



Reportable:	NO	YES
Circulate to Judges:	NO	YES
Circulate to Magistrates:	NO	YES
Circulate to Regional Magistrates:	NO	YES

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)**

CASE NO: 1013/17

In the matter between:

ABEEDA DAWOOD

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

O'BRIEN AJ

1. The N12 Road between Warrenton and Christiana in the Northern Cape runs from North to South. It is a tar road 7,6 metres in width. As is evident from pictures taken, on either side of the road there are grass wedges. The road is a single lane road for vehicles travelling in opposite directions, which is separated by a broken line.

2. On 24 December 2004, Mr Erifaan Hoosen Dawood (“the deceased”) was driving a white Nissan vehicle travelling in the direction of Warrenton. He was travelling in a convoy on his way to Cape Town. He picked up passengers whom he dropped off in Christiana. Mr Joseph Sebeela (“Sebeela”) was one of the passengers who continued his journey with the deceased who was seated in front next to him.
3. According to Sebeela the deceased was in a hurry to catch up with the convoy of vehicles he was travelling with, and after dropping the passengers in Christiana, they had to catch up with them.
4. About 8 km outside Christiana they were behind a truck which they could not pass. This was because of the road being busy with vehicles travelling in the opposite direction.
5. The deceased also attempted to overtake the truck but could not do so. When he noticed oncoming traffic, he had to go back into his lane travelling behind the truck.
6. Travelling behind the truck created poor visibility due to the water spraying from the truck onto the road and onto their vehicle.
7. At the fatal moment, the deceased attempted to overtake the truck. He indicated with his right signal, picked up speed, and moved to pass the truck to a spot where they were in the middle in relation to the length of the truck.

They were close to the middle line in the lane of oncoming traffic when the deceased shouted something in Afrikaans about an oncoming vehicle and that he could not move to the left or the right. He saw oncoming lights and within 5 seconds heard a bang.

8. Thabo Makaudi was on his way to Schweizer Reneke in the North West and travelled with a Mazda 626 Sedan. He noticed an oncoming truck whose water sprayed on his windscreen. As a result, he put his hands on the steering wheel leaning forwards to see clearer. His car was approaching the back of the truck when he suddenly noticed a white car in his lane. He did not have a chance to brake because it happened all of a sudden.
9. He could not swerve to the left because there was no time to do so. After the collision, he was unconscious, and spend some time in the hospital.
10. The deceased died as a result of injuries he sustained in the collision. As a result, the plaintiff acting on behalf of her three children instituted a claim against the defendant for loss of support. In her particulars of claim, she alleges that the collision was caused by the sole negligence of Makaudi, the main ground being – as the evidence shows – the latter failed to avoid the collision when, by the exercise of reasonable care, he could and should have done so.
11. The defendant pleaded that the collision was caused by the sole and exclusive negligence of the deceased.

12. In terms of Rule 33(4) of the Uniform Rules of Court, on invitation by the parties, I separated liability from the quantum of the plaintiff's claim.

Common cause facts:

13. It is common ground that the collision occurred in the lane in which Makaudi was travelling. Stated differently, at the time of the collision he was travelling in the correct lane he was supposed to travel in.
14. Moreover, it was a rainy day; the road was wet; it was misty and raining at the time of the collision and visibility was poor.

Submissions:

15. Mr W Coughlan acting for the plaintiff and relying on the evidence of Sebeela and an accident and reconstruction expert, John Craig, argued that the Court should find for the plaintiff. He submitted that given the analysis carried out by Craig the collision was caused by the deceased overtaking the truck when he had insufficient sight distance to ensure that there were no oncoming vehicles and that it was safe to do so. In fact, Mr Coughlan during the proceedings conceded that the deceased was reckless.
16. Notwithstanding the deceased driving, he submitted that Makaudi had sufficient time to observe the headlights of the deceased vehicle and would have had sufficient space to execute a swerving manoeuvre onto the western

edge of the road or the western verge, which would have very likely avoided the collision. In the result, the insured driver took no evasive action. Because the plaintiff and her children were not joint wrongdoers, she only had to prove the proverbial 1% negligence on the part of Makaudi to be successful with her claim.

17. Mr R Liddell, acting for the defendant submitted that the onus is on the plaintiff to prove that the insured driver was negligent. He contends that there is a conflict between Sebeela's and Craig's evidence making Craig's reconstruction suspect. He submitted that the deceased, given the poor visibility caused by the spray of water coming from the tyres of the truck by driving in the lane of oncoming traffic, was reckless. The insured driver did not have sufficient time at his disposal to take evasive action nor to execute a fanciful swerve – as suggested by Craig – given the sudden danger he faced.

