

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: A168/2010

In the appeal between:

THE ROAD ACCIDENT FUND

Appellant

and

J A FOURIE NO

Respondent

CORAM:

H M MUSI, JP *et* VAN DER MERWE, J
et SINGH, AJ

JUDGMENT:

VAN DER MERWE, J

HEARD ON:

14 FEBRUARY 2011

DELIVERED ON:

24 FEBRUARY 2011

[1] This is an appeal against the judgment of a single Judge in a road accident trial matter. The appeal is with the leave of the court *a quo*.

[2] Between 16H00 and 17H00 on 23 December 2006 and on the road between Arlington and Senekal, a collision occurred between a blue Volkswagen Caravelle vehicle with registration number CZG163FS (“the Caravelle”) and a white

Toyota Hi-Ace vehicle with registration number TWD243GP (“the Toyota”). Both vehicles were microbusses that were operated as taxis at the time. The Caravelle carried a full load of passengers and also towed a trailer. The driver of the Caravelle has since died. The driver of the Toyota was Mr Nkopone Lawrence Matlali. The Toyota carried four passengers.

- [3] The collision took place on a long and straight stretch of tarred road, approximately 6,3 meters wide. The road has one lane for traffic in each direction and has no emergency lanes on either side thereof. On both sides of the road there are grass verges. The Caravelle travelled in the direction from Arlington to Senekal and the Toyota approached from the opposite direction. In the area where the impact took place there is a broken middle line on the road as well as a solid white line that prohibited overtaking by the Toyota. Visibility was good. It is also common cause that the right front of the Caravelle came into contact with the right-hand side of the Toyota.

- [4] Juda Peter Hlongwane (“Juda”) was a fare-paying

passenger in the Caravelle and he sustained injuries as a result of the collision. Juda's father, Mr Andrew Molahloa Hlongwane therefore instituted action on his behalf against the appellant for payment of damages on the basis that the collision was caused by the negligence of the driver of the Toyota, alternatively by the negligence of the driver of the Caravelle. However, subsequently an order was made in terms of which advocate J A Fourie was appointed curator *ad litem* for Juda with the result that advocate Fourie in his official capacity was substituted as the plaintiff and therefore presently the respondent. The negligence of the driver of the Caravelle was not placed in issue. In the plea the respondent pleaded that that was the sole cause of the collision.

[5] The parties agreed to a separation of issues that was ordered by the trial court. The result hereof was that the issue for determination at the trial was whether the negligence of the driver of the Toyota caused or contributed to the collision.

[6] After hearing evidence the trial court found that the collision

was mainly caused by the negligence of the driver of the Caravelle but that the negligence of the driver of the Toyota contributed thereto. On the basis that the collision was caused solely by the negligence of the driver of the Caravelle, the respondent's claim against the appellant is on the pleadings limited to the amount of R25 000,00. As a result the trial court in effect made a declaratory order that the appellant is liable for payment of Juda's proved or agreed damages. The trial court also ordered the appellant to pay the costs of the hearing.

[7] The issue on appeal is whether the court *a quo* was correct in finding that the driver of the Toyota was negligent.

[8] Juda has no recollection as to how the collision happened. In this regard the respondent relied on the evidence of Mr Lerato Joseph Tseke and Mr Fusi Francis Tsenase. Both were passengers in the Caravelle at the time of the collision. Their version is essentially the following. The Caravelle was travelling in its lane at a speed of approximately 120km/h. The Toyota that approached from the opposite direction was travelling with its right wheels on the solid barrier line in the

middle of the road. The driver of the Caravelle changed a music compact disk (CD). As a result hereof the Caravelle moved towards its right and travelled with its right wheels also on the middle line but not over the middle of the road. The driver of the Caravelle corrected this by moving the Caravelle back to its position in its lane. At this stage it was realised that the oncoming vehicle had moved over the middle of the road into its incorrect lane. The driver of the Toyota moved the vehicle to its left in order to attempt to avoid a collision but was unable to do so. As a result the collision took place near the middle of the road but in the lane in which the Caravelle was travelling.

- [9] Mr Matlali, the driver of the Toyota, testified for the appellant. He said that he was not able to tell at what speed he was travelling but that he was not in a hurry. He saw the Caravelle approaching but there was no reason for him to anticipate erratic or irregular driving of this vehicle. When he was about to pass the Caravelle, it suddenly swerved to its right over the middle of the road onto its incorrect side of the road and into the path of the Toyota. Mr Matlali said that as a result of this emergency there was nothing that he could

do to attempt to avoid a collision other than to swerve to his left, which he did but without success.

