did not understand the question and that he had very little time within which to react particularly due to the speed at which the other motor vehicle was approaching. It was unclear to the court as to how the time of three minutes was calculated as it depended on the speed of the other motor vehicle which is unknown save for the plaintiff's testimony that he was driving at a high speed. When asked how he knew that the other motor vehicle was speeding he stated that the lights of the motor vehicle were approaching much faster than usual. He testified that there were no motor vehicles in front of him.
- [8] Upon a statement to the effect that his endeavours to avoid the collision had not been very effective the plaintiff responded that he did what he could in the little time that available to him.
- [9] It was common cause that the driver of the motor vehicle who sought to overtake the other motor vehicles died at the scene of the collision.
- [10] The plaintiff was the only witness who testified on his behalf.
- [11] A certain Warrant Officer Mashau with 25 years' experience was the first witness called on behalf of the Road Accident Fund. He testified that on the 4th of April 2012 he visited the scene of the collision and found two motor vehicles. In the one a person was trapped inside and the other lying unconscious on the tarmac. The driver of the other vehicle was deceased.
- [12] Warrant Officer Mashau testified that he opened a case. Initially he had written down that the deceased was travelling from east to west but then he spoke to six colleagues of the deceased who arrived at the scene of the collision. They informed him that the deceased lived in the direction of Polokwane and that they had attended a workshop earlier with the deceased in Thohoyandou. They said that they were on their way home from the workshop when they came across the collision scene without being aware that it was their colleague who was involved in the collision. Warrant Officer Mashau thus changed the direction in which the plaintiff had been travelling from east to west to west to east in his collision report. (The mother's report referred to below also influenced him.) It was wholly unclear as to what made him assume, initially, that the deceased had been travelling from east to west. He thus decided that the plaintiff was driving to Thohoyandou and the deceased towards Polokwane.
- [13] Interestingly it is apparent from the statement that he also changed the compass directions from North to South to South to North and from West to East to East to West. Hence one has to turn his collision report upside down in order to understand it.

- [14] Warrant Officer Mashau testified that the police station was eight kilometres away and that it took him 15 minutes to reach the scene of the collision.
- [15] During cross-examination Warrant Officer Mashau testified that he completed the collision report the very same evening. He stated that he and medical staff arrived first on the scene followed by the deceased's co-workers who had attended the said workshop with the deceased.
- [16] Warrant Officer Mashau testified that the house of the deceased's family was at Vuwani; close to Thohoyandou. He went to the deceased's family home at 02h00 in the morning and the mother cried stating that they had just seen the deceased at about 21h40, which further confirmed his assessment that the deceased was travelling from Thohoyandou to Polokwane. He conceded that he made no effort to consult with the occupants of the Plaintiff's motor vehicle which he referred to as vehicle A. The deceased's vehicle was referred to by him as vehicle B.
- [17] Warrant Officer Mashau confirmed that he was unaware of an investigating officer. He testified that vehicle A was driving to Thohoyandou and vehicle B to Polokwane. He said that the motor vehicle fragments were on the side of the road leading to Polokwane.
- [18] The second witness who testified on behalf of the Road Accident Fund was Sergeant Justice Nkhumeleni, a police officer with 15 years' experience. The role that he played in the investigation of the collision was that of draughtsman, photographer and fingerprint expert.
- [19] Sergeant Nkhumeleni said he drafted the sketch-plan of the scene of the collision on the 4th of April 2012 based on the information which he obtained from Warrant Officer Mashau, who had spoken to the six colleagues of the deceased. He testified that when he arrived at the scene he saw the two motor vehicles. The one travelling to Thohoyandou was damaged on the front right corner, into the right side of the fender and driver's door. Part of the rear of this motor vehicle was also damaged. He speculated that the driver of the vehicle may have been speeding. He said the damage to the motor vehicle from Thohoyandou to Polokwane was to the whole of its right side which was, as he put it, totally damaged. Sergeant Nkhumeleni marked the plaintiff's motor vehicle with an F and the deceased's motor vehicle with a D on the sketch plan. The sketch-plan is attached to this judgment.
- [20] During cross-examination Sergeant Nkhumeleni was asked whether the damage to the plaintiff's vehicle stretched from the fender to the front door upon which he answered that he had not checked. He reiterated that he utilised the information obtained by Warrant Officer Mashau from colleagues from Polokwane. He did a rough sketch and then after a day he drafted the sketch-plan on a computer for the police docket and for court purposes. He also took photographs but, for reasons unknown to the court, these were never introduced into evidence.

