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**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 number: 5115/2014

In the matter between:

JOHANDI COUS N.O.

Plaintiff

(Duly appointed *curator ad litem* on behalf of
WILLEM JACOBUS JORDAAN,
Identity number: [5.....])

and

ROAD ACCIDENT FUND

Defendant

CORAM: CHESIWE, AJ

HEARD ON: 23, 24 & 26 AUGUST 2016

JUDGMENT BY: CHESIWE, AJ

DELIVERED ON: 03 OCTOBER 2016

- [1] The plaintiff is Mr Willem Jacobus Jordaan, an adult male who is currently unemployed and residing at [...] H. R. F., Bloemfontein, Free State. The plaintiff has been placed under curatorship of Johandi Gouws N.O (the curator) on the 4 August 2016 by Mathebula AJ of the above Honourable Court.
- [2] The defendant is the Road Accident Fund, a statutory body established in terms of the Road Accident Fund Act 56 of 1996 (the Act) with its head office or alternatively its chosen *domicilium citandi executandi* at 38 Ida Street Menlopark Pretoria.
- [3] This action is for payment of compensation for damages suffered as a result of bodily injuries caused by a collision that occurred on 2 April 2013. The court is requested to determine which party is liable for the damages of the plaintiff and who is to be blamed for the collision. At the commencement of the trial, the parties per agreement requested the court to direct that the issues relating to merits and *quantum*¹ be separated and the only issue to be decided by the court will be that of the merits, whereafter it was subsequently so ordered. The *quantum* trial was postponed to the 5 December 2016.
- [4] It is common cause that a collision occurred on the 2 April 2013 at De La Rey Avenue, Fleurdal, Bloemfontein, between a motor vehicle with registration numbers and letters DXE443FS (the Hyundai) and a motor vehicle with registration numbers and

1. It was done in terms of Rule 33(4) of Uniform Rules.

letters CVL245FS (the Nissan). The Hyundai was driven by the plaintiff and the Nissan was driven by Mr Johannes Michael Lindaque (the insured driver).

[5] The plaintiff in the particulars of claim, paragraph 4.1 to 4.6, pleaded that the accident occurred as a result of the negligent driving of the insured driver who was negligent in one of the following instances:

5.1 The insured driver exceeded the speed limit immediately prior to the accident, alternatively he drove too fast under the prevailing circumstances.

5.2 He failed and neglected to keep a proper lookout.

5.3 He neglected or failed to apply his brakes which under the circumstances the accident could have been avoided had he applied his brakes effectively.

5.4 He failed to foresee and prevent an accident which was under the prevailing circumstances reasonable foreseeable.

5.5 He drove reckless, dangerous or unsafe and/or negligent under the prevailing circumstances.

[6] The defendant filed an Amended Plea on 20 May 2015 in respect of paragraph 4 of the particulars of Claim, the defendant denied any negligence on its part or on the part of the insured driver alternatively in the event that the driver of the insured vehicle was

negligent as alleged, the defendant pleaded that the plaintiff was also negligent in one or more of the following respects:

“the plaintiff failed to keep a proper look-out. He failed to avoid the collision while he was with the exercise of reasonable care and in a position to do so.”

- [7] Before commencement of the trial on 24 August 2016, an application was made by the plaintiff that an *inspection in loco* must be conducted. Subsequently the court granted an order for the inspection *in loco* of the scene of the accident. The parties that attended the inspection *in loco* were: Honourable AJ Chesiwe, Mr Kagiso Moruri, Adv HJ Cilliers, Mr Cobus Verwey, Ms Janelle Nel, Mr Jurie Jordaan, Mr Barry Grobbelaar, Adv Mhlana, Mr A Jeje and Mr Albert Cilliers. A sketch was provided to all parties present to assist during the inspection. The issues identified at the collision scene were set out in detail in the Heads of Argument of the plaintiff and these were also read into the record. The defendant raised no objection to issues pointed out at the scene and that the issues be read out into the record.
- [8] The plaintiff did not testify, as he has no recollection of the accident, due to the brain injury he suffered during the collision. It is for this reason a curator *ad litem* was appointed on behalf of the plaintiff. The plaintiff called the first witness, Mrs Janelle Nel, she testified that on the 2 April 2013 at about 21:00, she was watching television with her fiancée at house no. 70 in General De La Ray Avenue, when she heard a loud bang outside the house. She went outside to look and as she exited through the

gate she noticed a Hyundai motor vehicle facing south westerly and also noticed a Nissan which was facing the same direction as the Hyundai.

