

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO 13/13626

Delete whichever is not applicable

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

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In the matter between:

NQATYISWA PEVERETT obo J SMITH and L HOPA

PLAINTIFF

And

ROAD ACCIDENT FUND - JOHANNESBURG

DEFENDANT

JUDGMENT

ANDREWS AJ

1. This is a claim for damages arising as a consequence of the death of Mr Johnson Thobile Mbane ("the deceased"), who was injured in a collision with a motor vehicle and subsequently died. The claim is a loss of support claim brought by the plaintiff in her representative capacity as the natural guardian of Jessica Smith and Lutho Hopa, who were minors and dependants of the deceased at the time of his death. The issue of quantum in this claim has been settled by the parties. What remains to be determined is liability of the defendant, the Road Accident Fund, duly established by the provisions of section 2(1) of the Road Accident Fund Act, 56 of 1996 ("the Act").
2. At the commencement of the hearing of this matter an application was made by the plaintiffs' legal counsel, *Mr Louw* for the defendant to begin, in light of the fact that the plaintiff had no witnesses. This application was refused after arguments were presented by counsel for the respective parties. The plaintiff's counsel then proceeded to interview the defendant's witnesses in the presence of the defendant's legal representatives, and then led their evidence.
3. At the close of the plaintiff's case the defendant's legal counsel, *Mr Matoboge* applied for absolution from the instance, and in the alternative for the plaintiff's claim be dismissed with costs on the basis that the plaintiff had failed to make out a *prima facie* case of causation of death due to negligence or other wrongful act by the Mr Steven Leith ("the insured driver") while driving the vehicle with registration letter and numbers BZ& 162 GP ("the insured vehicle"), both being essential requirements for a dependant's loss of support claim under the Act.
4. The application for an order of absolution was refused, as it cannot be concluded that no reasonable court could draw the inference contended for by the plaintiff that:-
 - a. The deceased was dead before being struck by the second vehicle; and
 - b. The act of swerving to the left by the insured driver was conduct that was at least one percent negligent.
5. It is common cause that at approximately 19H00 on 31st October 2009 and on the R21 Griffith Road highway a collision occurred involving the insured vehicle driven by the insured driver, and the deceased who was a pedestrian at the time.
6. The plaintiff pleaded that the collision was caused solely by the negligent driving of the insured driver, who was negligent on one of more of the following respects:
 - a. he failed to keep up the lookout;
 - b. he travelled at a speed which was excessive in the circumstances;
 - c. he failed to apply the brakes of the insured vehicle at all, alternatively timeously and/or sufficiently;
 - d. he failed to avoid the collision when, by taking reasonable and proper care (including but not limited to, travelling more slowly, swerving) he could and should have done so;
 - e. he failed to maintain any, alternatively sufficient control over the insured vehicle;
 - f. he failed to take into account the rights of other users of the road..
 - g. It was further pleaded that the deceased was the biological father of the two minors and was lawfully obliged to maintain them, and did so. He sustained injuries as a result of the aforesaid collision from which he died on 31st October 2009. Had he not been unlawfully killed, he would have been legally obliged to continue to support them and would have been able to do so.

