



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case No. : 1951/2013

In the matter between:-

RIAAN CARL VENTER

Plaintiff

Case No. : 1076/2013

In the matter between:-

GENEVIEVE VENTER

Plaintiff

and

MEMBER OF THE EXECUTIVE COUNCIL

DEPARTMENT OF POLICE, ROADS

AND TRANSPORT, FREE STATE PROVINCE

Defendant

HEARD ON: 19 APRIL 2016

JUDGMENT BY: KRUGER, J

DELIVERED ON: 28 APRIL 2016

- [1] This judgment concerns the negligence in relation to the claims of Mr and Mrs Venter flowing from a collision on 8 October 2011. On that day Mr Venter was the driver of his Jeep SUV vehicle and Mrs Venter was his front-seat passenger. Mr Venter swerved out for an unlit and unmarked island in the middle of the road and his car rolled several times. He was flung out and injured to such an extent that he can remember nothing of the day of the accident until 14 days thereafter.

I THE CLAIM OF MRS VENTER

- [2] Mrs Venter instituted action on 15 March 2013 under case number 1076/2013 in which she claimed:

(a)	past hospital and medical expenses	R 31 602.17
(b)	future medical expenses	R 50 000.00
(c)	general damages	R231 602.17

- [3] In its plea the defendant denied liability alternatively sought an order that Mrs Venter's claim be reduced by the extent of Mr Venter's negligence. A third party notice was issued against Mr Venter. Mr Venter filed a plea to the third party notice denying that he was a joint wrongdoer. In argument before me Mr Bomela, for the defendant, placed no reliance on the third party notice and did not refer to it.

- [4] On 10 November 2015 Moloi J made *inter alia* the following orders:

“2. The question of negligence in relation to the plaintiff's claim will follow the outcome of the court's finding on negligence in case number 1951/2013 in the above Honourable Court.

3. The quantum of the two plaintiffs under case number 1951/2013 and case number 1076/2013 are consolidated in terms of rule 11.”

II THE CLAIM OF MR VENTER

- [5] Mr Venter instituted action on 20 May 2013 under case number 1951/2013 in which he claimed:

(a)	past hospital and medical expenses	R 701 117.78
(b)	future medical expenses	R 226 000.00
(c)	past loss of earnings	R 14 762.20
(d)	future loss of earnings	R 500 000.00
(e)	general damages	R 600 000.00
	Total:	<u>R1 815 879.98</u>

- [6] In the plea the defendant denied liability, alternatively that Mr Venter's claim be reduced because of his contributory negligence for driving at an excessive speed, not keeping a proper look-out and failing to brake.
- [7] On 10 November 2015 the matter was by agreement postponed to a pre-trial hearing before a judge under Rule 37(8). The quantum of the claims of Mr and Mrs Venter were consolidated.

III THE HEARING BEFORE ME ON 19 AND 20 APRIL 2016

- [8] The hearing before me dealt only with the issue of liability in respect of the claims of Mr and Mrs Venter, not quantum. The evidence of Mr Venter, Mrs Venter and Mrs Buys was lead. The defendant called no witnesses. The report of Deon Roux, the chief engineer at the Department of Police, Roads and Transport was handed in by consent.

- [9] Mr Venter testified that he could remember nothing of the accident until 14 days after the accident. He remembers that he and his wife and child were travelling, he does not know where. In cross-examination he said he does not drive recklessly. He went to the scene of the collision later and saw that the island was not visible.
- [10] Mrs Venter was a front-seat passenger in the vehicle driven by her husband. She was at a function and wanted to leave. Her husband works as an electrician and was called out to attend to an emergency at the mine during the afternoon. When he arrived at 9pm they left. They did not go home but went to friends they were going to see the next day. They did not take their normal route home but took a road they did not know. That was the R30 between Welkom towards Odendaalsrus. The road has two lanes for traffic in each direction. She and her husband were discussing their plans for the next day. Her husband drove and looked at the road ahead. At one stage she turned to look ahead and saw an island in the road. She shouted "Riaan, Island". At that stage her husband swerved left to try to avoid colliding with the island. Their vehicle overturned and rolled a view times. The area was dark as there were no signs to warn drivers to move to the left. The lights of their vehicle were on and functioning properly. The island was not visible for someone to see from a distance. She estimated that they were 2½ metres from the island when she saw it. When her husband swerved the car went out of control and rolled. Her husband was flung out of the vehicle. He had a bad head injury and was bleeding from the head. She did not recall whether her husband was wearing his seatbelt. In her view her husband could have done nothing else to avoid the collision.

