

REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

- (1) REPORTABLE: YES**
- (2) OF INTEREST TO OTHER JUDGES: YES**
- (3) REVISED**

Case No.: 40838/15

MKHONDO: THOZAMA	Plaintiff and
ROAD ACCIDENT FUND	Defendant

JUDGMENT

MNGQIBISA-THUSI, J:

- [1] The plaintiff, Mr Thozama Mkhondo, has instituted an action against the defendant, the Road Accident Fund, in which he seeks damages (loss of support) for loss suffered in a motor vehicle collision which occurred on 13 October 213. Mr Sipho Robert Mabasa ("the deceased), who died at the scene of the accident, was the driver of a motor vehicle, a Volkswagen Golf, bearing registration number [...], which motor vehicle collided with two other motor vehicle, initially, with a Toyota Prado bearing registration number [...] ("the first insured Motor vehicle") and subsequently with a Hyundai bearing registration number [...] ("the second insured motor vehicle"). Both the first and second insured vehicles were towing a trailer and a caravan, respectively.
- [2] The collision happened along the Rosslyn and Brits Road, with the first and second insured motor vehicles travelling in the opposite direction to that of the deceased. The Prado was driven by Mr Claude Smit ("the first insured driver") and the Hyundai was driven by a certain Mr Gouws ("the second insured driver").

- [3] It is common cause that before the initial collision happened, the vehicle driven by the deceased had a tyre burst and the deceased lost control of his vehicle, resulting in him colliding with the trailer of the first insured vehicle, ending up on the wrong lane where he collided head- on with the second insured vehicle.
- [4] At the time of the accident, the plaintiff was married to the deceased in terms of a customary marriage on 26 June 2010 and one minor child, Nosipho Mabasa, was born from the marriage.
- [5] The parties agreed by that the matter would proceed only on the issue of merits, and that quantum be postponed *sine die*.
- [6] It is the plaintiff's contention that the collision was as a result of the negligence of either and/or both of the insured drivers in that he/they:
- (i) failed to keep a proper lookout;
 - (ii) failed to avoid the collision when by the exercise of reasonable care, he could and should have done so;
 - (iii) failed to take sufficient account of the presence and/or alternatively visibly intended actions of the deceased's vehicle;
 - (iv) failed to take due regard of other road uses, in particular the deceased's vehicle;
 - (v) failed to exercise proper or adequate control over his vehicle;
 - (vi) failed to apply the brakes of hi vehicle timeously, or at all;
 - (vii) drove at an excessive speed under the prevailing circumstances;
 - (viii) failed to allow sufficient berth for the deceased's vehicle to proceed unhindered.
- [7] The defendant has denied that either of the two insured drivers negligently caused the collision. In the alternative, the defendant pleads that the deceased's negligence contributed to the cause of the accident.
- [8] The issue to be decided is whether either of both of the insured drivers negligently caused the collision.
- [9]] In the pre-trial minute the parties agreed that, in view of the demise of the deceased, the version of the first insured driver, Mr Smit, as contained in

his statement, should be taken into consideration by both the court and the accident reconstruction expert the plaintiff intended calling as a witness. Mr Smit's statement reads in part as follows:

- "Whilst driving, he noticed a black VW Golf which was travelling from direction east towards direction west. He saw the right front tyre bursting of the WV black vehicle and it began to swerve.
- Then the said vehicle "hit" the right front portion of his trailer he was pulling, he stopped his vehicle to see what had happened, he observed that the said WV Golf also collided with another vehicle".

[10] The only witness to testify at the trial was Mr Conrad Walter Lotter ("Mr Lotter"), a reconstruction expert. Mr Lotter's evidence is as follows. He did not attend the scene of the accident. However, analysing the accident, Mr Lotter was provided with certain information¹. Mr Lotter described the area where the accident happened as he used certain information made available to him. Mr Lotter described the scene of the accident in the following manner. The road is approximately 3.5m wide on each lane with a yellow line on the edge of the road. On the shoulder of each there is a gravel portion of approximately 2m wide. Further that the road is straight and there are no obstructions to obscure visibility.

[11] Mr Lotter testified that from his observations of the positions the vehicles had adopted after the accident, he observed that both insured vehicles were in their correct lane. The conclusion Mr Lotter came to was that after the deceased lost control of his vehicle, he must have swerved to the right, which would have given the first insured driver about 1.5 seconds to take evasive action. Thereafter the deceased would have swerved to the left and this movement would have been for approximately 1 second. Thereafter there would have been a third movement by the vehicle driven by the deceased, leading to the deceased's vehicle colliding the trailer

¹ A copy of the accident report; the statement of constable SG Sekao, the first police officer to arrive at the accident scene; a statement of warrant officer A T Kgomo, the investigating officer; a black and white copy of the police's photo album; the statement of Mr Smit, a statement of Mr B van Wyk, an eye witness, the post-mortem report, a telephone conversation with Mr Smit and Google map showing the layout of the accident scene.

pulled by the Toyota Prada and this movement Would have taken 1 second. According to Mr Lotter, taking into account the time lapses of the movements of the deceased's vehicle, the first insured driver would have had 4,5 seconds to avoid the collision, particularly as he had observed the tyre burst f he deceased's vehicle.

