REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG, PRETORIA)

Case No: 38267/2013

DATE: 25 JUNE 2015

In the matter between:

SUSARA MARIA VILJOEN **PLAINTIFF**

And

ROAD ACCIDENT FUND **DEFENDANT**

JUDGMENT

MABENA AJ:

[1] The Plaintiff instituted an action for damages for injuries arising out of a collision which occurred on the 15th of August 2012 between a Mercedes Benz motor vehicle bearing the registration number [D………..] herein after, referred to as an insured vehicle, driven by one

Mr LLN Makwakwa and a BMW motor cycle bearing registration number [F………] driven by one Mr J.J Viljoen (hereinafter referred to as the deceased), at approximately 19h30 at the junction of Louise Street and OR Tambo Street.

[2] The Plaintiff alleges that the collision was caused solely by the negligence of the defendant's insured driver, who was negligent in one or, more of the following respects:

2.1 He failed to keep a proper look out: and/or;

2.2 He failed to keep the motor vehicle under proper control and/or;

2.3 He travelled at an excessive speed in the circumstances of the case, and/or;

2.4 He travelled at a dangerous speed, having due regard to the traffic conditions at a time and place, and/or;

2.5 He failed to avoid a collision when, by the exercise of a reasonable care, he could have and should have done so.

2.6 He failed to apply his brakes either timeously or at all, and/or;

2.7 He failed to give due regard to other road users, and more particularly to the deceased, and/or;

2.8 He failed to display and exercise the necessary degree of skill as a driver of a motor vehicle; and/or;

2.9 He executed a right hand turn at a dangerous and inappropriate moment.

[3] As a result of the aforesaid collision, the Plaintiff alleges that the deceased suffered injuries and passed away on the same day, the 15th of August 2012.

[4] The matters, as per agreement between the parties proceeded on both liability (Merits) and quantum.

[5] **<u>COMMON CAUSE ISSUES</u>**

5.1 It is common cause that on the 15th of August 2012 at or in the vicinity of the junction of OR TAMBO and Louis Street, at Witbank / Emalahleni (Mr Jacobus Johannes Viljoen) a motor cyclist, collided with the insured vehicle driven by LLN Makwakwa.

5.2 It is also common cause that the Plaintiff need only to establish 1% of causal negligence on the part of the insured driver, namely, Mr LLN Makwakwa in order to succeed with her full claim.

5.3 It is further common cause that the deceased was lawfully married to the Plaintiff on the 30th of January 1987.

5.4 It is common cause that as at the time of the demise of the deceased, the deceased was still married to the Plaintiff.

5.5 It is common cause that the deceased sustained injuries in the collision that caused or resulted in his death.

5.6 The deceased was employed, before his demise as an engineering foreman at Extrata Coal SA and earned per the certificate of service and pay slips encapsulated in the trial bundle.

5.7 It is also common cause that due to the Plaintiff received an accelerated benefit in the amount of R 1 176 300.00 (divided by 50% equals R 588 150.00).

5.8 That the calculation makes due allowance for the re-marriage contingency as per the official statistics.

5.9 A 12% contingency is allowed on past loss, 15% on future.

[6] The intersection is controlled by traffic lights. The photo album of the vicinity of the collision was admitted. Photo 1A and 1B, 2A and 2B

and 3A depicts OR Tambo Street at Emalahleni. It was taken in the direction the deceased was travelling seconds before the collision. The insured vehicle was travelling in the opposite direction.

[7] Photos 4A and 4B, 5A and 5B and 6A. These photos were taken in the direction of travel of the insured vehicle.

[8] Photo 7A depicts the insured vehicle and the position at which it ended, after the collision.

[9] Photo 10 depicts the motorcycle and the position at which it came to a halt after the collision.

[10] Photo 5B depicts the engine garage at the junction in question.

[11] Photo 7A depicts the damages to the rear left door of the insured vehicle.

[12] EVIDENCE

On behalf of the Plaintiff Warrant officer Mphahlele was called as a witness. He testified that he attended the scene at the aforementioned intersection at approximately 19:30 on the 15th of August 2012.

[13]

12.1 He testified that: The speed limit at OR TAMBO, on that stretch of the road is 60 kilometers per hour. He also pointed to photo number 7A which depicts damages on the rear left door of the insured vehicle.

12.2 Photo number 5A and B depicts the long unobstructed view of the road. It also depicts Overhead street lamps on the intersection.

