IN THE HIGH COURT OF SOUTH AFRICA NOT REPORTABLE

EASTERN CAPE, PORT ELIZABETH

Case No: 19/12

Date Heard: 7 February 2013

Date Delivered: 19 February 2013

In the matter between:

GRAHAM HAMILTON McKAY Plaintiff

and

ROAD ACCIDENT FUND Defendant

JUDGMENT

EKSTEEN J:

[1] During the morning of 22 January 2007 a motor vehicle collision occurred in Haupt Street, Sidwell, Port Elizabeth. The plaintiff was the driver of the vehicle ("the plaintiff's vehicle"), which came into collision with a Toyota Quantum Minibus ("the insured vehicle") and he sustained severe bodily injury in and as a result of the collision. He has instituted an action for damages against the defendant arising from these events.

[2] An order of separation of the "merits" and "quantum" was previously made. Before me Mr ***Schubart***, on behalf of the plaintiff, and Mr ***Smith*** on behalf of the defendant, advised me that they are in agreement that the only issue which falls to be decided in the present proceedings relates to the causal negligence giving rise to the collision.

[3] The collision occurred in Haupt Street, a busy street in a semi-industrial area of Port Elizabeth. The plaintiff, who is a pig farmer in the area of Rocklands, had a contract with Britos Bakery to remove all stale bread held in stock each Monday morning. The plaintiff had accordingly proceeded to Britos Bakery and loaded his

one ton pickup truck with a considerable load of bread. He emerged from Britos Bakery which is situated in Haupt Street and proceeded across the width of the pavement which was all of 14,9m. There is some dispute on the evidence as to whether the plaintiff came to a stop at the verge of the roadway, prior to entering Haupt Street, before proceeding to cross the roadway. It is common cause, however, that the plaintiff proceeded into Haupt Street, across the lane of traffic for vehicles approaching from his right hand side, (herein referred to as “the left hand lane”) with the intention of turning right into Haupt Street. He had crossed the entire left hand lane and had partially crossed the centre line when he heard the sound of brakes and the insured vehicle collided with the right hand front door of the plaintiff’s vehicle causing it to overturn onto its side.

[4] The plaintiff testified that he had loaded his vehicle with bread at Britos Bakery when he proceeded out of the gate across the tarred pavement. He is adamant that he brought his truck to a stop at the curb stone prior to entering the roadway of Haupt Street. There, he says, he looked to his right hand side and saw only a sedan vehicle some distance away, which he estimated to be approximately 100m from him. He did not see the insured vehicle. Across the road, on the opposite pavement, the plaintiff says that he saw a woman walking with a young child at her side. Approximately 10m behind them he noted a man also walking on the pavement. Having assessed the position he considered it safe to proceed and moved forward across the left hand lane which carries vehicles approaching from his right hand side and he commenced his turn to the right with his vehicle already partially across the white line. At that state, he says, he noted the man on the pavement run forward. He assumed, so he says, that the child had run into the road in front of his vehicle, although he never saw the child nor her mother in the road. He immediately applied brakes abruptly and brought his vehicle to a stop. After he had stopped, so he testifies, the man stepped off the pavement and fell onto the tarred surface of the road in front of his vehicle. As the man attempted to rise, he heard brakes and the impact occurred. He did not see the insured vehicle at any time.

[5] During cross-examination the plaintiff was presented with a warning statement which he had made to the South African Police Services in respect of the accident. In the statement he recorded that he had proceeded forward into the road and that a child had run into the road which required him suddenly to apply brakes in order to avoid colliding with the child. He admitted that he had told the police thereof but testified that he had conveyed this information to the police some two days after the collision, when he was still in shock and he had at that stage assumed that the child had been in the road. The statement was, however, only signed on 1 February 2008. The plaintiff acknowledges, as recorded earlier, that in fact he had never seen a child in the road. None of the other witnesses observed any child in the roadway either and I think that it must be doubted whether the plaintiff ever stopped in the road prior to the collision.

