

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 7475/2008

In the case between:

ANNA SUSANNA ELIZABETH VAN DER MERWE

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT:

J. B. MTHEMBU, AJ

HEARD ON:

4 MAY 2010

DELIVERED ON:

3 JUNE 2010

[1] The plaintiff instituted this action against the defendant in terms of section 17 of the Road Accident Fund Act no. 56 of 1996. She seeks to recover damages she allegedly suffered as a result of the bodily injuries she sustained in a road accident which occurred on the Welkom/Theunissen road in the magisterial district of Virginia on 21 Augustus 2006.

[2] On 13 August 2009 the court issued an order separating the

merits from the quantum and that only the merits should be adjudicated at the hearing of this matter.

[3] The above order in essence entailed that I make a determination of the issues as contained in paragraph 5 of the plaintiff's summons and paragraph 5.2 of the defendant's plea. Therefore I proceeded to hear evidence in order to determine the relative negligence, if any, of the insured driver and that of the plaintiff, if any, seeing that the defendant had pleaded contributory negligence on the part of the plaintiff.

[4] Three persons testified on behalf of the plaintiff, namely Arina Sussana van der Merwe, in other words, the plaintiff herself, inspector De Ru, a police inspector and Konrad Walter Lotter an expert witness, mechanical engineer. The defendant did not call any witnesses. After hearing the evidence and oral argument, I then reserved judgment.

[5] First, in paragraph 3, the particulars of claim, the plaintiff alleged that a road accident occurred at Virginia on 21 August 2006 and that the scene of the accident was on the

Welkom/Theunissen road. She also alleged that there were two motor vehicles involved in the accident. The one motor vehicle with registration number GBC658FS was a Volkswagen Citi Golf sedan driver by a certain M A Mtshawe, the insured driver. The other motor vehicle was a Toyota Hilux bakkie with registration number DCD287FS driven by the plaintiff. These averments were admitted by the defendant at the hearing.

- [6] Second, in paragraph 5 of the particulars of claim, the plaintiff alleged that the said road accident was caused by the exclusive negligence of the insured driver. No less than ten grounds of negligent driving were proffered. Perhaps the most important of these grounds were set out in the paragraphs that read as follows:

“5.3 Versuim het om sy voertuig aan die korrekte kant van die pad te bestuur.

5.4 Gepoog het om ‘n voertuig wat in dieselfde rigting as sy voertuig beweeg het, in die gesig van aankomende verkeer verby te steek;

- 5.5 Op 'n stadium toe dit ongeleë en gevaarlik was om dit te doen na sy verkeerde kant van die pad oorbeweeg het;
- 5.6 Versuim het om op eiseres se waarskuwings te reageer om na sy korrekte kant van die pad terug te keer;
- 5.8 Agter die stuurwiel van sy voertuig aan die slaap geraak het;”

The defendant denied all these ten allegations.

- [7] Third, in paragraph 5.2 of the defendant's plea, the defendant alleges that the sole cause of the road accident was the negligence of the plaintiff. No less than six grounds of negligence were proffered. Among others, the defendant alleged in the following paragraphs of its plea:

- “5.2.2 He/She failed to keep the vehicle he/she was driving under proper control;
- 5.2.3 He/She drove at an excessive speed in the circumstances;
- 5.2.4 He/She failed to apply the brakes of his/her vehicle timeously adequately or at all;

The plaintiff denied all those six allegations of negligence.

[8] In the light of the above quotations from the pleadings and in view of the evidence presented at the trial, it became patently clear that the above quotations from the pleadings embodied the factual dispute between the parties. This then completes the cursory resumé of the pleadings.

[9] The evidence showed that the common cause consisted of the following facts. The Toyota Hilux bakkie was travelling from Theunissen to Welkom and the Citi Golf in the opposite direction. The accident occurred in the morning at about 11.30a.m. The weather was good. The driver of the Citi Golf sustained fatal injuries in the accident. The driver of the Toyota Hilux bakkie survived.

[10] The particular stretch of the road was a tarred road with one traffic lane in each direction. The two were separated by a painted white line of demarcation. On the outside of each traffic lane was a furrow and a gravel strip.

