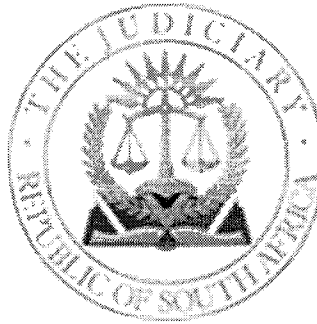




IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: **NO**
- (2) OF INTEREST TO OTHER JUDGES: **NO**
- (3) REVISED:

Date: **15 May 2018** Signature: _____

A handwritten signature in black ink, appearing to be "D. J. M.", is written over the signature line.

CASE NO: A3020/2015

In the matter between:

NTSUBE: RANDY

Appellant

And

THE ROAD ACCIDENT FUND

Respondent

JUDGMENT

NYATHI AJ

INTRODUCTION

[1] This is an appeal against a judgment handed down on the 1st of April 2014 by the Johannesburg Magistrates Court (Magistrate PJ Stanford), in respect of the merits only in a personal injury claim against the respondent ie in respect of the question whether and to what extent the respondent could be held liable for the loss suffered by the appellant.

[2] The matter previously served before court on the 8th December 2015 and was argued before Mailula J and Siwendu AJ (as she then was). Unfortunately Mailula J, who was evidently the scribe, fell ill subsequent to the hearing. As the argument could not be transcribed (or had not been transcribed), Siwendu AJ could not write the judgment and the Judge President accordingly directed that the matter be re-enrolled for a re-hearing *de novo*.

COMMON CAUSE FACTS

[3] It is common cause that an accident had occurred on 1 December 2007 between a vehicle driven by the Appellant (*'Appellant's vehicle'*) and a vehicle driven by the Insured Driver (*'the Insured Driver's vehicle'*) on a narrow, tarred road where the speed limit was 60 km/h. The weather was sunny and the day was clear. There is paving on one side of the road and gravel on the other side of the road.

APPELLANT'S VERSION

[4] The Appellant testified that he was travelling in a northerly direction along Concord road when he and his wife noticed a funeral procession in the distance. In order to avoid the delay that the procession would cause, they decided to travel an alternative route to their destination and he accordingly executed a right hand turn into a gravel road so that they could turn around and head in the opposite direction.

[5] He was 50 metres away from the gravel road when he first noticed the gravel road. He reduced his speed by applying brakes and put on his indicator about 40 metres before the gravel road. He noticed that there was no traffic coming from the opposite side but saw the vehicle of the Insured Driver coming from behind. He was half way across the opposite side of the road when he saw the Insured Driver's car coming at a very high speed towards him. The Insured Driver's vehicle collided with the rear right-hand side of the Appellant's vehicle. The Appellant's vehicle sustained damages. The Insured Driver's vehicle was positioned on the incorrect side of the road after the collision.

INSURED DRIVER'S VERSION

[6] The Insured Driver's version was to the effect that he only noticed the Appellant's vehicle a couple of metres before the collision occurred. He observed the Appellant's vehicle standing still towards the left of the lane in which he was travelling (in the same

direction) as if the Appellant had stopped to ask for directions. The Appellant turned in front of him. He attempted to avoid the collision by applying brakes. He did not observe the Appellant indicating with his vehicle's indicators that he intended to turn right. He also did not observe the funeral procession. He testified that there had not been a gravel road when the accident occurred.

THE EXPERT'S EVIDENCE

[7] The expert witness: Mr Rudolph Adriaan Opperman, a collision reconstruction expert, was called to testify on behalf of the Appellant. He is a professional engineer with a very impressive *Curriculum Vitae*. He has garnered 16 years experience in traffic safety research at the CSIR, and completed a number of accident reconstruction courses at the North-Eastern University in Illinois in the USA and headed the CSIR's accident reconstruction unit for seven years, amongst a host of other qualifications. Mr Opperman testified in accordance with his report which he had compiled placing reliance on, amongst other things, photographs and affidavits. He had also attended the scene with the Appellant and his attorney where he took measurements such as the width of the lanes of the road.

[8] The nub of Mr Opperman's evidence was that because the impact of the collision was on the right rear side of the Appellant's vehicle, such vehicle must have been at a 90 degree angle to the Insured Driver's vehicle. The Appellant's vehicle had crossed the centre of the road at the time of impact. He opined that it is probable that the Insured

Driver could have avoided the collision if he had obeyed the speed limit and had kept a proper look out. This was so because the collision had occurred in the south bound lane and just prior to the collision, the Appellant's vehicle had executed a more or less 90 degree right-hand turn. Such manoeuvre, he opined, would not have been possible at high speed. In his view, the appellant must have been travelling at a speed of no more than 10 kilometres per hour. He asserted that it is probable that if the Insured Driver had driven at an appropriate speed, had kept a proper look out, had braked and kept to the lane in which he was travelling, he would have passed behind the Appellant's vehicle and a collision would not have occurred.

