IN THE GAUTENG DIVISION, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

CASE NO: A831/09

COURT *A QUO* CASE NUMBER: 12230/2007

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

In the matter between:

DERICK WILHELM KOTZE **APPELLANT**

(Plaintiff a quo)

And

ROAD ACCIDENT FUND **RESPONDENT**

(Respondent a quo)

JUDGMENT

MSIMEKI J:

INTRODUCTION

[1] At 16H30, on 15 January 2008 and at the robot controlled intersection of Barend and Lombard streets in Klerksdorp, a collision occurred between the plaintiff's motor vehicle, a Passat, with registration number BFG [...] (the Passat) and the insured motor vehicle a white Nissan Micra, bearing registration number FJL [...] (the Nissan). The motor vehicles, at the time, were driven by the plaintiff and Ms R Foley, the insured driver. Having been injured in the collision the plaintiff instituted an action against the defendant, the Road

Accident Fund (the RAF) claiming damages that he suffered allegedly caused by the insured driver's negligent driving. On 19 June 2009 Ledwaba J (as he then was) dismissed the plaintiff's claim with costs. The plaintiff (now appellant) has appealed to the full court of this Division "against the whole of the judgment and orders." Leave having been granted the matter, as a result, serves before us.

[2] The appeal is opposed. Advocate N C Maritz (Mr Maritz) represents the appellant while the respondent is represented by advocate A Frosch (Ms Frosch).

[3] The grounds of appeal are that:

> 1. The Court a quo erred in finding that the versions of the Appellant and the eyewitness are mutually destructive.
>
> 2. The Court a quo erred in not finding that the matter can be adjudicated on the probabilities alone, which probabilities favour Appellant's version.
>
> 3. The Court a quo erred in not finding that the insured driver was contributorily negligent in causing the collision.
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> 4. The Court a quo erred in finding that the Appellant's evidence, that he did not see the insured driver's vehicle before the collision, is inconsistent with Appellant's version in exhibits "C" and "D".
>
> 5. The Court a quo erred in finding that Appellant suddenly swerved to the middle lane, when the eyewitness conceded in cross-examination that there was no "sudden swerve" but rather a gradual movement to the right which could have taken anything from one to three seconds.
>
> 6. The Court a quo erred in finding that the Appellant's "sudden swerving" to the middle lane was the sole cause of the collision.
>
> 7. The Court a quo erred in concluding that the Appellant's claim should be dismissed with costs.

[4] The respondent contends that the appellant has failed to make out a case for the relief that he seeks.

[5] The respondent filed its heads of argument late while the appellant did not comply with the time periods set out in Rule 49 (6) (a) and 49 (7) (a). The appellant brought an application for an order reviving the appellant's appeal which had lapsed; condoning the appellant's late prosecution of the appeal and condoning the non compliance with Rule 49 (6) (a) and 49 (7) (a). The respondent also, sought an order condoning the late filing of its heads of argument. Both parties in their applications made out good cases for the relief that they sought and persuaded the court to accede to their requests. The applications were granted and the appeal

was then argued.

[6] Prinsloo J ordered that the merits and quantum be separated. The matter before Ledwaba J, as a result, concerned the merits only.

THE ISSUE

[7] The issue, in a nutshell, is whether the collision was caused by the negligence and/or contributory negligence of the insured driver and/or the plaintiff.

COMMON CAUSE FACTS

[8] These are that:

1. On 15 January 2006, and at 16h30, a collision occurred between the appellant's motor vehicle and the motor vehicle driven by Ms Foley.

2. The appellant was the driver of the Passat while Ms Foley drove the Nissan.

3. The Passat was towing a Mercedes Benz motor vehicle (the Mercedes Benz) by means of a cable. Mr Lee Tshene, behind the wheel, was controlling the Mercedes Benz which was being towed by the Passat.

4. The collision occurred at the intersection of Barend and Lombard streets.

5. Barend street is a one way street with the left lane compelling motor vehicles to turn left.

6. Lombard Street is also a one way street moving from west to East. Motor vehicles, at the intersection, are forbidden from turning to the right.

7. The Passat, the Mercedes Benz and the Nissan were all travelling from North to South in Barend street.

8. The Nissan, after colliding with the Passat, rolled and landed on its roof.

9. The insured driver, only had a Learner's drivers licence which was still fresh.

10. The insured driver, contrary to the Learner's licence, was driving without someone who had a valid driver's licence.

11. The insured driver did not see the Passat and the Mercedes Benz prior to the collision.

12. Barend street is tarred and flat.

13. The weather, at 16H30 on 15 January 2006, was clear and the street was dry

14. Berea motors was on the left hand side of Barend street but further south from the intersection.

[9] The plaintiff, in his particulars of claim, inter alia, alleged that the insured driver "het versuim om met voldoende oplettenheid te bestuur." This, according to the appellant, is one of the respects he relies on for alleging that the insured driver was negligent.