- [21] Sergeant Nkhumeleni readily conceded that the plaintiff was never consulted and only after three months after the collision a statement was taken from the plaintiff. He was cross-examined as to whether his sketch-plan was not premature as he did not have all the relevant information. He confessed that this was, indeed, the case.
- [22] Sergeant Nkhumeleni also conceded that his sketch-plan was incorrect in that it indicated that the direction in which the deceased's motor vehicle was travelling was Thohoyandou, which he marked as "A" and "B" as the direction in which the plaintiff's motor vehicle was travelling in the direction to Polokwane. The key to his sketch plan indicated how confused he was. It is reproduced below. The photographs referred to in the heading, as stated, were never utilised during the trial. He said, however, that irrespective of this fact, the point of impact remained the same. He testified that Warrant Officer Mashau had altered his report but that he had never altered his sketch-plan. Regarding the point of impact - it may have remained the same but depending upon whether one looks at Warrant Officer Mashau's report upside down or the right way up, the evidence regarding the point of impact was uncertain as one cannot say in which lane it was. The key to his sketch-plan is set out below:
-

"KEY TO SKETCH PLAN AND PHOTOGRAPHS "A" ON SKETCH PLAN AND PHOTO 1:

SHOWS THE ALLEGED DIRECTION IN MNEHICLE REG GGG 430 G, WHITE VW POLO CLASSIC WAS TRAVELLING PRIOR ACCIDENT.

"B" ON SKETCH PLAN AND PHOTO 1:

SHOWS THE ALLEGED DIRECTION IN WHICH M/VEHICLE REG MNZ 094 GP, WHITE VW POLO PLAYA WAS TRAVELLING PRIOR ACCIDENT.

"C" ON SKETCH PLAN AND PHOTO 1: SHOWS THE ALLEGED POINT OF IMPACT.

"D" ON SKETCH PLAN AND PHOTO 1, 2, 4, 5 AND 6:

SHOWS M/VEHICLE REG GGG 430 G, POLO CLASSIC AS FOUND AT THE SCENE.

"E" ON SKETCH PLAN AND PHOTO 3:

SHOWS THE DECEASED AS FOUND AT THE SCENE. "F" ON SKETCH PLAN AND PHOTO 7, 8, 9, AND 10:

SHOWS MNEHICLE REG MNZ 094 GP, WHITE POLO PLAYA AS FOUND AT THE SCENE."

- [23] During re-examination it was established that the lane which went from Thohoyandou to Polokwane contained the debris which indicated the point of impact.

- [24] The Road Accident Fund then closed its case.

- [25] It was argued on behalf of the plaintiff that the defendant had proffered two mutually destructive versions and that the defendant's witnesses had no knowledge of how the collision occurred and they were unsure of the facts and that their testimony was riddled with contradictions.
- [26] Counsel for the plaintiff referred the court to the case of Stellenbosch Farmers' Winery Group Limited and Another v Martell & Cie SA & Others (427/01) [2002] ZASCA 98 (6 September 2002). This case emphasise the importance of assessing the credibility of various factual witnesses and, in addition, the reliability of their evidence. At paragraph [5] (pages 4-5) it was held that when the court is faced with two conflicting versions the court must make findings on the following: -
- (a) the credibility of the various/actual witnesses;
 - (b) their reliability; and
 - (c) the probabilities.

