

**IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA**

CASE NO. AR 75/2010

In the matter between:

ZAHEEDA VATHER	FIRST APPELLANT
ZAHEEDA VATHER obo Layyah Vather	SECOND APPELLANT
ZAHEEDA VATHER obo Jahaan Vather	THIRD APPELLANT
ZAHEEDA VATHER obo Riyah Vather	FOURTH APPELLANT

and

ROAD ACCIDENT FUND	RESPONDENT
---------------------------	-------------------

APPEAL JUDGMENT Delivered on 30 August 2011

KRUGER J

[1] This is an appeal against the Judgment of Niles-Dunér J dismissing the plaintiff's claim against the defendant, with costs.

[2] It is common cause that a collision occurred during the early hours of the morning of 18 August 2001 when a Volkswagen Golf, driven by the deceased, struck the rear of a refuse removal truck driven by the insured driver. It is also common cause that the collision occurred upon the right hand lane of two lanes travelling in

the same direction along the Old Greytown Road, Pietermaritzburg. It is also common cause that the deceased driver was negligent in that he was travelling too fast. The only issue to be determined was whether the insured driver was also causally negligent.

[3] The plaintiff's claim was based essentially on the evidence of the witness Nivigasen Naidoo. Mr. Naidoo alleged that he was travelling behind the refuse removal truck when it suddenly changed lanes into the path of the Volkswagen Golf motor vehicle. The Court *a quo* considered and analysed, in detail, the evidence of Naidoo and concluded that his evidence was improbable. The Court *a quo* also expressed a doubt as to whether Mr. Naidoo witnessed the collision or was travelling along the road at the time the collision took place.

[4] The Court *a quo* found the evidence of Mr. Naidoo wanting for three reasons:

- a) he did not see the indicators or revolving light on the refuse truck,
- b) he was reluctant to overtake the refuse truck on its right and travelled behind it; and
- c) he did not follow up the matter with the police.

[5] Mr. Naidoo initially testified that he could not remember whether or not the yellow rotating light on the bin of the truck had been switched on. He later changed his testimony and stated that he could not dispute that the yellow rotating light was on at the time

and also could not dispute that the hazard lights had been on as well. As the trial progressed he became all the more certain that neither the hazard lights nor the rotating light on the bin of the truck were switched on. This however is in contrast with the evidence of the insured driver, Mr. Lucky Mngwevu, who testified that the yellow rotating light on top of the vehicle automatically illuminates when the vehicle's ignition is switched on. Indeed the photographs tendered in evidence show that the light was still on when the police officers arrived at the scene and took the necessary photographs. Counsel for the appellant has conceded that the lights were indeed on and that Mr. Naidoo was incorrect in his evidence. However he has submitted that because of Mr. Naidoo's uncertainty on this aspect, the Court was wrong in concluding that there was a possibility that Mr. Naidoo did not witness the collision.

[6] The Court *a quo* also did not accept Mr. Naidoo's version that he travelled behind the refuse removal truck as the driver of the truck appeared not to be very steady on the steering, "in the sense that he was straddling the lines and he was moving to the extreme left". This was repeated during cross-examination when he testified that ordinarily he would have overtaken the truck but because of the way in which the truck was driving, he decided to drive slowly behind it. The Court *a quo* found that his evidence in this regard was improbable. I agree with the conclusions of the Court *a quo* for, *inter alia*, the following reasons:

- a) Mr. Naidoo was driving a Mercedes-Benz 220 motor vehicle and could easily have overtaken the refuse removal truck on the right hand lane which was free at the time.

- b) It was not his evidence that the refuse removal truck was straddling the centre lane or encroaching upon the right hand lane which made him nervous to overtake.
- c) He testified that he travelled behind the truck for a distance of approximately two hundred and fifty or three hundred metres and was prepared to continue travelling behind it in the left hand lane as he had another two kilometres to travel to reach his destination.
- d) The speed travelled by the refuse removal truck was approximately forty to fifty kilometres per hour. Mr. Naidoo had to accordingly reduce his speed in order to maintain a safe travelling distance behind the refuse removal truck.
- e) Notwithstanding his reluctance to overtake the refuse truck, when it moved into the right hand lane, he decided to overtake the truck on the left and accelerated to do so.

[7] Mr. Naidoo's evidence was also criticized regarding the manner in which he behaved after the collision. He testified that he returned to the scene and remained there for only approximately five minutes. During this time he identified himself to a police officer and gave a police officer his details, stating that he was a witness. He could not remember the policeman's name but averred that he was never contacted by the police again. He however found out later on the same day that the driver of the vehicle had died and yet did not make any follow up enquiries at the police station. The Court *a quo*

had difficulty in accepting that Mr. Naidoo did not bother to enquire about the collision for a period of six years but immediately responded when he read an article in the newspaper. Counsel for the appellant has argued that his behaviour in this regard ought not to be criticized as it is rare for witnesses to follow up matters with the police. I am of the view that the Court *a quo* was correct in disregarding his evidence on this score, more especially in the light of his evidence that the police officer to whom he reported, did not write anything down. One wonders how then he would have expected the police to contact him. When he learnt of the death of the deceased, and knowing that the policeman did not write down his details, one would have expected him to report to the police station to ensure that his details were recorded and that his statement was taken.

[8] Perhaps the most improbable aspect of his testimony was his evidence that he overtook the refuse removal truck, on the left hand side, after the collision had taken place. If one has regard to the report of the expert witness, Mrs. Wilna Badenhorst, the following emerges:

- a) The Volkswagen Golf was driving in the right hand lane and swerved to the left immediately prior to the collision occurring.
- b) The area of impact is close to the broken barrier line that divides the left hand east bound lane from the right hand east bound lane.

- c) The Golf collided with its right front against the left rear of the truck.
- d) The Golf came to rest on the extreme left hand side of the left hand east bound lane almost opposite the area of impact (my underlining).

If the accident happened in the manner described by Ms Badenhorst (as is the plaintiff's claim) the question then arises how did Mr. Naidoo escape being involved in the collision? Indeed it is improbable if not impossible for him to have avoided the collision. It is also highly improbable and impossible that he would have been able to overtake the refuse removal truck on its left after the collision. His explanation for this was that he believed that the truck driver was trying to get away because the truck did not stop immediately after the collision but stopped a few metres ahead. In this regard he "accelerated" and "shot past him" as the truck was still continuing. This, in my opinion, reinforces the finding of the Court *a quo* that either Mr. Naidoo was not present or the accident did not occur in the manner in which he described. I am accordingly of the view that the Court *a quo* was correct in rejecting his version.

[9] Having reached this conclusion and as there is no conflicting evidence to gainsay that of the insured driver, the Court *a quo* was correct in concluding that there was no basis upon which the insured driver's evidence could be rejected and that there was absolutely nothing which he could have done to avoid the collision. Accordingly, I agree with the finding of the Court *a quo* that the plaintiff has failed to prove any causal negligence on behalf of the insured driver.

[10] I accordingly make the following order:

The appeal is dismissed with costs, such costs to include the costs incurred consequent upon the employment of two Counsel.

KRUGER J

I agree

GORVEN J

I agree

LOPES J

Appearances/

Appearances

For the Appellant : Mr J Marais S C with
Mr V Naidoo

Instructed by : Chetty Asmall & Maharaj
Pietermaritzburg

For the Respondent : Mr M G Roberts with
Mr. C. Snyman

Instructed by : Tomlinson Mnguni James
Pietermaritzburg

Date of Hearing : 22 August 2011

Date of Judgment : 30 August 2011

