FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 2415/2010

In the matter between:

OUPA APRIL MASITENG Plaintiff

and

ROAD ACCIDENT FUND Defendant

JUDGEMENT: RAMPAI AJP

HEARD ON: 1 FEBRUARY 2012

DELIVERED ON: 20 APRIL 2012

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[1] The matter came to court by way of action proceedings. The plaintiff sued the defendant for payment of the amount of R722 411,70 and ancillary relief. The action was defended.

[2] The evidence showed that certain facts were undisputed, notwithstanding denials as contained in the pleadings. The plaintiff was at Frankfort on 19 March 2008. He spent the evening out visiting his relative somewhere at Namahadi where he also lived. From his cousin's, he walked on foot back home at Ithoballe. He walked alone in a narrow

pedestrian passage bounded by a school on the one side and a stormwater ditch on another side. He was walking perpendicular to Namahadi Street.

[3] At the end of the passage, he reached the aforesaid street, turned left and continued to walk upwards at a gradient. On that occasion he was walking between the front fence of the school on the left hand side and the aforesaid tarred street on the right hand side.

[4] It was also undisputed that the defendant's insured vehicle was a BMW sedan with registration number BZZ415FS; that it was driven by Mr K J Matsaneng at Frankfort in the same neighbourhood during the particular night; that such vehicle and the plaintiff collided in the aforesaid street at or about 22:30 and that the scene of the accident was adjacent to a primary school called Thato-Mfundo.

[5] Prior to the accident the sedan was travelling perpendicular to Namahadi street but from the opposite side. It was moving on a dirt street towards the school. At the intersection of the dirt and tarred streets, it turned left.

Shortly after turning it joined Namahadi street where the plaintiff was walking.

[6] The area of impact between the sedan and the pedestrian was on the stretch of the tarmac demarcated by the dirt street at the high end and the narrow pedestrian passage at the low end. The critical issue in the case was precisely where on that particular portion of the street did the collision occur?

[7] On the one hand Mr Cilliers, counsel for the plaintiff, submitted that the area of impact was down at the low end and on the shoulders of the street between the front fence of the school and the pedestrian passage where the plaintiff had turned up the street. But Mr Kanyane differed. He submitted, on the one hand, that the area of impact was on the other side of the tarmac up at the high end and right on driver's correct path of travel. Therefore, I was called upon to determine whether the point of impact was up or down and whether it was on or off the tarmac.

[8] Before I proceed to analyse the evidence, I want to describe

the vicinity around the scene of the accident. The accident happened in an urban area. The scene was in Namahadi street at a spot adjacent to a primary school. The street was apparently one of the principal arteries of traffic in the township called Namahadi at Frankfort. The street consisted of one traffic lane in each direction. The centre line which ordinarily demarcates the roadway into two opposite traffic lanes was invisible on the photographs. On each side of the tarmac there was a concrete pavement – vide 4 exhibit 'a'. There were no street lamps, traffic lights or road signs in the vicinity.

[9] I now proceed to examine the factual allegations to ascertain the true facts. The version of the defendant was narrated by one witness, namely: Mr K J Matsaneng, the insured driver. His evidence was that the dirt street joined the main street on a higher plain, adjacent to the school premises. He was driving on that street prior to the accident. He did not stop at the intersection to ascertain if it was safe to do so but simply entered the main street and turned left. He immediately saw a pedestrian on the tarmac right in front of the sedan walking towards the centre line. At most the pedestrian was about

5m ahead. He was shocked. He dimmed the headlamps and slightly applied the brakes. The pedestrian suddenly turned back. The vehicle ran him down on the tarmac.

[10] After the collision, the sedan went out of control and crashed into an electricity pole near the culvert. The concrete pole in question was captured by a camera – vide photograph 10, exhibit 'a'.

[11] According to the version of the driver, the pedestrian was walking towards the school when he first noticed him. We also know that the insured motor vehicle was travelling towards the same school shortly before it turned left at the intersection. From this, it can be reasonably deduced that the pedestrian and the vehicle came from the same direction. The powerful high mast neighbourhood lamps lit the area. The headlamps of the vehicle were also on bright shortly before the accident. The two powerful sources of illumination made visibility around the particular area very good.

