

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 802/2007

In the case between:

STEFANUS JOSUA BENJAMIN VAN DER
MERWE

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

JUDGMENT: VAN DER MERWE, J

HEARD ON: 26, 27 and 29 JANUARY 2010

DELIVERED ON: 18 FEBRUARY 2010

[1] This is an action for damages instituted in terms of the Road Accident Fund Act, no. 56 of 1996. At the commencement of the trial an order in terms of Rule 33(4) was made by agreement between the parties. The effect of this order was that only the issue of negligence was to be determined initially and that all other issues stood over for later determination, if necessary.

[2] It is common cause between the parties that at approximately midnight on 2/3 February 2003 a collision took place between a Volkswagen Golf vehicle ("the Golf") and a Ford pick-up ("the Ford"). The Golf and the Ford approached each other from opposite directions on a dark but dry night on a straight and level portion of the tarred road between Frankfort and Villiers. This road has one lane for traffic in each direction with a broken line in the centre of the road. The towns of Frankfort and Villiers are approximately 34km apart. The collision took place approximately 10km from Frankfort in the direction of Villiers. The Golf was a marked police vehicle driven by the plaintiff in a northerly direction in the direction of Villiers. Sergeant (then Constable) Jacobus Petrus Carelzen and Mr Nkosinate Jim Rabede were passengers in the Golf. The Ford was driven by Mr Jan Molahlehi Gatebe in the opposite direction, that is in the direction of Frankfort. Mr Piet Makanda at the time was a passenger in the Ford. The Ford incidentally belonged to a police officer stationed at Frankfort, namely Inspector Sampie Motloun.

- [3] The plaintiff testified that he is an inspector in the South African Police Service (“SAPS”) stationed at Villiers. On the evening in question he travelled with Sergeant Carelzen with the Golf from Villiers to Kroonstad in order to transport Mr Radebe, who was then a prisoner, from Kroonstad to Villiers. On the way to Kroonstad he heard an unusual sound emanating from the vehicle, but upon inspection he could find nothing wrong. As a result, however, on the way back to Villiers, he drove at the reduced speed of approximately 80km/h. Whilst approaching Frankfort he received a telephone call on his cellphone from his station commander at Villiers, namely inspector Ludick. Inspector Ludick inquired as to the whereabouts of the plaintiff and his passengers. According to the cellphone records of the plaintiff, handed in without objection and confirmed by the plaintiff, this call was received by the plaintiff on his cellphone from the Villiers Police Station number at 23h40 and lasted for 30 seconds. After concluding this call the plaintiff placed his cellphone in his right trouser pocket. The next thing that the plaintiff remembers is that he was lying injured on the tar road.

The plaintiff has no recollection of how the collision occurred.

[4] The aforesaid Inspector Gert Jacobus Ludick confirmed that he made the telephone call to the plaintiff. He testified that upon enquiry the plaintiff said that they were close to the Wilge River, that is about 2km before Frankfort from Kroonstad. Inspector Ludick testified that this conversation was ended normally and that it was not interrupted by a collision taking place.

[5] Sergeant Jacobus Petrus Carelzen confirmed the evidence of the plaintiff, including the evidence in respect of the telephone call received from Inspector Ludick. He testified that thereafter he closed his eyes in order to rest. He said that he then heard the sound of the hooter of the Golf as well as the plaintiff cursing and immediately thereafter the collision took place. He was unable to say which vehicle was on its incorrect side of the road. He testified that after the collision the plaintiff was unconscious in the Golf. Sergeant Carelzen did not at the time have a cellular phone. He then removed the cellular phone of the plaintiff

from the latter's right trouser pocket and called the emergency number 10111. The aforesaid cellphone records of the plaintiff's cellphone confirm that this number was called at 23h59 on 2 February 2003 and that the call lasted 44 seconds. After this call, Sergeant Carelzen removed the plaintiff from the vehicle so that the plaintiff lay on the tar surface of the road.

- [6] Mr David Anthony Nigel Gibb was called by the plaintiff as an expert witness in respect of reconstruction of accidents. I do not find it necessary to refer to the evidence of Mr Gibb in respect of his reconstruction of the collision. It suffices to say that Mr Gibb conceded that it is very difficult to make any inference from the movements of vehicles after a collision, especially when the respective speeds of the vehicles are not known. What is important though, is the following, as explained by Mr Gibb. It is common cause between the parties that essentially a head-on collision took place. The first impact of the collision on both vehicles must therefore have been on the right front parts thereof. As is depicted clearly on the photographs of the damaged vehicles, the first impact involved approximately one third

of the right front part of the Ford but only a limited part of the right front part of the Golf, so much so that even the right front headlamp of the Golf was to a large extent still intact. From these objective facts it follows as a matter of logic that the collision could only have taken place whilst the Ford was angled to its right towards the Golf. From this follows that the two vehicles could not each have been travelling virtually straight, albeit with one of them over the middle line, because then the extent of the first impact damage on the Golf would have been similar to that on the Ford. It also follows that the collision could not have taken place whilst the Golf was angled towards its right towards the Ford travelling straight in its lane. Such collision is in turn incompatible with the extent of the first impact damage on the Ford.

