Reportable: Yes / No
Circulate to Judges: Yes / No

Circulate to Magistrates: Yes / No

IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape Division)

Case no: 492/2001

Date delivered: 06/02/2004

In the matter of:

AYANDA MAXWELL DLEKEDLA **PLAINTIFF**

and

ROAD ACCIDENT FUND **DEFENDANT**

JUDGMENT

TLALETSI J:

INTRODUCTION

1. The plaintiff has instituted an action for damages against the defendant pursuant to a collision which took place on the 30th September 1998 along Central Road, Kimberley which is within the area of jurisdiction of this court.

2. I ordered with the consent of both parties, that the merits and the *quantum* be separated in terms of rule 33 (4) of the Rules of this court. The effect of the order is that the issues of the negligence and the liability of the parties and the driver; as well as the costs of the trial at this stage be decided before and separately from the remaining issues.

3. An inspection *in loco* was held before any evidence was tendered. A sketch plan of the scene prepared by the parties was admitted as exhibit "B". A bundle of photographs depicting the place where the collision took place was admitted as exhibit "A". Central Road is a dual carriage way divided by a paved island. It runs from East to West. The width of the lane in which the collision occurred is 9 metres, i.e. from the pavement on the side of Campbell Restaurant to the island. The road is leading into a subway bridge where it narrows inward.

4. It was common cause that the plaintiff who was a pedestrian was involved in a collision with a motor vehicle bearing registration numbers and letters: CC 63710, driven by one Mr. M. Motlekar. The collision occurred at Beaconsfield, in a build up area. Plaintiff sustained bodily injuries as a result of the collision.

PLAINTIFF'S CASE

5. The plaintiff's case is based on his sole evidence. His evidence may be summarised as follows. On the 30 th September 1998 he was at Campbell Restaurant (the restaurant) waiting for his uncle. He did not consume any liquor as he had no money. At about 14h55 as he felt the pangs of hunger, he decided to leave. After leaving the entrance of the restaurant he walked a short distance on the pavement. He stopped and looked towards his right for any oncoming motor vehicles. There were no people and cars outside the restaurant. He then proceeded to cross the road, as there were no oncoming vehicles. As

he was in the middle of the road, he heard and noticed a motor vehicle which was already close to him, travelling towards him. It was at a distance of about 10 ½ metres from him.

6. According to him the dual road had a dotted white line which could accommodate two motor vehicles travelling to the same direction. The car he saw was travelling on the left lane which was on the side of the restaurant. As he saw this motor vehicle he retreated about 3 paces to avoid the collision. As the car was now close to him, seeing that it was to collide with him he ran across towards the island. He was at all times looking at the motor vehicle. After crossing the white broken centre line the motor vehicle swerved towards the same lane, closer to the island and collided with him.

7. The motor vehicle was neither travelling too fast nor slow. The front middle portion of the motor vehicle collided with him on his legs and he fell next to the island that divided the road. He did not see this motor vehicle before he embarked on crossing the road.

8. Under Cross examination he testified that there were no motor vehicles parked in front of him or the restaurant. He admitted that he should have seen this motor vehicle before crossing the road more so that nothing obscured his view. He denied ever stopping or standing still on the road. He retreated three paces and as he reached the pavement he noticed that the motor vehicle was moving directly towards him and he immediately ran forward. It was put to him and he disputed, that he was not in contact with the front portion of the motor vehicle, but the left side.

9. He was referred to a written statement in Afrikaans allegedly made to the police by him. He acknowledged his signature but disputed the contents as he never related to the police the details of the accident. He in fact referred the police to his uncle on the latter's instructions whilst in hospital. In the statement it was pointed out that he said 'as he noticed that it was late, he ran across the road, and he saw a motor vehicle approaching. He stopped and retreated. He thought that the motor vehicle will stop. As he was on the road he ran forward and the next thing he collided with the left door of the motor

vehicle'. This statement was handed in as exhibit 'C'. According to the plaintiff he attended school up to standard 7 and was taught English and Isixhosa Languages.

10. The plaintiff was further referred to another statement signed by him and allegedly obtained by his attorneys. In this statement which was accepted as exhibit 'D' the following is recorded:-

"Ten einde by my woning uit te kom moes ek noodwendig gewys Centralweg vanuit 'n westilike na 'n oostelike rigting kruis. Ek het gaanstil staan op die westilike opgeboude sypaaitjie langs Centralweg en nadat ek myself vergewis het dat daar geen aankomende verkeer was nie het ek daarop oor Centralweg vanuit 'n westelike na 'n oostelike rigting begin loop. Ek het reeds die 1ste baan suksesvol gekruis en was ongeveer in die helfte van die 2 de baan waarop ek 'n motorvoertuig gewaar het wat in die regter baan teen 'n hoë spoed vanuit 'n suidelike na 'n noordelike rigting in Centralweg aangekom het, welke motorvoertuig sonder enige indikasie oor beweeg het in die regter baan en reg op my afgepeil het. Ek het daarop begin vinniger loop in die rigting van die eiland waarop voormelde motorvoertuig met my gebots het toe ek ongeveer 1 m vanaf die opgeboude eiland was."

DEFENDANT'S CASE

11. The defendant on the other hand based its case on the evidence of the driver, Mr. M. Motlekar. His evidence in brief was that he had been travelling for about 500 meters along Central Road at a speed of approximately 50 – 55 km/ h. He saw a sedan motor vehicle parked next to the entrance of Campbell Restaurant or on his left hand side. He was travelling from east to west. There were no markings on the road.

12. As he approached the restaurant he moved to the right lane and reduced speed. He saw the plaintiff standing at a distance of about 10 – 12 paces looking at him. He did not blow the hooter as he believed that the pedestrian was aware of his coming. He was standing on the left side in relation to his motor vehicle. There was nothing between him and the plaintiff that could obscure his view. As he drove past him he heard a thud and he immediately

stopped his motor vehicle. He alighted and noticed that the plaintiff had fallen on the ground towards the island. The left front door of the motor vehicle was dented. The left mirror of the motor vehicle had already been damaged on a previous occasion.

13. He testified further that when he saw the plaintiff he moved his motor vehicle more towards the right closer to the island. He could not avoid colliding with the plaintiff as he had already driven past him when the plaintiff collided with his motor vehicle.

14. Under Cross examination the following transpired. He used Central Road 75% of his time on his way to and from work. The area is well known to him. Because liquor is sold at Campbell Restaurant which was a bottle store then, the place was busy during month end and people often sat on the stoep. However on this day there were no people seated outside save for the sedan motor vehicle in which two people were seated. The speed limit in that area is 60 km/h. The pavement in front of the restaurant is raised and he was in a position to see at

least the upper body of a person in front of the sedan motor vehicle. He had an unimpaired view of what was happening on the road.

15. He testified further that as he approached the restaurant he changed his lane. At this stage he did not see anybody. The reason why he changed the lane was that it is a dangerous area and people could run out of the bar/ restaurant in front of the parked car. He was therefore worried about pedestrians. He was now travelling at a speed of approximately 45 km/h. At this stage the pedestrian was on the right hand lane towards the island. He did not see him run or walk there. He testified further that he did not see him in time, and had he seen him, he could have taken evasive action. He does not know how he made contact with his motor vehicle as he did not see him move.

16. He was asked about his written statement to the police which was handed in as exhibit 'E'. He admitted saying in his statement that seeing the pedestrian he reduced speed. He drove slowly and swerved to the right. He

thought that the person will stop. He saw him move on the road. He could not explain the difference between his testimony and what he said in his police statement. He however denied ever making a u-turn on the road.

THE ISSSUE AND LEGAL PRINCIPLES

17. The plaintiff is saddled with the onus to prove, on a balance of probabilities that the driver of the insured vehicle Mr. Motlekar, had driven the said motor vehicle negligently and that his negligence had caused or contributed to the accident (*See :* ***Guardian National Insurance Company Ltd v Saal*** *1993(2) SA 161 (C) at 162 f-g.*

18. The classical formulation of negligence (culpa) is that of **Holmes JA** in ***Kruger v Coetzee*** 1966 (2) SA 428 (A) at 430 E -G :

"For the purpose of liability culpa arises if :-

(a) a diligence 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 constantly stated by this court for some 50 years. Requirement (a) (ii) is sometimes overlooked. Whether a diligence 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 of other cases."

19. It means therefore that even if a reasonable possibility of harm is foreseeable but it cannot be reasonably expected of the defendant to guard against that harm, the plaintiff would have therefore failed to discharge the onus of proving the defendant's negligence.

20. As to what a reasonable person is, **Van den Heever JA** had the following to say in **Herschel v Mrupe** 1954(3) SA 464 (A) at 490 F: –

"The concept of *the bonus paterfamilias is not a timorous faintheart 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 precautions to protect his person and property and expects others to do likewise?"*

21. The principles extracted from various decided cases regarding the driver's duty have been stated as follows in ***Manuel v SA Eagle Insurance Company Limited*** *1982 (4) SA 352 (C) at 357 A-D per* ***Comrie AJ*** *(as he then was):-*

> "A motorist who sees a pedestrian on the roadway or about to venture thereon, should regulate his driving so as to avoid an accident. The pedestrian may by his conduct convey to the motorist the impression that he recognises and intends to respect, the motorist right of way. When such an impression is conveyed by the pedestrian, the motorist may proceed on his way accordingly. Whether the motorist is reasonably entitled to assume or infur, from the conduct of the pedestrian, that his right of way is being recognised and respected, is a question of fact to be decided in each case. When the assumption is not justified, the motorist must regulate his driving to allow for the possibility, or probability, that his vehicle may not enjoy an unobstructed passage. Where a pedestrian reacts appropriately to the presence of an approaching vehicle, or to a warning by the vehicle, the critical enquiry is whether a reasonable motorist would foresee the reasonable possibility that the pedestrian might nonetheless act irrationally by moving, perhaps suddenly into the vehicle or its path."

22. It is expected of a prudent driver to guard against the possibility of a pedestrian's instinctive reaction to a sudden awareness of the proximity of his/her motor vehicle, to act impulsively or irrationally on the spur of the moment to his/her own and /or the driver's detriment. It is also expected of the motorist to allow a reasonable space between his/her

vehicle and the pedestrian. (see: **S v Khan** 1974(1) SA 383 (NPD) at 385 F-H.)

23.**Mr Nortier** who appeared on behalf of the plaintiff argued among others, that Mr Motlekar was negligent in that he failed to keep a proper lookout. Having known that he was travelling in a dangerous area of the road he ought to have ensured a continuous scanning of the road ahead, from side to side for potential obstructions(see: **Rondalia Assurance Corporation of SA Ltd v Page and Others** 1975(1) SA 708(AD) at pp 718 H -719 B). He submitted further that the negligence of the insured driver was the cause of the collision.

24.**Mr Pohl** on behalf of the defendant submitted that *inter alia*, as there was no pedestrian crossing at the point of the collision the motorist had a right of way. He argued that the plaintiff having stopped on the road he conveyed to the motorist the message that he acknowledged his presence and right of way, and he was therefore entitled to assume that the plaintiff gave him a right of way. (see**: Machumela v Santam Insurance Co**. **Ltd** 1977 (1) SA 660 (AD) at 663 E – F).

25.There was disagreement as to whether the road at the point of collision had road markings that separated the traffic travelling to the west. In my view nothing turns around on this aspect. It is common cause that the road is 9 metres wide and is able to accommodate at least two motor vehicles travelling parallel to each other in the westerly direction. Further more Mr Motlekar through out his evidence referred to him changing lanes between the restaurant and the island.

26.The next aspect to be considered is the reason why Mr Motlekar decided to change the lanes or the side on which he had been travelling. It was put to the plaintiff under cross examination that the reason why Mr Motlekar moved from the lane close to the restaurant to be closer to the island is that he was approaching a subway where the road narrows towards the right. However the reason given under cross examination by Mr Motlekar is that he was worried about the pedestrian who could run across the road from the restaurant pavement in front of the sedan motor vehicle. Having this in his mind, I would have expected him to be more cautious.

27.The other issue is when did Mr Motlekar take note of the plaintiff's presence. According to his evidence save for the two people seating in the sedan motor vehicle he did not see any other person. Nothing obstructed his view from the pavement up to the island. Having travelled a distance of at least 29 metres one would have expected him to see the plaintiff enter the road. He only saw him already in a standing position in the middle of the road, and cannot account how it came about for him to be at this point.

28. It was however put to the plaintiff on his behalf that he saw the plaintiff stop and look at him. It is for this reason that he interpreted this to be a message conveyed to him that his right of way was being recognised. It was further put to the plaintiff that as Mr Motlekar was swerving to the right in preparation to go to the subway bridge, the plaintiff stopped. What complicates the issue is the fact that Mr Motlekar admitted that he told the police in his statement that he saw a person moving on the road and thought that he will stop although it is not the truth. All these discrepancies which are acknowledged by Mr Motlekar cannot be explained. His evidence on these issues cannot be relied upon. It clearly suggests that he failed to keep a proper lookout.

29. The next aspect is the point of impact. The plaintiff pointed

a point which is 6 metres from the pavement towards the island. Mr Motlekar however took it ½ metre further and 1 metre west of the point indicated by the plaintiff. I do not expect the parties after such a long time to be accurate without the assistance of markings. What is important though is that in their recollection their points are very close to each other. They both agree that it is in the same area where the plaintiff fell and the insured driver stopped the motor vehicle after the collision. The difference is in my view insignificant.

30.There is a serious dispute as to which portion of the motor vehicle was in contact with the plaintiff. The submission made on behalf of the plaintiff is that his version is more probable taking into account the undisputed fact that he sustained the injuries on both his legs and if he collided with motor vehicle on the side, one would have expected him to have sustained the injuries on his upper body as he would bend forward if in a running position. I find merit in this argument. To add, the plaintiff testified that he saw the front portion of the motor vehicle collide with him. The insured driver on the other hand conceded that he did not see the plaintiff move or collide with his motor vehicle. In my view it is highly unlikely that a man aged 38 years would sustain the injuries on both his legs and be admitted to hospital for 4 weeks by merely running into or hitting against a slowly moving motor vehicle. (See: **SA Mutual Co. Ltd v Mhlawuli** 1977(1) SA 891 (AD) at 895 A-B).

31.In my view the versions of the two witnesses do converge as to how the collision occurred. It is reasonable to infer that the plaintiff was crossing the road. As he was towards the middle he saw the motor vehicle moving torwards him. He retreated and noticing that it was too close to him ran forward. At the same time in order to avoid him the motor vehicle moved towards the right and as a result collided with the plaintiff.

32.I am of the view that Mr Motlekar did not do what was expected of him under the circumstances to avoid the collision. On his own version seeing the plaintiff at a distance of about 10 -12 paces neither did he reduce speed or stop his motor vehicle. He did not hoot. The sudden appearance of the plaintiff on the road as he allege, should have caused him to be more cautious. He conceded that had he seen the plaintiff earlier on he could have taken an evasive action, and the collision would not have taken place. The facts in the case of **Senator Versekeringmaatskapy v Lawrence** 1982(3) SA 136(AD) are distinguishable from this case. In that case the court took cognisance of the fact that the pedestrian had narrowly avoided an accident with another vehicle and the reasonable motorist expected that he would be more careful.

33. I therefore come to the conclusion that the insured driver was negligent as alleged in the pleadings, and that such negligence had a causal link with the collision. Mr Motlekar was not an impressive witness especially when he had to testify on the crucial aspect of the collision. He took a long time to answer and at times offered no answers under cross examination.

34. As to the position of the plaintiff I am of the view that he was also negligent. It was not opportune at the time to cross the road. He also failed to observe the vehicle in broad daylight when he was in a position to do so. The defendant has succeeded in discharging the onus of providing contributory negligence on the part of the plaintiff (See: **Adendorff v**

Shield Insurance Co. Ltd 1979(4) SA 390(CPD) at 393 A).

APPORTIONMENT

35. The next issue to be decided is the degree of negligence of the parties in relation to the collision. Counsel referred me to various decisions in which different awards were made. These helpful decisions include **Silitsha v Santam Insurance Company Ltd** 1982(2) SA 387(A) in which the majority of the court awarded the pedestrian 40% of her damages; **Hockly v AA Mutual Insurance Association Ltd** 1980 (1) SA 784 (AD) where the pedestrian was awarded 50% of her damages; and **Manuel v Southern Insurance Association Ltd** 1976(3) SA 736 (ECD) in which the court awarded 35 % of the proved damages in favour of the pedestrian.

36. It is clear from the above cited cases that each case was decided on its own facts. In *casu*, I am of the view that the degree in which the defendant was at fault in relation to the damage is equal to the degree in which the plaintiff was at fault. In my view each acted without keeping a proper look-out, the one to cross the street as he did and the other the

manner in which he drove his vehicle. Until a very late stage, each could have taken steps, successfully, to avoid the collision had they appreciated its imminence. As I have already found, in their confusion they both went to the same direction where the collision took place, in a bid to avoid each other. With regard to costs there is no justification for a departure from the general rule that costs follow the result.

The following order is accordingly made:

1. **The defendant is ordered to pay the plaintiff 50% of his damages.**

2. **The defendant is ordered to pay the costs.**

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L P TLALETSI
JUDGE

ADVOCATE FOR THE PLAINTIFF	:	ADV NORTIER
ADVOCATE FOR THE DEFENDANT	:	ADV PHOL
ATTORNEY FOR THE PLAINTIFF	:	VENTER VAN EEDEN INC.
ATTORNEY FOR THE DEFENDANT	:	HAARHOFFS INC.