REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)

CASE NO: 13734/10

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

25 July 2012 **FHD VAN OOSTEN**

In the matter between

ANDRIES MVULANE ZULU **PLAINTIFF**

and

ROAD ACCIDENT FUND **DEFENDANT**

Negligence - claim against RAF for damages in respect of personal injuries arising from collision
Practice - absolution from the instance at close of plaintiff's case - principles applicable – defendant absolved from the instance

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J U D G M E N T

VAN OOSTEN J:

[1] This is action in which the plaintiff claims damages from the defendant in respect of personal injuries arising out of a motor vehicle collision which it is common cause, occurred on 9 December 2006, along Moshoeshoe street, Sebokeng. At the commencement of the trial and as agreed between the parties, I ordered a separation of merits and quantum in terms of Rule 33(4)

and the matter accordingly proceeded on the merits of the plaintiff's claim only. Only the plaintiff testified and after the close of the plaintiff's case the defendant applied for absolution from the instance. This is the application I am now required to determine.

[2] The fact of the collision was not in dispute. A summary of the plaintiff's evidence is the following: on the evening in question and shortly after 22h00, the plaintiff was the driver of a BMW 318 motor vehicle on his way to a petrol filling station in Zone 10, Sebokeng, in a northerly direction along Moshoeshoe road, consisting of dual lanes in each of the opposite directions. It was dark although certain of the street lights were on. It was raining, the road was wet and the plaintiff had the wipers of the vehicle switched on. He was aware of the existence of potholes in the left lane and therefore decided to rather proceed in the right (fast) lane where to his knowledge there were no potholes. There was no other traffic on the road. Having shortly before departed from a stop sign he had reached a speed of approximately 50 km per hour when the right front wheel of his vehicle unexpectedly struck a pothole which was not visible due to the rain. This caused the front right suspension arm of the vehicle to break and he lost control of the vehicle. The vehicle veered off to the right, crossed the one lane in the opposite direction and came to a standstill in the far opposite lane, against a half meter high built up concrete barrier, facing in the direction of oncoming traffic. At that very moment the insured vehicle, which had been travelling in its left (and therefore correct) lane, in a southerly (and therefore opposite) direction, collided head-on with his vehicle. Bystanders arrived on the scene and he was dragged out of the vehicle. He later observed blue flashing lights indicating that the police had arrived.

[3] The only ground of negligence relied upon by the plaintiff is that the insured vehicle, prior to the collision, should have swerved to its right and therefore have avoided the collision. It is common cause that a swerve to the left was impossible due to the existence of the built up concrete barrier on that side of the road. The question, accordingly, is whether the insured driver could have swerved to its right and secondly, whether such manoeuvre would have avoided the collision. In this regard it is at the outset necessary to note

that the events occurred quickly: the plaintiff estimated the time from the striking of the pothole to the collision occurring, as "between 3 and 4 seconds". There is no evidence concerning the speed at which the insured driver was travelling. He was travelling in the left lane approaching the scene and was therefore confronted with a sudden emergency when the plaintiff's vehicle swerved right in front of him into the very lane he was travelling. In this regard the plaintiff in his evidence in chief testified that he had just after striking the pothole observed the insured driver's vehicle, which he estimated, at that stage, was a distance of some 400 metres away, which decreased to some 200 meters after he had struck the concrete barrier. The plaintiff's evidence on this score was seemingly unreliable and unsatisfactory: he clearly did not have either the opportunity nor were the circumstances such as to allow him to make any leave alone reliable estimate of the distance, assuming (without deciding) that he in fact did observe the lights of the oncoming vehicle. I need however not take this aspect any further as the plaintiff, in any event, has conceded as much. That being so, I am unable to find that it has been shown that sufficient opportunity existed for the insured driver to effect a swerve to the right. But, it does not end there: there is nothing to show that such a swerve would have avoided the collision.

[4] At this stage of the proceedings I am required to consider whether on the evidence of the plaintiff, he has discharged the onus to "convince the court that the inference he advocates is the most readily apparent and acceptable inference from a number of inferences" as was held in *AA Onderlinge Assuransie Assosiasie Bpk v De Beer* 1982 (2) SA 603 (A) at 614H-615B or, as it was stated earlier in *Marine and Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 (A) at 38H:

> '...daar nie 'n opweging van verskillende moontlike afleidings sou geskied nie, maar slegs 'n bepaling of een van die redelike afleidings ten gunste van die eiser is.'

The evidence of the plaintiff falls short of this requirement. In passing it needs mentioning that the maxim of *res ipsa loquitor* does not apply (*Road Accident Fund v Mehlomakulu* 2009 (5) SA 390 (ECD)), which I need to add in any event was not contended for. The plaintiff's contention concerning the ground of negligence relied on attracts nothing more than conjecture and speculation

as opposed to inferences that can properly be drawn from objective facts proven by the evidence (*Caswell v Powell Duffryn Associated Collieries Ltd* 1939 (3) All ER 722 at 733).

[5] In conclusion, the plaintiff, at the close of the plaintiff's case, in my view, has failed to adduce evidence upon which a court, applying its mind reasonably to such evidence, could or might find for the plaintiff (*Gascoyne v Paul and Hunter* 1917 TPD 170). It follows that the claim cannot succeed.

[6] In the result the plaintiff's claim is dismissed with costs.

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FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

COUNSEL FOR THE APPELLANT	***ADV T MOSENYEHI***
PLAINTIFF'S ATTORNEYS	***MAFORI LESUFI INC***
ATTORNEY FOR THE DEFENDANT	***MR E SWARTZ***
DEFENDANT'S ATTORNEYS	***SWARTZ INC***
DATE OF HEARING	***24 JULY 2012***
DATE OF JUDGMENT	***25 JULY 2012***