REASONS OF THE TRIAL COURT

[9] The Magistrate's reasoning in support of his judgment in the court *a quo* begs closer scrutiny. A court is obviously not bound by an expert's opinion. However, where the facts upon which he bases his opinion are common cause and the reasoning is sound, it is difficult to conceive of circumstances under which such opinion/s would not be accepted. No argument was advanced as to why the court should not accept his opinion. The learned Magistrate rejected his findings based on flawed reasoning. The learned Magistrate rejected the expert's findings and substituted his own findings and calculations for his, without affording Mr Opperman an opportunity to deal with such findings and calculations. The difficulty with this approach is self evident. Firstly, he did not canvass it with the expert. Secondly, the respondent did not lead any expert evidence in this regard but thirdly, and most importantly, his calculations were flawed in

logic. The conclusion reached by the learned magistrate is that if the speed of the Appellant's vehicle is increased (as per his testimony) then, even if the insured driver had maintained the speed limit, the collision would still have occurred, does not bear scrutiny. According to his analysis it made no difference at what speed the Appellant executed the U-turn, whether at 10, 20 or 30 kilometres per hour, the collision would still not have been avoidable. The evidence shows the contrary ie if the appellant's vehicle's speed at the time of the execution of the turn had increased and the insured driver had maintained the speed limit, the insured driver could have avoided the collision. The faster the appellant was going, the more the distance between him and the insured driver would have been.

[10] The expert's conclusions are reliable and finds further support in the Insured Driver's contradictory evidence. By way of illustration: On the Insured Driver's version, the Appellant had pulled off the road and was parked on the left shoulder of the road out of the way. Why was it necessary for the Insured Driver to indicate that he was overtaking? Furthermore, when replying to a question by the court *a quo*, the Insured Driver stated that he knocked the Appellant's motor vehicle from behind. He had applied brakes and the car went "...its own way" and started swerving and he knocked him from behind. This suggests loss of control. It also confirms the Appellant's version that he heard the screeching of tyres on the road just prior to the collision. This fact is suggestive of a high speed prior to impact.

LEGAL PRINCIPLES APPLICABLE

[11] In *Welf v Christner* 1976 (2) SA 170NPD it was stated that:

“It is the duty of a driver who is about to execute a right-hand turn across a busy public road...to take considerable care to ensure that he chooses a safe and opportune moment to cross. No systems of signals, however helpful that system might be, can be a substitute for or replace the fundamental duty of every driver to keep a proper lookout”

[12] In *Hartley v. Road Accident Fund* (Reported under SAFLII - ZAGPPHC/2016/282.pdf), Legodi J (as he then was) restated the duty of a driver before overtaking another vehicle. Such driver is under a duty to satisfy himself that it is safe to do so in order to prevent a motor vehicle accident due to negligence.

CONCLUSION

[13] Having considered all the evidence in this matter as well as the common cause facts, the most probable version of how this collision at issue occurred, is: The point of impact as well as the final resting place of both vehicles and the damages to both vehicles when viewed against the backdrop of Mr Opperman's evidence, supports the conclusion that the Appellant's version is the most probable. The Insured Driver's version, particularly that he indicated his intention to overtake Appellant's vehicle which had stopped on the left shoulder of the road out of the way, seems in view of all the reasons advanced hereinbefore, improbable. The Appellant's account of hearing the

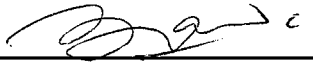
sound of screeching tyres on the road shortly before impact as well as the Insured Driver's narrative of having applied brakes and his vehicle swerving by itself can only suggest failure to keep a proper lookout and driving at a speed incommensurate with the situation as it prevailed prior to the collision.

[14] The appellant can not have been expected to guard against the insured driver's unreasonable conduct that occurred after he had executed his turning manoeuvre ie after he had crossed the middle of the road to the right hand side of the road. In the circumstances of this case, the appellant was entitled to assume that the drivers of other vehicles potentially approaching from behind would act with the care and attention that the situation demanded. In my view, the appellant's conduct matched up to what could be expected of a reasonable driver in the circumstances that pertained when the collision at issue occurred.

[15] It is unfortunate that Judge Mailula fell ill. All the costs consequent upon the opposition of this appeal, which ought in our view, not to have been opposed, should be carried by the respondent.

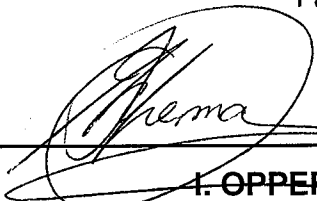
[16] Accordingly, the appeal is upheld with costs including the costs of the previous hearing (of this appeal) on 8 December 2015. The judgment of the court *a quo* is set aside and replaced by the following order:

- i. The Respondent is liable to pay 100% of the Appellant's damages, as agreed or determined by a competent court.
- ii. The Respondent is to pay the costs of suit.



J.S. NYATHI
Acting Judge of the High Court
Gauteng Local Division, Johannesburg

I agree,



I. OPPERMAN
Judge of the High Court
Gauteng Local Division, Johannesburg

Heard: 12 March 2018

Judgment delivered: 15 May 2018

For Appellant: Adv HP Van Nieuwenhuizen

Instructed by: Ivan Maitin Attorneys

For Respondent : Adv Molojoa

Instructed by: Sheereen Meersingh and Associates