

FORM A
FILING SHEET FOR SOUTH EASTERN CAPE LOCAL DIVISION
JUDGMENT

PARTIES:

- Case Number: **698/2007**
- High Court: **Port Elizabeth**
- DATE HEARD: **13 & 14 October 2009**

DATE DELIVERED: **16 October 2009**

JUDGE(S): **D. Chetty**

LEGAL REPRESENTATIVES –

Appearances:

- for the Plaintiff(s): **Adv Schubart**
- for the 1st Defendant(s): **Adv Van der Linde / Adv Dala**
- for the 2nd Defendant: **Adv Van Onselen**

Instructing attorneys:

- Plaintiff(s): **Mr Gray (Gray Moodliar)**
- 1st Defendant: **Mr Armoed (Boqwana Loon & Connellan)**
- 2nd Defendant: **Routledge Modise C/o Mr H Bekker
(Goldberg & De Villiers)**

CASE INFORMATION -

1. *Nature of proceedings:* **Action for Damages**
2. ***Topic:***

Key Words: Delict - Damages for personal injury – Motor vehicle collision – Motorist on through road observing approaching vehicle intending right turn at robot controlled intersection considerable distance ahead – Road deserted - Evidence establishing that motorist not decreasing speed – Concession that had he done so, collision would have been avoided – Duty of motorist to reasonably foresee unlawful conduct on part of approaching motorist – In *casu* such foreseeable – Approaching motorist contributorily negligent in failing to regulate speed – Apportionment – Insured driver 30% negligent

NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, PORT ELIZABETH)

Case No: 698/2007

In the matter between:

MADELEIN ERASMUS

Plaintiff

And

ROAD ACCIDENT FUND

1st Defendant

CLAIRE LOUISE VAN LELYVELD

2nd Defendant

Coram: **Chetty, J**

Date Heard: **13 and 14 October 2009**

Date Delivered: **16 October 2009**

Summary: Delict - Damages for personal injury – Motor vehicle collision –

Motorist on through road observing approaching vehicle intending right

turn at robot controlled intersection considerable distance ahead –

Road deserted - Evidence establishing that motorist not decreasing

speed – Concession that had he done so, collision would have been

avoided – Duty of motorist to reasonably foresee unlawful conduct on

part of approaching motorist – In *casu* such foreseeable – Approaching

motorist contributorily negligent in failing to regulate speed –

Apportionment – Insured driver 30% negligent

JUDGMENT

CHETTY, J

[1] This is an action for damages for personal injury suffered by the plaintiff in a collision between two motor vehicles, a Jetta and Cuore respectively, which occurred at approximately 2:30 a.m. on Sunday, 19 June 2005 at a robot controlled intersection at the junction of Canna Avenue and Kragga Kamma Road in the residential suburb of Sunridge Park in Port Elizabeth. The plaintiff was a passenger in the Cuore driven by the second defendant. By order of this court dated 3 February 2009 the merits of the action was ordered to be separated from its quantum component. At the commencement of the trial before me, the parties, no doubt in an attempt to expedite the matter, reached consensus that the only issues I be called to adjudicate upon related to the alleged negligence of the drivers of the two vehicles and, in the event of a finding that both were negligent, their respective degrees of culpability.

[2] Before I proceed to analyze and evaluate the evidence adduced, a general description of the area where the collision occurred, the prevailing weather, road and traffic conditions will provide an invaluable aid to determine the issues raised and it is to that which I now turn. It is not in issue that Kragga Kamma road runs roughly east to west, its eastern extremity commencing at the confluence of Cape Road and an off ramp from the N2 west. Initially two laned, it plateaus into a single lane, the road surface dissected by a broken white line for

vehicular traffic proceeding in the opposite direction. On the day in question the road was clear, visibility good and the traffic lights at the junction with Canna Avenue clearly visible for several hundred metres either way. Kragga Kamma Road is flanked by wide verges with large trees interspersed along its length. Prior to the junction, Kragga Kamma Road eastwards widens to two lanes, the left lane a through road and the right, a turning lane into Canna Avenue. The photographs handed in by counsel as exhibit "B" and in particular the sign posts visible on B1 identify the road as the M15 and it will be convenient to refer to it as either the M15 west or M15 east.

[3] Mr. *Mandiso Zinto* (*Zinto*) was proceeding along the M15 west en route to his home in Kamma Park in his Golf motor vehicle (the Golf). The flashing of lights at his rear caused him to veer his vehicle to the left for he was under no illusion that the driver required sufficient berth to overtake him. He identified photograph B2 as the area where the overtaking manoeuvre was executed. It is evident from these photographs and in particular the wide berth between the yellow line adjacent to the kerb and the kerb itself that there was sufficient room for *Zinto* to move to his left to facilitate the overtaking manoeuvre. *Zinto* described his speed as being in the region of 60 km/h and estimated the overtaking vehicle's speed at approximately 100 km/h. Although it is an acknowledged fact that a witness' recollection and estimate of speed is often inaccurate the very act of overtaking confirms that the Jetta was travelling at a speed considerably in excess to that of the Golf. In fact the driver of the Jetta, Mr.

Rodney Lamont (Lamont) conceded as much. Prior to the overtaking manoeuvre *Zinto* had seen the lights of an approaching vehicle, the Cuore, but, once the act of overtaking had been completed focused his attention on the Jetta ahead of him. He however observed the Cuore proceeding into and entering the right turning lane into Canna Avenue and that it was in the process of turning right when the collision occurred.

