

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No: A12/2012

In the appeal of:

ROAD ACCIDENT FUND

Appellant
(Defendant in court *a quo*)

and

PAUL DUMISANI DLAMINI

Respondent
(Plaintiff in court *a quo*)

CORAM: RAMPAL, J *et* MOLOI, J *et* MOLEFE, AJ

JUDGMENT BY: MOLEFE, AJ

HEARD ON: 3 SEPTEMBER 2012

DELIVERED ON: 25 OCTOBER 2012

- [1] This is an appeal against the judgement and resultant order by a single judge in the judgement delivered on 25 August 2011, the court *a quo* found that the accident was occasioned by the negligence of both the appellant's insured driver and the respondent. The court *a quo*

apportioned the blame 80% to 20% in favour of the respondent. The appeal is opposed.

- [2] The accident occurred at Warden, in the Free State on 12 July 2007. The scene of the accident was approximated 10 kilometres outside Warden, on the N3 national road between Villiers and Warden.
- [3] The respondent sustained bodily injuries in the accident and had sued the appellant for damages arising from those injuries in the sum of R2 340 562,30.
- [4] The first question to be decided by the court a quo was whether the driver of the insured vehicle was causally negligent in relation to the collision. The second question was whether there was contributory negligence on the part of the respondent. If the third question which then arose was, what the appropriate degree of the apportionment of the negligence was.

- [5] The undisputed facts were that in the morning of 12 July 2007 and on the N3 national road between Villiers and Warden, a collision occurred between a Tata Novus horse and trailer truck ("the truck") bearing registration numbers FWD453NW, driven by Mr S F Madiba ("the insured driver") and a Toyota Hilux motor vehicle ("the bakkie") bearing registration numbers VKY232GP, driven by Mr P D Dlamini ("the respondent"). The bakkie collided with the truck at the bakkie were killed? The respondent sustained head injuries and suffered amnesia as a result thereof. In terms of the Road Accident Fund Act, No 56 of 1996 the appellant was at all material times the insurer of the motor vehicle driven by the insured driver.
- [6] At the trial the respondent called the insured driver as his only witness and appellant did not call any witness. The insured driver was therefore the only witness in this case. The insured driver described the accident as follows: On the morning of the 21 July 2007, he was the driver of the truck, travelling from Delmas to Durban, carrying a heavy load of coal. He was travelling on the R101 road up to Warden where entered the N3 highway and turned

eastwards towards Durban. The two roads were linked by an on-ramp. He used his side mirrors to check for oncoming traffic along the N3 road and noticed two motor vehicles travelling along the N3 road in the same direction as the insured vehicle. He then decided to travel on the yellow line (the emergency lane) to allow the two vehicles to pass. He travelled for about 30-40 meters on the emergency lane, before he felt the truck jumping gear. As this occurrence was unusual, he looked in his left side mirror and noticed a canopy lying on the side of the road. He stopped the truck on the side of the road and went to investigate.

- [7] He found that a white bakkie had collided with the back of the truck, from the back, that it had gone deep under the truck and that was attached to the rear end of the truck. All three passengers in the bakkie were dead but the bakkie driver was still alive. He testified that at the time the collision occurred he was travelling at a slow speed of between 50-60 kilometres per hour as he was negotiating a steep incline.

- [8] When he entered the N3 road he never saw the bakkie except the two vehicles he mentioned. The trailer was very high and even if he could have looked in his rear view mirror, he would not have seen the bakkie if it was driving too close to the back of the truck. The truck weighed 30 tons and the bakkie was a 1 ton bakkie and was very light. As a result the insured driver did not feel the impact of the collision and was only alerted by the jumping gears that something was wrong.
- [9] The court *a quo*, on the question of the causal negligence of the driver of the insured vehicle made the findings: that the onus of proving negligence on a balance of probabilities rested with the plaintiff (respondent). It was clear that the insured driver did not keep a proper look out and that he entered the carriageways too close to the curve. A reasonable man in his position would have travelled further into the yellow line before entering the carriageway. He should have made sure that he saw a better part of the road behind him before he attempted to enter the carriageway.

