REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA)

Case No: 35330/2012 .

(1) REPORTABLE: "J6; NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

25 June 2015.
DATE

SIGNATURE

25/6/2015

In the matter between:

MAGERETHA DOROTHEA JANSEN VAN VUUREN PLAINTIFF

(In her capacity as the executrix)

and

ROAD ACCIDENT FUND DEFENDANT

JUDGMENT

MABENA AJ:

[1] The Plaintiff (in her capacity as executrix of the estate) of the late CHRISTIAAN HARMSE JANSEN VAN VUUREN (the husband), instituted an action for compensation for damages arising from a motor vehicle accident which occurred on the 5th of January 2011, at about 10:00, on the N3 Highway South bound (on the double carriage stretch

of the road), towards Durban, at approximately 10 kilometers from the MarianHill toll-gate.

[2] The Plaintiff was the driver of a silver grey RAV4 bearing registration number BMX 443L which collided with a silver Caravelle Microbus with registration number [………] herein referred to as the second insured vehicle.

[3] There was also a third vehicle involved in the collision, which allegedly overturned in front of the husband's vehicle, travelling on the left lane of the carriageway, that is on the left lane of the double carriage.

[4] As the pleadings were closed at the time of the demise of the husband, the Plaintiff substituted him, following a notice in terms of Rule 15 (2) of the Rules of this Court. Therefore, the Plaintiff sues in her capacity as the Executrix of the deceased estate.

[5] The parties agreed that the issue of Past Medical Expenses and General Damages be postponed **sine die.** Therefore the only issue for adjudication at this juncture is the issue of liability.

[6] **COMMON CAUSE ISSUES:**

6.1 It is common cause that the collision between the Plaintiffs vehicle and, the second insured driver's vehicle occurred on the latter's side of the road (i.e oncoming lane of the double carriage).

6.2 That the N3 is a double carriage highway on either side of the road, proceeding to the southely and northely directions.

6.3 It is common cause that the first insured driver's vehicle overturned in the left lane in front of her husband's vehicle. The Plaintiff, allegedly, in order to avoid colliding with the first insured vehicle, turned to the right lane, lost control of his vehicle and collided with the second insured vehicle, which was travelling in the opposite direction, in the northely direction.

6.4 That there was heavy rainfall at the time of the accident.

[7] The Plaintiff allege that the accident was caused solely by the defendants first insured driver, driven, at that time, by one Phumlani Nxumalo, alternatively the second insured driver, at that time, driven by one R. Pretorius and further alternatively, by the joint negligence of the first insured driver and second insured driver.

[8] With regard to the first insured driver, the Plaintiff allege that the collision was caused solely by his negligent, in one or more of the following respects:

8.1 He lost control of his vehicle, causing it to overturn in heavy rainy conditions, causing an obstruction in the road;

8.2 He failed to avoid a collision by taking reasonable and proper care, he both could and should have done so;

8.3 He failed to keep a proper lookout;

8.4 He travelled at a speed which was excessive in the circumstances;

8.5 He failed to apply his brakes timeously or at all;

8.6 He failed to maintain any, alternative sufficient control over the first insured vehicle;

[9] ALTERNATIVELY, the collision was caused solely by the negligence of the second insured driver who was negligent in one or more of the following respects:

9.1 He collided with the Plaintiff's vehicle after having noticed that the Plaintiff was attempting to avoid a collision with the first insured vehicle.

9.2 He failed to avoid a collision by taking reasonable and proper care when both could and should have done so;

9.3 He failed to keep a proper lookout;

9.4 He travelled at a speed which was excessive in the circumstances;

9.5 He failed to apply his brakes timeously or at all;

9.6 He failed to maintain any, alternative sufficient control over the insured vehicle.

[10] FURTHER ALTERNATIVELY, the collision was caused by the joint negligence of the first and second insured drivers, who were negligent in one of the grounds set out above.

[11] As a result of the collision, the Plaintiff allegedly sustained the following bodily injuries:

11.1 Skull fracture with haemorrhaging from both ears, subdural haematoma and head lacerations.

11.2 Diffuse axonal brain injury (haemorrhages) causing frontal lobe dysfunction regarding cognition and behaviour.

11.3 Permanent serious psycho-organic disturbances and loss of intellectual capacity;

11.4 Loss of smell, taste and hearing;

11.5 Left scapula fracture with glenoid fossa involvement;

11.6 Multiple rib fractures, with intercostal nerve damage and right pneumothorax as well as a mediastinal shift to the left;

11.7 Left sided hemi-paresis;

11.8 Myofascial injuries to the cervical and lumbo-sacral spine.

[12] It is further alleged that a result of the aforesaid severe injuries sustained by the Plaintiff in the collision:

