

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 5674/2008

In the matter between:-

C G THEBE

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

HEARD ON:

26 JANUARY 2010

JUDGMENT BY:

MOLEMELA, J

DELIVERED ON:

29 JANUARY 2010

[1] The plaintiff's claim arises out of a head-on collision that occurred between two motor vehicles in Bloemfontein in the early hours of the 12th February 2005. At the time of the accident one vehicle was being driven by Mr Chabane (referred to in the summons as "the first insured driver"), while the other vehicle was driven by Mr. Claasen (referred to in the summons as "the second insured driver"). The plaintiff is the mother of a minor child whose biological father was fatally injured while he

was a passenger in Mr. Claasen's vehicle. The claim is in respect of the child's loss of support.

[2] On the night in question, the 2 (two) aforementioned vehicles were travelling in opposite directions in Dr. Belcher Road, which is a dual road. Mr. Chabane's vehicle was travelling ifrom west to east while Mr. Claasen's vehicle was travelling in the same road from east to west.

[3] In her particulars of claim, the plaintiff alleges that the accident was caused due to the exclusive negligence of one of the aforementioned drivers, alternatively due to the contributory negligence of both drivers. The plaintiff is accordingly claiming for payment of R25 000,00 plus interest and costs, alternatively R230 424,00 plus interest and costs.

[4] At the commencement of the proceedings counsel for the plaintiff, Mr. Cilliers, applied for a separation of the merits (liability) from quantum. This application was unopposed and was duly granted. Mr. Cilliers placed on record that the

defendant was admitting that the minor child was the biological child of the deceased and that the deceased was liable for the child's maintenance. This was confirmed by the defendant's counsel, viz adv Frosch. It is common cause that the defendant had, subsequent to the filing of its plea, admitted in its response to the rule 37(4) questionnaire that the deceased (Mr Smith) was a passenger in Mr. Claasen's motor vehicle and that his death was caused as a result of the fatal injuries he sustained in the accident.

- [5] Mr. Chabane testified on behalf of the plaintiff and Mr. Claasen, on behalf of the defendant. Mr. Chabane's evidence can be summarised as follows. On the night in question he was driving in an easterly direction in Dr. Belcher Road. Dr. Belcher Street is a dual road and he (Mr. Chabane) was driving in the lane closest to the barrier line. Another vehicle was travelling in the same direction as his vehicle. It was a short distance behind his vehicle but was on the left lane. He normally drives slowly in the township and was thus driving "normally" on the night in question. As he was driving he noticed a vehicle travelling in

the opposite direction. The lights of this oncoming vehicle were on high beam (i.e. in bright lights). The light of his own vehicle were on low-beam (dim). At that stage, he was unable to estimate how far this oncoming vehicle was away from his vehicle at that stage as its bright lights were blinding him. He then flashed his lights to this approaching vehicle to signal to its driver that he should his vehicle's lights. He then noticed that this oncoming vehicle was veering to the lane in which he was travelling. He testified that he would not be able to estimate how far this vehicle was from his when it started veering into his own lane. Upon seeing this vehicle veering to his own lane, he applied the brakes slightly. A collision occurred. He lost consciousness and only regained it at the hospital.

- [6] Mr. Claasen's testimony was that on the night in question he was driving in the westerly direction in Dr. Belcher Road. He was in the company of the deceased. The road was an open road and he could see several cars from the direction of oncoming traffic. The weather was fine as it was not raining, but the road was dark. He was travelling on the lane closest to

the barrier line. As he approached a curve, he saw an Iveco bus travelling on the incorrect side of the road in that although it was from the direction of oncoming traffic, it was in the lane in which he was travelling. He testified that he could not estimate how far it was from his vehicle when he first saw it, but it was not far. He swerved to the right in order to avoid colliding with the Iveco bus. Immediately after swerving to the right there was an impact. At the point of impact he was under the impression that his vehicle had collided with the Iveco bus. He only learnt at a later stage that his car had in fact collided with Mr. Chabane's vehicle and not the Iveco bus. On the night in question he had not seen Mr. Chabane's vehicle at or near the scene at all. Under cross-examination he was asked whether there was anything that prevented him from swerving to the left to avoid the accident, instead of swerving to the side of oncoming traffic. He responded as follows:

"Nothing prevented me from swerving to the left but at that point in time I swerved the vehicle to the right."