The truck was cumbersome and he was driving very slowly on the incline, as such, he should have been more cautious. The court *a quo* found that by the insured driver entering the carriageway as he did he should have foreseen that his actions would endanger other road users and should therefore have been more cautious. The court found that the insured driver was negligent in entering the carriage way as he did and failing to keep a proper look out and his negligence was the cause of the accident.

[10] The court *a quo* also found that the respondent contributed to the negligence because he failed to avoid the collision when he could have done so. He should have been travelling at a high speed and had little time to avoid the collision by applying brakes. He should have seen the truck as it was broad day light and the truck was a cumbersome vehicle and was red in colour.

[11] On the question of apportionment of default, the court *a quo* found that the respondent's negligence was extensive and should be commensurate. The respondent's degree of

negligence was assessed at 20% and the court *a quo* made an order apportioning the blame/fault 80% to 20% in favour of the respondent.

[12] The applicant's counsel attached the decision of the court *a quo* on the following grounds:

- (a) The learned Judge erred in finding that the insured driver must have protruded onto the carriage way before the collision occurred, while no such evidence was presented to court;
- (b) That the learned Judge erred in finding that the insured driver's version that he travelled inside the yellow line during the impact was improbable, especially having regard to the fact that immediately before the accident the insured driver was travelling inside the yellow line to allow two motor vehicles travelling parallel to each other to pass;
- (c) That the learned judge erred in drawing inferences of an expert nature from the photo 4 on page 14 of exhibit "A" while no reconstruction expert testified or and no other expert evidence was presented on this aspect;

- (d) That the learned judge erred in not finding that the insured driver was travelling inside the yellow line, as he testified, when the plaintiff did not present any evidence contradicting his version;
- (e) That the learned judge erred in finding that the plaintiff must have been travelling along the N3 immediately before the accident, which finding the court only based on the fact that the plaintiff has been travelling at a high speed and that at such a speed the plaintiff could not have been travelling along the R101;
- (f) That the learned judge erred in finding that the trailer of the truck was very high and the insured driver would not have been able to see the respondent as he was too close behind the truck. He argued that it was a rear end collision and that the insured driver acted reasonably at all times.

[14] The appellant's counsel argued that the court *a quo* erred in finding that the respondent must have been travelling along the N3, and attacked the court *a quo*'s finding which was only based on the fact that the respondent had been

travelling at a high speed and at such speed that he could not have been travelling along the R101. It was the appellant's counsel's submission that the court *a quo* erred in finding that the insured driver's version that he travelled inside the yellow line during the impact was improbable. His contention was that the insured driver's version was not disputed and that no evidence was presented to contradict his version.

[15] The respondent's counsel agreed that it is a trite principle of our law that the plaintiff (respondent) bears the onus of proof in relation to the issues of causative negligence on the part of the insured driver in relation to the collision.

[16] Respondent's counsel referred us to **PROTEA ASSURANCE CO LTD v CASEY** 1970 (2) SA 643 (AD) where it was held that a driver in control of a cumbersome combination of vehicles of exceptional length and bulk and who proposes to enter the main road on which fast moving traffic may reasonably be expected, must realise that his undertaking may be hazardous to other users of the road.

The duties imposed upon drivers approaching an uncontrolled T-intersection were also explained in **S v BURGER** 1979 (1) SA 777 (C) at 779A – G.

[17] The respondent's counsel submitted that it was common cause that the vehicle drove by the insured driver was an extremely cumbersome and heavy vehicle comprising a horse and a trailer upon which two containers were mounted. The insured driver was entering the N3 from the lesser R101 which formed a junction with the N3 road. Accordingly, motorists including the plaintiff proceeding along the N3 would have had the right of way. This was conceded by the insured driver in his evidence where he stated that when he entered the N3, two vehicles were approaching in the same direction and he accordingly proceeded along the left-hand-side of the road on the yellow line to allow the vehicles to pass.

[18] The respondent's counsel argued that the rule of the right of way was applicable in this matter as the accident happened at the intersection of the R101 road and the N3 highway.

He contended that a reasonable motorist on a ramp would have given a right of way to motorists travelling on the national road. The insured driver must have seen the respondent's motor vehicle because it must have been on the N3 highway behind the two motor vehicles which he saw. Counsel contended that the insured driver did not stop and did not keep a proper look out before entering the N3 highway. He submitted that had he done so, he would have seen the respondent's vehicle as he was on the N3 on the way from Johannesburg and in broad daylight.