Discussion:

18. In **Representative of Lloyds and Others v Classic Sailing Adventures (Pty) Ltd 2010 (5) SA 90 (SCA) at para 60** the Court emphasised that where there is eyewitnesses or direct evidence of an occurrence, this may render the reconstructions of experts less relevant or even irrelevant. In approving **Van Eck v Santam Insurance Co Ltd 1996 (4) SA 1226 (C) at 1229 H – 1230 B** the Court stated that while it was not unusual for parties to tender expert evidence to determine the cause of a collision, the expert's evidence is

inevitably based on reconstruction and cannot conceivably bear the same weight as direct, eye-witness testimony of the event in question.

19. In evaluating the evidence of Sebeela I have had regard to the factors stated in **Stellenbosch Farmers Winery Group Ltd & Another v Martell ET CIE & Others 2003 (1) SA 11 (SCA)** at para 5.
20. Sebeela's evidence, with a few exceptions to which I shall refer later, does not contribute to the plaintiff's case. The plaintiff's case, as it crystallised in the evidence is that although the deceased was reckless, the insured driver had an opportunity to make a s-manoeuve causing evasive action which would have avoided the collision.
21. In considering the evidence of Makaudi, I have had regard to what was stated in **Motor Vehicle Assurance Fund v Kenny 1984 (4) SA 432 (E)** at 436 H – I where Eksteen J (as he then was) stated the following:

“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 prescription 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.”

22. In **Stacey v Kent 1992 (4) SA 495 (CPD) at 499 B – D** the Court said:

“Reasonable drivers drive on the correct side of the road, and in the normal course of events, if a driver driving on the incorrect side causes a collision with another vehicle on his correct side, that fact would be proof of negligence. The errant driver cannot escape responsibility by suggesting fanciful and hypothetical possibilities which the plaintiff has not eliminated. But if there is a substantial foundation of fact to indicate that the collision is out of the normal course of events, then the normal rule would not apply. It is not in the normal course of events to suddenly have steering mechanism become defective, nor to skid onto the incorrect side of the road, nor to suddenly suffer a black-out or to have a heart attack. Once a fact has been established that there is an occurrence out of the normal course of events, such as that his car was out of control because of a skid, it is for the plaintiff to prove on a balance of probability the negligence of the defendant, taking due account of the particular abnormal events or circumstances.”

23. Mr Coughlan was critical of Makaudi’s evidence. He argued that the accident rendered Makaudi unconscious and when he regained consciousness his memory had failed him as he was suffering from post-traumatic retrograde amnesia. He had no recall of even being in an accident. He was also suffering

from post-traumatic retrograde amnesia when he made his statement to the police. The fact that he could not recall how many passengers he had in his vehicle makes it unlikely that he would have recalled the moments before the impact. He concluded by stating that it is likely that Makaudi's evidence is a mental reconstruction of how he imagined the accident might have happened. Lastly, he referred to contradictions and inconsistencies between his evidence in court and the contents of the affidavit he made to the police shortly after the incident.

24. In my judgment, the criticism against Makaudi is unfounded and unjustified. His evidence was that he was travelling at approximately 80 km per hour on a national road and slowed down even further when he saw the spray of water omitting from the truck. Due to the poor visibility, he leaned forward towards his steering wheel to get a better vision. To expect from him to stop in the middle of the road would have been a dangerous manoeuvre that could have led to a multiple car pile behind him.
25. I accept Makaudi's evidence that he was more towards the rear of the truck when the collision occurred. The only evidence to gainsay his testimony in this regard is that of Sebeela, who stated that the collision occurred in the middle of the truck. Given the fact that both vehicles were sprayed with water from the truck and the fact that Sebeela would have in all probability concentrated on what was in front of him; even more so Makaudi would have done the same. It, therefore, would have been difficult for both drivers and Sebeela to determine whether they were in the middle or whether they were in front, the

middle or at the rear of the truck when the incident occurred. Makaudi's evidence was that he concentrated on the road in front of him. Similarly, Sebeela's evidence was that the deceased looked in front of him and uttered something in Afrikaans. Nothing turns on the point as to where precisely the vehicles were in relation to the truck when the collision happened.