[12] In those alleged circumstances and assuming, in favour of

the defendant, that the proximate point of impact was in the vicinity of the intersection, I find myself unable to acquit the driver of negligence. In my judgment, and on his own say-so, the driver had been negligent. His negligence was deeply anchored in his dismal failure to see the pedestrian earlier than a reasonably careful driver would in such circumstances. Had the driver done so, he would have slowed down the speed as he was nearing the intersection, he would have stopped at the intersection, he would have first ascertained whether it was safe to join the main street before he blindly turned as he did, he would have realised that the pedestrian was entitled to proceed because he reached the main street first, he would have allowed him to walk across and he would certainly have had sufficient time to avoid the collision – see **TOFFAR NO v SHIELD INSURANCE CO LTD** 1980 (4) SA 654 (CPD).

[13] The version of the plaintiff was narrated by two witnesses, namely Mr Oupa April Masiteng, the plaintiff himself and Mr Sipho Piet Moloi, the plaintiff's witness. The plaintiff's version and the defendant's version were diametrically opposed. According to the plaintiff's version, the proximate

point of impact was on the lower plain close to the point where the pedestrian passage on the side of the school linked up with the main street. There was photographic evidence which showed that there was a culvert, a curve and a damaged concrete pole in the vicinity. The pole was one of many which had been erected to support aerial electrical cables in the township in general and the main street in particular.

[14] The concrete pole was in the vicinity of a curve – vide photo 6 exhibit ‘a’. The photograph also showed that such a pole was slightly diagonal to the corner of the school fence where the victim turned out of the pedestrian passage into the precincts of the main street. If a straight line was drawn from the corner across the main street, the position of such pole would be beyond such an imaginary line as one drove down towards the curve from the direction of the dirt street up the slope.

[15] During cross-examination the defendant’s witness admitted that the distance between the concrete pole near the culvert and the car as shown in photograph 4, exhibit ‘a’ was ±

140m. The witness also conceded that it was fairly reasonable to estimate that the intersection where he turned the insured vehicle into the main street could have been ± 100m from the stationary car as reflected in the photograph. Therefore, the pole and the intersection were ± 240m apart.

[16] The defendant's witness also admitted that photographs 7, 8, 9 and 10 of exhibit 'a' were representative of one and the same concrete pole as depicted on photo 4 and 6 of exhibit 'a'. From the group of those four photographs, it could be seen how extensive the damage to the concrete pole was. It would appear that more damage was caused to the lateral aspect of the concrete pole fencing the main street that that facing the dirt street. I am uncertain as to whether evidence was canvassed about the estimated distance between the concrete pole and the proximate point of impact according to the plaintiff's version. By the look of things, however, it is pertinently clear and obvious that such distance was, a whole lot shorter by comparison to the estimated distance of 240m between the same concrete pole and the proximate point of impact according to the defendant's version.

[17] From the version of the defendant it seemed improbable firstly, that the insured vehicle would have travelled a farther distance of over 235m from the point of the first impact with the pedestrian to the point of the second impact with the pole. Secondly, the extent of the physical damage to the pole, just like the distance thereto, strongly militates against the defendant's version that the point of first impact was so remote from the point of the second impact.

[18] The aforesaid probabilities tended to give credence to the pedestrian's contention that the collision was very close to the passage; that the insured vehicle was travelling very fast; that it unexpectedly deviated from its correct traffic lane far from the intersection; that it moved across the centre line into the wrong traffic lane primarily designed for the opposite stream of traffic; that it left the tarmac on the incorrect side of the road and that it struck him down off the tarmac on the cemented portion of the street where he was walking.

