REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

03/2/15

CASE NO: 15450/13

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

26/02/2015

DATE SIGNATURE

In the matter between:

DONAVAN PETER DAVID DE BRUYN **PLAINTIFF**

and

ROAD ACCIDENT FUND **DEFENDANT**

JUDGMENT

HEARD ON: 03 FEBRUARY 2015

JUDGMENT ON: 26 FEBRUARY 2015

KUBUSHI, J

[1] The plaintiff's claim is against the Road Accident Fund (the defendant) for personal injuries sustained in a collision on 20 March 2010. At the time of the collision the plaintiff was riding a motor cycle and the driver of the insured motor vehicle, Mr Steve Peter Fleetwood (the insured driver), was driving a bakkie. The plaintiff sustained serious injuries as a result of the collision and he is claiming damages in respect thereof. The claim is based on negligence. The *onus* is thus on the plaintiff to prove on a balance of probabilities that the insured driver was negligent. The plaintiff has no recollection of the collision and the only evidence tendered is that of the insured driver and Mr Ian Robert Hurter an independent eye witness to the collision.

[2] The defendant denies the allegations of negligence and alleges that the collision was caused by the sole negligence of the plaintiff. In the alternative the defendant pleads contributory negligence on the part of the plaintiff in the event the court makes a finding that the insured driver was the proximate cause of or contributed to the negligence in the collision.

[3] The defendant in its plea raised a special plea that the plaintiff failed or neglected to submit himself to the medical assessment required in terms of regulation 3 (1*a*) of the Road Accident Fund. This special plea was not pursued during trial.

[4] At the beginning of the trial, the plaintiff's counsel applied for the amendment of paragraph 12 of the plaintiff's particulars of claim by the deletion of the words "being rendered a quadriplegic" on the last sentence in that paragraph. The defendant did not object to the application and the amendment was granted.

[5] The plaintiff's counsel handed in a bundle of documents as agreed between the parties at the pre-trial conference held on 9 December 2014 (two conferences were held). The bundle of documents consisted of: the Index – Pleadings and the Index – Documents. Some of the documents contained in the Index- Documents were: the Officer's Accident Report; sketch plan; and twelve photographs depicting the scene of the collision. The photographs consist of serial "A" and serial "B". According to counsel the photographs in

serial "A" were taken a year after the collision and the photographs in serial "B" were taken in January 2015. All the photographs depict the surrounding area where the collision occurred and they were taken from different angles.

[6] The parties had agreed at the pre-trial conference that merits and *quantum* should be separated. At the hearing and on application by the parties, I, in terms of uniform rule 33 (4) granted the application for separation of issues. The matter is proceeding before me on merits only and *quantum* is postponed *sine die.*

[7] I must also mention that at the close of the plaintiff's case the defendant's counsel applied for the defendant to be absolved from the instance. I refused to grant the application.

[8] The plaintiff's counsel informed me at the beginning of the proceedings that the plaintiff was suffering from amnesia as a result of the injuries sustained in the collision. The plaintiff was however called in to give evidence and confirmed that he does not have a memory of the collision. His memory prior to the collision has also been affected in that he can remember some parts of his life before the collision and then remembers from the time he found himself at a rehabilitation facility in Bloemfontein. He remembers nothing about the collision but testified that a certain Mr Ricket Potgieter was a passenger on his motor cycle on the day in question. The said Mr Potgieter was killed in another unrelated motor cycle collision. The sum total of the plaintiff's evidence does not help this court at all.

[9] In addition to this evidence, the plaintiff relied on the evidence of the following documents: the police accident report; the police sketch plan; and the photographs. These documents as already alluded, form part of the bundle of documents handed in court. According to the second minutes of the pre-trial meeting of the 9 December 2014 the parties agreed that the documents contained in the bundle are what they purport to be. They also agreed that the contents of the documents need to be proven or agreed in order to rely thereon. The plaintiff did not call any of the persons responsible for the contents of

the documents it relied on to give evidence. The defendant raised no objection, and, as such, the documents were accepted into evidence as they were.