- [7] Mr J M Gatebe was the first witness for the defendant. He borrowed the Ford from Inspector Motloun. At about 5pm on the day in question he travelled from Frankfort to Secunda in order to take his brother to Secunda. He was accompanied by Mr Piet Makanda. On his way back to Frankfort at about midnight, he saw the lights of a vehicle

approaching from the opposite direction, that is from Frankfort to Villiers. The headlights of this vehicle were on bright. He then switched the headlights of the Ford to bright and dim in succession in order to indicate to the oncoming vehicle to dim its lights. The headlights of this vehicle however remained on bright. He was to some extent blinded by the headlights of this oncoming vehicle. He travelled at approximately 80km/h as he used to do. He reduced the speed of the vehicle somewhat by releasing the accelerator a bit but with his foot remaining on the accelerator. He however kept on driving approximately 50cm from the centre line of the road. According to the evidence of Mr Gatebe, as was also put to the plaintiff, the Golf must have travelled over the centre line of the road on its incorrect side of the road for some time. It was therefore not the evidence of Mr Gatebe that the Golf suddenly or at the last moment swerved to its right over the centre line.

- [8] Mr Makanda confirmed the evidence of Mr Gatebe except for the following. According to Mr Makanda the Golf swerved to its right over the centre line immediately before the collision and that caused the collision. He also testified that

although even he was blinded by the bright headlights of the oncoming vehicle, the Ford continued travelling straight approximately 30cm from the centre line.

- [9] The defendant then called Inspector Lucas Mokhutu Mokoena of the SAPS stationed at Frankfort. During the night in question, he was on patrol duty with Inspector Sampie Motlounq. As a result of a report received the two of them proceeded to the scene of the collision, where they were the first to arrive. According to Inspector Mokoena pieces of broken glass from a headlight or headlights lying in the lane of the road leading towards Frankfort only, clearly indicated that the area of impact was in that lane, in other words in the lane in which the Ford travelled. He marked an area of impact on that side of the centre line by making a mark on the tar with a stick. He also said that he saw gouge marks of the type that would be made by the chassis of a vehicle and not the tyres thereof. He said that three or four gouge marks, leading from the area of impact towards Frankfort and towards where the Ford came to a standstill approximately in the middle of the road, were clearly visible. He said that each of these gouge marks

were each approximately 15mm deep and approximately 10cm long and 5cm wide. He was then shown a police photo plan forming part of exhibit "C". He said that he pointed out the points depicted thereon to the police photographer and pointed out that he is indeed himself depicted on the photograph. He said that the mark that he made with the stick to indicate the area of impact on the incorrect side of the road of the Golf, was clearly visible and that he pointed that out to the photographer who then was standing next to him. He said that he did not notice then and could not explain why the photographer placed the cone indicating the area of the impact on the other side of the road, that is in the lane leading to Villiers in which the Golf travelled before the collision. He also said that he pointed out the aforesaid gouge marks to the photographer. According to this witness it was clear to him that the area of impact was on the incorrect side of the road of the Golf. Although he regarded this as an important aspect, he did not mention it his police statement made on 3 February 2003.

[10] Mr Radebe, the prisoner transported from Kroonstad in the Golf, testified that on the way the plaintiff spoke on his cellphone on several occasions. He said that the plaintiff was driving at “a higher speed”. He also said that every time that the plaintiff spoke on the cellphone the vehicle was not steady but moved to the left or the right. He said that he does not deny that the cellphone of the plaintiff was taken from the trouser pocket of the plaintiff after the collision. He also said that he could not say that the driver was speaking on his cellphone at the time of the collision.

[11] It is clear that the plaintiff anticipated that the defendant’s case would be that whilst talking on the cellphone with only one hand on the steering wheel, the Golf moved to its right over the centre line causing the collision whilst the plaintiff was still speaking on the cellphone. It was indeed put to the plaintiff during cross-examination that that would be the evidence of Mr Radebe. As was pointed out already, in the end that was not evidence of Mr Radebe. The evidence of Mr Radebe that the plaintiff spoke on his cellphone on several occasions, resulting in erratic driving, is contradicted by the objective cellphone record evidence

indicating that there was no activity on the plaintiff's cellphone for more than an hour and a half before 23h40. I accept the evidence of Inspector Ludick that the call made by him to the plaintiff at 23h40, lasting 30 seconds, ended normally. I accept the evidence of Sergeant Carelzen that he retrieved the cellphone from the right trouser pocket of the plaintiff after the collision, which is a strong indication that the plaintiff was not talking on the phone when the collision took place. I accept the evidence of Sergeant Carelzen that he made next the call recorded on the plaintiff's cellphone records, namely to the emergency number at 23h59. I find that the collision was not the result of the plaintiff speaking on his cellphone at the time.

