

**FREE STATE HIGH COURT, BLOEMFONTEIN**  
**REPUBLIC OF SOUTH AFRICA**

Case No. : 302/2010

In the matter between:

**PAUL DUMISANI DLAMINI**

Plaintiff

and

**ROAD ACCIDENT FUND**

Defendant

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**HEARD ON:**

24 MAY 2011

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**DELIVERED ON:**

25 AUGUST 2011

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**KUBUSHI, AJ**

**INTRODUCTION**

[1] The plaintiff is suing the Road Accident Fund for damages for personal bodily injuries which he sustained in a motor vehicle collision. As a result of the said collision he sustained serious injuries and claimed damages in the amount R2 340 562,30 being for general damages, past and future medical costs and past and future loss of earnings.

[2] The defendant denied the allegations of negligence and alleged that the collision was caused by the sole negligence of the plaintiff. In the alternative the defendant pleaded contributory

negligence on the part of the plaintiff in the event the court made a finding that the insured driver was the proximate cause of or contributed to the negligence in the accident.

- [3] At the commencement of the hearing and in accordance with the agreement of the parties and in terms of Rule 33(4) of the Uniform Rules of Court I granted an order separating the merits and the quantum and ordered that the trial proceed on the merits only.
- [4] The plaintiff's counsel handed in a bundle of documents which was admitted in the record as exhibit "A" and a copy of a photo album admitted in the record as exhibit "B". The following documents formed part of Exhibit "A": the accident report from the Warden Police Station dated 12 July 2007; a motor accident claim form completed by FP Logistics in respect of a motor vehicle with registration number FWD 354 NW; a motor accident insurance claim form completed by Provantage (Pty) Ltd in respect of motor vehicle with registration number VKY 232 GP dated 16 July 2007; four photographs showing the motor vehicles after the accident all dated 12 July 2007; an unsigned statement which appears to be that of Mr Madiba, the

insured driver; a statement (in Afrikaans and a translation thereof in English) by sergeant Blanche Augustyn, the police officer who attended the scene of the accident. The documents that were part of Exhibit "B" were the following: a statement made and signed by inspector Tseko Joseph Nzimande, the police officer who took photographs of the scene of the collision; a key to the photographs and plan; a drawn plan of the collision scene; eight copies of the photographs showing the motor vehicles after the accident; a statement by Mr Paul Dumisane Dlamini and a warning statement; and a statement by Mr Shimane Frederick Madiba and a warning statement. The parties agreed that the exhibits were not to be proved in evidence but either party could challenge the contents thereof. The contents of these exhibits were not challenged at the trial.

- [5] The plaintiff's counsel informed me at the beginning of the proceedings that the plaintiff was suffering from amnesia as a result of the injuries sustained in the accident and that he will not be called to testify. The insured driver was called to testify on behalf of the plaintiff. The defence did not call any witnesses and the insured driver was the only witness in this case.

## **FACTUAL BACKGROUND**

[6] On the 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 number FWD 354 NW, driven by Mr S F Madiba (the insured driver), and a Toyota Hilux motor vehicle (the bakkie) with registration number VKY 232 GP, driven by the plaintiff. The bakkie collided with the truck at the back. All three passengers in the bakkie were killed. The plaintiff, sustained serious injuries to the head and suffered amnesia as a result thereof. The defendant was at all material times the insurer of the motor vehicle driven by Mr S F Madiba.

## **THE EVIDENCE**

[7] The insured driver, the only witness in the case, testified that in 2007 he was working as a driver employed by FP Logistics since 2002. He obtained his driver's licence in 1975. On the day of the collision, he was travelling in a Tata Novus truck with registration number FWD 354 NW, from Delmas to Durban. He was carrying a heavy load of light coal. He explained the truck as a big motor vehicle consisting of one chases with two containers thereon. He was travelling along the R101 route,

which was from Delmas and he was to join the N3 highway on his way to Durban. He entered the N3 using a slip road. His testimony was that before he joined the highway he checked his mirrors for oncoming traffic. He noticed two motor vehicles travelling on the highway parallel to each other in the southerly direction i.e in the same direction he was travelling. He then travelled inside the yellow line which was part of the slip road, towards the truck stop that was further up the road to allow the motor vehicles to pass.