[10] The appellant also presented the evidence of Mr H A Visser of the South African Police Service. He attended the scene of the collision in the exercise of his duties within hours of the collision occurring. He testified as to his observations on the scene, including gouge and scrape marks on the tarmac in the lane in which the Toyota travelled, indicating that the area of impact was on that side of road. He took photographs and drew a sketchplan and key thereto indicating this, all of which was handed in as exhibits.

[11] In terms of section 34 of the Civil Proceedings Evidence Act, nr 25 of 1965, counsel for the appellant attempted to hand in as exhibit a statement made by the driver of the Caravelle. The contents of this statement provide material corroboration for the evidence of the driver of the Toyota and the version of the appellant.

[12] The trial court refused to admit this statement into evidence. It also found the evidence of Mr Visser to be "... in its totality

unhelpful". Counsel for the appellant argued with some persuasion that the court *a quo* erred in both these respects. In the light of the conclusion that I have reached I do not find it necessary to make a finding on these matters.

[13] The court *a quo* rejected the evidence of Mr Tseke and Mr Tsenase. The court *a quo* accepted the evidence of Mr Matlali that the collision was caused by the movement of the Caravelle over the centre line into the lane and path of travel of the Toyota. The court *a quo* however held that this movement was not a sudden movement as described by Mr Matlali but gradual one as a result of which there was sufficient opportunity for the driver of the Toyota to avoid a collision by swerving to his left onto the grass verge. In this regard the court *a quo* found support in the evidence of Mr Tsenase.

[14] I am by no means persuaded by the argument of counsel for the respondent that the trial court erred in rejecting the evidence of Mr Tseke and Mr Tsenase. Both were poor witnesses. In evidence they contradicted themselves, each other and their respective police statements in material

respects such as when did the Toyota move over to its incorrect side of the road, for what period of time it travelled on the incorrect side of the road, to what extent it did so and where on the road the impact took place. The evidence of Mr Tsenase in particular is very improbable. At some stage in his evidence he said that whilst the Toyota was approaching on its incorrect side of the road and thereby created a very dangerous situation, he took his eyes off it, relaxed and talked to his fellow passengers. The version of these witnesses provides no conceivable reason for the Toyota to move to its incorrect side of the road but it does provide a reason for the Caravelle to have done so.

[15] In my judgment there is no reason why the evidence of Mr Matlali should not have been accepted in its totality. There is no valid criticism of his evidence. He was criticised for not using the equivalent of the word “sudden” in his police statement, in which the following description of the collision is given:

“Ek het in die rigting van Arlington gery. Ek het in my regte baan gery. Daar het ‘n groenerige Volkswagen Kombi van

Arlington se rigting af aangekom. Die genoemde voertuig het oorgekom in my baan in. Ek het probeer uitswaai na links om 'n botsing te vermy. Die voertuig het my voertuig steeds aan my regterkant getref.”

The person who took the statement obviously intended to provide a brief description of the collision. In the circumstances I can see no contradiction between this statement and the evidence of Mr Matlali. At best for respondent this aspect is neutral. Counsel for the respondent was constrained to concede that there is no evidential basis for the finding that a gradual movement of the Caravelle took place. In the result, this finding is pure speculation or conjecture. The court *a quo* also erred in relying on a piece of evidence extracted from the wholly unacceptable and rejected evidence of Mr Tsenase.

- [16] It is not disputed that on the version of Mr Matlali there was no negligence on his part. He had no reason to anticipate any danger and a reasonable person in the circumstances would not have done more than what Mr Matlali did to avoid a collision. It follows that the court *a quo* should have found

that the respondent did not prove contributory negligence on the part of the driver of the Toyota. The trial court should therefore have made an order declaring that the collision was caused solely by the negligence of the driver of the Caravelle. Counsel for the appellant asked that the costs of the trial be reserved for later determination.

[17] In the result the following orders are issued:

1. The appeal succeeds with costs.
2. The orders of the trial court are set aside and replaced with an order declaring that the negligence of the driver of Caravelle vehicle with registration number CZG163FS was the sole cause of the collision in question and that the costs of the trial be reserved for later determination.

C. H. G. VAN DER MERWE, J

I concur.

H. M. MUSI, JP

I concur.

S. SINGH, AJ

On behalf of the appellant: Adv. A. Combrink
Instructed by:
Matsepes Inc.
BLOEMFONTEIN

On behalf of the respondent: Adv. C. Ploos van Amstel SC
Instructed by:
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