[11] On the morning in question neither the plaintiff nor the insured driver pointed out any points on the scene to the police. They

never did so at any other time afterwards. On account of the force of the impact the rear section of the bakkie was still in its original lane whereas, the Citi Golf was on the opposite lane lying on its left hand side.

[12] The damage to the Toyota Hilux bakkie was on the front left hand side and its front left wheel was damaged in such a way that mud left scratch marks on the road. The damage to the Citi Golf was also on its front left hand side and damage would also have left scratch marks. These then were the undisputed facts.

[13] It is trite that the plaintiff bears the overall onus to prove, on a balance of probabilities, that the insured driver was driving negligently at the time of the collision. In **STACEY v KENT** 1995 (3) SA 344 (ECD) at 352i Kroon J writing for the majority of the full bench put it in this way:

“The enquiry at the conclusion of the case remains whether the plaintiff has, on a balance of probabilities, discharged the onus of establishing that the collision was caused by negligence

attributable to the defendant. In that enquiry the explanation tendered by the defendant will be tested by considerations such as probability and credibility.”

It is also trite that no onus rests on the defendant to establish, on a balance of probabilities, the correctness of his explanation, as to the circumstances which led to the occurrence of the event. **STACEY v KENT**, *supra* at 352 and **GUARDIAN NATIONAL INSURANCE CO LTD v SAAL** 1993 (2) SA 161 (CPD).

[14] On behalf of the plaintiff direct evidence was adduced by herself and indirect evidence was adduced by two witnesses one of whom was an accident and reconstruction expert. No direct or indirect evidence was adduced on behalf of the defendant.

[15] Where one motor vehicle suddenly deviated from its correct path of travel, moved across or encroached onto the wrong side where it collided with another motor vehicle, the driver of the latter, the court has held, has proved facts from which an

inference of negligence against the driver of the former vehicle may be inferentially deduced in the absence of an explanation see **ARTHUR v BEZUIDENHOUT AND MIENY** 1962 (2) SA 566 (AD) at 573 C – H. In such a case the maxim *res ipsa loquitor* may correctly be applied. See also **SARDI AND OTHERS v STANDARD AND GENERAL INSURANCE CO LTD** 1977 (3) 776 (AD) at 780 C – D.

[16] I shall now examine the facts, evaluate the evidence and apply the aforesaid principles of law to the facts.

[17] The plaintiff testified that during Augustus 2006 she was a farmer. She was on her way to Welkom. It was a beautiful road with no potholes. The weather was good. She was travelling at a speed of 100 kilometres per hour which was the maximum speed limit on that road. She saw a truck in front travelling in the opposite direction that was 3 – 4 telephone poles, about 240 metres away. Then a Citi Golf came from behind the truck onto her lane.

[18] She testified that she reduced her speed by removing her foot

from the accelerator and applied her brakes. She also flicked her head lights a few times. The Citi Golf did not react, it came towards her. Just as the truck passed her, the Citi Golf was close by and trying to move to its right side and to her left side. The Citi Golf's right hand wheels went on to the side of the gravel. When the truck passed her, the Citi Golf was 20 metres away.

[19] She tried to move to the right but at that time the Citi Golf moved back to the road and collided with her vehicle. The point of impact was on the middle part of her lane. Her vehicle was damaged on the left front side and the Citi Golf was also damaged on the left front side. At the time of impact her vehicle's front right wheel was over the middle lane. A few seconds before impact she moved to the right. If she had not moved to the right, there would have been a head on collision.

[20] At that crucial moment it was impossible for her to swerve to the left as the Citi Golf driver's side was already off the road. There was also a furrow on her left hand side. When the collision occurred, she was travelling between 50 – 60

kilometres per hour. The only option she had was to come to the right hand side of the road.

[21] During her indirect evidence she testified that although she was scared, she still managed to apply her brakes, hoot, flick her lights and reduce speed.