- [8] At about 30 – 40 meters into the N3 and still travelling inside the yellow line, he felt the truck jump gear. He changed to the next gear and as this was unusual he looked at his left side mirror and noticed a canopy lying on the side of the road. This appeared strange to him as he had not seen this canopy when he passed the spot where the canopy was lying. He looked at his right side mirror and noticed a white object at the back of the truck. He stopped the truck at the side of the road and went to investigate. At the back of the truck he found that a white Toyota Hilux bakkie had collided with the truck. The bakkie had gone deep under the truck and was attached to the rear end of the truck. The passengers in the bakkie were already dead but

the driver was still alive. According to the witness, at the time when the collision occurred he was travelling at a very slow pace of between 50 – 60 km/h as he was negotiating a steep incline.

- [9] Under cross examination, he testified that there were no stop signs or any signs at the intersection of the R101 and the N3 as it was a slip road. The accident happened in broad day light, the road surface was smooth and dry and there were no obstructions. He drove inside the yellow line because he saw the two motor vehicles driving parallel to each other. He testified that he was considering other road users by allowing the two motor vehicles to pass. He was at that time driving at a speed of 50 – 60 km/h because of the steep incline. He saw no other motor vehicles except the two that passed him. When he entered the N3 he had not seen the bakkie either on the R101 or the N3. Because the trailer was very high even if he could have looked in his rear view mirror he would not have seen the bakkie if the bakkie was driving too close to the back of the truck he was driving. The truck weighed 30 tons and the bakkie was a 1 ton bakkie and was therefore very light as a result he did not feel the impact and was only alerted by the jumping

gears that something was wrong. The road was a Y junction, when coming from the R101 there was a bridge over the N3 and as such he could not see the N3. The slip road was on a steep incline and where the R101 joined the N3 the road curved towards the right.

[10] At the end of the evidence of this witness, the plaintiff's counsel applied for a postponement of the case in order to call an expert witness to testify about accepted perception/reaction times and distances in collision cases. The defendant's counsel opposed the postponement on the grounds that the case was set down well in advance and the plaintiff's counsel was aware that he would require the expert witness but failed to make sure the witness was in attendance. I declined the application on those reasons.

[11] The plaintiff closed his case. The defendant also closed its case without leading evidence. The two counsels addressed me and I made an order that they submit heads of argument. The heads of argument were to be filed on or before the 25 June 2011.

## **THE ARGUMENTS**

### **THE PLAINTIFF**

[12] The plaintiff's counsel argued that in adjudicating the merits the court must consider whether there was negligence on the part of the insured driver and whether or not that negligence was causally connected to the accident. The test, according to him, was that of a reasonable person. 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. The insured driver was driving a very heavy vehicle. His visibility of traffic coming behind him was obscured to some extent.

[13] He contended that a reasonable motorist would have given a right of way to motorists travelling on the N3 and observed other motorists. Every driver was obliged to keep a proper lookout especially as he entered a busy road and there was a heavy duty on him to keep a proper look out in such circumstances, he argued. He maintained that when a heavy motor vehicle, like that of the insured driver, entered a free way – the driver thereof was duty bound to do so without endangering other road users. The insured driver testified that he looked but did not see the plaintiff. He must have seen the



plaintiff's motor vehicle because it must have been on the N3 either with the two motor vehicles or immediately thereafter. According to him, the insured driver was supposed to consider other road users by not entering the high way when it was not opportune to do so. He did not stop and he did not look out, if he had done so, he could have seen the plaintiff because the plaintiff was on the N3.

[14] According to him this was not a simple rear end collision. The motor vehicles in question were not in the traffic and none was stationary. This was a case where a truck was entering a main road and did not have a right of access. The accident happened a short distance after the insured driver entered the main road, the N3, even though it was at the side of the road. He maintained that the truck cut in front of another motor vehicle, namely the plaintiff's bakkie. A truck travels slowly and if it cuts in front of another motor vehicle it poses a danger to that motor vehicle. The truck driver failed to see the bakkie, he must however, have seen it, the collision happened in broad day light as such he did not keep a proper look out. The court must therefore find the insured driver negligent in that he failed to keep a proper look out and that he entered the road at a time

when it was not safe to do so.