As to (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 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 extracurial statements or actions,
- (v) the probability or improbability of particular aspects of his version,
- (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's 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, 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. "

[27] In *Baring Eiendomme Bpk v Roux* 2001 [1] All SA 399 (SCA) at paragraph [6] the Supreme Court of Appeal adopted the following passage in *National Employers' General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (A) at 440E-441A: -

"...Where there are two mutually destructive stories, [the Plaintiff] 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 and 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'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 views expressed by Coetzee J in *Koster Ko-Operatiewe Landbou Maatskappy Bpk v Suid-Afrikaanse Spoorwei! & Hawens* 1974 (4) SA 420 (W) and *African Eagle Assurance Co Ltd v Cainer* 1980 (2) SA

324. 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 of probabilities that he was telling

the truth and that his version was there/ ore acceptable. It does not seem to me to be 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 that enquiry, to consider the probabilities of the case, as though the two aspects constitute separate fields of the 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. "

[28] It was argued that the plaintiff's evidence was more reliable than that of the defendant and he had given evidence to the effect that he was relaxed and close to home and there would be no reason for him to speed and veer into oncoming traffic.

[29] The defendant's witnesses made assumptions which led to Warrant Officer Mashau changing the directions from which the two vehicles were travelling. He never even consulted the plaintiff. The second witness, Sergeant Nkhumeleni relied on the assumptions made by Warrant Officer Mashau. Nonetheless the plaintiff's evidence that he was close to home, apparently Thohoyandou, was never challenged.

[30] In the case of *Minister van Vervoer v Bekker* 1975 3 SA 128 (0) it was stated that a driver executing the manoeuvre of overtaking may only do so when it is safe to do so.

[31] In the matter of *Mampeonae Annah Ranthama v Road Accident Fund* (delivered in the High Court Orange Free State Provincial Division on 30 August 2007) the following was stated by Kruger J: -

"This is an overtaking situation, not one, as Mr. Pohl would have it, dealing with a collision close to the centre of the road. In what Mr. Pohl called the locus c/assicus on such cases, *CANTEMESSA* (above) the centre of the road was not marked by means of white lines (page 3 of the report: the accident occurred in 1937). Overtaking is a potentially dangerous manoeuvre (*KRUGER v VAN DER MERWE AND ANOTHER* 1966 (2) SA 266 (A) at 273 C - E). The question is whether there was a failure to keep a proper lookout and whether that failure was causally connected to the collision (*GUARDIAN NATIONAL INSURANCE CO LTD v SAAL* 1993 (2) SA 161 (C) at 163 B - D). The plaintiff has to prove that had Maseko reacted when the reasonable man would have reacted, the collision would probably not have occurred (*DIALE v COMMERCIAL UNION ASSURANCE CO OF SA LTD* 1975 (4) SA 572 (A) at 578 F). The question is whether Maseko ought reasonably to have become aware at a stage when avoiding action could still be taken, that the Jetta was coming into his line of travel (*BAY PASSENGER TRANSPORT LTD v FRANZEN* 1975 (1) SA 269 (A) at 277 B - C). ... Overtaking is an inherently dangerous manoeuvre. The photographs depict a slope in the road; the Jetta was coming up-hill towards the intersection. One cannot fault a person in Maseko's position for not being able to swerve and avoid the collision. The driver of the Jetta created a dangerous situation by straddling the barrier line. ..."

[32] Mr Mametse, on behalf of the defendant, argued that had the collision occurred in the manner set out by the plaintiff, and there was still a distance of 100 to 150 metres between him and the other vehicle, he had one to two minutes at least to avoid the collision yet he simply flickered the lights of his vehicle.

[33] It was also argued that the Plaintiff was wholly negligent or should be held liable for contributory negligence. Even this assumption on the part Mr Mametse is questionable. Top athletes run an entire kilometre in three minutes and a few seconds.

[34] Given the confusing and poor quality of the evidence tendered by the witnesses for the defendant, no reliance can be placed on their testimony. The plaintiff was a credible witness who did not deviate from his version and who was clearly confronted with a situation in which he had only seconds within which to react. He did the best he could under the circumstances.

[35] Once this is the case, the plaintiff cannot be faulted and it is held that the collision was caused by the sole negligence of the deceased driver.

Order

In the result, the following order is made: -

1. The defendant is 100% liable for the damage caused by the collision.
2. The defendant is to pay the costs of the action.

JUDGE OF THE HIGH COURT

For the Plaintiff Advocate Mdluli

Instructed by Makgahlela Mashaba Attorneys (011-656 5858)

For the Defendant Advocate Mametse

Instructed by Tsebane Molaba Attorneys (012-342 4921)

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