- [11] In cross-examination she said that she and her husband were talking about the arrangements for the next day before the collision. She could not say that he did not see the island. She also could not say what would have happened if her husband did not swerve but proceeded over the island. She agreed that the road they were travelling on was dark and not known to her and her husband. She did not remember whether her husband put on his seatbelt.
- [12] Mr Riaan Buys is a colleague of Mr Venter at the mine. They knew each other as colleagues. They were not friends. Both of them were attached to the unit doing rescue work at the mine, and they were on standby on the day of the collision. No alcohol was served at the function. He left the function at about the same time as the plaintiffs, and was travelling on the same road. He knows the road very well. He has been using it daily for 30 years. He knows it is a dangerous road, it is known locally as the road of death. There are two lanes for traffic in each direction. In the centre of the road there is a "lane" leading directly into the island. The lines on the road are practically invisible. There is loose gravel on the road. The sign on the island indicating that drivers should keep left was knocked down a day or two before the collision. There have been several collisions at this point. Buys has often seen vehicles and emergency vehicles standing there. Frequently vehicles collide with the raised island.
- [13] On the evening in question Buys was travelling in the left lane of that road at about 70-75 km/h. He saw the plaintiffs overtaking him, not quickly. Venter was not travelling at more than 80km/h,

which is the speed limit on that road. Venter had his vehicle 100% under control. Buys saw that Venter was heading for the island, and said to his wife that Venter's vehicle was going to hit the island. He saw Venter's vehicle swerving left, then right, then rolling. There is no doubt in Buys' mind that Venter acted correctly in swerving.

[14] In cross-examination Buys said one only sees the island when you are at it if you do not know about it. His view was that a driver could see the island at about 10-15 metres with his lights on dim. He said that because he knows the road he is more careful when driving there. He always keeps in the left lane. In re-examination he said that if a driver sees an island 10-15 metres ahead of him he gets the fright of his life and jerks away from the danger, which is what Venter did.

[15] The most damaging aspects of the defendant's case appear from the Engineer's report. The engineer, Mr Deon Roux conducted investigations at the scene on 22 and 29 October 2012, as a result of the collision on 8 October 2011 in which the plaintiffs were involved. The engineer states in the report that he received information that the warning sign on the island is replaced frequently "due to the sign being collided with by vehicles on a regular basis". On 22 October 2012, a year after the collision in which the plaintiffs were involved, the engineer saw the keep left warning sign lying on the raised island and took a photograph thereof (Photo 4.2.4 in his report).

- [16] The engineer found that the road markings were in very poor condition and provide “almost no guidance”. He stated: “Only the red reflective beads of the road studs are in a good condition with the white and yellow beads providing no reflection at night. This creates a very dangerous situation in that the red reflection at the road studs can lead a motorist directly into the raised island”. If one looks at photograph 4.3.1 in the engineer’s report, two lanes of traffic can be seen travelling into the photograph. To the right of the inside lane there is what appears to be a lane with red warning studs at its right, leading directly into the island. This means that a driver, accepting that the red studs mark the centre of the road, travelling to the left of those studs, will drive directly into the island. It is not in dispute that on the night of the collision there was no marking sign on the island. The lines on the road were practically invisible. This was a dangerous situation which the defendant had a duty to prevent. Its failure to do so constituted wrongfulness because of defendant’s breach of a legal duty not to cause harm to another (**Jones NO v Santam Bpk** 1965 (2) SA 542 (A) at 551H).

IV ARGUMENTS RAISED BY DEFENDANT

- [17] Mr Bomela, for the defendant contended that the plaintiffs’ claims should be dismissed because in both particulars of claim it is stated that Mr Venter lost control of the vehicle, whereas the evidence shows that he swerved and the vehicle rolled. He made no objection when the evidence was led and did not cross-examine the witnesses on this alleged discrepancy. There is no merit in this point. The vehicle went out of control because of the swerve. There is no conflict.