26. Makaudi was an excellent contrary to what Mr Coughlan submits. Even Sebeela confirms that the deceased undertook a dangerous manoeuvre when he decided to overtake the truck in the circumstances then. The deceased did this when the road was busy, and he tried to play catch-up with the other vehicles in his convoy. He was prone to taking chances. Sebeela confirmed that the collision happened exceptionally quickly. They did not see the lights of oncoming traffic and suddenly the collision occurred.
27. Makaudi's evidence was straightforward. I did not gain the impression that he was not telling the truth. He appeared to me as someone who stated the facts as he remembered it and was not tripped up during cross-examination. I have no hesitation in accepting his version.
28. Criticism was levelled against his evidence that he contradicted his statements. In **S v Mafaladiso & Andere [2002] 4 All SA 74 (SCA)** the following was said regarding discrepancies between the witness' evidence and his statement:

“Die blote feit dat daar self-weersprekings voorhande is, moet deur ‘n hof met omsigtigheid benader word. Eerstens moet nougeset vasgestel word wat die getuie werklik bedoel het om op elke geleentheid te sê, ten einde te bepaal of daar ‘n weerspreking voorhande is en wat die presiese omvang daarvan is. In hierdie verband moet die feitebeoordelaar inagneem dat ‘n vorige verklaring nie bywyse van kruisverhoor afgeneem is nie, dat haar taal- en kultuur verskille tussen die getuie en die opskrifsteller mag wees wat die korrektheid van wat presies bedoel is in die weerstaan en dat die verklaarder selde of ooit deur ‘n polisiebeampte gevra word om in detail sy of haar verklaring te verduidelik. Die eerste sin in paragraaf 8 van die klaagster se verklaring is ‘n duidelike geval waardaar meer nougesette benaderingswyse aan die kant van die afnemer van die verklaring die gewraakte sin sou opgeklaar en verhelder het of anders beantwoord het. (Sien oor die gevare van vertaalde getuienis en m.i, a fortiori, polisieverklarings, R v Gumede 1949 (3) SA 749 (A) op 757 in fine.”

29. The statement by Makaudi was taken in Afrikaans, and he testified in English in this court. For the reasons set out in **Mavaladiso** *supra* I am satisfied that the so-called contradictions are not material and do not impact on the quality of his evidence.
30. By accepting the evidence of Makaudi, the enquiry ends here.

31. But much was made by the Plaintiff that having regard to Sebeela's evidence insofar as his ability to state measurements and time is concerned and on which Craig relies to come to the conclusion that Makaudi should have taken evasive action based on scientific calculations that an analysis must be done.
32. Before doing so, I am mindful of what was stated in **Biddlecombe v Road Accident Fund [2011] ZASCA 225 (30 November 2011) at para 10** of the judgment:

"[t]he expert task with reconstructing what occurred is often dependent for the reconstruction not simply on the application of scientific principle to accurate data but on calculations based on imperfect human observations. The fact that the reconstruction rest on a potentially imperfect foundation is a reason for caution in determining its evidential value."

33. In my view, Sebeela's evidence regarding distance and time must be treated with caution not only for his inability to give direct measurements or actual time but also given the circumstances under which those observations were made. It cannot be more emphasised that it was raining and visibility was extremely poor compounded by the fact that the truck caused a spray of water on the vehicles involved in the collision. It is highly improbable for Sebeela to have concentrated on the rain on the windscreen; to determine time and distance, and listening to the deceased and still able to give a definitive time

or measurement. To make observations in these circumstances is in my view extremely doubtful.

34. During cross-examination, Craig accepted Sebeela's version as correct. However, this changed as he stated that Sebeela's distances could not be right. Craig also conceded that the insured driver's version could not be excluded. Furthermore, he also conceded that he does not know where the point of impact was. He also did not visit the scene of the accident.
35. In concluding that the insured driver had enough time to avoid the accident by taking evasive action he relies on the fact that the insured driver had 3 seconds to do so. This was based on Sebeela's evidence. But as stated earlier, Sebeela's evidence is improbable.
36. Craig's evidence was that Sebeela's approximation of 30 metres visibility was impossible. He gives no basis other than stating perception-reaction time. Furthermore, Craig did not know the weight of the vehicles – although he contends that it would not influence his calculation; he did not know what the exact speed of the vehicles was; his assumption on the speed of the vehicles is based on conjecture. In these circumstances, the factual basis for Craig's reliance and formulating his opinion is unreliable.

Conclusion:

37. The deceased did not drive as a reasonable driver would have done given the circumstances. A reasonable driver would have waited for a clear pathway when he overtook the truck. He would have made sure that it was safe to pass the truck at the time when it was done. To expect Makaudi to swerve to his left by performing a s - manoeuvre (which even Craig indicated would be difficult to perform) and endanger his own life, contrary to what a reasonable driver would have done is to expect the impossible. The reasonable driver does not drive with mathematical precision. In my judgment, the deceased was the sole cause of the accident.

38. I make the following order:

38.1 Absolution from the instance is granted with costs.

S C O'BRIEN AJ

Date heard:	21 August 2018
Date delivered:	21 September 2018
Obo Applicant:	Adv W Coughlan
Instructed by:	Engelsman Magabane Inc.
Obo Respondent:	Adv R Liddell
Instructed by:	Robert Charles Attorneys