- [15] According to the plaintiff's counsel, once negligence had been established the court may then consider contributory negligence and therefore apportion negligence. He conceded that the plaintiff was negligent in that he collided with a large motor vehicle in broad daylight and in circumstances that he should have seen it. The defendant must however prove contributory negligence. According to him it was highly probable that the plaintiff must perhaps have been travelling at 120km/h. With the bakkie travelling at that speed and the truck travelling at a speed of 50 – 60 km/h it would have taken the plaintiff approximately one second to cover that distance and collide with the truck. That would have meant that the plaintiff had only one second to perceive and react to the danger posed by the insured driver's motor vehicle. He submitted that an average person faced with a sudden emergency takes time to react. He or she sees the danger before he or she puts his or her foot on the brakes. It takes one to two seconds to put a foot on the brakes. The plaintiff as such had little or no time to put his foot on the breaks, he stated. But because the truck was travelling slowly the plaintiff ought to have seen it and reduced

speed.

[16] He conceded that there was a degree of contributory negligence to be attributed to the plaintiff. The weight of blame should however be attributed to the insured driver because he created the cause of the accident – he entered the road without making sure that it was safe to do so. The insured driver must be found to be negligent. He requested the court not to allow contributory negligence.

#### THE DEFENDANT

[17] The defendant's counsel in counter argument stated that the *onus* was on the plaintiff to prove on a balance of probabilities that the defendant was negligent. The plaintiff had no recollection of what happened. The only witness was the insured driver. The insured driver testified that he drove inside the yellow line of the road and allowed other motor vehicles to pass. The weather was clear. He observed the road – only two motor vehicles passed. The N3 at that point was a two lane road and the plaintiff, coming from behind the truck, could have easily overtaken the insured motor vehicle on its right. The insured driver was driving slowly and inside the yellow line.

She argued that it could not be said that there was negligence on the part of the insured driver.

[18] According to her, the trailer of the truck was very high and the insured driver would not have been able to see the plaintiff if he was driving too close behind the truck. The plaintiff ought to have foreseen that he was travelling up to the truck and reduced speed. The test for negligence is that it must be foreseen. The insured driver could not have foreseen the accident because he did not see the plaintiff. She contended that where there was a rear end collision an explanation must be given. There was no explanation by the plaintiff as he cannot recall what happened and no other witness was called to show that the defendant was negligent. She argued that the insured driver acted reasonably at all times.

### **THE ISSUE TO BE DECIDED**

[19] At the end of the trial I was faced with two contradictory versions as to how and why the collision occurred and who between the two drivers bore the duty of care towards the other. The only available witness' evidence did not assist me to determine how and why the collision occurred. He did not see

the plaintiff's motor vehicle either before the collision or at the time of the collision. He became aware of the collision only after it had happened. I therefore had to determine the issues on the basis of the reconstruction of the collision by the two counsels when they addressed me.

[20] The plaintiff's counsel presented that at the time of the collision the insured driver was approaching an intersection and as such motorists, including the plaintiff, proceeding along the N3, which was a main road, had a right of way, and the insured driver, coming from a minor road, had a duty to ensure that he entered the main road, namely, the N3 in this instance, at a time when it was safe or opportune to do so. According to him, because the insured driver did not see the bakkie, he failed to keep a proper look out and thereby entered the N3 when it was not safe or opportune to do so. The insured driver, according to him, was therefore the proximate cause of the collision.

[21] The defendant's counsel on the other hand contended that this was a rear end collision and it was expected of the plaintiff to furnish an explanation. The plaintiff, according to her, did not testify and as such failed to provide that explanation. She

argued that at the time of the collision, the plaintiff had a general duty to act reasonably and a particular duty to regulate his speed in relation to his range of vision. According to her, the plaintiff ought to have seen the truck and reduced his speed. The truck, having been described as a cumbersome vehicle, must have been visible from a reasonable distance, the collision happened in broad day light and there was nothing which could have caused the plaintiff not to see the truck and reduced speed.