[10] The factual matrix of the collision can only be gleaned from the unchallenged evidence of the defendant through the testimony of the insured driver and that of Mr Hurter. Mr Hurter was travelling behind the insured driver immediately before the collision.

[11] The common cause facts between the parties are that on 20 March 2010 at about 18:00, the insured driver was driving his bakkie with registration number HFC 224 NW along Carel De Wet Road in Elandsrand, Brits. The plaintiff, Mr Donovan Peter David De Bruyn, was riding his motor cycle with registration number HFH 026 NW along Raasblaar Avenue. The two streets meet and cross each other at an intersection. Carel De Wet Road carries traffic from West to East whilst Raasblaar Avenue carries traffic from South to North and both streets carry traffic in single lane in opposite directions. Motor vehicles travelling along Carel De Wet have right of way. At the corner of Carel De Wet Road and Raasblaar Avenue, on both opposite sides of Raasblaar Avenue, there are stop signs. As such motor vehicles travelling along Raasblaar Avenue must stop at the intersection to allow motor vehicles travelling along Carel De Wet Road to pass. The evidence is that the plaintiff drove through the stop sign and collided with the insured driver. The motor cycle and the bakkie collided with each other in the intersection. According to the sketch plan on page 38 of the bundle, the collision occurred in Carel De Wet Road, in the lane of travel of the insured driver and directly opposite the stop sign that is in Raasblaar Avenue. After the collision, the motor cycle landed in that lane and the insured motor vehicle stopped in Carel De Wet Road in the lane of oncoming traffic.

[12] The scene of the collision as depicted in the photographs is not in dispute. It is common cause that at the time of the collision there were trees somewhere up the street along both Raasblaar Avenue and Carel De Wet Road, the foliage of which would have respectively, limited visibility of both drivers towards the intersection. From photograph A3 depicting the view of the plaintiff towards the intersection, it is evident that the stop sign is clearly obscured by the foliage. And, from photograph A5 depicting the view of the

insured driver towards the intersection, it is clear that Raasblaar Avenue is obscured by the foliage.

[13] At the intersection, along the left side of both streets, there is a school. The gate of the school is along Raasblaar Avenue. On the day in question it was a Saturday and there were no school children in that area.

[14] Almost all the facts in this instance are common cause between the parties. What remains in issue is the question of negligence. The plaintiff in his particulars of claim, alleges that the defendant was negligent in that: he failed to keep a proper lookout; he drove at an excessive speed under the circumstances; he failed to keep the insured vehicle under proper control; he failed to apply the brakes of the insured motor vehicle timeously, alternatively sufficiently, further alternatively at all; he failed to avoid a collision when by the exercise of reasonable care, he could and should have done so; the insured driver entered the abovementioned intersection when it was unsafe to do so.

[15] What I must, therefore, determine is whether or not there was any negligence on the part of the insured driver and, if so, to what extent this negligence contributed to the collision.

[16] The negligence required to establish liability in civil actions is determined by a simple test, namely the standard of care and skill which would be observed by a reasonable person.[1] I am, thus, required to determine on all the evidence before me whether the insured driver had in the circumstances of this instance, observed the required standard of care and skill.

[17] The plaintiff's counsel conceded, on behalf of the plaintiff, during his opening address that the plaintiff was the proximate cause of the collision in that he drove through a stop sign without stopping whilst it was expected of him to do so and is as a result negligent. His contention, however, is that the insured driver contributed to the collision.

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[1] See National Employers General Insurance Co Ltd v Sullivan 1988(1) SA 27 (AD).

According to counsel, the insured driver was aware that he was approaching a high risk area and he ought to have reduced speed to give himself the opportunity to keep a proper lookout. At a speed at which he was travelling at the time, that is 60 km *per* hour, he was not able to do anything. If he had travelled at a reduced speed he should have seen the plaintiff approaching and been able to reduce speed further or apply brakes or swerved to avoid being hit by the motor cycle. But because he was travelling at an excessive speed in the circumstances he was not able to take appropriate avoiding action, so he argued.