- [19] I agree with the respondent's counsel that the insured driver, with a cumbersome combination of vehicles should have given the right of way to the respondent who was already travelling on the national road. I do not agree with the insured driver's version that he entered the N3 highway when it was safe to do so and that he moved to the emergency lane when he saw the two vehicles. The accident clearly occurred on the N3 road and the insure driver entered the national highway. When it was not safe and his action of entering the N3 road without making

certain that it was safe to do so, and without giving the right of way to motorists on the national road could endanger other road users. The insured driver should have been more cautious.

I therefore agree with the court *a quo* that the insured driver's negligence was the cause of the accident.

[20] The second leg of the appeal is the contributory negligence aspect. The findings of the court *a quo* was that the plaintiff contributed to the negligence as he failed to avoid the collision when he could have done so. The plaintiff must have been travelling at a very high speed and had little time to stop the bakkie to avoid the collision. He should have seen the truck as the truck was a cumbersome red vehicle and the accident was in broad day light.

[21] The appellant's submission was that the plaintiff's negligence contributed more to the collision than the insured driver's because the plaintiff was travelling at an excessive speed, the insured driver's truck and the trailer were visible

and that the insured driver was travelling at a speed of approximately 50 – 60 kilometres per hour due to the steep incline he was negotiations. The plaintiff had ample space to overtake the insured driver.

- [22] According to the respondent's counsel, it is highly probable that the respondent must have been travelling at 120km/h and the truck travelling at a speed of 50-60km/h. It would have taken the respondent approximately one second to perceive and react to the danger posed by the insured vehicle. He referred to **RODRIQUES v SA MUTUAL AND GENERAL INSURANCE COMPANY** 1981 (2) SA 270 (AD) wherein it was accepted that ordinarily, the time allowed for a motorist to perceive danger and react to it was one and half second.

According to Cooper, **MOTOR LAW**, Vol 2, PP 434 and 441 a vehicle travelling at 60km/h will travel 16,7m per second. A vehicle travelling at 120km/h will travel 33,3m per second. At a speed of 120km/h it would take an average, 133m to come to a stop assuming a braking co-efficiency of 0,5.

In this case, the respondent had very little time to react.

[23] The respondent's counsel conceded that a degree of contributory negligence could be attributed to the respondent in that he collided with a large truck in broad day light, but that the weight of the blame should however be attributed to the insured driver as he entered the road without making sure that it was safe to do so.

[24] I have considered the contention raised by the appellant's counsel but I am not persuaded by his submissions that the plaintiff's negligence contributed more to the accident. I am persuaded by the respondent's counsel's submission that the respondent contributed to the negligence which caused the collision. In my view the finding of the court *a quo* was correct.

[25] In respect of the apportionment of damages, the court *a quo* determined apportionment of negligence to be 80% on the part of the appellant and 20% on the part of the respondent.

[26] Counsel for the respondent referred the appeal court to EKSTEEN v GOTZE 1979 (2) SA 1141 (CDD) and to the TRANSNET LTD t/a METRORAIL AND ANOTHER v WITTER 2008 (6) SA 549 (SCA), wherein it was held that an appeal court would interfere on apportionment of damages only where it was shown that the trial court failed to exercise its discretion judicially, or had been influenced by wrong principles or a misdirection on the facts or had reached a decision which could not reasonably have been made by a court properly directing itself to all the relevant facts and principles.

[27] In my view, the apportionment by court *a quo* cannot be faulted and the appeal has to fail on that ground too.

[28] Accordingly, the following order is made:

28.1 The appeal is dismissed.

28.2 The appellant is directed to pay the costs of the appeal.

D. S. MOLEFE, AJ

I concur.

M. H. RAMPAL, J

I concur.

K. J. MOLOI, J

On behalf of the appellant: Adv. M. Steenkamp
Instructed by:
Webbers Attorneys
BLOEMFONTEIN

On behalf of respondent: Adv. P A Corbett
Instructed by:
Matsepes Inc
BLOEMFONTEIN

/eb