- [22] The following facts are common cause, namely, that the plaintiff suffered amnesia and could not testify at the trial; the insured driver was the only witness to the incident; the plaintiff's motor vehicle collided with the insured driver's motor vehicle at the back and was embedded in the truck; the truck was a cumbersome motor vehicle with two containers on a single chassis and weighed 30 tons; at the time of the collision the insured driver was entering the N3 highway through a slip road from the R101 road travelling at a speed of 50 -60 km/h because the slip road had a steep incline; the collision occurred in broad day light and there were no obstructions; the insured driver was alerted of the collision when the truck jumped gear

and he did not see the bakkie either before or at the time of the collision.

[23] Based on the above, I had to determine whether or not the plaintiff had proved negligence on a balance of probabilities against the defendant. If so, to determine whether or not there was any contributory negligence on the part of the plaintiff.

## **PROOF OF NEGLIGENCE**

[24] It is trite that the *onus* of proving negligence on a balance of probabilities rests with the plaintiff. In this instance so too the plaintiff was expected to prove negligence against the defendant on a balance of probabilities. See **MONTOELI v WOOLWORTHS (PTY) LTD** 2000 (4) SA 735 WLD at 742C. The court in **KRUGER v COETZEE** 1966 (2) SA 428 (A) at 430E – H set out the test for proving negligence as follows:

“For the purposes of liability *culpa* arises if –

- (a) a *diligens paterfamilias* in the position of the defendant –
  - (i) would have foreseen the reasonable possibility of the conduct injuring another in his or her person or property and causing him or her patrimonial loss; and

(ii) would take reasonable steps to guard against such occurrence; and that

b) the defendant failed to take such steps.

Whether a *diligens paterfamilias* in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend upon the particular circumstances of each case, no hard and fast basis can be laid down.”

[25] The question to be asked was whether the insured driver had foreseen the reasonable possibility of his action, entering the carriageway as he did, injuring another person and if so, whether he took reasonable steps to guard against such an occurrence. The plaintiff’s counsel presupposed that the plaintiff must have been travelling on the N3 at the time of the collision and that as the insured driver did not keep a proper lookout, he did not see the bakkie, he entered the road and cut in the path of the on coming bakkie and caused the collision.

[26] I agree with him, both motor vehicles must have been travelling on the N3 carriageway at the time of the collision. The evidence was that the bakkie collided with the truck from the back. It went deep under the truck and was attached to the rear end of the truck. The wreck of the bakkie, as depicted in



the photograph, was squashed and extensively damaged. The extensive damage to the bakkie and the fact that it was deeply embedded in the back of the truck indicated the extent of the force of the impact. It suggested to me that the bakkie must have been travelling at a very high speed. The legal speed limit on a highway like the N3 is 120km/h. One can safely assume that the plaintiff was travelling at that speed. However, because of the extensive damage caused to the bakkie and the fact that it went deep under the truck, a possibility existed that he might have even been travelling at a speed higher than 120km/h. If that was the case, at that speed the plaintiff could not have been travelling along the R101. The collision happened on the N3 and if he had joined the N3, from the R101, using the slip road as the insured driver did, he would have been forced to reduce speed. I find therefore that at the time of the collision the bakkie must have been travelling along the N3.

[27] Besides the evidence of the insured driver I also relied on the exhibits that were admitted in the record. I relied mainly on the photographs which the plaintiff's counsel referred the insured

driver to when leading him in his evidence in chief. The photographs were part of exhibit "A". There were four photographs in all. The first photograph (photo 1), in black and white, was on page 12 and showed the bakkie embedded at the back of the truck; the second photograph (photo 2), also in black and white, on page 13, showed a trailer at the side of the road; the third photograph (photo 3) in colour, was on page 14 also showed a trailer on the side of the road; and the last photograph (photo 4), in colour, also on page 14 showed the bakkie embedded at the back of the truck.

[28] Photo 4 was the one that caught my attention. It showed the truck standing inside the yellow line with the bakkie embedded at the back. The truck's trailer was painted bright red. The bakkie was embedded more towards the right side of the truck and with its rear right wheel resting outside the yellow line on the carriageway. There were two people, most properly the emergency crew, standing behind the truck next to the left front side of the bakkie. This space where the two people were standing indicated that the impact was more to the right side of the truck. The left side of the bakkie was the one that collided with the truck and perhaps that was the reason why the

passengers were killed.