[18] The contention by the defendant's counsel is that in the absence of evidence by the plaintiff there is no obligation on the defendant to have done anything. I do not agree.

[19] It is trite that a driver who approaches an intersection in a through street does not have an absolute right of precedence or is not relieved of his duty of keeping a proper look out.[2] It is my view that although the plaintiff did not tender any evidence, there is, however, evidence before me in the form of the police report and sketch plan and the photographs. There is also evidence tendered by the insured driver and Mr Hurter. I must consider all this evidence and in the process determine whether or not the insured driver had, in the circumstances of this case, an obligation to have done something in order to evade the collision.

[20] The insured driver's testimony is that he did not travel at an excessive speed and he kept a proper look out. He states in his evidence that he was travelling at a speed of 60 km *per* hour. This is confirmed by Mr Hurter who was travelling behind him immediately before the collision. It is common cause that the speed limit in that part of the road is 60 km *per* hour. The insured driver conceded under cross examination that the area around the intersection is high risk mainly because it is next to a school. On that basis, the plaintiff's counsel contends that even though the speed limit in the area was 60 km *per* hour, because this is a special intersection due to the high risk the insured driver should have reduced speed.

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[2] Franco v Klug 1940 AD 126 at 135.

[21] I do not agree with counsel's submission that the insured driver should have reduced speed in the circumstances of this case. Even though it can be accepted that the area around the intersection is high risk, sight should not be lost that the collision occurred at 18h00 on a Saturday which was not a school day. There is no evidence that there were school children around the area at that time and there was no sign which required motorists to slow down in that area. There was as such no reason for the insured driver to reduce speed. He was also not travelling at an excessive speed, as the plaintiff's counsel wants to suggest. He was at all times, from the time he emerged from underneath the bridge, travelling at a speed of 60 km *per* hour and there is no evidence to the contrary and as stated this is the maximum speed at which he should have been travelling at on that part of the road. For the same reasons that did not require him to reduce speed, it cannot be said that he was driving at an excessive speed.

[22] My view is that, even though the insured driver was not, in the circumstances of this case, driving at an excessive speed or was expected to reduce speed, he was, however, under the duty to keep a proper or general look out.

[23] It is trite that a driver travelling along a through road does not enjoy an absolute right of precedence, and he or she is not relieved of the duty to keeping what is so often referred to as a general look out. Such a general look out means more than looking straight ahead – it includes an awareness of what is happening in one's immediate vicinity, viewing the whole road from side to side. A driver on a through road is not under a duty to keep a cross road under the same careful observation as would be required of him if there was no stop sign.[3] But, where approaching traffic in the side road will enter the intersection on the left of traffic in the main road, thus unavoidably barring the way for traffic in the main road, there is greater duty of care on the driver on the main road. He must observe the crossing traffic more closely than in cases where such traffic will enter the intersection on his or her right.[4]

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[3] See Marine&Trade Insurance Co Ltd v Biyasi 1981 (1) SA 918 (A).
[4] See Kruger v Santam Versekeringsmaatskappy en 'n Ander 1983 (4) SA 455 (O)

[24] The evidence is that, at 5 to 10 meters to the intersection, the insured driver looked left and right for crossing traffic along Raasblaar Avenue and saw nothing. At this distance he would have been able to see at a distance of two motor vehicles which could have stopped at the stop sign, if any. He looked again for crossing traffic when he was about 2 to 5 metres to the intersection and again saw nothing. At this distance he should have been able to see at a distance of three motor vehicles which could have stopped at the stop sign, if any. Having seen no traffic he proceeded to enter the intersection.

[25] The insured driver's evidence is that he did not see the motor cycle until immediately before it collided with his bakkie. This in my view suggests that the insured driver must have been driving along somewhat inattentively as he entered the intersection, and, as such became conscious of the motor cycle only when it was close upon him. The motor cycle must have been somewhere along Raasblaar Avenue at the time the insured driver entered the intersection. This can be inferred from three aspects in the insured driver's testimony.