- [12] The evidence of Inspector Mokoena to the effect that the area of impact was clearly in the lane towards Frankfort, that is on the incorrect side of the road of the Golf, falls to be rejected. Sadly, the inference is irresistible that Inspector Mokoena *ex post facto* attempted to assist his colleague, Inspector Motlounq. It will be remembered that Inspector Mokoena said that on the scene of the collision it became clear to him that the accident was caused by the

police vehicle, that is the Golf, that moved over the centre of the road to its incorrect side of the road. He also said that he regarded this as an important aspect, which is obviously the case. Nevertheless, he made no mention of this in his police statement made shortly afterwards. He could not provide a satisfactory explanation for this. Also, according to Inspector Mokoena the mark that he made on the road representing the area of impact was pointed out by him to the police photographer standing next to him and was clear to see. That the police photographer immediately thereafter placed the cone representing the area of impact on the other side of the road, is in these circumstances so improbable that it cannot be accepted. I fear that the evidence of Inspector Mokoena of the gouge marks on the road is an obvious fabrication. He said that he indicated these gouge marks to the photographer who could in any event see them clearly. Nevertheless the photographer did not photograph these marks. The fact is that marks of this kind would have been seen on the police photo plan before me. For this too, this witness provided no acceptable explanation.

[13] As I already pointed out, the objective evidence shows that the collision could not have taken place whilst both vehicles were travelling straight but with the Golf partly on its incorrect side of the road (as Mr Gatebe testified) nor could it have been caused by the Golf veering to its right into the path of the Ford travelling straight in its lane (as Mr Makanda said). This evidence of Mr Gatebe and Mr Makanda can therefore not be accepted. It has been said that direct or credible evidence of what happened in a collision generally carry greater weight than the opinion of an expert seeking to reconstruct the events from his experience and scientific training. See **MOTOR VEHICLE ASSURANCE FUND v KENNY** 1984 (4) SA 425 (ECD) at 436H – 437B. This is however not a case to which this statement can apply. In this case, objective factual evidence and the inferences therefrom indicate that the eyewitness evidence of the defendant cannot be correct.

[14] By reason of the foregoing, it must in my judgment be accepted that the right front parts of the vehicles collided whilst the Ford was angled to its right toward the Golf and not the other way around. In these circumstances it is

hardly possible that the collision could have been caused by the Ford swerving to its right in view of the Golf travelling straight but over the centre line. In my judgment it was shown on a balance of probabilities that the negligence of the driver of the Ford in causing the Ford to move to its right over the centre line of the road, contributing to the collision.

- [15] Even though the Ford moved to its incorrect side of the road, it is clear that the collision took place very close to the centre of the road. In cases such as this, both drivers are generally held to be equally at fault. Generally in these circumstances the inference is made that the driver that did not stray onto his/her incorrect side of the road was also and equally negligent in driving close to the centre of road and failing to keep a proper lookout or failing to take reasonable avoiding action. See **CANTAMESSA v REINFORCING STEEL COMPANY LTD** 1940 AD 1 at 6; **VAN STADEN v AVENANT & 'N ANDER** 1971 (2) SA 456 (NC) at 458 – 459; **JADEZWENI v SANTAM INSURANCE COMPANY LTD AND ANOTHER** 1980 (4) SA 310 (C) at 311H and further. As the plaintiff in this case does not

have any recollection of the collision, he gave no evidence to displace this inference. This was conceded by counsel for the plaintiff, fairly and from the outset. It appears that there was plenty of space to the left of the Golf. The lane in which it was travelling was approximately 3.4m wide whereas the width of the Golf was probably less than 1.5m. I find therefore that the negligence of the plaintiff and of the driver of the Ford contributed equally to the collision.

[16] I should add that the same result must follow on the acceptance of the version of Mr Gatebe and/or Mr Makanda. On this evidence even though the driver was partially blinded by the bright headlights of the oncoming Golf, he continued to travel approximately 30 - 50cm from the centre line of the road. The Ford was approximately 1,6m wide, travelling in a lane approximately 3,4m wide. Despite sufficient space to its left, the Ford collided with the oncoming Golf that had moved only slightly over the centre line.

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

1. It is declared that the collision in question was caused by equal degrees of negligence on the part of the plaintiff and of Mr J M Gatebe.
2. The defendant is ordered to pay the costs of the trial.

C. H. G. VAN DER MERWE, J

On behalf of plaintiffs: Adv. J. P. Daffue SC
Instructed by:
Naudes
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On behalf of defendant: Adv. S. M. Malatji
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