[29] The photograph showed the place where and the position in which the truck came to stop when the insured driver wanted to investigate “the white thing” at the back of the truck. The position at which the bakkie came to stop, as depicted in the photograph, suggested to me that, at the time of the collision, the truck must have been travelling, or that the greater part of the body of the truck was in the carriageway, and not inside the yellow line as the insured driver testified. My view is that sometime before the collision occurred the insured driver must have protruded onto the carriageway. If the insured driver was travelling inside the yellow line, like he testified, I cannot fathom how the bakkie could have collided with the truck. If he was travelling as he said he was, there could have been enough space for the bakkie to pass without colliding with the truck. I found his version of events in this regard improbable and concluded that at the time of the collision the bakkie must also have been travelling on the carriageway.

[30] The insured driver, to my mind, was already travelling on the carriageway at the time of the collision. The evidence before

me was that the insured driver did not see the bakkie at all. But the bakkie was somewhere on the N3. The insured driver's testimony was also that the road formed a Y junction and when coming from the R101 there was a bridge over the N3 and as such he could not see the N3. The slip road was on a steep incline and where the R101 joined the N3 the road curved towards the right. This curve and the steep incline, in my opinion, might be the reason why he did not see the bakkie. At the time the truck entered the carriageway the bakkie must have still been somewhere down the curve and/or the incline and the insured driver would not have seen it. Failure to see the bakkie did not absolve the insured driver from his duty to keep a proper look out. He cannot, in my view, be exculpated from blame simply because he did not see the bakkie. In the **SIKO v SANTAM INSURANCE CO LTD** 1979 (2) SA 687 (SECLD) judgment at 694F – H, the honourable Addleson J stated the following:

“I can envisage no circumstances where a driver is totally relieved of his duty to keep a proper look-out. There may well be circumstances where his duty is not as onerous or stringent as in other cases...”

[31] This is one of the cases where the duty to keep a proper look out was onerous. The insured driver was supposed to have been more cautious. In his own words, from where he was travelling he could not see the N3. He had travelled only about 30 – 40m into the N3 when he felt the gear jump. It means he had just entered the carriageway when the collision occurred. It is thus evidently clear that he did not keep a proper look out. He entered the carriageway too close to the curve. A reasonable man in his position would have travelled further, say about 100 – 200m, inside the yellow line before entering the carriageway. He should have made sure that he sees 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. My view is therefore, that by entering the carriageway as he did, he should have foreseen that his action could endanger other road users and should therefore have been more cautious. In the circumstances, to my mind, the insured driver was negligent in entering the carriageway as he did and failing to keep a proper look out and that that negligence was a cause of this collision.

[32] The plaintiff, however, contributed to the negligence. He failed to avoid the collision when he could have done so. He must have been travelling as I have already indicated at a very high speed and had little or no time to put his foot on the breaks to stop the bakkie in time to avoid the collision. He should have seen the truck though, it was broad day light, the truck was said to have been a cumbersome motor vehicle and it was painted bright red. There were no obstructions along the road which could have obscured his view. The truck was travelling very slowly he ought to have seen it and reduced speed. A reasonable driver negotiating a road is obliged to avoid harm to other road users by driving at a speed commensurate with his or her vision and ability to stop timeously.

[33] The plaintiff's counsel referred me to the case of **EKSTEEN v GOTZE** 1979 (2) SA 1141 (CPD) as a guide to me to apportion fault against the parties in this instance. The apportionment in that decision was assessed at 90% to 10% because the court found the negligence of the plaintiff to be not great. I am, however, of the view that the plaintiff's negligence in this instance was quite extensive and should therefore be commensurate. Having taken all the circumstances of this case

into consideration, my view is that the plaintiff's degree of negligence should be assessed at 20%.

[34] Ordinarily costs should follow the successful party. I see no reason why even in this case it should not be so. The plaintiff is thus entitled to his costs.

[35] In the circumstances I make the following order:

1. The plaintiff's claim succeeds to the extent of 80% negligence on the part of the defendant.
2. The defendant is ordered to pay the costs to the extent of 80%.

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**E.M. KUBUSHI, AJ**

On behalf of the plaintiff:

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On behalf of the defendant:

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