- [7] It is trite law that for liability based on negligence to be established the standard used is that of a reasonable man in

the position of the defendant. Furthermore the duty to prove such negligence rests on the plaintiff. In a claim such as the present the plaintiff would have to prove this standard was not met by the driver(s) concerned. She would have not only to prove the defendant's negligence, but that such negligence on the part of the relevant driver(s) had caused the accident in which the fatal injuries were sustained. It is also trite law that each case is judged on its own facts.

- [8] Adv. Frosch, argued that the versions of Mr. Chabane and Mr. Claasen were mutually destructive and that Mr. Claasen could not have had any contributory negligence as the accident was apparently caused by the negligence of the driver of the Iveco bus. She argued that the correct order to make in this matter would be to grant absolution from the instance as no negligence had been proven in respect of both drivers. Adv. Cilliers argued that Mr. Claasen's evidence had already been conceded in the plea and thus the only issue for this court to consider was whether any contributory negligence could be

attributed to Mr Chabane or not. I think it is apt to, at this stage consider the defendant's plea.

[9] In paragraph 4.1 of the plea the defendant pleaded as follows:

“In the event of the above Honourable Court finding that Basie Jeffrey Smith (hereinafter referred to as ‘the deceased’) was a passenger in motor vehicle bearing registration CVM958FS [i.e. driven by Mr. Claasen] and that the deceased passed away as a result of the collision as alleged by the plaintiff (all of which is still denied), then and in that event the defendant denies that the driver of the insured vehicle (hereinafter referred to as ‘the insured driver’) was negligent, either as alleged by the plaintiff or at all and avers that the collision occurred as a result of the sole negligence of the driver of motor vehicle bearing registration CVM958FS, him being negligent in one or more or all of the following respects:”

[10] The defendant furthermore pleaded as follows at paragraph 6.1 of its plea:

“In the event of the above Honourable Court finding that the deceased was a passenger in motor vehicle bearing registration CVM958FS and

that the deceased passed away as a result of the collision as alleged by the plaintiff (all of which is still denied), then and in that event the defendant admits that the collision occurred as a result of the sole negligence of the driver of motor vehicle bearing registration CVM958FS, him being negligent in one of more or all of the following respects:" (my own underlining).

[11] When one considers the plea in conjunction with the admissions made in the rule 37(4) response as well as verbally in court, then there is no room for any interpretation save that of a concession in respect of Mr. Claasen's negligence was made by the defendant. I therefore agree with Adv. Cilliers' contention that Mr. Claasen's negligence has been conceded by the defendant. Even if I were wrong in this regard, I would agree with Mr Cilliers' contention that Mr. Claasen, in his own evidence, in any event conceded to having been negligent when he admitted to having swerved to the incorrect side of the road (i.e. in the lane of oncoming traffic) and that he did so even though nothing prevented him from swerving to the left. On his own version, he clearly executed a dangerous manoeuvre without satisfying himself of the presence of other

traffic. I am persuaded that he was negligent to the extent as set out in the particulars of claim. See **BURGER v SANTAM VERSEKERINGSMAATSKAPPY BPK** 1981 (2) SA 703 (A).

[12] I must say I do not have any strong criticism relating to the credibility of either Mr Chabane or Mr Claasen. Although Mr. Chabane was visibly impatient towards the end of his evidence, this does not detract from the fact that he impressed me as an honest and credible witness. I must however point out that the version put forward by Mr Claasen pertaining to the events immediately preceding the collision is highly improbable. He testified about an Iveco bus that was travelling on his side of the road just moments before the collision. He also testified that at no stage did he see Mr Chabane's vehicle. The fact that his vehicle collided with that of Mr Chabane confirms that Mr Chabane's vehicle was indeed at the scene. The inevitable question is why he did not notice Mr Chabane's vehicle when it was indeed at the scene. Given Mr Claasen's testimony to the effect that at the point of impact he actually believed that his vehicle was colliding with the Iveco bus, one would then have