[22] When counsel for the defendant suggested to her that during the 5 – 6 seconds it took her to take the above preventative measures, she had reasonable time to decide how best to avoid the collision because the other person did not do anything but continued to come towards her, she replied that she thought that that person would swerve back to his lane. She did not concede that because her speed was much higher, she could not take any other action after alerting the Citi Golf that it was on her lane. She also did not concede that if she says that she reduced speed to 50 – 60 kilometres per hour, it follows that she would have been able to go on the left hand side of the road without endangering herself nor did she concede that because of her high speed, it was dangerous for her to move to the gravel part of the road. The driver's side of

the Citi Golf was on the gravel and the rest of it was on her side of the road.

[23] The truck passed her in a matter of seconds and at that stage the Citi Golf was very close to her and she swerved to her right. In the middle was a broken line and the Citi Golf was trying to overtake the truck.

[24] The next witness on behalf of the plaintiff was Inspector Du Ru. He has been with the South African Police for 22 years and for the past 12 years was at the criminal record centre. He received training in sketch drawing, video recording, drawing up measurements and to do finger prints. He stated that he visited the scene just after the accident at about 12:30. The marks on the gravel were still fresh, if you stand at point "G" of the sketch plan, it was possible that the Citi Golf could have gone off the road, then came back on to the road.

[25] He testified that he drew the sketch plan and took photographs of the scene. The area of impact of the collision was on point "C" of the sketch plan. Photo 5 shows scratch marks closer to

the white line and going over it.

[26] During cross examination he answered that if you considered the positions of the vehicles, then it was unlikely that the scratch marks on photo 5 could have been caused by something else. There were no brake marks on the scene. The sketch plan was drawn from his observations.

[27] Konrad Walter Lotter was the last witness to testify on behalf of the plaintiff. He stated that he is a mechanical engineer, registered with the engineering council. After he left the South African Police Services on 31 July 1999 where he was employed as a mechanical engineer, he did work in his own company until now. He investigated what happened in this accident in question. He confirmed as true and correct the opinions he expressed in the written summary of his evidence.

[28] In point 2.1, third paragraph, he indicates various scratch marks at the scene, starting close to the centre line. Vide photo 5 on exhibit "B". In paragraph 4, looking at photos 5 and 6 of exhibit "B", you see the best position of the vehicles, the bakkie is still

on its original lane (its rear section), whereas the Citi Golf is on its opposite lane lying on its left hand side.

[29] In point 2.2 photos are available to assess the damage properly. The impact was on the bakkie's front left hand side and its front left wheel was damaged in such a way that mud left scratch marks on the road. There was a large angle between the two vehicles.

[30] The damage on the Citi Golf was on its left side and due to the impact, it was struck on its front section. Both vehicles were at an angle at the time of impact. The damage on the Citi Golf would also have left scratch marks.

[31] On paragraph 3 of point 2.2, most of the damage was on the left hand side of the Citi Golf (photo 5), because of this damage, the scratch marks were probably caused by the left hand side of the Citi Golf. Most of the Citi Golf was on the lane of the bakkie at the time of impact. The marks start from west to east, so one or both vehicles had momentum to the east. The Citi Golf was travelling at such high speed that it drove the

bakkie back.

[32] He testified that, in that 0.1 seconds when the crashing occurred and you take the scratch marks to the west it means the Citi Golf was more in the lane of the bakkie. Before impact, the Citi Golf was in the wrong lane, far onto the lane of the bakkie.

[33] The Citi Golf was on the wrong side probably on the gravel, it swerved to the left trying to get to its rightful lane but turned its steering onto the right hand side, so when the impact occurred it fell over.

[34] Everything indicates that the Citi Golf was far into the lane of the bakkie, the driver of the bakkie could not swerve to the left and it would have fallen into the furrow and rolled if it swerved to the left off the road. At approximately the time that the bakkie tried to swerve to the right, the Citi Golf also tried to swerve to the left, to its original lane but most of the vehicles were in the lane of the bakkie at the time of impact. It would have been extremely dangerous for the Citi Golf to overtake at

that time.