- [18] Mr Bomela further submits Venter was not paying proper attention to the road because he was involved in a conversation with his wife planning the events of the next day. Mr Bomela overlooks the fact that Mrs Venter testified that her husband was looking at the road while they were talking. It is not unusual for drivers to talk while driving. It is speculative to say that Mr Venter was distracted. There is no merit in this point.
- [19] Mr Bomela suggests that because Mrs Venter testified that she saw the island and shouted “island” to her husband, that Mr Venter did not see the island. The probability is that both saw the island at the same time. The fact that she said she saw it a moment before Mr Venter swerved does not mean that he did not see it. It cannot be found that Mr Venter was not keeping a proper look-out.
- [20] Mr Bomela also contended that because Venter was not familiar with the road, he should have been more careful. The point to bear in mind here is that the speed limit is 80km/h and it is not in dispute that Venter was travelling within that speed limit. It cannot be held to have been negligent on Venter’s behalf to have been travelling below 80km/h.

V CONCLUSION

- [21] Venter was faced with a sudden emergency when he saw the unmarked island in the middle of the dark road ahead of him. Allowance must be made for the circumstances, and it cannot be expected of Venter to have considered all alternatives (**Union Government (Minister of Railways and Harbours) v Buur** 1914 AD 273 at 286). The evidence of both Mrs Venter and the

independent witness, Mr Buys, is that Mr Venter could do nothing else but swerve. At 80km/h he would have been travelling at 22.2 metres per second. Even if he saw the island at 10-15metres the correct averting action was to swerve. Braking would have been useless.

VI MR VENTER'S SEATBELT

[22] On the probabilities it must be found that Mr Venter was not wearing his seatbelt. The reasons are the following:

- (1) Mrs Venter did not see him putting it on.
- (2) There was no evidence from either Mr or Mrs Venter that he usually wore his seatbelt.
- (3) The fact that he was flung out of the vehicle indicates that he was probably not wearing a seatbelt. There is no evidence that the seatbelt broke, as Mr Louw suggested in argument, and also no apparent reason why it should have broken – this was not a head-on collision the car rolled.

[23] As to the seatbelt Mr Bomela said that the failure of Mr Venter to wear his seatbelt constituted negligence, and he requested that the award in Mr Venter's case be reduced.

[24] There are cases dealing with seatbelts:

- (1) **Union national South British Insurance Co Ltd v Vitoria**
1982 (1) SA 444 (A)

The plaintiff was a front-seat passenger. The parties argued that the collision was caused by the exclusive negligence of the driver of the other vehicle. There was a head on collision. Rumpff CJ held (at 460E-G) that the plaintiff's

negligence was that she failed to avoid injury through the use of a seat-belt. It was held that the onus is on the defendant to prove that the award of damages should be reduced by the failure to use a seatbelt. The defendant did not succeed in proving that, and no reduction was ordered (at 463E-G).

(2) **Vorster and Another v AA Mutual Insurance Association Ltd**

1982 (1) SA 145 (T)

Goldstone J reduced the award of damages related to the non-use of the seatbelt by 20%. The plaintiff was granted a full award of damages unrelated to the use of the seatbelt (at 165C-H). Goldstone J points out that the approach of English, Australian and Canadian courts is to reduce a plaintiff's damages which are attributable to the failure to wear a seatbelt by between 15 and 25 percent. Questions are asked whether the plaintiff was grossly or only slightly negligent in not wearing a seatbelt (at 164G-H, with reference to Lord Denning MR in **Froom v Butcher** 1976 QB 286):

- [25] As a result of the fact that Mr Venter drove without a seatbelt, thereby increasing that severity of his injuries, his claim should be reduced. It cannot be said that Mr Venter's negligence was gross or slight, and a 20% reduction is appropriate.

ORDER**A. Case 1951/2013**

1. It is declared that the plaintiff Mr Venter is entitled to 80% of his proven or agreed quantum.
2. The defendant is ordered to pay 80% of Mr Venter's costs in case no 1951/2013.

B. Case 1076/2013

3. It is declared that the plaintiff Mrs Venter is entitled to 100% of her proven or agreed quantum.
4. The defendant is ordered to pay Mrs Venter's costs in case no 1076/2013.

A. KRUGER, J

On behalf of Plaintiff: Adv MC Louw
Instructed by:
McIntyre & Van Der Post
BLOEMFONTEIN

On behalf of Defendant: Adv LR Bomela
with Adv BO Masoka
Instructed by:
State Attorney
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