expected the Iveco bus to have been involved in the same accident as a third vehicle, given its close proximity to Mr Claasen's vehicle. It is simply improbable that Mr Claasen's vehicle would not have collided against any portion of the Iveco bus when that bus was allegedly in such close proximity. On probabilities, Mr Claasen was not keeping a proper look-out and failed to observe that he was driving in Mr Chabane's lane. With respect, I think the existence of an Iveco bus at the scene of the accident is just a figment of Mr Claasen's imagination. In my view, if the said bus was in such close proximity to Mr. Claasen's vehicle, then it, too would have been involved in the accident.

[13] Mr Cilliers argued that Mr Chabane's negligence pertains to his failure to immediately apply his brakes and slow down once he was blinded by the lights of the oncoming vehicle. As authority for his proposition he relied on the cases of FLANDERS AND ANOTHER v TRANS ZAMBEZI EXPRESS (PTY) LTD AND ANOTHER 2009

(4) SA 192 (SCA); TRENCOR SERVICES (EDMS BPK)

V LOOTS & LOOTS 7 ANDERE 2001(1) SA 324 (NC); S

V VAN DEVENTER 1963 (2) SA 475 (A). None of the

afore-said cases are on all fours with the case at hand.

None of the collisions referred to in those cases were

head-on. The critical difference in the facts is that Mr

Chabane did not collide into an object that was stationary

in his path, having failed to observe it timeously because

of being blinded by the bright lights of an oncoming car.

Although he was blinded by the lights, he could still see

the road ahead. He was thus not completely blinded and

that is why he was able to notice that the oncoming car

had started veering into his lane. When he noticed this

car veering onto his side of the road, he immediately

applied his brakes to reduce speed. In my view, the fact

that he testified that he applied the brakes lightly instead

of fully is neither here nor there when consideration is

paid to the fact that the collision occurred while he was

still applying the brakes. Sight must also not be lost of the

fact that he collided against a vehicle that was

approaching and not a stationary vehicle. Furthermore, such a vehicle was on the incorrect side of the road. I cannot agree with adv Cilliers' postulation that the accident could have been prevented if the brakes had been applied fully and not slightly. For such a conclusion to be reached, evidence would have to be led about the speed of the respective vehicles immediately before the accident and of course a reliable estimation of the distance between the vehicles when the drivers first had sight of each other's vehicles as well as the time that elapsed between the first sighting and the collision. I have no such evidence before me.

- [14] The impression that I have from the evidence is that Mr Chabane did not drive for any appreciable distance between the time he first saw the oncoming vehicle's bright lights and the time of the collision. Without reliable evidence as to velocity and distance, any conclusion about the effect of the difference in the force applied to the brakes would be based on nothing but conjecture. As

I see the facts, there is nothing that a reasonable man in Mr Chabane's position could have done to avoid the accident. A driver is not expected to anticipate that another driver will veer off from his correct side of the road for no apparent reason. In my view, there is no negligence that can be ascribed to Mr Chabane. I am thus satisfied that the defendant has not discharged its burden of proving any negligence against Mr. Chabane.

[15] On account of all the abovementioned circumstances, I find that the accident was caused by the exclusive negligence of Mr. Claasen.

[16] With regards to costs, Adv. Frosch argued that the defendant had made a tender the day preceding the hearing and that such tender was not accepted by the plaintiff. She contended that the plaintiff was therefore not entitled to the costs of the hearing. Adv Cilliers submitted that the aspect of the tender would only become relevant after judgment, at the stage of the taxation of the bill of

costs. Since I was not provided with any details pertaining to the nature of the tender that was made, I am of the view that the issue of costs should rather stand over for consideration together with the quantum at a later stage.

17. I therefore make the following order:

17.1. The accident was caused as a result of the exclusive negligence of Mr Claasen.

M.B. MOLEMELA, J

On behalf of the plaintiff:

Adv. Cilliers
Instructed by:

BLOEMFONTEIN

On behalf of the defendant:

Adv. Frosch
Instructed by:

BLOEMFONTEIN