[35] Because of two extreme actions of the Citi Golf it would have been difficult for any driver to control the vehicle, it jerked to the left then to the right, even if the collision did not occur, the driver would have lost control.

[36] The Citi Golf started to overtake, then drifted and at a late stage swerved to the direction of the bakkie. There were a number of options available to the Citi Golf. It could have moved back behind the truck. That would have been the safest option to avoid a collision. It would be a dangerous and unsafe option to move out from behind the truck.

[37] He stated that the driver of the Citi Golf did not indicate the actions of an attentive driver. It was as if he was hypnotised. He was not alert; it appears as if he could have fallen asleep, by swerving to the left then to the right.

[38] During cross-examination he stated that he did not visit the accident scene. He saw the photos and testified in the

criminal matter as well. He did not consult with the investigating officer as he prefers not to speak directly to witnesses and prefers to look at facts objectively. The accident was well documented as per the photographs and the sketch plan.

[39] Notwithstanding that he did not visit the scene, the point of impact is incorrect on the sketch plan. If you take point "C" which is more towards the east, then the marks will appear more towards east at least 2 metres from the centre line, as the area indicated as the point of impact is already towards the east. The marks on the centre line prove that point "C" is incorrect.

[40] He said the impact occurred more than a metre into the lane of the bakkie. Disregarding what the lines tell us, the driver must establish if it is safe to overtake. The Citi Golf was partially on the edge of the road to the left of the bakkie meaning that half of the Citi Golf was on the gravel, the other half on the road.

[41] As per photo 2, the bakkie could not swerve to the left on the

rough edge of the road as the driver could have endangered herself unless if she was travelling at 10 kilometres per hour.

[42] It was probable that the debris would be thrown on the opposite lane. The Citi Golf could have been travelling at two times the speed of the bakkie. This concludes the testimony of Mr Lotter. It brings us to the end of the plaintiff's case.

[43] As I have stated above, the defendant did not call any witnesses as the insured driver sustained fatal injuries in the accident.

[44] Mr Steenkamp, on behalf of the plaintiff, urged me to find in favour of the plaintiff. He argued that according to the version of the plaintiff, which version was supported by Du Ru and Lotter, the collision took place on her correct side of the road. Therefore, he submitted that the insured driver of the Citi Golf was negligent. It was quite clear that this accident was unavoidable; the plaintiff could only go to the right.

[45] But Ms Ramaimela, on behalf of the defendant disagreed. She

argued that the insured driver was not the sole cause of the accident. This court should make its finding based on the reasonable man test. A 100% compensation for the plaintiff would be unreasonable. A 50% - 50% apportionment as a cause of the accident would be reasonable.

[46] In **SOLOMON AND ANOTHER v MUSSETT AND BRIGHT** (1926) AD 427 at the bottom of page 433, the court held that:

“The general rule under such circumstances is that persons using the road upon their proper side have the paramount right and are entitled to preference, so that, in case of danger of a collision, it is the duty of those on their wrong side to give way first.”

As to the above quote, it is exactly what happened here.

[47] In **MARAIS v CALEDONIAN INSURANCE CO LTD** (1967) (4) SALR 199, in this case the plaintiff moved to the incorrect side of the road. On page 199 paragraph H, the court had this to say:

“Had the plaintiff voluntarily resorted to the exceptional course of swerving to his wrong side, this would probably have been inexcusable as the wrongful driver had given way timeously, but this was not such a case.”

It is quite clear that this accident was unavoidable; the plaintiff could only go to the right. The plaintiff had to do something, and she did, she took the only alternative available. The Citi Golf remained on the incorrect lane all the time, at the very last opportunity closed the gate for the plaintiff by moving to the left.

[48] The driver’s ability to avoid an accident depends amongst other factors, on the speed of the vehicles approaching each other. In this case the undisputed evidence of Lotter is that the Citi Golf was travelling at twice the speed of plaintiff’s bakkie. If the evidence of the plaintiff is that she reduced speed to about 50 – 60 kilometers per hour, then the Citi Golf was travelling between 100 – 120 kilometres an hour.

[49] Turning to the argument of a reasonable man as advanced by

Ms Ramamela on behalf of the defendant, in **McMURRAY v H L & H (PTY) LTD** 2000 (4) SA 887 (N), the court had this to say about the reasonable man:

“One knows that the reasonable man generally expects and is entitled to expect reasonableness rather than unreasonableness, legality rather than illegality, from others. (**SOLOMON AND ANOTHER v MUSSET AND BRIGHT LTD** 1926 AD 427 at 433; **MOORE v MINISTER OF POSTS AND TELEGRAPHS** 1949 (1) SA 815 (A) at 826). The reasonable man certainly does not in general regard himself as obliged to take steps to guard against recklessness or the gross negligence of others. (**SOUTH AFRICAN RAILWAYS AND HARBOURS v REED** 1965 (3) SA 439 (A) It goes without saying that this notional reasonable man generally complies with the law and always acts reasonably. We know that the reasonable man is not a timorous faint heart, always in trepidation lest he or others suffer some injury; on the contrary, he ventures out into the world engages in affairs and takes reasonable chances. He takes reasonable precautions to protect his person and property and expects others to do likewise (per Van Heerden JA in **HERSCHEL v MRUPE** 1954 (3) SA 464 (A) 490F).”

As the evidence shows, the plaintiff did everything humanly possible to avoid the accident. It is quite clear that the reasonable man would have been injured in this accident. If the plaintiff had moved to the left, she would have driven into the Citi Golf.

[50] If it is accepted that the collision took place on the plaintiff's correct side of the road, then the *maxim res ipsa loquitur* applies. In this regard it is then necessary to have regard to the decision of **ARTHUR v BEZUIDENHOUT AND MIENY** 1962 (2) SA 566 (A) at 573 C – H:

“I am of the opinion that on the facts of the present case the maxim may rightly be applied. For when plaintiffs proved that defendant's truck for no apparent reason suddenly swerved onto its incorrect side there to collide with their truck, plaintiff proved facts from which an inference of negligence against the defendant may, in the absence of any explanation be drawn – *res ipsa loquitur*.”

[51] In the case of **SARDI AND OTHERS v STANDARD AND GENERAL INSURANCE CO LTD** 1977 (3) SA 776 (A), the

court had this to say about the *maxim res ipsa loquitur*:

“In this court in seeking to establish negligence of the driver of the insured vehicle counsel for the appellant referred to the fact that he swerved across the road. Wherefore counsel relied on the *maxim res ipsa loquitur* (the thing speaks for itself). He submitted that it was for the respondent to adduce sufficient evidence to overcome the *prima facie* effect of the evidence that Coxon drove on to the incorrect side of the road. The maxim has no bearing on the incident of the onus of proof on the pleadings. It is invoked where the only known facts, relating to negligence consist of the occurrence itself.”

[52] In the instant case the collision was occasioned by the exclusive negligent driving of the insured driver. On the version presented on behalf of the plaintiff, the direct evidence of the plaintiff was that the Citi Golf veered into her lane and at the very last opportunity closed the gate for her by moving to the left. I have to come to the conclusion that the collision was caused by the defendant's insured driver.

[53] Counsel for the plaintiff urged me to find that the accident was

caused by the insured driver and the defendant must pay all the proven damages from this accident and it must pay 100%.

[54] On the other hand, counsel for the defendant argued that a 100% finding against the insured driver was not reasonable and that a 50% - 50% apportionment would be more reasonable. However, counsel for the defendant later abandoned this submission and left the issue in the hands of the court.

[55] As I have stated above, there was no negligence on the part of the plaintiff and the accident was caused by the negligence of the insured driver.

[56] Accordingly I make the following order:

56.1 The defendant is liable for 100% of the plaintiff's proven or agreed damages.

56.2 The defendant is also liable for the plaintiff's costs to date.

J. B. MTHEMBU, AJ

On behalf of the plaintiff: Adv. Steenkamp
Instructed by:
Wessels and Smith
BLOEMFONTEIN

On behalf of the defendant: Adv. Ramaimela
Instructed by:
Matsepes
BLOEMFONTEIN

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