Mrs Nel, testified that she did not personally see the collision happen. However she was able to note the damages on both vehicles, the Hyundai was badly damaged on the left front side and the Nissan was damage on the front. She confirmed that the road surface was tarred and dry, the weather was good, that the road visibility is good as the street is not only located in a residential area but is also busy. She testified that the speed limit in De La Rey Street is 60km/H.

The skid marks that she pointed out at the inspection *in loco* were measured by Mr Grobbelaar. The skid marks were measured from house no. 74 to where the Nissan was stationed and their length was 13,7metres (m). The distance from the middle of the driveway of house no. 74 to where the direction the Hyundai was pointed was 39,8m. She confirmed that the debris was observed in front of the driveway of house no. 74. Ms Nel testified that on the morning of 3 April 2013, she passed the accident scene and saw the skid marks which she confirmed were those contained in the plaintiff's bundle.

- [9] The plaintiff then called Mr Jurie Jordaan as the second witness and he testified that he was the plaintiff's brother. Mr Jordaan stated that he did not witness the accident, but visited the scene of the accident on the morning of 3 April 2013. He took photographs of the scene. He testified that he observed skid

marks on the road surface of general De La Rey Avenue, which at the inspection *in loco* were marked as starting from house no. 78 and led up to the middle of the driveway of house no. 74. He further confirmed that the measurement done by Mr Grobbelaar during the inspection *in loco* on 24 August were the correct distances.

During cross-examination, Mr Jordaan informed the court that he had a telephone conversation with the insured driver, who confirmed to him that he was going home travelling in a southern western direction on General De La Rey Avenue when the collision occurred.

- [10] The plaintiff called an expert witness Mr Grobbelaar. He proceeded to deal with his report which was handed in as exhibit B. Mr Grobbelaar was very detailed in his report and testimony. He testified that the construction of the motor vehicle collision scene, literally starts at the end where the vehicles ended up as pointed out by Mrs Nel. He explained that the point of impact as indicated to be from the front of the driveway of house no. 74 to house no. 78 explained the length of the skid marks as 31m.

According to Mr Grobbelaar, in his expert opinion the insured driver saw the Hyundai at a distance of at least 72m before the impact in front of house no. 74. He explained that the average reaction time of a human being to apply pressure to the brakes after observing an object was 1.5 seconds. He further explained to the court that had the insured driver travelled at the legal speed limit of 60Km/h, at the distance of 72m from the Hyundai he would

have been able to stop at least 10m before house no. 74 and the insured driver would not have collided with the Hyundai. He calculated the minimum speed that the insured driver travelled at a distance of 72 meters from the Hyundai at 115Km/h and the maximum speed at 127Km/h and explained the probability that the insured driver grossly exceeded the speed limit was the sole cause of the collision.

- [11] Mr Grobbelaar, emphasis that the collision occurred in the lane of travel of the Nissan. Had the Nissan been travelling at or below the speed limit of 60Km/h instead of 115Km/h or more, the collision would on probability have been avoided. He concluded that whether the Hyundai had its lights on or not was irrelevant as it is clear that the Nissan on probability saw the Hyundai at a distance of approximately 72m. He said that the distance was more than enough for the Nissan driver to have seen the Hyundai and be able to brake to a stop prior to the collision. Mr Grobbelaar informed the court that the calculation that he had done was actually to the advantage of the insured driver by working on the best case scenario of the insured driver.
- [12] The defendant opted not to call any witnesses or the insured driver. The defendant indicated that the insured driver was not available to come to court to testify.
- [13] Advocate Mhlana on behalf of the defendant submitted that the plaintiff was contributory negligent in that he failed to exercise the same care and skills which a reasonable man in the circumstances would have exercised in the following respects:

13.1 He failed to keep a proper look-out.

13.2 He failed to avoid a collision while he was with the exercise of reasonable care and in a position to do so.

[14] Adv Mhlana further argued that the plaintiff's witness Ms Nel came after the collision and that her evidence is not evidence that the court could draw inferences that either the plaintiff and/or the insured driver is the cause of the accident. He argued that Mr Jordaan, brother of the plaintiff does not know how the accident occurred as he was not at the scene. He visited the scene the following day on 3 April 2013 when he went to take photographs. He could only speculate from the distances of 32m that the skid marks were those made by the insured driver. Adv Mhlana indicated that Mr Grobbelaar's evidence confirmed the insured drivers version that the collision occurred in its lane of travel from eastern direction to western direction and that the plaintiff vehicle was crossing the road facing house no. 74 and was stationary. That the expert witness view that the insured vehicle might have been travelling at an excessive speed, and this is based on the expert opinion of the distance of the brake marks of 32 metres, where the insured vehicle started prior to the impact and the 20 metres where the plaintiff vehicle stopped after the collision. He concluded that it is probable that the plaintiff misjudged the speed of the insured vehicle prior to performing his turn.