THE LAW

[10] Potgieter J, in **De Bruyn, N.O v Minister Van Vervoer 1960 (3) SA 820 (O.PA.) at 823 G-H** said:

> "Maar soos ek reeds opgemerk het, indien 'n person n behoorlike uitkyk hou, het hy n blik oor die hele straat voor hom-dus van kant tot kant. Dit is nie nodig vir hom om sy kop eers na links te draai on te sien wat op die linkerkant van die straat aangaan en dan weer sy kop na regs te draai om te sien wat aan die regterkant aangaan nie."

[11] Potgieter JA when dealing with proper look-out in **Neuhaus, N.O v Bastion Insurance Co. Ltd 1968 (1) SA 398 (A) at 405 H-406A said:**

> "Proper look-out means more than looking straight ahead - it includes an awareness of what is happening in one's immediate vicinity. He should have a view of the whole road from side to side and, in the case of a road passing through a build up area, of the pavements on the side of the road as well"

All that this means is continuous scanning of the road ahead, from side to side for obstructions or potential obstructions.

A boy in **Neuhaus N.O v Bastion Insurance** had run diagonally across the road without looking or without stopping to wait for traffic. The court found that the boy was negligent. The conclusion was arrived at on the basis that if the boy had stopped to look left and right for traffic, he would have seen the vehicles on the road and would not blindly have run into the truck which ran him over.

[12] Briefly the plaintiffs case is as follows:

He, at 16H30 on 15 January 2006 and in Klerksdorp, towed a Mercedes Benz motor vehicle using his Passat motor vehicle. Lee Tshene was alone in the Mercedes Benz seated behind the steering wheel and controlling it. The emergency (hazard) lights of the two motor vehicles were on. He stopped at the intersection of Barend and Lombard streets as the robot facing him had been red and against him. To avoid the breaking of the cable, he slightly moved the Passat forward in order to tighten the towing cable. This, he did before the robot turned green. As he did that he felt an impact on the right side of the Passat. The Passat and the Mercedes Benz, were moving from North to South along Barend street. The Passat collided with the Nissan which he had not seen before the collision.

[13] The insured driver’s version is that she, too, was driving along Barend street from North to South approaching the intersection. She was accompanied by her younger brother. She was moving in the middle lane and did not see the Mercedes Benz and the Passat before the collision. She, at the time, was travelling without someone who had a valid driver’s licence. Her testimony was that she heard the younger brother screaming and saying Carla! and their Nissan was then airborne and ended up landing on its roof next to Doves.

[14] The appellant testified and called professor Lemmer as his expert witness. His expertise was never challenged and so was that of Mr Barry Grobler the respondent’s expert witness. The respondent also called Ms Carla Foley, the insured driver, Jacques Nagel the independent witness, inspector Hendrik Jacobus, Petrus Lourens and inspector Andries Jacobus Van Deventer to testify on its behalf.

[15] **Professor Gerald Lemmer** testified on behalf of the plaintiff. He is an expert who, as an expert, has testified in courts several times. His expertise as shown above was not challenged. He and Mr Barry Grobler are accident deconstructionists. His testimony is that he and Mr Grobler agree that the Passat and the Mercedes Benz were not stationary at the time of the collision. He testified that it was possible that there was contact between the Passat and the Nissan. This, because the final position of the Passat, according to him, shows that the Passat rotated through almost 180°. He was unable to explain if the Nissan overturned on impact or immediately after the collision. He held the view that the insured driver would probably have jerked on her steering wheel causing the Nissan to move across the road. The witness found it a little improbable that the Passat could have turned to the right. It was, according to him, unlikely that the Passat could have made a sudden turn. The implication, according to him, is that the Nissan could have been overtaking at a substantial speed while being close to the Passat and the Mercedes Benz. The two experts never inspected the motor vehicles. They also had no access to photographic evidence. He testified that the position of glass was not a particularly good indicator of the point of collision as glass could be all over the show after a collision. When cross examined he testified that it was probable that the presence of glass could denote the point of collision. He reiterated that the motion of the Nissan across the road was due to a steering

action on the part of the insured driver.

[16] **Inspector Lourens** drew the sketch plan on page 32 of the merits bundle which is page 235 of the court record. (Volume 3 of 4). He went to the scene of the accident approximately 10 minutes after the collision. He testified that the point of collision was approximately 6 meters from the stop line before the robots. The sketch plan was not drawn according to scale. He could not tell the court as to which vehicle the pieces of glass found at the scene were from. He also could not tell the court if the broken glasses found in the middle lane were not in the other lanes. He could not explain if the Mercedes Benz had not been pushed to where he found it. The Passat, according to him, had been damaged in front.

[17] **Inspector Van Deventer** spoke with the eye witness at the scene. The eye witness (Nagel) explained to him that the Passat had been towing the Mercedes Benz in the left lane of Barend street. The motor vehicles travelled from North to South. The Nissan, according to the eye witness, had been travelling in the middle lane. The witness further told Mr Van Deventer that the Passat turned right in front of the Nissan. Mr Nagel told Mr Van Deventer that the Nissan was overtaking the Passat and the Mercedes Benz when the Nissan collided with the Passat causing the Nissan to roll ending up on its roof. Inspector Van Deventer, under cross examination, testified that Mr Nagel had explained to him that the Passat which was towing the Mercedes Benz had turned right in front of the Nissan. He, in re-examination, changed his evidence and testified that Mr Nagel had told him that the Passat had moved to the right lane and not that the Passat had turned to the right in front of the Nissan. This is an obvious contradiction.

[18] **Mr Nagel** confirmed the occurrence of the accident on 15 January 2006. He and his family were at point E of the sketch plan when the accident took place. He saw a Passat towing a Mercedes Benz. The motor vehicles were moving in the left lane. The Passat moved to the right whereupon the driver of the Mercedes Benz cautioned against that. In doing so the driver used his hands and even hooted. The Nissan was in the middle lane. The Nissan and the Passat collided when the Passat moved over to the middle lane. The collision, according to him, occurred before the intersection or at the intersection. The uncertainty, as he testified, was as a result of the fact that he could not remember everything that took place 4 years back. He did not notice that the hazard lights were on as his attention was not thereon. He denied that the driver of the Mercedes Benz pushed it to where it finally stopped. Cross examined he testified that the incident, at the time, was about 4 years old and that the accident had happened fast. Put to him that Mr Van Deventer’s evidence was that the Nissan, according to him (Nagel), was busy overtaking the Mercedes Benz and the Passat when the Passat suddenly moved to the right he answered that he had no quarrel with that. He conceded that Berea Motors was on the left side of Barend street and that while driving along Barend street one cannot turn right into Lombard street which is also a one way street. He testified that the Passat, whether it took it one, four or five seconds, gradually moved over to the right lane. The Passat and the Mercedes Benz

were 25-30 meters when he saw them coming. He only realised that the Passat was towing the Mercedes Benz when they were almost at the intersection and not at the distance of 25-30 meters. The hazard lights of the Passat were not on. He was not sure of the hazard lights of the Mercedes Benz. The Passat, according to him, was slower than the Nissan when he first saw them. The damage to the Passat was severe. According to him the Passat never stopped at the intersection.

[19] **Mr Barry Grobler** compiled his report using the warning statement of the plaintiff, the sketch plan, the statement of inspector Van Deventer and the photographs. He testified that it was improbable that the Passat was stationary when it collided with the Nissan. The witness confirmed that the debris, generally, are not a good indicator of the point of impact. He agreed that the issue was whether the Nissan drove into the front side of the Passat or whether the Passat turned right into the path of travel of the Nissan. He further agreed with Professor Lemmer who said that the laws of physics could not solve the problem. He disagreed with Professor Lemmer who held the view that the motion of the Nissan was due to the steering action on the part of the insured driver.

[20] **Ms Carla Foley,** the insured driver, testified too. Her testimony was that she was at the intersection of Barend and Lombard streets. She and her younger brother were going to watch a film when she heard the younger brother scream. She then felt the impact and the next moment she was in the air and the Nissan then rolled. She did not see where the motor vehicle she collided with was from. She never saw a motor vehicle moving towards her lane. She testified that she was over the stop line when the collision occurred. She was not going to the left or the right but proceeding straight on. She only realised that they had met with an accident when the younger brother screamed. She testified that she remembered nothing further about the accident. Her Nissan landed on its roof. She did not see which motor vehicle collided with theirs. She, at the time, only had a learner’s license which was still fresh as it was a month to two old. When cross examined she testified that she saw nothing when the accident occurred as she, at the time, was looking ahead where she was going to. Her testimony was that the collision took place on the other side of the stop line beyond the line. Her evidence is not in accord with Mr Nagel’s evidence who testified that the collision occurred before or at the intersection. The point of impact, according to her, was after or beyond the stop line which, according to her, was a meter after the stop line. When asked if the inspectors had been wrong when they testified that the collision took place before the stop line, she emphatically answered that they indeed, were wrong. This is a serious contradiction. Her Nissan was first airborne, landed on the tarmac, rolled and ended up on its roof. She did not see the Mercedes Benz. She could also not tell if the hazard lights of the motor vehicles had been on. She knew nothing about the damage to the Passat. She conceded that she had not kept a proper look out and that she was not an inexperienced driver. She further conceded that a driver has to drive at a reasonable speed; keep a reasonable distance between her and the motor vehicle in front of her and make provision for motor vehicles on her sides which may move in a manner which may endanger her movement.

She conceded that she did not act as expected. She neither hooted nor braked. Informed that she had not kept a proper look out she answered that that was 100% so. Her re examination only got her to testify that it could be possible that she was behind the line. This question and the answer remained unhelpful as the line was not identified. She testified that she could not drive in town on the day in question.

[21] The appellant, to succeed, had to prove that the accident had been caused solely by the negligence of the insured driver or that the insured driver was, to an extent also negligent. This is the onus that the appellant had to discharge.

[22] If reliance was placed on contributory negligence, then the appellant, as well as the respondent, needed to discharge the onus relating to contributory negligence. It was conceded on behalf of the appellant that the respondent had discharged its onus of establishing contributory negligence on the part of the appellant.

[23] Mr Nagel is the independent witness. His evidence is in direct conflict with the evidence of the insured driver regarding the point of impact. According to him this point is before the stop line at the robot. The insured driver places the point of impact beyond the stop line. Inspector Van Deventer in the main gave evidence following what he had been told by Mr Nagel. The court below was informed that the Passat had turned in front of the Nissan. This version changed to say there was gradual movement of the Passat towards the middle lane. Another version is that the collision between the Nissan and the Passat occurred when the Nissan was overtaking the Passat and the Mercedes Benz.

[24] The evidence of the insured driver was not very much helpful as she testified that she did not see the Passat and the Mercedes Benz before the collision. She made several concessions which demonstrated that she had not kept a proper look before the collision. She, in fact, in so many words conceded that she, 100%, had not kept a proper look out and that she had not followed the rules that a Leaner driver ought to have followed. The insured driver, had she kept a proper look out, would and could, indeed, have seen the Mercedes Benz and the Passat and avoided the collision. Her conduct clearly demonstrates that she, as well, was to an extent negligent on the day of the accident. The degree of her negligence remains to be determined.

[25] Mr Maritz, for the appellant, submitted that there was no reason for the appellant to turn or to move to the right lane as Lombard street is a one way street from West to East. The appellant, according to the submissions, was towing the Mercedes Benz to Berea Motors which was still ahead and on the left hand side of Barend street. The appellant was shown the differences between his affidavits and his testimony and he responded by saying that his evidence was correct. The differences, in my view, are not material. The appellant testified that he was in the left lane as he towed the Mercedes Benz. This evidence is confirmed by Mr Nagel. The appellant, just like the insured driver, testified that he did not see the Nissan until after the collision. This, too, demonstrates that the appellant was also negligent. What remains to be determined is the

extent of his negligence.

[26] Professor Lemmer and Mr Grobler, in my view, do not make the case any clearer. The gist of their testimony is that the Passat and the Mercedes Benz were in motion when the collision took place.

[27] Ms Frosch, for the respondent, referred to the cases of **Sampson v Pimm 1918 AD 657 and Kok v SKF Laboratories (Pty) Ltd 1962 (3) SA 764 (OK) 776B** to implore the court to hold against the appellant for failing to call Lee Tshene. It must be remembered that the respondent too failed to call the insured driver's younger brother. I am not going to blame any of the parties.

[28] It is not clear why Mr Nagel would testify about the fact that the driver of the Mercedes Benz hooted and used gestures to caution the appellant against moving to the middle lane when the insured driver says nothing about it.

[29] The appellant and the insured driver, in my view, would and could have seen each other before the collision had they kept a proper look out. They could have avoided the collision. The two, in my view, are equally to blame for the accident. They both were contributory negligent. The court below, in my view, erred in finding that the appellant was the sole cause of the accident. The appeal to the extent referred to in this judgment should succeed.

[30] I, in the result, make the following order:

1. The appeal is upheld with costs

2. The order of the court a quo is set aside and replaced with the following order:

> **2.1. "The defendant is ordered, to pay 50% of the plaintiff's proven or agreed damages**
>
> **2.2. The defendant is ordered to pay the costs of the action."**

M.W. MSIMEKI

JUDGE OF THE GAUTENG DIVISION

PRETORIA

I agree

N.B TUCHTEN

JUDGE OF THE GAUTENG DIVISION

PRETORIA

I agree

And it is so ordered

W. HUGHES

JUDGE OF THE GAUTENG DIVISION

PRETORIA

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DATE OF HEARING: 8 OCTOBER 2014

DATE OF JUDGMENT.