[12] Mr Lotter further testified that, he was of the opinion that had the second insured driver kept a safe distance behind the first insured driver, he would have had 2 seconds to react to the collision between the deceased's vehicle and the trailer of the first insured driver. Mr Lotter was further f the opinion that, from the photographs he was given, it appears that the collision between the second insured driver and the deceased happened in the middle of the road. He came to the conclusion that it appears that the second insured driver did not take any evasive action to avoid colliding with the deceased's vehicle. Mr Lotter was of the opinion that from the information in his possession, his conclusion was that both insured drivers were negligent.

[13] The defendant did not call any witnesses before closing its case.

[14] On behalf of the plaintiff it was argued that I should make a finding that both insured drivers were negligent. With regard to the first insured driver, counsel submitted that had he been keeping a proper lookout, he could have foreseen the deceased crossing lanes and as a reasonable person he would have taken steps to avoid the deceased colliding with his vehicle. With regard to the second insured driver, counsel argued that if he had kept a safe following distance, as a reasonable driver, he would have seen the deceased crossing over to the incorrect lane and would have avoided the accident.

[15] Liability for negligence arises if a reasonable person in the position of the defendant:

- (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss;
- (ii) would take reasonable steps to guard against such occurrence;

and

(iii) the defendant failed to take such steps².

[16] It is common cause that immediately before the first collision, the front tyre of the deceased's vehicle burst, and he lost control of the vehicle. Further that the deceased's vehicle collided with the back of the first insured driver's trailer and hereafter collided head-on with the vehicle driven by the second insured driver.

[17] It is also common cause that the deceased died at the scene of the accident and since both insured drivers did not testify, there are no eye witnesses as to how the accident occurred except what is contained in the first insured driver's statement to the police, which statement was by agreement, to be considered. The only other evidence before this court is the evidence and the report of Mr Lotter on how the accident could have happened.

[18] In *Motor Vehicle Assurance Fund v Kenny* 1984 (4) SA (ECO) 432 the court stated at 436H that:

" Direct or credible evidence of what happened in a collision, must, to my mind, generally carry greater weight than the opinion of an expert, however experienced he may be, seeking to reconstruct the events from his experience and scientific training. Strange things often happen in a collision and, where two vehicles approaching each other from opposite directions collide, it is practically impossible for anyone involved in the collision to give a minute and detailed description of the combined speed of the vehicles at the moment of impact, the angle of contact or of the subsequent lateral or forward movements of the vehicles. Tompkins' concession, therefore, that there are too many unknown factors in any collision to warrant a dogmatic assertion by an expert as to what must have happened seems to me to have been a very proper one. An expert's view of

² *Kruger v Coetzee* 1966 (2) SA 266 (A).

what might probably have occurred in a collision must, in my view, give way to the assertions of the direct and credible evidence of an eyewitness. It is only where such direct evidence is so improbable that its very credibility is impugned, that an expert's opinion as to what may or may not have occurred can persuade the Court to his view (cf Mapota v Santam Versekeringsmaatskappy Bpk 1977 (4) SA 515 (A) at 527-8 and Madumise v Motorvoertuigassuransiefonds 1983 (4) SA 207 (0) at 209)".

- [19] In his statement Mr Smit admits to seeing the front tyre of the deceased car bursting. However, Mr Smit does not say if he took any evasive action or that under the circumstances he would not have been able to take any action in order to avoid the collision. According to Mr Lotter, the first insured driver had about 2 seconds in which he could have taken evasive action to avoid the collision. However, bearing in mind that the first insured driver was pulling a trailer, Mr Lotter could not say whether the first insured driver, taking into account that he was pulling a trailer, had sufficient time to avoid the accident.
- [20] There being no evidence to contradict the accident construction expert's evidence and in the failure by either of the insured drivers testifying and no explanation given as to why they were not available to testify, I am of the view that with regard to the first insured driver, I am not convinced that evidence on a balance of probabilities was presented to show that within the time period postulated by Mr Lotter, the first insured driver could have taken evasive action to avoid the deceased colliding with his trailer.
- [21] With regard to the second insured driver and bearing in mind that he was pulling a caravan, I am satisfied by Mr Lotter's evidence that had he kept a safe distance behind the first insured driver, he would have had sufficient time to avoid colliding with the deceased. From the time the deceased lost control of his vehicle and initially veering to the right and then to the left, the second insured driver would have seen these movements and taken evasive action. I am satisfied that the plaintiff has proven on a balance of probabilities that the second insured driver was negligent in failing to take

any steps, in view of the emergency situation which had arisen, to avoid colliding with the deceased instead of driving straight on.

[22] In the result the following order is made:

1. The second respondent is found to be liable to the plaintiff's agreed or proven damages due to the negligence of the second insured driver.
2. The defendant to pay the costs of the action.

N P MNGQIBISA-THUSI
Judge of the High Court

For the Plaintiff Adv I.W Makhubo (instructed by Mohulatsi Attorneys); for the Defendant Adv R Strydom (instructed by Mathie Jooma Sabdia Inc.)