[26] Firstly, the speed at which the insured driver testified that the motor cycle was driving at, shows that it must have been travelling along Raasblaar Avenue all the time before it collided with the bakkie. The insured driver's testimony is that the motor cycle was travelling at a high speed. If it is to be accepted that the motor cycle was driving at a high speed, then, it must have been travelling along Raadblaar Avenue. The submission by the defendant's counsel in his closing argument that the motor cycle may not have been travelling all along in Raadblaar Avenue at the time the insured driver entered the intersection, but could have stopped somewhere on the side of the road or zig-zagged along the road, thus making it impossible for the insured driver to see it, is to me fallacious. Besides such submission being pure speculation by counsel it does not form part of the evidence before me. In any event, it is highly improbable that if it was zig zagging along the street it would have travelled at such a speed. It is also improbable that if it was travelling at a high speed it would have taken off from where it had stopped at that speed.

[27] Secondly, the point of impact which is shown on the police sketch plan is indicative that the motor cycle was not that far off at the time the insured driver entered the intersection. The collision occurred in the middle of the intersection right opposite the letter "stop" written on the road, that is, in the path of travel of the motor cycle.

[28] Lastly, the fact that the motor cycle hit the left front side of the insured motor vehicle is another indication that even though the insured driver was already in the intersection at the time of the collision, the motor cycle was not that far away from the intersection and if the insured driver had kept a proper or general look out he would have seen it. If the motor cycle had hit the bakkie more towards the back a different inference could be made.

[29] If the motor cycle was travelling along that road at that time, the insured driver ought to have seen it and could have avoided the collision by swerving or applying brakes. The insured driver in his own testimony, states that because he did not see the motor cycle until very late, he did nothing – he did not apply brakes or try to swerve. The insured driver's duty of care did not end when he entered the intersection. There was a duty on him as he enters the intersection and whilst travelling through the intersection to maintain the look out. My sense is that after the 2 to 5 metre distance and as he entered the intersection he let down his guard and as such failed to keep a proper look out and thus contributed to the collision.

[30] In apportioning fault against the parties in this instance, I have to consider the extent at which each party contributed to the collision. In favour of the plaintiff, his counsel submits that I should consider the following factors: the probable speed of the motor cycle; the fact that the stop sign was completely obscured to a certain extent and emerges as one approaches the stop sign; plaintiff was resident in Rustenburg at the time and did not know the area of the collision very well. Counsel's contention is that I should apportion fault at 30% and 40% in favour of the defendant. The assertion by the defendant's counsel is that the apportionment should be nothing higher than 25%.

[31] It is common cause that the plaintiff is the proximate cause of the collision and as such more of the fault should be attributed to him. Except for the fact that the stop sign was obscured as depicted in one of the photographs in the Index – Documents bundle, the other factors raised by the plaintiff's counsel for my consideration on this issue do not form part of the evidence before me and are thus mere speculation. My view is that in the circumstances of this case the apportionment of fault attributable to the insured driver should be determined at 20%.

[32] Ordinarily costs should follow the successful party. I see no reason why even in this case it should not be so. The plaintiff has succeeded in proving a degree of negligence against the insured driver and is thus entitled to his costs to that extent.

[33] In the circumstances I make the following order:

1. The plaintiff's claim succeeds to the extent of 20% negligence on the part of the defendant.

2. The defendant is ordered to pay to the plaintiff 20% of the agreed or proven damages.

3. The defendant is ordered to pay the costs of suit to the extent of 20%.

E. M. KUBUSHI

JUDGE OF THE HIGH COURT

<u>Appearances:</u>

On behalf of the plaintiff:	Adv. E KROMHOUT Instructed by: **EDELING VAN NIEKERK INC.** C/O ARTHUR CHANNON ATT. C/O DE JAGER ATTORNEYS Menlo Law Chambers 49-11th Street PRETORIA
On behalf of the defendant:	Adv. H VERMAAK Instructed by: **SEKATI MONYANE&PARTNERS** 935 Jan Shoba Street Brooklyn PRETORIA