12.3 Further that there are two lanes on either side of the streets with turning lanes (third lane) (to the left and to the right for vehicles travelling in the opposite directions of the OR TAMBO Street).

12.4 That the AR Form was completed by someone else. That “A” on the sketch plan represents the insured vehicle. That “B” represents the motorcycle.

12.5 He identified the point of impact between the motorcycle and the insured vehicle by the presence of broken glasses and debris lodged on the road as a result of the impact.

12.6 That the damage to the insured vehicle as depicted in photo 7A indicates that the insured vehicle was on the way of the motorcycle.

12.7 That at the point of impact the insured vehicle was on the verge of turning.

[13] It was put to warrant officer Mphahlele during cross-examination that the insured vehicle was already 180% angle before the accident and that the impact of the collision spinned it around. That the motorcycle was travelling at a high speed to an extent that it caused the insured vehicle to spin around due to the impact.

[14] It was further put to him that after the impact the insured vehicles spinned around and ended at point “E” of the sketch plan and not point “B” as testified by Warrant Officer Mphahlele.

[15] The following propositions were also put to Warrant Officer Mphahlele;

15.1 That the insured driver testified, **inter alia** that as he approached the intersection the lights turned amber and then red.

15.2 That there was a vehicle in the opposite direction that had come to a standstill at the traffic lights.

15.3 That the insured driver brought the vehicle to a stop, and a green arrow flickered to the right, giving him the right to execute a right turn into Louise Street.

15.4 That as the insured driver proceeded to execute the right turn and as his vehicle was in the right angle, he saw, with the corner of his eye, a motorcycle approaching, and heard a bang. It collided with the insured vehicle on the left rear door.

15.5 It was lastly put to him that there was nothing the insured driver could have done to avoid the collision, at that time.

The Plaintiff closed its case without calling further witnesses.

[16] The defendant called Mr Linda Leo Makwakwa as a witness. He testified that:

16.1 That on the 15th of August 2012 he was driving his Mercedes Benz which collided with a motor cycle at corner OR TAMBO and Louise Street, at Emalahleni.

16.2 He travelled from N4 freeway, into OR Tambo Street off-ramp.

16.3 He is familiar with that stretch of the road as well as the junction in question.

[17] That as one approaches the OR Tambo and Louise intersection, the road broadens on the side of the first lane, in order to make room for a third lane, (turning lane into the right). And the same applies with regard to the vehicles travelling in the opposite direction. The road widens to accommodate the turning lane to the left.

17.1 That as he approached the intersection, the robot was green and it was followed by amber, and upon reaching the intersection, it turned red. This was later followed by the flickering green arrow, signaling right of way to vehicles turning to the right into Louise Street.

17.2 According to his experience, if the robot is red for vehicles travelling straight in the opposite directions over the intersection, the green arrow applies to vehicles turning right or left (on the third lane) of the lanes. As the green arrow flickered to the right, he proceeded to enter the intersection after ensuring that it was safe to enter the intersection. He was driving, at that time, 20 to 25 kilometers per hour and the headlights of his vehicle were switched on.

17.3 As he was executing the turn, having already negotiated same, he saw with the corner of his eye, a motorcycle approaching, that his vehicle had already turned into Louise Street, as depicted by photo 7A. The motorcycle collided with the insured vehicle. It spinned around and faced the direction of the police station (That is, the opposite corner of the intersection). That there was nothing he could have done to avoid the collision.

[18] He was extensively cross-examined on the functioning of the robots,

more pertinently the position in regard to the green arrow are red in both directions. He was also extensively cross-examined about his disparities in his viva voce evidence and the affidavit he deposed of dated 22 November 2012. In this affidavit, (page 48, paragraph 4) Mr Makwakwa deposed that:

"On the 15th of August 2012 at about 20h15 in the evening and at Emalahleni, I was driving southwards at OR TAMBO, and as I approached the OR TAMBO and Louise street intersection, I intended to turn right at the intersection. The intersection is controlled by traffic lights at that time, a traffic light was showing an arrow flickering green affording me a
right way to right into Louise street and travelled eastwards".

[19] It was put to Mr Makwakwa that this deposition is at variance with his viva voce evidence. That his viva voce evidence as outlined above is inter alia, that he stopped at the intersection until the green arrow flickered giving him right of way into Louise Street.

[20] It was also put to him that he did not keep a proper look out. Hence he did not notice the motorcycle approaching. Mr Makwakwa contended that the extent of the damage on the insured vehicle and the fact that after the collision the insured vehicle rotated slightly, were indicative of the excessive speed the motorcycle was travelling at the time of the collision.

EVALUATION OF EVIDENCE

21.1 The Defendant did not challenge the evidence of Warrant Officer Mphahlele regarding the directions of travel of both the motorcyclist and the insured driver.

21.2 The evidence of the break marks on the tunnel was not disputed nor challenged by the Defendant.

[21]

22.1 That the insured driver executed a right turn under the circumstances while there was a green arrow flashing which gave him a right of way was challenged by the Plaintiff.

It was submitted on behalf of the Plaintiff that the insured driver has not established that when he executed the right
turn into Louise Street, the arrow was flashing green due to contradictions in his evidence.

22.3 In **viva voce** evidence the insured driver testified that he stopped at the intersection before executing a turn to his right. However, in his affidavit, he deposed that he executed the turn without stopping.

22.4 The insured driver's **viva voce** evidence is that he saw, with the corner of his eye, the motorcycle at a late stage, while in his affidavit he deposed that he never saw the motorcycle and he only heard a noise of impact.

[23]

23.1 That even if the arrow was flashing green for the insured driver it is clear that he had no appreciation of the oncoming vehicles and in particular the motorcyclist. There was a vehicle which had stopped in the first lane of oncoming traffic, however there was no obstruction in regard to the second lane in which the motorcyclist was travelling.

23.2 The inexplicable failure to notice or hear the oncoming motorcycle, lend credence to the view that the insured driver failed to keep a proper lookout.

[24]

24.1 In **Franco v Klug 1940 (AD) 126,** it was held that a driver entering an intersection does not have an absolute right of precedence.

24.2 It was held in **Rondalia Assurence Corporation of South Africa Ltd v Page and others 1975 (1) SA 708 (AD)** that a
driver entering an intersection is under a duty to keep a proper "general look-out".

[25]

25.1 A motorist was negligent because despite having a clear view of the cross road for about 100 to 150 yards, he had failed to see a motorcyclist "...Until the last moment..."

Marine and Trade insurance Co. Ltd v Biyasi 1981 (1) SA 918(A).

In this case the court also held that although the motorcyclist had been the "Primary cause of the collision", the insured driver "... would also have realized... that the Plaintiff was not going to stop at the stop line... and would in that event, have taken effective steps to avoid the collision, e,g by sounding a hooter to alert the Plaintiff to the danger, or by applying his brakes and bringing his car to a stop, before reaching the Plaintiffs path of travel".

[26]

25.2 On the insured driver's testimony that the motorcyclist was driving at a high speed, this suggestion it was submitted, was based solely on unacceptable surmise and the extent of the damage to the insured vehicle, one cannot infer that the motorcycle was driving at a speed higher than the speed limit.

25.3 The question that the impact caused the vehicle to rotate suggest that the motorcycle might have been at a high speed, it was submitted on behalf of the Plaintiff that this is an aspect of expert evidence. This can only be determined after one has taken into account aspects of momentum, coefficiency of friction, angles of attach etc which all fall within the realm of expert evidence. There is merit in this submission.

26 3 This court was referred to the **Full Bench in Motor Vehicle Assurence Fund v Kenny 1984 (4) SA 432 (E) at 436 H-l**

where the following was said where there are experts involved:

"Strange things 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 description of the combined speed of the vehicles at the moment of impact, the angle of contact with subsequent lateral and forward movements of the vehicle".

[26] This court is convinced that one cannot infer by the degree of rotation, what the speed was if one does not know what the angle of attack was.

[27] I am of the view that on either versions of the insured drivers in regard to stopping or not stopping at the intersection, he had ample opportunity to notice the approaching motorcyclist. His failure to do so constitute negligence.

[28] I accept the version of the Plaintiff as plausible and on the balance of probabilities, the Plaintiff has been able to show that the collision was caused solely by the negligent driving of the defendant insured vehicle.

[30] The Plaintiff only has to prove 1 percent negligence against the Defendants in order to succeed in 100percent of her claim.

[31] In the result, I make the following order:

1. The Defendant's negligent driving on the 15th of August 2012 was the sole cause of the collision between the motorcycle bearing registration number FHK 123MP and the insured vehicle bearing registration number DW 657MP on the junction between OR TAMBO Street and Louise Street at Emalahleni.
2. A draft order hereto annexed and marked "X" is made an order of this court.

M.H. MABENA.

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION