

IN THE NORTH GAUTENG HIGH COURT
(PRETORIA)

CASE No.: 7997/2007

In the matter between:

DIRECTOR-GENERAL OF
THE DEPARTMENT OF LABOUR

PLAINTIFF

and

THE ROAD ACCIDENT FUND

DEFENDANT

4 SEPTEMBER 2009
NOT REPORTABLE

HAAL DE	TOEPASSING IS NIE
(1) RAPPORTEER	J/NEE
(2) VAN BELANG VIR ANDER REGTERS:	J/NEE
(3) HERSIEN.	
2009-09-02	<i>[Signature]</i>
DATUM	HANDTEKENING

JUDGMENT

Hiemstra AJ

[1] The plaintiff, the Department of Labour, paid certain amounts totalling R749 547,10 to the widow and dependants of Mr A.B. Cowan, as it was obliged to do in terms of section 54(1)(a) of the Compensation for Occupational Injuries and Diseases Act, 130 of 1993. Mr Cowan was killed in a motor vehicle accident while driving a vehicle in the course and scope of his employment with Ludeke Transport.

[2] On 5 September 2002 the late Mr Cowan was the driver of a Peterbilt truck-tractor with interlink trailers when it collided with a Mercedes truck-tractor with interlink trailers, driven by Mr P.V. Xhwangu. It is common cause between the parties that, should this court find that Mr Xhwangu had negligently caused the accident, the defendant would be liable to compensate the plaintiff in the amount that it had paid the dependants of Mr Cowan.

[3] The collision occurred on the N1 highway between Gariep dam and Colesberg. Mr Cowan travelled in a southerly direction while Mr Xhwangu travelled in a northerly direction.

[4] The plaintiff called one witness, Captain B.A. Sandy of the SAPS, who was at the time of the accident an Inspector attached to the Free State Criminal Record Centre. He is a plan draftsman, forensic photographer and fingerprint expert. He attended to the scene of the accident, took photographs, made a video recording and drew a sketch plan. He testified that, in his opinion the point of impact between the two vehicles was within the correct lane for the Peterbilt truck driven by Mr Cowan. He based this conclusion on the locality of mud that had been dislodged underneath the vehicles at the moment of impact as well as the distribution of broken glass.

[5] Captain Sandy further testified that there were steel guardrails on each side of the road and steep slopes beyond the guard rails. Both vehicles were too wide to fit into the emergency lanes without encroaching on the driving lanes.

[6] The defendant called the driver of the Mercedes truck, Mr Xhwangu, Mr D.J. le Grange, an eye witness and an expert in the reconstruction of motor vehicle accidents, Mr B. Grobbelaar.

[7] Mr Xhwangu testified that he had been travelling from Cape Town to Johannesburg. After the Orange River near Garieb a Peterbilt truck approached from the North. He saw the Peterbilt moving over to its right over the centre of the road. In order to avoid a collision, he swerved to his left as far as he could. He could go no further to his left because of the guard rail and the steep slope beyond the rail. He realised that the two trucks remained on collision course and swerved to the right. He said he did so in order to avoid a head-to-head collision. The truck-tractors nevertheless collided with each other at an angle.

[8] Mr le Grange is a truck driver with 30 years' experience. He drove behind the Mercedes truck at the time of the accident and corroborated the evidence of Mr Xhwangu in

every material respect. He is of the opinion that there was nothing that Mr Xhwangu could have done to avoid the collision.

[9] Mr Grobbelaar, the expert witness, disagreed with Mr Sandy as to the probable point of impact. He said that the position of the dislodged mud and distribution of glass are not conclusive of the point of impact. He could, however, not pinpoint any alternative point of impact.

[10] Much attention was paid to the point of impact. However, in my view, it is of little or no assistance in deciding this matter. The accident happened in the process of both vehicles swerving from side to side to avoid a collision. It does not matter where the vehicles eventually collided.

[11] Mr H.P. Joubert, counsel for the plaintiff, conceded that the Mr Cowan had been negligent by moving over to his wrong side of the road. He argued, however, that Mr Xhwangu should have avoided the collision. He referred me to *Williams v Nel* 1939 WLD 188 where Schreiner J said on 196:

"Now, going to the wrong side of the road when another vehicle is approaching on its wrong side is to my mind a dangerous course which the circumstances may justify but which nevertheless should not be lightly resorted to. If other satisfactory means are available for avoiding the accident then that course should not be taken, because there is always the risk that the other party may come back to his correct side."

This dictum was followed in a long line of decisions including *Burger v Santam Versekeringsmaatskappy Bpk* 1981 (2) SA 703 (A) at 708 and *President Insurance Co Ltd v Tshabalala and another* 1981 (1) SA 1016 (A) at 1020.

[12] Mr C. Harms, on behalf of the defendant, in turn referred me to *Road Accident Fund v Grobler* 2007 (6) SA 230 (SCA) in which Hancke AJA said:

"When a person is confronted with a sudden emergency not of his own doing, it is, in my view, wrong to examine meticulously the options taken by him to avoid the accident, in the light of after-acquired knowledge, and to hold that because he took the wrong option, he was negligent. The test is whether the conduct of the respondent fell short of what a reasonable person would have done in the same circumstances."

This decision follows a long line of decisions starting with *South African Railways v Symington* 1935 AD 37 in which Wessels CJ stated at 45:

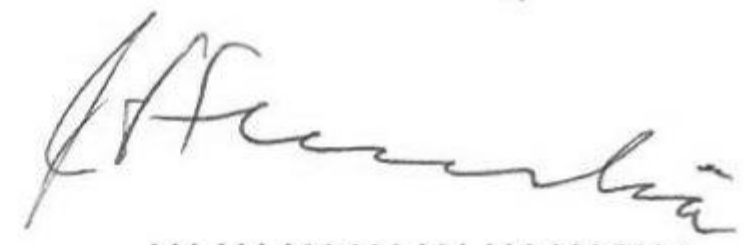
"Where men have to make up their minds how to act in a second or in a fraction of a second, one may think this cause the better whilst another may prefer that. It is undoubtedly the duty of every person to avoid an accident, but if he acts reasonably, even if by a justifiable error of judgment he does not choose the very best course to avoid the accident as events afterwards show, then he is not on that account to be held liable for *culpa*."

[13] The onus of proof rests on the plaintiff. The only evidence on behalf of the plaintiff is that of Captain Sandy as to the point of impact. As I have already found, the point of impact does not take the matter further. On the other hand, the evidence of Mr Xhwangu and Mr le Grange was that whatever option Mr Xhwangu had taken, he would not have avoided the collision. If he could not avoid the accident, it does not matter what option he took.

[14] I therefore find that the plaintiff has failed to discharge its onus.

I make the following orders:

1. Absolution from the instance is granted in respect of plaintiff's claim;
2. The plaintiff is ordered to pay the defendant's costs.



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J. Hiemstra AJ

2009-08-31