12.1 The Plaintiff was rendered unconscious on impact treated in ICU while in a coma with GCS 8/15 and was intubated and artificially vetilated;

12.2 An underwater drain for his haemopneumothorax was applied;

12.3 He was eventually cared for in a rehabilitation unit;

12.4 The Plaintiff endured pain, suffering and discomfort and will in future continue to endure such pain, suffering and discomfort;

12.5 The Plaintiff suffered emotional shock and trauma and will in future suffer emotional shock and trauma;

12.6 The Plaintiff underwent medical treatment, the full nature and extent whereof is more fully set out in the Medigo Legal Report by Dr D de Klerk (Neurosurgeon), attached as Annexure "A" attached to the Plaintiff s particulars of claim.

12.7 The Plaintiff suffered loss of enjoyment of life and has suffered brain damage, loss of memory, loss of concentration and attention, an inability to control impulses and live independently; he suffers from physical disability, specifically relating to his hemi-paresis (has to walk with crutches) and pain to the ribs and shoulder, as a result of the collision and his injuries sustained therein.

[13] The Plaintiff accordingly, allegedly suffered damages in the amount of **R 3 550 000.00** calculated as follows:

13.1	Past medical expenses	**R** 550 000.00
13.2	Future medical expenses	R 1 000 000.00
13.3	General damages	R 2 000 000.00
	TOTAL	**R 3 550 000.00**

[14] In **viva voce** evidence, the Plaintiff testified that she was a passenger in the vehicle, a RAV4 utility vehicle, bearing registration number BMX 443L, driven by her husband.

[15] That it was raining heavily. Visibility was poor. That for a while prior to the collision they had been driving 110/115 kilometers per hour. As the rain got heavier, the deceased reduced the speed to 70 kilometers per hour. She observed it from the instruments cluster. She *even* confirmed it with the deceased.

[16] Suddenly the first insured driver's vehicle overturned in front of their vehicle. The overturning vehicle slided in the same direction of travel,

thereby obstructing the husband's left lane of travel. The husband's vehicle and the first insured driver's vehicle were both travelling on the left lane of the carriageway.

[17] She testified that in an attempt to avoid colliding with the first insured driver's overturned vehicle, her husband swerved the Plaintiffs vehicle to the right lane, then lost control of the vehicle. The vehicle skidded across the highway and onto grass median dividing the carriageways, and ended in the incorrect and oncoming lane of the second insured driver's lane of travel. The Plaintiff's vehicle collided with the second insured driver's vehicle on the latter's correct side of the road.

[18] Under cross-examination, amongst others, she was asked why she enquired about the speed limit from the deceased if she could observe it herself, from where she was seated. Her response was that she could not see the speedo-meter clearly as visibility was poor due to the prevalent weather conditions.

[19] The Plaintiff closed its case.

[20] The Defendant closed its case without calling any witness.

[21] The Plaintiff does not dispute that the accident occurred on the second insured driver's side of the road. Let alone that it is a common cause issue.

[22] Mr De Vries, who appeared for the Plaintiff submitted that only the negligence act of the first insured vehicle is causally linked for the damage suffered by the Plaintiff. That the presence of the overturned vehicle in the left lane gave rise to the sudden emergency which necessitated the husband to take action as he did, in an attempt to avoid the danger in circumstances of sudden emergency.

[23] In other words, the Plaintiff rely on the presence of the overturned first insured driver's vehicle in the left lane of the highway as conduct causally connected to the damages eventually suffered by the Plaintiff

[24] On the other hand, on behalf of the Defendants it was argued that, once it is proven that the Plaintiff's vehicle, as in this case, entered the incorrect side of the road, as at the time of the collision, this gives rise to an inference of the driver's negligence. Consequently, an evidential burden is cast upon the Plaintiff to adduce evidence sufficient to rebut the inference of negligence. Mr Kanyane referred me to **Colin Authur Weir v James Savage [2013) ZAWCH C 31 (27 February 2013).**

If the explanation is insufficient to dispel an inference of negligence, the Plaintiff will be held negligent.

The law of collision in South Africa by HB Wopper at page 78.

[25] Also **In President Insurance Company Limited v Tshabalala and another 1981 (1) SA 1016 (A) @ 1020 C,** it was held that, in an impending collision, as a general rule, one must avoid swerving to his or her incorrect side of the road.

[26] In effect, the doctrine of sudden emergency is that a driver acting in the best way to avoid danger in a sudden emergency, is not negligent. **Goode v SA Mutual Fine and General Ins 1979 (4) SA 3 or Brown v Hunt 1953 (2) SA 540 (A).** The Plaintiff must therefore further explain or negative apparent negligence

[27] Cooper's Delictual Liability in Motor law, 1996 @ page 275 alludes that it is trite that a driver who is faced with a sudden emergency is

required to exercise reasonable care and use reasonable skill to avoid imminent danger.

