11/6/2009
NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.
(3) REVISED.

11/06/09
DATE

SIGNATURE

Case No: 28560/2006
Date: 11/06/2009

In the matter between

MARGARET SEBOTSENG MODIRAPULA **Plaintiff**

And

ROAD ACCIDENT FUND **Defendant**

JUDGMENT

VILAKAZI AJ:

1. The Plaintiff claims payment in the sum of R 1 306 215.73 plus interest thereon at the rate of 15, 5% from the date judgment to the date of payment against the defendant arising from accident which occurred on the 31st of December. 2002 at Amandabult, Northern Province between herself and a motor vehicle with registration number CDY119NW (insured motor vehicle) then driving by a certain Edward N Mothusi (insured driver).

2. The defendant denies liability in *toto*.

3. On or about the 31st December 2002 the plaintiff was involved in a motor accident as a result of which she sustained the following injuries:

   1. Laceration of:
      - i. The forehead and
      - ii. The right knee.
   2. Fracture of:
      - i. Both upper arms
      - ii. Left femur
      - iii. Left fibia
      - iv. Right ankle (compound)

4. On admission at Amandabult Hospital, she was stabilised by the doctors; thereafter transferred to Peglerae Private Hospital in Rustenburg where internal fixation of the fractures was performed, the laceration of the forehead and knee sutured.

5. In her particulars of claim she avers that the collision has been caused solely by the negligence of the insured driver, he being negligent on one or more of the following instances:

   "2.1 He drove the said vehicle reckless, negligently and unlawfully

   2.1.1. he drove the said vehicle and public road without a valid drivers licence or

   2.1.2. he failed to apply brakes timeously and adequately or

   2.1.3. he failed to fail to regards for other road users or

   2.1.4. he failed to keep a proper lookout or

   2.1.5. he drove at an excessive speed under the circumstances or

   2.1.6. he failed to keep the insured motor vehicle under control or

> *2.1.7. he failed to take precaution to prevent the said collision, when by use by reasonable care and skill; he could and should have avoided the said collision."*

6. In its plea the defendant denies this allegations and alleged, amongst others that:

> *"6.1 she failed to take the rights of other road users, specifically the insured driver into account;*
>
> *6.2 she failed to take any, alternatively sufficient notice of the presence and/or movement of the insured motor vehicle;*
>
> *6.3 she entered the main thoroughfare, and the insured driver's lane of travel at the time when it was unsafe and/or inopportune to do so and in total disregard of her own safety and the safety of other road users, particularly the insured driver;*
>
> *6.4 she attempted to cross a main thoroughfare and the insured driver's lane of travel, at the time when it was unsafe and/or inopportune to do so and in total disregard of her own and the safety of other road users more particularly the insured driver."*

7. Over and above that, the defendant pleaded that there was contributory negligence on the part of the plaintiff which justified an apportionment of damages, if any, awarded to the plaintiff in terms of the Apportionment of Damages Act of 1956. At the commencement of the trial, the parties agreed to a separation of quantum and merits. The plaintiff was the only witness in her case while for the defendant there were no witnesses at all. The plaintiff's evidence was briefly to the effect that as she was walking alone and approaching a certain tarred road. When she was near the sharp curve she noticed the insured motor vehicle approaching from the left. She proceeded until she reached the gravel portion on the right side of the curve. She did not pay any further attention to the oncoming motor vehicle as she assumed that it would follow it normal course of travel. The

next moment she raised her eyes, she realised that the motor vehicle was not following the curve but was coming straight down towards her. She tried to retreat but it was too late and the insured motor vehicle collided with her. She passed out and regained consciousness at hospital.

8. During cross-examination, it emerged that the plaintiff had made a statement to the police which was inconsistent with his evidence before court. The statement was to the effect that she was trying to cross the tarred road when the collision occurred. The plaintiff admitted having made a statement to the police while she was in hospital. She admitted further that all other information which appeared on the statement was given to the police by herself. However, she vehemently denied having told the police that she was trying to cross the tarred road at the time of the collision. The plaintiff denied that the statement was read back to her though she admits having signed it. The statement was not handed in as an exhibit.

9. In any civil case, the *onus* rests on the plaintiff to prove his/her case on the balance of probabilities. In considering the merits, the Court will take into account the evidence as whole, the probabilities and improbabilities in order to arrive at a decision. In this case, the Court will have to look at the probabilities of the plaintiff's version as against the version put to her during cross-examination. It is evident when one considers the plaintiff's version that the accident could not have happened as she had described it.. When one scrutinised the sketch plan and the photos contained in the bundle, it becomes clear that the accident could not have happened as she described. The road starts to curve a few metres from where she had allegedly been standing and makes a sharp curve from right to the left. If the driver of the insured motor vehicle had been driving on the left lane and lost control of the vehicle as he was negotiating the curve, the insured motor vehicle would have careered straight onto the overgrown area and collided with or even drove-passed the chevron by a few meters.

10. Even without retreating the insured motor vehicle would not have collided with the plaintiff. On the evidence, the court is not satisfied that the collision occurred as described by the plaintiff but is inclined to believe that the plaintiff was crossing the road at the time of the collision. On the plaintiff 's own version there is a degree of contributory negligence on her part and the court accepts that she was attempting to cross the road at the time when it was inopportune for her to do so and without exercising a proper lookout.

11. Similarly the driver of the insured motor vehicle did not keep a proper lookout and failed to take reasonable steps to avoid the collision which by exercise of reasonable care and skill he could and should have avoided the collision. Had the insured driver, as an observant and diligent motorist, kept the movement of the plaintiff under observation he could have realised that the plaintiff did pay attention of his distance and carried on walking until it was too late for both of them to avoid the inevitable. During cross-examination of the plaintiff it was not put to the plaintiff what steps were taken by the driver of the insured motor vehicle to avoid the collision. Significantly, there was no indication that the driver used hooted to draw the plaintiff's attention of his approach.

12. The Court is accordingly satisfied that there was simultaneous negligence on both parties. However, the driver of the insured motor vehicle had a greater responsibility to keep his vehicle under proper control and to ensure the safety of other users of the road, in particular the plaintiff in this matter. Accordingly an apportionment in terms of the Apportionment of Damages Act, 34 of 1956 is applicable to this matter.

13. The defendant does not contest the quantum which has been established through several medico-legal reports, occupational therapists and psychologists.

14. Having weighed all the facts in this matter the court is of the view that 40% negligence must be apportioned against the plaintiff. The defendant does not dispute the quantum.

15. As the plaintiff has been substantially successful in her claim the costs must follow the cause.

Consequently:

Judgment is granted in favour of the plaintiff as follows:

• Past medical expenses	R38 286, 29
• Future hospital and medical expenses	R127 400, 00
• General damages	R180 0000
• Past loss of earnings	R4 800.00
• Future loss of earnings	R172 000
TOTAL	**R522 486, 29**

Interest on the above amount at the rate of 15,5% per annum from date of judgment to date of payment;

Costs of suit.

TJ VILAKAZI AJ
Acting Judge of the High Court