[4] Under cross-examination by counsel for the first defendant it was put to *Zinto* that *Lamont* had not in fact overtaken him at the point where the M15 west plateaus but earlier, where it comprised two lanes. *Zinto* denied this and remained steadfast that the overtaking had occurred where he had earlier pointed to on photograph B2 viz. after the merging of the two lanes. *Zinto* is a completely independent witness who, notwithstanding the effluxion of time since the collision, gave a clear and coherent account of the events which unfolded on the night in question. His recollection of the circumstances surrounding the collision remained consistent and his evidence is to be preferred to that of *Lamont*. By contrast *Lamont's* evidence appears clearly to be a post-accident reconstruction. Under cross-examination he was confronted with a statement which he made to the police more than a year after the collision which differed in several respects from his evidence in chief. To his credit he readily conceded that the more accurate account would be the police statement for his recollection of the collision was extremely hazy. Although he initially stated that he had applied his brakes when he observed the Cuore's indicators signalling to turn

right he confessed to having no independent recollection of having done so, deducing, from brake marks visible on the road post accident, that he had in fact applied his brakes. *Zinto*, who was travelling behind him, did not observe any brake lights and I accept that *Lamont* failed to apply his brakes. That he was travelling at an excessive speed in the circumstance admits of no doubt. *Zinto's* uncontroverted evidence was that after execution of the overtaking manoeuvre, the distance between the Jetta and his vehicle increased considerably to the extent that when the collision occurred he was approximately one hundred metres from the scene of the collision.

[5] The M15 was, as adumbrated earlier, devoid of all traffic. It was the early hours of the morning and strict adherence not only to the speed limit but the rules of the road can readily be discounted. *Lamont's* intoxicated condition, albeit not to any appreciable degree, must inevitably, notwithstanding his protestations to the contrary, have dulled his senses, and, coupled to the excessive speed at which he was travelling, have compounded the problem caused by the second defendant turning into Canna Avenue ahead of him. In fact he readily conceded that had he braked sufficiently and travelled at a lesser speed the collision could, and, in all probability would, have been avoided. What compounds the problem is that he had observed that the second defendant intended to execute a turn to the right before she reached the junction. He however assumed that by reason of the dipping of the vehicle's lights that the second defendant would afford him clear passage by virtue of him having the right of way.

[6] The question which falls for decision thus is whether he was negligent in failing to reduce his speed and to take corrective action to avoid the danger caused by the second defendant turning across his line of travel. In my view he was clearly negligent albeit not to the same extent as that of the second defendant. The flickering of the Cuore's indicator lights would have alerted *Lamont* of the driver's intention to execute a turn to the right. Had he kept a proper lookout he would have been able to observe whether it had stopped or continued moving. His inability to give a definite answer compels the conclusion that he failed to keep a proper lookout. The Cuore's indicator lights gave ample warning that the second defendant would turn right and given the fact that it was in the early hours of the morning with no other traffic in the area save Zinto's vehicle behind him, *Lamont* was clearly negligent in not reducing his speed accordingly. Had he been travelling at a more sedate pace he would no doubt have been able to pass the Cuore on its left.

[7] Turning across the line of oncoming traffic is unfortunately not an uncommon occurrence and our courts have recognized that in given circumstances a reasonable driver will bear that in mind and allow for it. This much was recognized by Rumpff CJ in **Marine and Trade Insurance Co Ltd v Singh**¹ where the learned judge stated –

¹ 1980 (1) SA 5 (AD) at 9E-H

“ . . . when unlawful conduct is actually seen, the reasonable man will, *a fortiori* , allow for that conduct. What has been said above, describes in broad terms the legal duty on any driver of a vehicle. It will always, however, depend on the particular circumstances of each case, and on prevailing views on transport and traffic requirements, whether in any particular case the unlawful conduct is to be regarded as reasonably foreseeable so as to require the reasonable man to allow for such conduct. It will also depend on the particular circumstances of each case whether or not the manner in which the required allowance has been made is sufficient for the purpose of discharging the duty imposed on the reasonable man. It really boils down to reasonable foreseeability of the unlawful act and reasonable allowance on the part of the driver for such act. I find it unnecessary to refer to any other decided cases, save perhaps to the majority and minority judgments in *Griffiths v Netherlands Insurance Co of SA Ltd* [1976 \(4\) SA 691 \(A\)](#) in which a number of cases, some relevant to the present case and others not, are referred to.”

[8] In my judgment, given the prevailing circumstances and in particular the signalled intention on the part of the second defendant to turn right, it was reasonably foreseeable that she would in fact do so. Although the probabilities are that the second defendant had clearly misjudged the Jetta's speed when executing the turn to the right, *Lamont* was contributorily negligent in failing to make allowance for her negligent conduct.

[9] It was readily conceded by counsel for the plaintiff and the second defendant that the second defendant's culpability was the greater and the question now is to determine the respective drivers' degrees of fault. In the light of the various considerations adverted to hereinbefore a finding that the second defendant was 70% to blame for the collision would seem meet. As regards costs, the parties were in agreement that an order for joint and several liability on the part of the defendants would be a proper one.

[10] In conclusion therefore –

3. **The insured driver's (*Lamont*) degree of fault is assessed at 30% and that of the second defendant at 70%.**
4. **The defendants are ordered to pay the plaintiff's costs jointly and severally, the one paying the other to be absolved, such costs to include the costs of the photographs (exhibit "B"); the costs of the pre-trial inspection in loco attended by counsel and the application in terms of Rule 33 (4).**

D. CHETTY

JUDGE OF THE HIGH COURT

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