[15] The defendant opted not to call witness including the insured driver Schreiner JA in **Galante v Dickinson** 1950 (2) SA 460 (A) stated that:

“...Later cases in this Court have examined positions where it has not been shown that the witness was available at the trial or where there was no good reason why he should have been called by the one side rather than the other (see *Gleneagles Farm Dairy v Schoombee*, 1949 (1), S.A.L.R. 830 (A.D.)). In the case of the party himself who is available, as was the plaintiffs witness in this case.”²

The court could only draw inferences on the evidence of the plaintiff before court; the court is aware of the plaintiff medical condition but has no full knowledge as to the unavailability of the insured driver. Schreener JA says further stated that:

“It is not advisable to seek to lay down any general rule as to the effect that may properly be given to the failure of a party to give evidence on matters that are unquestionable witness his knowledge. But it seems fair at all events to say that in an accident case where the defendant was himself the driver of the vehicle the driving of which the plaintiff alleges was negligent and caused the accident, the court is entitled, in the absence of evidence from the defendant, to select out two alternative explanations of the cause of the accident which are more or less equally open on the evidence that one which favours the plaintiff as opposed to the defendants.”³

- [16] From the evidence it was obviously unreasonable and dangerous for the insured driver to exceed the legal speed limit in that area. General De La Rey Street is in a residential area and a busy street. It is expected that vehicles will turn in and out of it, to join the main road. Nevertheless, before the court there is no

² *Galante v Dickinson* 1950 (2) SA 460 (A) at 465.

³ *Ibid.* See also *Dlangamandla v Road Accident Fund* 2011 (5) SA 565 (FB) para [43] and *De Maayer v Serebro and Another; Serebro v Road Accident Fund and Another* 2005 (5) SA 588 (SCA).

evidence from the plaintiff as to what exactly he was doing prior to the collision but that is neither here nor there.

What is clear from the expert's evidence is that the insured driver was driving at an excess speed of 115km in a 60km/h zone. This made it difficult for the insured driver to apply his brakes at a reasonable time. According to Mr Grobbelaar, the average reaction time of a human being to be able to apply pressure on the brakes after observing an object is 1.5 seconds. So, had the insured driver travelled at the legal speed of 60km/h at the distance of 72m from the Hyundai he would have been able to stop at least 10m before house no. 74 and the Hyundai that collision would never have resulted.

Although the plaintiff, with hindsight, made an error of judgement, this should not be visited with negligence given the period of time in which the insured driver had to respond and there was no evidence to suggest that Plaintiff had been negligent. The plaintiff had discharged the onus of proving on a balance of probabilities that the driver of the insured vehicle was solely to blame for the collision. In **Steenkamp v Steyn** 1944 AD 536, it was stated that

“Plaintiff misjudged the situation and that was an error of judgement, but unless such judgement was culpable, in the sense that a reasonable careful driver would not have been guilty of it, it was not negligence”.⁴

⁴ *Steenkamp v Steyn* 1944 AD 536 para [553].

[17] Section 1 of Apportionment of damages, Act 34 of 1956; Apportionment of Liability in case of contributory negligence.

“(1) (a) Where any person suffers damage which is caused partly by his own fault and partly by the fault of any other person, a claim in respect of the claimant but the damages recoverable in respect thereof shall be reduced by the court to such an extent as the court may deem just and equitable having regard to the degree in which the claimant was at fault in relation to the damage.”

Before court there is only one version, that of the plaintiff. There is further no evidence of any negligence relating to the plaintiff and consequently the version of the plaintiff remains uncontested.

[18] In our law the test for negligence is that of a reasonable man⁵. In other words what is required is the standard of care and skill which a reasonable man in the position of the driver would have observed⁶.

Motor Law Vol 2 at 99 - the principles applicable are the following:

“The rule gives rise to a conference, not a presumption, of negligence. The court is not compelled to draw inferences. At the end of the case the enquiry is where, on all the evidence, the balance of probabilities lies. If it is substantially in favour of the party bearing the onus on the pleadings, he succeeds, of not, he fails⁷. Thus, this onus throughout rests on the plaintiff and it onus encumbent upon him, under the circumstances, to come and give a reasonable and probable explanation as to what happened. He will succeed if he satisfies the court upon preponderance of probabilities that his

⁵ *Coetzee v Kruger* 1965 (3) SA 677 (E) and *Herschel v Mrupe* 1954 (3) SA 464 (A).

⁶ *S v Stavast* 1964 (3) SA 617 (T) 620B and see also *S v Van As* 1976 (2) SA 921 (A) at 928G.

⁷ *Fourie v Road Accident Fund* [1999] 3 All SA 661 (O).

version is probably true and thus acceptable, regard being had to the facts of the case.”⁸

In this regard the court had to rely on the expert witness evidence which in most cases the expert by and large rely on speculation and a theoretical reconstruction of the collision which would per se take one in the realms of the unknown⁹. Experience has taught that it is very often impossible for an expert, sitting in the arm chair of the court room, to logically explain what happens in a collision. A strict and dogmatic mathematical reconstruction depends on so many exact facts and information as to angles, speed, manner of the vehicles, distance and reaction of time. This was given by Mr Grobbelaar in this matter as opposed to the defendant who chose not to call any witness. In **Van der Westhuizen and Another v SA Liberal Insurance Co. Ltd** 1949 (3) SA 160 (C), Ogilvie Thompson AJ (as he was then) stated that:

“the strictly mathematical approach, though undoubtedly very useful as a check, can but rarely be applied as an absolute test in collision cases, since any mathematical calculation so vitally depends on exact positions and speeds; whereas in truth these latter are merely estimates almost invariably made under circumstances wholly unfavourable to accuracy.”¹⁰

The credibility of the witnesses for the plaintiff, were impressive and good witnesses, where the probabilities that favour the

⁸ Ibid. See also *National Employers' General Insurance v Jagers* 1984 (4) SA 437 (E) at 440D–F.

⁹ Ibid at 667.

¹⁰ *Van der Westhuizen and Another v SA Liberal Insurance Co. Ltd* 1949 (3) SA 160 (C) at 168.

plaintiff. The court could did not find any inconsistencies or contradictions in their testimonies.

- [19] Whether the plaintiff was turning into house number 74 or driving out or making a U-turn is not before this court neither is it clear as to what the plaintiff was doing. The onus rest throughout on the plaintiff and it is incumbent upon him, under the circumstances, to come and give a reasonable and probable explanation as to what happened and why he did what he did. The plaintiff will succeed if he satisfies the court upon preponderance of probabilities that his version is probably true and thus acceptable, regard being had to the facts of the case of **National Employers General Insurance v Jagers** 1984 (4) SA 437 (E) at 440D-F.

Adv Cilliers submitted that the plaintiff's version is more probable and that there is clear evidence that the insured driver was speeding as could be seen from the skid marks. Adv Cilliers submitted that the expert witness, Mr Grobelaar is qualified and as an expert witness, he applied his mind and made a mathematical determination of the calculations and that these were not challenged by the defendant and that the defendant's version is not before court.

- [20] I find, accordingly that such cause of action may, depending on the circumstances, be justified if no other acceptable means be available or avoiding the collision and that the conduct of a driver having to take such a decision should be examined within the context of the extreme circumstances in which he finds himself e.g. exceeding the legal speed in 60Km/h zone. What is

expected of a driver in the position of an insured driver as stated by Van Heerden AJA (as he then was) in **Burger v Santam Versekerings Maatskappy** 1981 (2) SA 703 (A) as follows:

“Na my mening sou 'n redelike bestuurder in sy plek minstens drie stappe gedoen het. Hy sou naamlik, desnoods deur rem te trap, die spoed van die paneelwa tot 'n baie stadige pas laat daal het; hy sou so ver moontlik na links gedraai het, en hy sou aanhoudend getoet het.”¹¹

Mrs Nel led evidence that she did not hear any hooting on that night. Mr Grobbelaar led evidence that the speed at which the insured driver was driving would not have made it difficult for him to brake on time nor could he have avoided colliding with the plaintiff.

- [21] There is to my mind no evidence to suggest that the plaintiff was himself negligent. In this instance I am satisfied that plaintiff had discharged the onus of proving on a balance of probabilities that the driver of the insured vehicle was solely to blame for the collision. It was patently clear during the trial that the plaintiff had sustained serious bodily injuries and these are listed in the report of Dr LF Oelefse attached to the bundle of the plaintiff documents. The doctor certified the plaintiff as totally disable and will never be able to work again.

¹¹ *Burger v Santam Versekerings Maatskappy* 1981 (2) SA 703 A at 708H- 709A.

[22] In the circumstances I make the following order.

ORDER

1. I find the defendant 100% liable for damages sustained by the plaintiff and arising out of the bodily injuries occasioned by the collision on which took place on the 2 April 2013.
2. Defendant to pay plaintiff's costs to date.

S CHESIWE, AJ

On behalf of plaintiff:	Adv. JMM Verwey
Instructed by:	Hill, McHardy & Herbst Inc. Bloemfontein

On behalf of defendant:	Noxolo Maduba
Instructed by:	Maduba Attorneys Bloemfontein