[19] In our motor law, there is no rigid general principle that a driver is negligent if he drives, particularly at night, he drives at such a speed that he cannot effectively exercise proper

control over a vehicle in motion and, if needs be, to stop it within the range of his vision. Conversely, there is no inflexible general principle of driving that driving at such speed that a driver cannot so control and, if practical exigencies dictate, safely stop the vehicle within his restricted field of vision, cannot constitute driving negligence – **UNION & SWA INSURANCE CO LTD v MARKUS** 1981 (3) SA 1220 (AD).

[20] The insured driver knew that the main street was a busy road. He had driven in that street before. His brother lived at Phahameng. Since that was the case, it was not unreasonable to assume that the insured driver had prior to the date of the accident, probably driven in that street many times to and from his brother's. He had previously seen pedestrians in the street at night especially over the weekend. Given the knowledge of the street and the danger posed by the pedestrians in what was a major street in the township concerned, a reasonable driver would have been more careful and mindful to the hazards than the insured driver. That he was careless and perhaps reckless was demonstrated by the way he joined the main street.

[21] The plaintiff's injury, the material damage to the pole and to the vehicle objectively indicated that the vehicle was travelling too fast seconds before the disaster. He was negligent in driving at a high speed in the prevailing circumstances. Such negligence was the cause of the collision. In the circumstances, I have come to the conclusion that the defendant's insured driver was negligently driving the insured vehicle and that the accident was occasioned by his exclusive negligence.

[22] The contention that the plaintiff was also negligent was not supported by any credible and reliable evidence. Where he was walking, parallel to the trafficable portion of the street, seconds before the disaster, the plaintiff was entitled to expect that he was visible to any reasonably careful motorist and that he allowed adequate safe berth between himself and oncoming vehicles. In my view the plaintiff was not to blame for the accident. Even if he was somehow negligent, which contention failed to persuade me, such negligence did not contribute to the actual causation of the accident.

[23] The crucial issue in this secondary inquiry was what danger was reasonably foreseeable by the pedestrian to justify the contention that he could and should have taken practical precautions to guard against it. The argument was unsound.

[24] Accepting the pedestrian's version as substantially correct and assuming in the driver's favour, that there was a fairly broad space between the concrete portion or pavement and the school fence, the fact remains that the pedestrian was not walking on the same side of the roadway as the insured vehicle; that he did not walk across but along the trafficable tarmac; that there he saw the oncoming vehicle initially moving on its correct side of the roadway; that there were no other road-users or dangerous obstructions on the road between him and the approaching vehicle; that there was no obvious reason why any reasonable driver in the position of the insured driver would have wanted to move over to the wrong side of the roadway; that he believed that he was visible to the driver and that the driver would, in those circumstances, respect his right to use that portion of the road which appeared to be reasonably safe relative to oncoming motorists as well.

[25] The accident happened because, contrary to all objectively reasonable human expectations, the vehicle suddenly deviated from its correct path of travel, veered diagonally to the right across the tarmac, left the roadway on the wrong side and ran the pedestrian down on the pavement. I hold the view, and it is a very firm view, that the pedestrian did not act unreasonably by not deviating from his original course. His failure to take any practical evasive action did not, on the proven facts, amount to negligent walking which materially contributed to the cause of the accident. **SENATOR VERSEKERINGSMAATSKAPPY BPK v LAWRENCE** 1982 (3) SA 136 (A).

[26] The defendant's counsel, Mr Kanyane endeavoured to extract, from the plaintiff's evidence, proof of negligence on the part of the plaintiff. He argued that in as much as having observed the driver's dangerous driving, he failed to run away from the pavement out of the dangerous course of the vehicle in order to give the driver a wide berth. The answer to this was that there was no reliable evidence led as to: How broad the space between the pavement and the fence

was; or how quick the pedestrian's reflexes would allow him to react to such an emergency or how close to the fence the vehicle went. It has to be borne in mind that the deviation was very sudden.

