

**IN THE HIGH COURT OF SOUTH AFRICA
TRANSCAAL PROVINCIAL DIVISION**

CASE NO: 4511/07

In the matter between :

LIONAL JOHN CASS

And

ROAD ACCIDENT FUND

Defendant

JUDGMENT

ismail AJ:

- [1] The plaintiff was a passenger in a motor vehicle driven by his grand mother on the 26 January 1996. The vehicle in which the plaintiff was travelling in collided with another vehicle [the insured vehicle] on the N4 highway near Middelburg. The plaintiff's grand mother was fatally injured in the collision and he sustained injuries to his body.
- [2] At the time of the collision the plaintiff was a minor. 13 years old at the time, and his grandmother fetched him at school and they were travelling to their farm in Arnold.
- [3] At the commencement of the trial Ms Strauss, acting for the plaintiff sought to have the merits separated from the question of quantum. She submitted that the plaintiff had to show 1% negligence in order to succeed on his claim as the defendant pleaded that the plaintiff's claim was limited to R25 000,00 for special damages because the driver of the car wherein the plaintiff's was a passenger was solely negligent for the collision.
- [4] The application for the separation of the question of the merits and quantum was successful and the matter proceeded in terms of Rule 33(4) of the Uniform Rules of Court regarding the question of negligence.

[5] The plaintiff testified to the effect that he was a passenger in the Nissan motor car driven by his 78 year old grand-mother. They were travelling from Middelburg in the direction of Arnold. It was approximately 5pm and it was raining quite heavily. He stated that the road had two lanes in each direction and the middle of the road was separated by two solid lines with yellow paint between the lines[see exhibit A1].

[6] His grand mother was on the extreme left lane and she moved over to the right lane in order to overtake another vehicle. She passed the vehicle which she overtook and suddenly the plaintiff noticed brake lights of a car in front of them. His grandmother swerved to avoid colliding with the car and that is all which he can remember as he was rendered unconscious. He could not say how far to the right his grand mother swerved. It was put to him that the defendant's version was that his grandmother collided with the insured driver on the opposite side of the road and on the extreme right lane from their side. He denied this. The plaintiff estimated that his grand mother was travelling at a speed of approximately 80km/h. With the completion of the plaintiff's evidence his case was closed.

[7] Mr Thabethe acting for the defendant brought an application for absolution from the instance. He submitted that the plaintiff failed to make out any case of negligence against the insured driver. This application was strenuously opposed by Ms Strauss who submitted that the defendant's insured driver had to testify and the version put to the plaintiff was not evidence. The test for granting of judgment of absolution was laid out in the matter of *Gascoyne v Paul Hurter*, 1917 TPD 170 where De Villiers JP at 173 stated:

" At the close for the case for the plaintiff, therefore, the question which arises for the consideration of the Court is. is there evidence upon which a reasonable man might find for the plaintiff ? ... The question therefore is. at the close of the case for the plaintiff was there a *prima facie* case against the defendant. . "

In *Atlantic Continental Assurance Co of SA v Vermaak* 1973 (2) SA 535 (E) at 526 **F-H** the court stated 'where the evidence on the merits relating to the alleged negligence on both sides is in the nature of things bound to be inextricably interwoven, a trial court should be very chary of granting absolution at the close of the plaintiff's case "

[8] Mr Thabethe thereafter led the evidence of Mr Lawrence Johnson [Johnson] a member of the defence force during 1996. The gist of his evidence was that the vehicle in which the plaintiff was a passenger had overtaken his car immediately preceding the collision. He stated that he was travelling at a speed of approximately 80-90km/h. According to him when the vehicle overtook him it gradually moved towards its right, namely towards the opposite side of the road. He stated that he did not observe a vehicle in front of him at the time the Nissan was overtaking his vehicle.

[9] Mr Johnson stated that he made a u turn after the accident in order to assist the injured people. His car's hazard were on prior to the accident as visibility was poor. He noticed that the Nissan vehicle was on the extreme right lane and the truck was off the road surface approximately 20 metres into the

bush or grass.

[10] The second witness which the defendant called was the insured driver, Mr Solomon Setabola [Mr Setabola]. He stated that he was driving from Belfast towards Tshwane and that he had 2 passengers seated with him in the front of the truck and approximately twenty passengers at the back of the vehicle. He described the weather on that day as *"it was raining and it was also misty"*. According to him if on coming cars had their head lights on you could observe them from about 40 metres away. He was asked to point out the distance and it appeared that it was 25 metres rather than 40 metres.

He stated that he was *"astonished to see the vehicle heading towards him and that it was travelling at a high speed and in a wink of an eye the car collided with the vehicle he drove"*. He stated that he tried to swerve to his left in order to avoid the collision however he was unsuccessful in his attempt

11] He described the damage to the Nissan to the front, top and driver's side. According to him the Nissan collided with the right side of his vehicle.

[12] During cross-examination this witness stated that after the accident his truck was off the road surface on the grass and that the Nissan wherein the plaintiff was a passenger was in the lane he was travelling on. According to him the Nissan came towards his side of the road and he saw it crossing the middle lines and he realized that the vehicle was going to collide with him. He swerved towards his left in order to avert the accident. It was put to Mr Setabola that he was adapting his version as he failed to state in his evidence in chief that he took his foot off the accelerator pedal and he also failed to tell the court that he applied brakes. He was confronted with the evidence of Mr Johnson who testified that the Nissan moved gradually across the middle line whereas Setabola stated that the vehicle moved across swiftly. His response to this difference was that *"I don't know people never view a thing the same way"* - see *S v Oosthuizen 1982(3) SA 571 (T-)* Where statements are made by two witnesses, the Contradiction in itself proves only that one of them is erroneous.

[13] Pursuant to Mr Setabola's evidence the defendant closed its case

[14] Ms Strauss submitted that the court should find that the insured driver was negligent in that he failed to take reasonable steps to avoid the accident when he could do so, such as apply brakes or travel at a slower speed than that which he was travelling at. Mr Thabethe on the other hand hardly surprisingly submitted that the insured driver did everything expected of a reasonable driver to avoid the accident. He swerved his truck towards the left in order to avoid the accident.

[15] During their respective addresses to the court both counsel agreed that the sole issue which I needed to determine was whether the insured driver was contributorily negligent in that he did not take appropriate action in order to avert the accident. Both advocates agreed with me on this aspect. Neither of them could provide me with any reported authority dealing with a similar situation. This case

had to be determined on the factual matrix of evidence presented before me.

APPRAISAL OF WITNESSES AND THE EVIDENCE

[16] The evidence of Mr Cass, the plaintiff, did not assist in the determination of the question of whether there was any negligence on the part of the insured driver. The common cause evidence in this matter are :-

(1) That the vehicle the plaintiff was a passenger in drove off onto the wrong side of the road ;

(2) That it was raining heavily at the time and visibility was limited to a distance of 25-40 metres;

the collision took place on the lane in which the insured driver was travelling on;

that the plaintiff's grand mother died in the accident and that the plaintiff suffered injuries arising out of the collision:

that Mr Johnson was travelling at a speed of between 80-90km/h when the Nissan passed him and that the Nissan at that stage was travelling at least 20km/h faster than Mr Johnson's vehicle.

(3) that the plaintiff saw what appeared to be brake lights which caused the driver, his grand mother, to swerve onto the lanes off oncoming traffic;

[17] Mr Johnson was an independent and objective witness and it is his evidence which to a large extent gives the court a semblance of how the accident took place. Although he did not observe red brake lights ahead of him he was prepared to concede that there could have been another car ahead of him. This entrenches the view that the weather conditions were severe and that visibility was limited.

[18] The test to determine negligence has always been described as the "reasonable man test". In *Kruger v Coetzee* 1966 (2) SA 428 (A) Holmes JA stated : " For the purposes of liability *culpa* arises if-

(a) a *diligens paterfamilias* in the position of the defendant-

(i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and

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

(b) the defendant failed to take such steps

This has been consistently stated by this Court for some 50 years, requirement (a) (ii) is sometimes overlooked. 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. Hence the futility, in general, of seeking guidance from the facts and results in other cases."

[19] Mr Setabola on his version was travelling at a speed of 90km/h. It was submitted by defendant's counsel that the speed in those circumstances was excessive and had he been travelling at slower speed he could have avoided the accident. I do not agree with counsel's submission in this regard because both the driver of the vehicle wherein the plaintiff was travelling in and Mr Johnson were travelling at a similar speed. In fact on Mr Johnson's evidence the plaintiff's vehicle was travelling between 100-110km/h at the time he was being passed. It would appear that the cause of the accident occurred when the plaintiff's grandmother overtook Mr Johnson's vehicle at an inopportune time and when she moved into the right lane travelling towards Witbank, she saw the brake lights ahead of her causing her to swerve. This set in motion a train of events, namely that she crossed over to the incorrect side of the road and secondly an accident occurring on the left lane of her travel on the incorrect side of the road. The fact that the plaintiff's driver was negligent is *fait accompli*, however the question which needs to be answered is whether the insured driver was also negligent in that he did not adhere to the requirement set out under (a) (ii) referred to by Holmes JA.

[20] Applying the principles laid down by the Appellate Division in *Coetzee's matter supra*, to the facts presented in this matter I am of the view that the insured driver who would have been two lanes away from the Nissan vehicle travelling in opposite directions to each other, would have had limited vision to about 25 metres ahead of him. When the Nissan swerved to its right, onto its incorrect side, the speed at which it swerved would be an important factor. On this score Mr Johnson described its movement as a gradual swerve as opposed to the insured driver who described its movement as fast and rapid. Mr Setabola stated that he swerved but was unsuccessful in avoiding the accident. In this regard he stated that his vehicle after the accident was off the road surface and some 20 metres into the grass on the left of the road. This is important in that it indicates that the truck moved off the road either because of the impact or because the driver swerved as he testified. Whether Mr Setabola applied brakes or not in the circumstances and could have thereby avoided the accident I have my doubts. He did what any reasonable driver in the circumstances would instinctively have done namely swerve to avoid the accident.

Notwithstanding his attempt at avoiding the accident as he put it "he was unsuccessful."

[21] In the circumstances I am of the view that the insured driver was not negligent and that he tried to avoid the accident. Accordingly I am of the view that the plaintiff's action should be dismissed with costs.

APPEARANCES

For the Plaintiff: Adv S Strauss instructed by J H Van Der Merwe Inc-Pretoria

For the defendant: Adv Thabethe instructed by Geldenhuys Lessing Malatji Inc- Pretoria

' Judgment delivered on 4 March 2009.