[6] Mr Roestof, like the plaintiff, farms in the area of Rocklands outside of Port Elizabeth. He states that he was on his way to the Britos Bakery in Haupt Street to assist the plaintiff in removing the bread in accordance with his contract. Mr Roestof did not see the collision. The significance of the evidence of Mr Roestof lies in the observations which he made upon arrival at the scene. He states that upon arrival he found the plaintiff's vehicle lying on its side in the lane on the opposite side of the road from Britos Bakery (herein referred to as "the right hand lane"). He also noted a Quantum vehicle stationary on the same side of the road. Black brake marks were embedded upon the tarred surface of the road leading to the rear wheels of the insured vehicle. He paced off the brake marks and found them to be 24 paces in length. The one brake mark, he says, commenced approximately 250-500mm to the left of the centre barrier line, proceeding across the barrier line and leading up to the left hand rear wheel of the insured vehicle. The other, he says, commenced well onto the right hand side of the roadway and proceeded for a similar distance ending behind the rear right wheel of the insured vehicle. The insured vehicle was damaged, he says, on the front panel between the headlights to the right hand side. The damage to the plaintiff's vehicle, which is depicted on photographs handed in in evidence, was on the right hand door.

[7] Mr Pokbas, the driver of the insured vehicle testified that he was employed at the time with RAM Couriers and that he drove the insured vehicle, which belonged to RAM Couriers. He proceeded along Haupt Street in the left hand lane approaching Britos Bakery. The road was not busy that morning and there were no vehicles travelling in front of him as he approached Britos Bakery and he noted that the front of the plaintiff's vehicle close to the curb stone on the pavement to his left hand side. At this stage, he says, that he was already close to the entry to Britos Bakery, a distance which he estimates at 15m. When he saw the plaintiff's vehicle he says that he reduced speed marginally so as to observe that the plaintiff's vehicle would, as he anticipated, come to a stop. The plaintiff's vehicle did not come to a stop and proceeded into the roadway across his path of travel and he applied his brakes firmly.

[8] Pokbas states that he is unable to say at what speed he was travelling but that he was provided by RAM Couriers with a printout of the Tachograph which was fitted in his vehicle and which indicated that he had been travelling at a speed of 63km/h at the time of impact. He has since mislaid this print-out. He states that he did not swerve left, as he was afraid of hitting the curb stone and possibly colliding with vehicles parked on the pavement and he did not swerve to the right hand side as there was an approaching vehicle in the right hand lane. There was nothing, he says, that he could do to avoid the collision, which he states occurred in the left hand lane.

[9] He acknowledges that he would have left brake marks on the road surface but he did not observe them himself. After the collision, he says that he had blood in his eyes and he could not observe the brake marks on the road surface for that reason. He states that the paramedics, who had arrived in an ambulance, advised him not to open his eyes as there might be shattered glass which could damage his eyes.

[10] In cross-examination the plaintiff was extensively taxed in respect of the time of the collision. In his evidence in chief he estimated that the collision occurred between 9 and 10 o'clock in the morning. In his statement made to the police he had estimated that the collision occurred at approximately 10h30. When taxed under cross-examination in respect of the time, he acknowledges the contradictions and

states that these are estimations and that he did not have a watch with him. I do not think that much turns on this issue.

[11] He was cross-examined extensively in respect of his evidence that the plaintiff's vehicle did not come to a stop at the verge of the curb stone prior to entering the roadway. He was referred to his evidence on oath during a prosecution in the Magistrate's Court where he had repeatedly stated that the plaintiff's vehicle was standing at the verge of the roadway. In this court Pokbas persisted in his version that the vehicle had not come to a complete stop and that the wheels were still moving, although very very slowly. This, he says, he observed when he was, in his estimation approximately 15m from the plaintiff's vehicle. The reason for him only observing the plaintiff's vehicle at that stage was that the plaintiff's vehicle had been obscured prior to that by other vehicles parked on the pavement to the left of the roadway. In his evidence in the Magistrate's Court, on oath, however, when asked why he had only observed the plaintiff's vehicle at that stage, he responded:

> "When I was at the driveway that is when I opened my eyes. I was at the driveway. When I was close to the driveway then I saw it."

Pokbas was at a loss to explain this evidence in the Magistrate's Court in this regard.