[27] Since no proper foundation was laid, the conduct of the pedestrian could not be properly assessed within proper factual context. That being the case, the suggested evasive course of action cannot be equated to contributory negligence. To blame the pedestrian for not avoiding a clearly unforeseeable and sudden accident as was suggested, would be to unrealistically impose too burdensome an obligation on the pedestrian. The defendant failed to discharge the onus that the plaintiff did not keep a proper lookout or that he could and should, by taking any evasive step, have avoided the accident. The plaintiff did not render himself guilty of any negligence whatsoever by choosing to remain on the pavement he used as a sidewalk.

[28] It is trite that the onus rests on the plaintiff to prove that the accident was occasioned by the negligence of the defendant's driver in the driving of the insured vehicle. No

onus rests on the defendant to show that the insured driver had not being negligent. Where the plaintiff proves that the collision occurred on the driver's wrong side of the road, a legitimate inference and not a presumption of negligence arises against the driver. Once the plaintiff has done so, the driver had to give an explanation sufficient to dispel the drawing of such an inference.

[29] The plaintiff and his witness were credible and reliable witnesses. Notwithstanding some discrepancies in his evidence, I accept the plaintiff's version as a substantially true account of the circumstances of the accident. On the contrary, the same cannot be said about the defendant's version. The defendant's witness was unimpressive. His evidence was contradictory, inconsistent and improbable in certain material respects. I have no hesitation to reject it as an incredible and unreliable account of what happened. Wherever his evidence differs from that of the plaintiff or his witness, their must be preferred to his.

[30] There is one more aspect on which I need to comment. There was a passenger in the insured vehicle. The lady

concerned was not called on behalf of the defendant to give evidence. The lady was seemingly available according to the driver. Perhaps she might have been in a position to testify on the crucial issue in the matter concerning the point of impact. There was simply no explanation by the defendant as to why the lady was not called.

[31] It has to be borne in mind that she was, by the look of things, closely associated with the driver. It seemed to me that neither the plaintiff nor his witness were aware of the lady. The defendant possessed adequate resources to trace and interview witnesses in order to prepare its defence. In the circumstances I am persuaded that the probable reason why the defendant did not call the lady as a witness was that the defendant feared that her evidence would expose facts unfavourable to its case – **MUNSTER ESTATE (PTY) LTD v KILLARNEY HILLS (PTY) LTD** 1979 (1) SA 621 (AA).

[32] On the facts the following findings were justified: the plaintiff was walking along the street off the tarmac. To get to his final destination, in other words his home at Ithoballe, he had to cross the main street at some point farther up the street.

The vicinity was illuminated by a high mast aerial lamp. The insured vehicle was travelling in the same street but in the opposite direction. It was travelling at a high speed in the circumstances where the driver knew, all too well, that pedestrians often crossed the busy main street to and from adjacent neighbourhoods on either sides of such street. It then deviated from its path of travel, moved across the tarmac and overran the plaintiff on the shoulders of the road. The insured driver did take effectively adequate steps avoid the accident. The driver could and should have been able to avoid the accident since there were no other road-users or obstacles on the road. He failed to keep a proper look-out and to exercise effective control over the vehicle and thus caused the accident.

[33] Consequently the plaintiff has showed, on a balance of probabilities, that the defendant was 100% liable for the damages he suffered as result of the road accident which took place in Namahadi Street at Namahadi Frankfort on 19 March 2008.

[34] The aforegoing disposes of the issue of the merits. Now I

turn to the issue of quantum.

[35] The plaintiff was born on 8 March 1964. He was a standard 5, in other words grade 7, pupil when he dropped out of school. He became a widower in 1992 when his wife passed away. The couple had two children. He is the sole breadwinner for his two dependant minor children, as son 16 years old and a daughter 12 years old. Since 2006 he worked as a garden attendant until 19 March 2008, being the date on which he was injured in a road accident. His employer was a certain Mr Linde of Frankfort. He never resumed work after the accident. Since then he has not gainfully worked. He has virtually no source of livelihood. He lost one eye in a previous accident. Prior to the accident, he did not take part in any form of sporting activity. He has a sedentary lifestyle – vide orthopaedic assessment report per Dr P Engelbrecht.