7. The defendant denied the allegations of negligence and causation of death and put the plaintiff to the proof thereof. The following is a summary of the evidence led by the three witnesses.
8. Ms Isabella Meyer, a member of the Ekurhuleni Metropolitan Police Department, testified that she arrived at the scene of the collision at about 19H40 after receiving a callout. She found the traffic at the scene to be "quite busy" and recorded her observations of the evidence of the collision on a sketch which she later transcribed into a computer generated diagram. Her evidence referred to the initial sketch which she stated was the more reliable one.
9. Of relevance was a depiction of the highway which contains three lanes, separated by broken lines, and the position of debris from the collision. This straddled the white line separating the first and second lane, and she stated that most of the debris was found in the second lane. She found a side mirror from the insured vehicle lying in the middle of the first lane. She estimated the point of first impact to have been in the middle of the first lane. In front of that point she measured a 20.3 meter vehicle skid mark which veered towards the shoulder of the road, where the insured vehicle had stopped. In the second lane close to the white line she measured a 41.8 meter trail of blood at the end of which lay the deceased. She measured the middle lane as having a width of 3.7 meters.
10. The witness confirmed that she had made a statement after attending the scene. The streetlights were out of order at the time. The speed limit on the road was 120 km per hour. She spoke to the insured driver and recorded that that he had stated that he was driving in the middle lane when he saw a pedestrian crossing from the left side. He was not sure if he was running or walking. He was right in front of him. He swerved to the left and the deceased collided with the right side mirror. Her statement recorded the following "the driver....alleged that he saw the pedestrian in the middle of the road crossing from the left side, swerve (d) to the left but the pedestrian was still running to the right hand and collided with the pedestrian in the middle lane." She stated that the position that she found the mirror in suggested that the impact had happened in the first lane.
11. The evidence of the witness Ms Luzaan Lieth, a passenger in the insured vehicle was that she was travelling with her husband, the insured driver, (hereafter referred to as Leith) in the middle lane of the R 21 highway, and just after they had passed under a bridge she noticed a white packet and some movement and she then shouted. Leith responded by pulling the vehicle over to the left. She could not make out a figure, only a white bag at a distance of about 6-7 meters from the insured vehicle, as it had all happened so fast. Only afterwards did they assume that this object was a person.
12. She stated that the reason they could not see the deceased earlier was that the road was dark under the bridge, and although they were not directly under it, they were within a darker area in the range of the bridge. The vehicle lights were on but they were not strong lights. She estimated that the position of the deceased when struck was in the middle lane, just off to the right and close to the third lane. They had been travelling at the same speed as the other vehicles and her husband was "not a racing driver."
13. After seeing the deceased, Leith swerved and braked and then stopped the vehicle on the shoulder of the road. He did not swerve earlier because they did not see the deceased earlier. He then got out of the vehicle to flag down the motorists and help the deceased, who was trying to get up. Then a second vehicle, driving very quickly

crossed into the first lane and collided with the deceased, dragging him a distance of about 20 meters before coming to a halt. The vehicle then reversed over the deceased, drove over him again and left. The deceased was found to have died after that.

14. Leith then testified that while driving in the middle lane of the R21 highway, his passenger Ms Leith screamed and he then saw a white packet in front of his vehicle at a distance of about 6 to 7 seven meters away. He swerved hard to the left and braked. It was dark and at the speed of 100 to 120 km per hour he could not tell if the deceased was walking running or standing. The deceased was one third of the way into the middle lane which he was driving in. It was dark and he could not see his clothes. He did not know why he had not seen him before that, as his eyes were on the road. When asked why his wife saw the deceased before he did, he responded by saying that she is a nervous passenger and keeps her eyes on the road.
15. Under cross examination Leith was presented with a sketch of the insured vehicle's skid mark and it was suggested to him that the angle of the skid indicated that this was a very mild swerve. He replied that he is not an expert and does not usually skid, but that he had indeed swerved to avoid the deceased.
16. Leith stated that his instinct was to swerve to the left, and he had no time to assess the situation, and what was behind him. After colliding with the deceased he confirmed the version given by Ms Leith as to the second vehicle which collided with the deceased, dragging him further down the road. He could not vouch for the suggestion that swerving to the right he would have missed the deceased. If he had gone straight he probably would have hit the deceased on the left of the vehicle.

Analysis of the evidence and arguments

17. The evidence of Leith was credible and consistent and was corroborated in a number of material respects by the evidence of Ms Meyer. Her description of where she found the accident debris, and skid marks corroborated his evidence of the position of the vehicle and deceased when the collision occurred. The evidence of Ms Leith was less reliable. Her evidence as to the position of the deceased when struck by the insured vehicle did not square with the position of the debris from the accident as described by Ms Meyer. She explained this discrepancy by stating that at the time it was dark, the lanes were not visible and she was not concentrating on them at the time. *Mr Louw* recorded that this version of the position of the collision differed from what she had told him in the earlier consultation. I accept that her recollection might not have been precise given the circumstances of the collision and her description of the lighting. Accordingly no reliance will be placed on her testimony as to the position of the deceased at the point of collision.
18. The Leiths' evidence was not disputed that a second car collided with the deceased after the collision with their vehicle, and dragged him a distance of about 40 meters, stopped, reversed over him and then drove over him again and left the scene. He was confirmed dead after this occurrence. They both testified that they had seen the deceased trying to get up after the first collision. No evidence was led as to the precise time of his death but in all likelihood it occurred after the second collision given this fact. The driver of the second vehicle was not cited in the claim and the court was advised that the claim against him had prescribed.

19. *Mr Louw* argued that Leith should have swerved to his right of his field of vision, away from danger but instead swerved to the left and towards the deceased. The deceased was on the left hand side of his vehicle when he saw him. He argued that to get around an object that is to the left of the vehicle entailed moving a greater distance than swerving away from it to the right. In so doing Leith made an error of judgment and failed to take sufficient evasive action. He was not keeping a proper lookout and did not see the deceased, and had to be warned of his presence by his passenger. A skilled driver would have kept a lookout for objects on the road and this he failed to do. He got a fright and exercised the wrong option by swerving to the left and he swerved wrongly, in other words did not take sufficient evasive action. In so doing he negligently caused the collision with the deceased. This act set in motion a chain of events which but for the collision would not have occurred and which resulted in the death of the deceased. As a result the defendant is liable as pleaded.
20. *Mr Matoboge* argued that the entire blame for the collision lay with the deceased in that he was unlawfully on the highway. He referred to section 323 (2) of the National Road Traffic Regulations 2000 (GNR 225 of 17 May 2000), which states that no person shall be on a freeway save in limited circumstances that do not apply in this case. Leith stated that he did not expect to see a pedestrian on that road which is a highway and the location of the collision was not in a residential area. The deceased by his conduct had created a situation of sudden emergency. It was a case of *volenti non fit iniuria*. The insured driver had acted immediately he saw the deceased and had taken reasonable steps.
21. *Mr Matoboge* argued further the second collision was an *actus novus interveniens* and was the actual cause of the death of the deceased, rather than the first collision. He drew this conclusion from the fact that the deceased was seen trying to stand up after the first collision. He argued that the plaintiff had framed the case based on citing the wrong driver and when this was realised it was too late to rectify the matter as the claim had prescribed. In the circumstances it was unjust to hold the defendant liable.
22. The following summary of the applicable legal principles was set out by van Heerden, AJA in *Minister of Safety and Security and another v Rudman and another* [2004] 3 All SA 667 (SCA) at paragraph 65:

“The classic test for establishing the existence or otherwise of negligence, quoted with approval in numerous decisions of this Court, is that formulated by Holmes JA in *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E-G.

“For the purposes of liability *culpa* arises if –

(a) *a diligens 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.

Whether a *diligens 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.”

As was emphasised by this Court in *Sea Harvest Corporation (Pty) Ltd and another v Duncan Dock Cold Storage (Pty) Limited and another*. 2000 (1) SA 827 (SCA) para 21-22 at 839G-840 in the following terms:

“[21] ..it should not be overlooked that in the ultimate analysis the true criterion for determining negligence is whether in the particular circumstances the conduct complained of falls short of the standard of the reasonable person. Dividing the inquiry into various stages, however useful, is no more than an aid or guideline for resolving this issue.

[22] It is probably so that there can be no universally applicable formula which will prove to be appropriate in every case . . .”

“ . . . it has been recognised that, while the precise or exact manner in which the harm occurs need not be foreseeable, the general manner of its occurrence must indeed be reasonably foreseeable.” (See too the most recent *Carmichele* case (SCA) (*supra*) para 45 at 148G-149A.)

Moreover, it must constantly be borne in mind that, in considering the question as to what is reasonably foreseeable:

“ . . .one must guard against what Williamson JA called ‘the insidious subconscious influence of *ex post facto* knowledge’ (in *S v Mini* 1963 (3) SA 188 (A) at 196E-F). Negligence is not established by showing merely that the occurrence happened (unless the case is one where *res ipsa loquitur*), or showing after it happened how it could have been prevented. The *diligens paterfamilias* does not have ‘prophetic foresight’ . . .In *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound)* [1961] AC 388 (PC) ([\[1961\] 1 All ER 404](#)) Viscount Simonds said at 424 (AC) and at 414G-H (in All ER) :

‘After the event, even a fool is wise. But it is not the hindsight of the fool; it is the foresight of a reasonable man which alone can determine the responsibility.’” (See *S v Bochriss Investments (Pty) Ltd and another* 1988 (1) SA 861 (A) at 866J-867B, quoted in *Sea Harvest Corporation* (*supra*) para 27 at 842G-H and in the most recent *Carmichele* case (SCA) (*supra*) para 45 at 149B-D.)