[12] Anton Manuel states that he was a pedestrian at the side of the road on the morning in question. He states that he was on way to work and that the collision occurred early in the morning. Manuel states that as he was approaching the entrance to Britos Bakery he noted the plaintiff's vehicle emerge from the Britos Bakery across the pavement blocking his path and he accordingly stopped to wait for it to pass. He states that the vehicle slowed down as it approached the curb stone before entering the road but did not come to a stop. The plaintiff's vehicle had its right hand indicator on as it entered the road but he is unable to give any estimation as to the speed of the vehicle, save to say that it accelerated into Haupt Street.

[13] After the plaintiff's vehicle had proceeded into the roadway Manuel continued along his way passing behind the plaintiff's vehicle and walking further up the pavement. He then heard the impact behind him and on turning around noted that the insured vehicle had come into collision with the plaintiff's vehicle.

[14] Manuel states that prior to the collision, and as he had approached the entrance to Britos, he had turned around to look behind him and had first seen the insured vehicle approach some distance away. After the plaintiff's vehicle had entered into the roadway he again turned around and noted the insured vehicle, now close to the plaintiff's vehicle. Even at this stage, however, he did not anticipate that a collision would occur. He again looked ahead of him and only upon hearing the impact did he turn around for the third time. He then noted the plaintiff's vehicle lying on its side and the insured vehicle stationary on the road. He testifies that both vehicles were in the left hand lane, being the lane of travel of the insured vehicle. Under cross-examination, however, when asked about the brake marks observed by the witness Roestof, Manuel states that he did not observe the brake marks as they were under the insured vehicle. He is accordingly unable to dispute the evidence of Roestof and unable to comment on the length of the brake marks or their direction.

[15] Manuel was clearly incorrect as to the time of the collision and, indeed, probably mistaken in his recall that he was on his way to work. In evidence in the criminal prosecution he conceded that the collision occurred at approximately 10h00. I think it can safely be found that the plaintiff is correct in respect of the time of the collision. Manuel's evidence was also unsatisfactory in a number of other respects. He too stated repeatedly in his evidence in the Magistrate's Court that the plaintiff's vehicle was stationary at the edge of the road before proceeding into the street, a matter which he denied before me.

[16] In his pleadings the plaintiff alleges that the collision was caused solely by the negligence of the insured driver. The defendant, on the other hand, denies this contention and avers that the collision was caused solely by the negligence of the plaintiff. The onus to establish negligence on the part of the insured driver rests upon the plaintiff. Similarly, the onus to establish negligence on the part of the plaintiff rests upon the defendant. Clearly this onus, in each case, can only be

discharged by adducing credible evidence upon which it can be found, on a balance of probability, that the relevant party had acted negligently in a respect giving rise to the collision.

[17] I do not think that the disputes, such as they are, on the evidence are material to the outcome of the matter. It is common cause that the plaintiff emerged with a heavy laden vehicle from Britos Bakery. He states that he had come to a stop at the verge of the road whilst the defendant's witnesses are of the view that he reduced speed to a snail's pace before again accelerating into the road. I would prefer to find, on the evidence before me that the plaintiff did come to a stop. This concession was made under oath in the Magistrate's Court by both Manuel and the insured driver. Their denial of this fact in this Court is not convincing. Even if I am wrong in this regard, I do not think that it would make any difference to the outcome of the matter. The plaintiff, in proceeding to cross the path of travel of vehicles approaching from his right hand side was embarking upon an inherently dangerous manoeuvre. It was incumbent upon the plaintiff to insure when moving into the road that it was opportune for him to do so at that time, and that he could do so with safety. The drivers proceeding in the left hand lane along Haupt Street, as the insured driver was, are entitled, unless or until put upon their guard, to assume that driver's in the position of the plaintiff will not enter into the roadway in the face of oncoming traffic. (Compare in this regard ***Aboubaker v Haliday*** 1955 (2) SA 633 (CPD).)

[18] The essential issue to be determined in this matter is accordingly where the insured vehicle was at the time when the insured driver ought to have realised that the plaintiff intended to enter onto the roadway across the line of travel of the insured vehicle, and what effective steps could he have been expected to take at that time or thereafter to avoid the collision. The insured driver ought, in my view, to have realised that the plaintiff's vehicle may enter into the road in front of him when the plaintiff pulled away, after stopping at the verge, or, if he did not stop, when he began to accelerate towards the road. It is only at that time that the insured driver would be obliged to take evasive measures to avoid the accident.

[19] The plaintiff did not see the insured vehicle at all before entering into the road. He is accordingly unable to cast any light on the position of the insured vehicle at the time that he entered into the roadway. The insured driver states that he was already very close to the entrance of Britos Bakery when he observed the plaintiff's vehicle still on the pavement. At that stage he states that the plaintiff's vehicle was moving very slowly and he thought that the plaintiff's vehicle would come to a stop. Whether the plaintiff's vehicle was stationary or moving very slowly there was no obligation at that stage upon the insured driver to take evasive action. The obligation arises, when it ought to become clear to the insured driver, as a reasonable man, that the plaintiff's vehicle does not intend to respect his right of way. The witness Manuel states that when he first turned around he saw the insured vehicle approaching at a distance back in the position which he identified with reference to a Toyota Quantum vehicle parked on the pavement as depicted on a photograph before court. At that time, he says, the plaintiff's vehicle had begun to enter Haupt Street and the front end of the vehicle was in the street with the rear on the pavement. He did not give any estimation as to this distance. Neither party requested an inspection *in loco* to determine this distance and no measurements have been agreed upon in respect of the distance. The evidence of Manuel is of little assistance in the absence of some indication of the actual distance.

[20] Mr ***Schubart*** argues that I should find, on the evidence, that the insured driver did not keep a proper lookout and that he had travelled at a speed excessive in the circumstances. He states that the "admission" by the insured driver during his evidence in the Magistrate's Court that he only "opened" his eyes 15m from the scene of the accident is indicative thereof that he had failed to keep a proper lookout. At face value there is some force in this argument, however, on the evidence of the insured driver, when he did see the vehicle of the plaintiff it was travelling very slowly towards the edge of the roadway and there was no indication at that stage that the plaintiff would enter the roadway. I think, however, that I am bound to accept, as recorded before, that the plaintiff had in fact come to a complete stop at the edge of the roadway prior to entering Haupt Street. Either way, when the insured driver did see the vehicle there was no reason to take evasive action yet. To the extent, therefore, that the evidence establishes that the insured driver did not keep a proper

lookout prior to that, such negligence cannot be said to have contributed to the causation of the accident.

[21] Mr ***Schubart's*** argument that the insured driver was travelling at a speed excessive in the circumstances proceeds by reference to the length of the brake marks found upon the roadway. I do not think that there is any reason to doubt the correctness of the evidence of Roestof in respect of the brake marks. I do not however, think that I can find on the strength thereof that the insured driver was travelling at a speed excessive in the circumstances. In ***Road Accident Fund v Mgweba*** 2005 (1) All SA 646 (A) at 651c-g Erasmus AJA stated:

> "… The trial court, as well as the full court, simply assumed that the length of these marks constituted evidence that Bailey was travelling at a speed in excess of 50-60 kph. In doing so, with respect, they indulged in accident reconstruction without the benefit of expert evidence. Accident reconstruction is a branch of dynamics requiring special knowledge in the discipline of physics. A court may venture into that field but only at a level that can properly be said to be a matter of common sense falling within common human experience. It is often a fine line (and frequently a debatable one) that separates unacceptable conjecture from acceptable deductive reasoning based on proven physical facts.
>
> [17] A court could, in my view, take cognisance of the fact that skid marks are caused by the wheels of the motor vehicle locking in the application of its brakes. It is, further, a matter of basic and obvious logic that there is some correlation between the length of the marks and the speed at which the vehicle was travelling when the skidding commenced: the higher the velocity, the longer the marks will be. However, calculating the speed of the vehicle from the length of the skid marks is beyond the ability of the non-expert that is the court. That calculation will require evidence regarding the stopping distance of the particular vehicle at a given speed in the particular physical circumstances. In this case, there was no evidence regarding the facts relevant to that computation, nor of the mathematical formula based on such information. In the circumstances, the fact that the insured vehicle left skid marks of 9-10 meters does not have the precise probative value placed upon it by the trial court; and the court *a quo* followed it into that error."

[22] In the present case the brake marks, were on the evidence of Roestof, 24 strides. No indication arises from the evidence as to the length of Roestof's paces. This was not pursued either in his evidence in chief or in cross-examination. In the matter of ***Road Accident Fund v Mgweba*** *supra*, the length of the skid marks were measured by a police official to be 16 paces. Erasmus AJA dealt with this evidence as follows at 648g:

> '[6] Jacobs paced off the distances himself. A pace is of course a relative measurement, and he was asked to indicate the length of his stride. This was agreed upon as being "just a bit more than half a metre". On that basis, the skid marks of 16 paces on the diagram were 9 to 10 metres in length.'

[23] It seems to me without an indication of the length of Roestof's paces the conclusion, based on the brake marks, that the insured driver was travelling at a speed excessive in the circumstances, becomes extremely tenuous. In any event, in the absence of expert evidence I do not think that the conclusion is justified.

[24] It is common cause that the plaintiff proceeded across the line of travel of the insured driver, however, there is some dispute as to the progress which he ultimately made. The insured driver states that the collision occurred on the left hand side of the road and that he was unable to swerve either left or right. He simply applied his brakes. Manuel supports the insured driver in this observation. I recorded earlier, however, that there is no basis upon which the evidence of Roestof as to his observations of the brake marks could be contested. Neither Manuel nor the insured driver were in a position to dispute the observation to which he testified. I find accordingly that the brake marks did extend from approximately the middle of the road onto the right hand side of the roadway. On this evidence it must accordingly be accepted that the insured driver did swerve to his right hand side. I think that this is the normal reaction for any human being faced with the danger emanating from his left hand side and proceeding across his path of travel, as the plaintiff's vehicle did. It accordingly accords, in my view, with the probabilities.

[25] Mr ***Schubart*** argues, on an acceptance of the point of impact on the insured's driver's incorrect side of the road, that there was sufficient room for the insured driver to have passed safely behind the plaintiff's vehicle without swerving to his right hand side. He argues further, on an acceptance of the plaintiff's evidence, that plaintiff's vehicle had been stationary in that position for a number of seconds prior to impact and that the insured driver would have had ample opportunity to pass behind the plaintiff's vehicle. In view of my finding that the collision occurred on the right hand lane I am satisfied that there was indeed sufficient space in the left hand lane for the

insured vehicle to pass behind the plaintiff's vehicle. Was the insured driver then negligent in failing to do so?

[26] Neither Manuel nor the insured driver ever saw a child in the road nor a pedestrian falling in front of the plaintiff's vehicle. On the plaintiff's own evidence he never saw a child in the road in front of him. I think in the circumstances that it is doubtful that the plaintiff had come to a stop prior to the collision. There would have been no reason to do so. If he had, it could have only have been moments prior to impact. Had he been stationary on the right hand side for any appreciable time it seems to me inexplicable that the insured driver would have swerved to his right hand side as he clearly did. Moreover, the insured driver denies that the plaintiff's vehicle was stationary at the time of impact. In considering the conflicting versions on this aspect in the light of the probabilities, I do not think that the evidence of the plaintiff can be accepted.

[27] Has it then been proved that the insured driver was negligent in swerving to his right hand side? The insured driver was confronted with an unexpected danger when the plaintiff's vehicle moved from a stationary position on the pavement into Haupt Street directly into the path of travel of the insured driver. It may well be that he may have acted differently had he had more time at his disposal. I do not think, however, that the insured driver should be penalised for not having swerved to his left hand side in these circumstances. In ***Rex v Phillips*** 1949 (2) SA 671 at 677 (OPD) Horwitz J stated:

> 'Appellant acted in this emergency as best he could and, even if his reaction to the complainant's negligence may have been mistaken or not wisely taken,
>
> > "he is not contributorily negligent if, on the spur of the moment, or by mistake, he does something which caused the very collision he is anxious to avoid."
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> (Mazengarb: *Negligence on the Highway*, p. 123)'

I think that this dictum is equally apposite in this case.

[28] In all the circumstances I do not think that the plaintiff has discharged the onus to prove negligence on the part of the insured driver giving rise to the collision.

[29] In the circumstances the plaintiff's claim is dismissed with costs.

J W EKSTEEN
JUDGE OF THE HIGH COURT

Appearances:

For Plaintiff:	Adv L Schubart SC instructed by Heine Ungerer Attorneys, Port Elizabeth
For Defendant:	Adv D Smith instructed by Ketse Nonkwelo Attorneys, Port Elizabeth