[36] From the scene of the accident the plaintiff was taken to Mafube Hospital at Frankfort. On 20 March 2008 he was rushed to Boitumelo Hospital at Kroonstad where he was admitted. His fractured left femur was immobilised by

means of internal fixation. The fixatives, a metallic plate, pins and screws, were inserted. The fractured right tibia was immobilised by means of external fixation. The leg was encased in a plaster of paris. (vide clinical record – Mafube Hospital and orthopaedic report – Dr P Engelbrecht.

[37] Five days after the accident, on 24 March 2008, the plaintiff was retransferred to Mafube Hospital. He was further hospitalised for bedrest. He was discharged from the hospital on 18 June 2008. In all he was hospitalised for a total period of sixty days – (vide clinical records and medical report – Dr S Bayizitanda).

[38] The injured plaintiff was seen, examined and assessed by a few professionals or experts. He consulted the following experts: Ms L Delport – occupational assessment report;
Dr P Engelbrecht – orthopaedic assessment report;
Mr G W Jacobson – actuarial assessment report;
Ms S van Jaarsveld – psychological assessment report.

[39] None of these experts gave evidence for and on behalf of the plaintiff, concerning the nature, extent and effects of the

injuries he sustained. They gave no evidence because their expert findings and opinions pertaining to the plaintiff's injuries were, on behalf of the defendant, substantially admitted. The only component of the quantum which was in dispute was the plaintiff's alleged past medical expenses of R8 640,00.

[40] In his opening address Mr Cilliers abandoned such segment of the plaintiff's claim. Mr Kanyane confirmed that, by agreement between the parties, the contents of the aforesaid assessment reports were admitted. In view of the agreement and abandonment, oral evidence by the experts was effectively dispensed with.

[41] The wholesale agreement reached by the parties rendered it unnecessary for me to critically comment any further on the issue of quantum. The mutual agreement concerned three segments only of the claim, viz: future loss of earnings, future medical expenditure and general damages.

[42] The plaintiff has emerged as the victorious party. The costs of the action ordinarily have to follow success. That general

rules applies to the instant matter. Such party and party costs includes the reasonable qualifying fees of the plaintiff's expert witnesses for their necessary preparations and reservations, as well as counsel's fees on the scale senior/ junior advocates.

[43] Accordingly, I make the following order:

43.1 The plaintiff claim succeeds 100% on the merits.

43.2 The defendant shall pay the composite sum of R722 412 to the plaintiff by way of electronic transfer into the trust account of Blignaut and Wessels held at First National Bank, branch number 230833 account nr 53550366696, reference number M1333.

43.3 The aforesaid capital sum consists of R447 412 and R275 000 in respect of future loss of income and composite general damages.

43.4 The defendant shall furnish the plaintiff with written undertaking in terms of section 17(4)(a) of the Road Accident Fund Act, 56 of 1996 as amended to cover his future medical expenses including the costs of his future accommodation and nursing for treatment or provision to him of medical services or provision to him of goods as a result of the injuries he sustained in a road accident at Frankfort on 19 March 2008 after such costs have been incurred and proof thereof produced to the defendant.

43.5 The defendant shall pay the plaintiff's necessary disbursements including reasonable qualifying fees of the following expert witnesses of the plaintiff for their necessary preparations and reservations:

(a) Dr P Engelbrecht, an orthopaedic surgeon;

(b) Ms L Delport, a physiotherapist;

(c) Ms S van Jaarsveld, an industrial psychologist;

(d) Mr A W Jacobson, an actuary.

43.6 The defendant shall pay interest on the capital amounts specified in paragraph 35.3 at a rate of 15% per annum from the 15th day of this order.

43.7 The costs of this action shall be borne and paid by the defendant on the scale as between party and party and shall include counsel's fee on the scale of a senior-junior advocate.

M.H. RAMPAI, AJP

On behalf of plaintiff:	Adv. H. J. Cilliers Instructed by: Naudes BLOEMFONTEIN
On behalf of defendant:	Adv. J T Kanyane Instructed by: Mpobole & Ismail BLOEMFONTEIN

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