[28] In applying the aforesaid doctrine to the present case, I am inclined to posit the following questions:

28.1 Did the "act" of overturning of the first insured vehicle place the Plaintiff in such a position of danger that the latter had to take steps to try and avoid colliding with it?

28.2 Putting it differently, is it the first insured driver's conduct which created the risk of harm to the Plaintiff, a substantive part of the causative link leading to the damages suffered by the Plaintiff? **Kruger V Van Der Merwe 1966 (2) SA 266 (A).**

28.3 Is the "act" of overturning of the first insured driver's vehicle causally connected to the damage eventually suffered by the Plaintiff consequent a collision with the vehicle of the second insured driver?

The attribution of Negligence to the first insured driver by virtue of mere "act" of overturning of the vehicle, as negligent conduct which was operative at the time of the collision and linked to the husband's bodily injuries, would be premised on the basis that "negligence causes harm". And not that negligence is the attribute of the "conduct" which causes harm. Consequences flow from conduct and not negligence. As alluded above, the "act" of overturning of a vehicle does not constitute negligence unless the "act" created a risk of harm.

[29] On the facts, the weather conditions did not permit driving at the normal speed limit in the highway which is 120 kilometers per hour. Visibility was poor to permit normal speed limit. There may have been

sufficient time for the husband to exercise an option for swerving into the right lane at the critical time. Since there was time to weigh the

pros and cons, I do not understand why the husband did not choose any of the below mentioned available options, and preferred to enter the right lane.

[30] Moreover, the evidence of the Plaintiff merely outlines the events as they occurred and as she observed them as a passenger in the vehicle, but she could not assist this court with regard to the crucial explanation why the husband manoevered the vehicle the way he did causing his vehicle to end up in the opposite lane of travel.

30.1 Why the husband chose to veer into the right lane instead to the left of the road.

30.2 Why he considered that option to be safe.

30.3 In view of the weather conditions, and specifically the minimal speed he was allegedly driving, why he chose the second lane as a safer option.

30.4 As the first insured vehicle, was sliding forward, what danger did it pose to the husband as according to evidence he was only driving 70 kpm.

30.5 Why didn't he react to the overturning vehicle in any other way other than swerving to the right lane, since he had enough time to weigh the pros and cons of the situation, and choosing to swerve to the right lane.

30.6 Why didn't he apply his brakes?

[31] In the absence of evidence in this regard, I am unable to determine whether or not the reasonable man would have acted in the manner the husband did. I do not have an explanation why the husband could not bring his vehicle under control, under those circumstances, in the material time.

[32] In my view, a reasonable man would not have acted the way the deceased did. Notwithstanding the above, the Plaintiff as a reasonable driver, on the road that has two lanes driving 70 kpm should have chosen a safer option, would have applied his brakes or pulled over on the side of the road. He would also foresee the other vehicle stopping in front of him. The overturned vehicle did not create any risk of harm to him which is causally connected to the collision with the second insured vehicle, in the opposite carriageway.

[33] Indications are that the husband was driving very fast, regard being had of the weather conditions. He consequently could not bring his vehicle under control under those circumstances.

[34] On the other hand, the Defendant did not call the driver of the first insured vehicle as a witness. No reasons were advanced for failure to do so. Consequently and similarly, without an explanation from the driver of the first insured vehicle as to what caused his vehicle to overturn, one cannot, by a mere conduct of overturning of a vehicle, draw an inference of negligence against the driver. No evidence is advanced as to how and why he lost control of the vehicle.

[35]

35.1 Consequently, in the absence of any explanation on the part of the Plaintiff as to why, on the face purported sudden emergency, the husband chose to turn into the second lane

35.1 rather than exercising any other option in trying to maintain control of his vehicle, and;

35.2 On the other hand, failure on the part of the Defendant to call the driver of the first insured vehicle as a witness in order to explain the circumstance surrounding the overturning of the first insured vehicle, this court cannot decide satisfactory on the evidence before it.

[31] Therefore, after hearing the evidence of the Plaintiff, the question to be asked is whether a reasonable man (or ought to) give judgment in favour of the Plaintiff. I am of the view that there is no evidence in which a reasonable man should (or ought to) give judgment in favour of the Plaintiff.

(Gascoyne v Paul and Hunter 1917 TPD 170).

[32] Consequently, I make the following order:

37.1 Absolution from the instance be granted to the defendant.

37.2 The Plaintiff is ordered to pay the costs of this action.

M.H. MABENA

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION