SOUTH GAUTENG HIGH COURT, JOHANNESBURG

Case No. 08/15848

In the matter between:

ALFRED ZOTTER Plantiff

and

ROAD ACCIDENT FUND Defendant

MEYER, J.

[1] This is a claim for the payment of compensation for damages as a result of bodily injuries caused by a most unnecessary motor vehicle collision. The parties were in agreement that the issues for decision at this stage should exclude the *quantum* of damages and be confined to the questions of negligence and causality. I ordered such separation.

[2] The following undisputed facts appear from the pleadings and the evidence of the only witnesses who testified, who are the plaintiff, his wife, and the driver of the insured vehicle, Mr. Mathikinga. The collision occurred on 3

September 2005 at about noon on the N12 highway between the Snake Road on-ramp and the Putfontein off-ramp ('the highway'). The distance between the Snake Road on-ramp and the Putfontein off-ramp is about two kilometers. The plaintiff was the driver of a 1.3 Ford Bantam light delivery vehicle bearing registration number and letters CNS 473 GP ('the plaintiff's vehicle'). He was accompanied by his wife, Mrs. Zotter. Mr. Mathikinga was the driver of a 1.3 Ford Tracer motor vehicle with registration number and letters FHW 537 GP ('Mr. Mathikinga's vehicle'). He was accompanied by a passenger to whom he had given a lift. Both vehicles entered the N12 highway at the Snake Road on-ramp and travelled in an easterly direction towards Witbank. The intention of each driver was to exit the highway at the next off-ramp, which is the Putfontein off-ramp.

[3] The conditions were in every respect ideal. It was a clear day. The visibility was excellent. The part of the highway on which they were travelling has a double-carriageway for traffic travelling east and good sized emergency lanes on both sides (exhibit 'A', photographs 1 – 8). Mr. Mathikinga probably entered the highway shortly before the plaintiff and his wife did. There was no traffic visible to him while he was travelling on it. The plaintiff and his wife also did not encounter traffic apart from Mr. Mathikinga's vehicle. They noticed Mr. Mathikinga's vehicle for the first time when it was about five hundred metres ahead of them. It was travelling in the left lane at an estimated speed of between 80 – 90 kilometres per hour. The plaintiff and his wife were at that stage also

travelling in the left lane at an estimated speed of 100 kilometres per hour. The plaintiff moved over to the right lane to overtake Mr. Mathikinga's vehicle. The collision between the two vehicles occurred when the plaintiff's vehicle reached that of Mr. Mathikinga.

[4] The respective versions of the point of collision (impact) are mutually destructive. The plaintiff's version is that Mr. Mathikinga's vehicle swerved over to the right lane when the plaintiff commenced overtaking it and it collided with the plaintiff's vehicle in the left lane in which the plaintiff was travelling. The defendant's version is that Mr. Mathikinga was travelling in the left lane when the plaintiff's following vehicle collided into the rear of Mr. Mathikinga's vehicle.

[5] The plaintiff indisputably did not keep a proper look-out. He lost sight of Mr. Mathikinga's vehicle at some stage before his vehicle even reached that of Mr. Mathikinga. The plaintiff conceded that he did not see where Mr. Mathikinga's vehicle was travelling when he was still approaching it, that he did not see it when his vehicle reached it and when his vehicle was about to pass it, and that he did not see it when the impact occurred. The plaintiff testified that he was just looking straight ahead.

[6] I find it astounding, on anyone's version, that the plaintiff did not even see Mr. Mathikinga's vehicle immediately before and at the time of the impact. On the plaintiff's version, Mr. Mathikinga's vehicle swerved over to the right lane and

the contact between the vehicles was behind the right rear wheel towards the rear end of Mr. Mathikinga's vehicle and on the left front side forward of the left front wheel on the plaintiff's vehicle. This means that most of Mr. Mathikinga's vehicle was immediately next to and forward of the plaintiff's vehicle on its left side. On Mr. Mathikinga's version, the plaintiff's vehicle collided with the right rear of his vehicle. This means that part Mr. Mathikinga's vehicle was immediately ahead of the plaintiff's vehicle at the time of the impact.

[7] Apposite is the following passage in the judgment of Jansen, J.A. in *Nogude v. Union and South-West Africa Insurance Co. Ltd.* 1975 (3) 685 (A.D.), at p 688 A – C:

> 'A proper look-out entail a continuous scanning of the road ahead, from side to side, for obstructions or potential obstructions (sometimes called "a general look-out"; cf. *Rondalia Assurance Corporation of S.A. Ltd. V. Page and Others,* 1975 (1) S.A. 708 (A.D.) at pp. 718H – 719B). It means –
> "more than looking straight ahead – it includes an awareness of what is happening in one's immediate vicinity. He (the driver) should have a view of the whole road from side to side and in the case of a road passing through a built-up area, of the pavements on the side of the road as well".
> (*Neuhaus, N.O. v. Bastion Insurance Co. Ltd.,* 1968 (1) S.A. 398 (A.D.) at pp. 405H – 406A).
> Driving with "virtually blinkers on" (*Rondalia Assurance Corporation of S.A. Ltd. V. Gonya,* 1973 (2) S.A. 550 (A.D.) at p. 554B) would be inconsistent with the standard of the reasonable driver in the circumstances of this case.'