23. Leith reacted to the sight of the white object which was held by the deceased, after his passenger had screamed. He did not see the deceased as such, only this object. His explanation as to why Ms Leith had reacted to it before he did was that she was a nervous passenger and keeps her eye on the road. Assuming that he had been as attentive as she was, in other words a reasonable person who keeps his eye on the road, the question is whether he could have taken evasive action which would have resulted in him not colliding with the deceased.
24. The following facts are relevant to this enquiry. The Leiths both testified that it was very dark on the highway and they were travelling at high speed with head lights that were not very powerful. Leith could not tell if the deceased was standing, walking or running because it was dark. Neither of them saw the deceased - they only saw a packet he was holding. This is consistent with the terrain being very dark. Leith saw the deceased so late that he did not have time to take his foot off the accelerator. He swerved sharply, according to his evidence. He acted by instinct. He could not say whether the outcome would have been different if he had swerved to the right.

25. A speed of 120 km per hour roughly approximates to 33 meters a second and if Leith had seen the deceased when his wife did, he would have had a fifth of a second to take evasive action. *Mr Louw* argued that drivers are constantly called upon to make split second decisions and a quarter of a second is enough to make the right decision.
26. In my view this may be true if an object, for example a pothole, is clearly visible in front of a driver, and depending on the speed in which the vehicle is moving. In the present case it was so dark that neither of the occupants could even see that there was a human being in the road in front of them and whether he was moving or stationary. If the deceased been moving ie walking or running across the highway from left to right in front of the traffic, a swerve to the right might have resulted in a collision with him. It therefore does not follow that there was a "correct" course of action for Leith to take under the circumstances and that he took the wrong course of action by swerving to the left.
27. It is common cause that the speed limit was 120km per hour and no evidence was tendered that Leith was travelling beyond the speed limit. The argument that he was going too fast is therefore not supported by facts.
28. The suggestion that Leith did not swerve sufficiently is an inference drawn by *Mr Louw* from the angle of a skid mark created by the insured vehicle's tyres on the road, before it came to a halt. This theory does not take into account the effect of speed on the mark caused when the vehicle skidded. Leith stated that he did not take his foot off the accelerator when he swerved and he was travelling around 120 km per hour. Clearly a vehicle travelling at a lower speed will cover a shorter distance than a vehicle travelling at a higher speed, in the same amount of time. If both were to swerve to an equal degree, it would seem reasonable to infer that this would affect the angle of their respective tracks on the ground. However in the absence of expert evidence about what the skid mark indicate about the degree to which Leith swerved, nothing further can be concluded from it, save that it shows that the vehicle veered to the left, which is consistent with Leith having swerved when he encountered the deceased.
29. In circumstances of poor visibility, which the evidence shows applied in this case, the argument that Leith did not keep a sufficient lookout, and that if he had done so he could have taken more appropriate evasive action, is conjecture rather than fact. According to Ms Meyer the street lights were not operating. If a human being was not visible to his very attentive wife at a distance of 7 meters it seems unlikely that he would have been more visible at a greater distance, with even less light on the him from the headlights.
30. It is clear that as soon as he saw the white object Leith foresaw that he could collide with it and took evasive action. The action he took, which was to swerve to the left, all but missed the deceased. Only the side rear view mirror of the vehicle hit the deceased knocking him to the ground. A few more centimetres and he might have missed him altogether. His conduct in swerving to the left was reasonable in the circumstances and if it was not, he certainly did not have time to weigh up the options and take a better course of action as, apart from anything else it was not clear to Leith whether the deceased was standing, walking or running.
31. The conduct of Leith was reasonable in the circumstances. He swerved and largely avoided a serious collision with the deceased. There is no basis on which it is possible to conclude that his actions were negligent. The claim therefore fails.

32. In light of the fact that the dependents of the deceased have suffered a loss of parental support, and were minors when he passed away I have exercised my discretion and make no order as to costs against the plaintiff

33. I make the following order:

- a. Judgement for the defendant;
- b. No order is made as to costs.

A ANDREWS

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

DATE HEARD : 27th AUGUST 2014

DATE DELIVERED : 28th October 2014

For the Plaintiff : ADV LOUW

Instructed by : Smit Herbst and Burger Attorneys

For the Defendant : ADV MATOBOGE

Instructed by : Kekana Hlatshwayo Radebe Inc