[8] The plaintiff suggested that he did not see Mr. Mathikinga's vehicle since he, the plaintiff, had to keep his eyes on the road straight ahead of him because of the speed of 100 kilometres per hour at which he was travelling. If this is so

then he was also travelling at an excessive speed in the circumstances of this case even though he was travelling at a speed that was below the speed limit and in excellent conditions for travel.

[9] Mr. Mathikinga's evidence that his vehicle travelled towards the left side on the left lane 'touching' the emergency lane is probable since it is common cause that he was travelling at a relatively slow speed of between 80 – 90 kilometres per hour on a highway with a speed limit of 120 kilometres per hour. It is common cause that there was nothing untoward in the way in which his vehicle was travelling until immediately before the collision occurred. One would have expected him to merely continue on his course on the left of the road. He testified that he had no reason to change over to the right lane and that he intended to take the upcoming Putfontein turn-off to his left. Mrs. Zotter, however, came up with a reason why Mr. Mathikinga's vehicle suddenly swerved to the right and impacted with the plaintiff's vehicle in the right lane.

[10] The plaintiff testified that his wife told him that the insured driver was talking to his passenger at the time of the impact. In her evidence in chief, Mrs. Zotter said that she looked at Mr. Mathikinga when they got close to his vehicle and she noticed that he was talking and looking at the passenger that was seated next to him. When they got nearer to his vehicle, she noticed his vehicle moving over to their side. She alerted her husband by saying 'watch out' to him. They 'caught' Mr. Mathikinga's vehicle at its rear right hand side when they were

passing it. Her version changed somewhat when she was cross-examined. She said that she saw Mr. Mathikinga talking to and looking at his passenger when they were about 6 – 7 metres away from his vehicle. His vehicle swerved somewhat to the left and then suddenly swerved over to the right lane when they reached the rear of his vehicle and started to overtake it. She did not notice whether Mr. Mathikinga and his passenger were still communicating when Mr. Mathikinga's vehicle swerve to the right. She also contradicted herself as to which vehicle impacted with which one.

[11] Mr. Mathikinga testified that he only spoke to his passenger, who was a young man of about 15 or 16 years of age and unknown to him, when the young man asked him for a lift and again when the impact happened. Adv. Z. Kahn, who appeared for the plaintiff, submitted that it is improbable that a conversation would not have taken place between Mr. Mathikinga and his passenger. I disagree. Counsel's submission in this regard ignores the fact that his passenger was unknown to him, the wide age difference between them, and the divergent traits of people.

[12] Mr. Mathikinga testified that he steered his vehicle onto the left emergency lane and easily brought it to a standstill in the emergency lane after it had been impacted at its right rear end. The evidence of the plaintiff and that of his wife was that the plaintiff's vehicle went over to the far right and into or through a ditch in the centre island which divides the two parts of the highway. Adv. Kahn

submitted that the post impact movements of the two vehicles are inconsistent with Mr. Mathikinga's version and rather support the version of the plaintiff's wife as the probable one. I disagree. The direction in which Mr. Mathikinga's vehicle moved after the impact – into the emergency lane and forward – is, on the evidence available to me, not improbable or inconsistent with his version of a rear end impact, particularly when regard is had to the relatively small size of each vehicle and the relative estimated speed of each (80 – 90 and 100 km p/h). Any inference drawn from the fact that Mr. Mathikinga's vehicle did not spin or its rear end did not swerve more dramatically because of the impact will be mere speculation and will amount to dubious reasoning. Nor can any inference be drawn from the movements of the plaintiff's vehicle. The post impact movements of the two vehicles do, in my view, not establish any probability favouring the one version above the other.

[13] Adv. Kahn submitted that Mr. Mathikinga was also negligent since he did not view what was happening behind him through the rearview mirrors of his vehicle. This submission is, in my view, also without merit. Mr. Mathikinga testified that he viewed what was happening behind him from time to time, but that he did not notice the plaintiff's vehicle until after the impact. This means that he probably did not use his rearview mirrors during the time that the plaintiff's vehicle was travelling behind his vehicle when it would have been visible to him in the rearview mirrors of his vehicle. He cannot, in my judgment, in the

circumstances prevailing at the time be held at fault for not having looked in the rearview mirrors of his vehicle more frequently than he did.

[14] Mr. Mathikinga's version is on the totality of the evidence the more probable one. He was an impressive witness. A consideration of the probabilities does not detract from the favourable impression that he made while he was in the witness stand. I accept his evidence that he was not distracted by a conversation with his passenger and I consider the evidence of Mrs. Zotter not to be reliable on this issue. There accordingly exists no plausible reason why Mr. Mathikinga would have swerved his vehicle into the lane in which the plaintiff and his wife were travelling. The plaintiff, on the other hand, clearly did not keep a proper look-out of the road ahead of him and it is probable that his vehicle or part of it veered into the right lane and collided with the right rear end of Mr. Mathikinga's vehicle.

[15] I conclude in finding that the plaintiff has not discharged the *onus* of proof on a balance of probabilities that the collision was caused by any degree of negligence on the part of the driver of the insured vehicle Mr. Mathikinga. I should mention that it is a matter of regret that no police plan and evidence relating to the investigation that was conducted at the scene of the collision shortly after its occurrence were presented at the trial. Such evidence may have included evidence of debris and other marks found on the road at the scene of the collision from which an approximate point of collision may have been inferred.

[16] In the result the following order is made:

The plaintiff's claim is dismissed with costs.

P.A. MEYER
JUDGE OF THE HIGH COURT

26 October 2009