IN THE NORTH GAUTENG HIGH COURT – PRETORIA
(REPUBLIC OF SOUTH AFRICA)

CASE NO: 33275/09

In the matter between: 13/6/2012

THABO JONAS MMEKWA **PLAINTIFF**

and

ROAD ACCIDENT FUND **DEFENDANT**

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.
(3) REVISED.
12/06/2012 DATE ..... SIGNATURE

JUDGEMENT

Date of hearing: 19 February 2012

Date of Judgement: June 2012

INTRODUCTION

[1] On 3 June 2009, the Plaintiff, a self employed bricklayer, instituted an action against the Road Accident Fund ("the Defendant") as a juristic person created in terms of section 2 of the Road Accident Fund Act 56 of 1996 ("the Act") whose object is to pay compensation in accordance with the provisions of the Act for loss or damage caused by the negligent driving of motor vehicles, claiming damages for personal injuries sustained from a motor collision that occurred on 31

August 2008 near a plot in Roodeplaat allegedly caused by the sole negligence of Jansen Van Vuuren (the "insured driver").

[2] The trial proceeded only on the issue of liability, after I have ordered, in accordance with the request by the parties counsels, that the issue of liability and that of the extent of damages was to be separated and the latter issue to stand over for later determination.

[3] In its Plea filed on 15 August 2009, save for admitting to the name of the plaintiff and its own *locus standi,* the Defendant denied any knowledge of the accident, placing all the allegations in the plaintiff's particulars of claim in issue by either denying any knowledge thereof or putting the plaintiff to the proof thereof. On 8 February 2012, a week before trial, the Defendant filed a notice in terms of Rule 28 amending its Plea, denying that the collision as alleged by the Plaintiff occurred and claiming that if it is to be found that the collision occurred, then the Plaintiff was negligent and the collision was caused by Plaintiff's sole negligence alternatively that such negligence contributed to the cause of the collision.

[4] In the pre-trial minute of the 13th February 2012, the Defendant conceded that a collision occurred on 31 August 2008 as in accordance with the accident report in which the insured driver confirmed that he was driving on Moloto Road in Roodeplaat when he hit an object that he later discovered to be a person. The Defendant also agreed that Plaintiff was the pedestrian but still put all the other issues in dispute.

[5] It was also common cause that the locale where the collision took place the road is tarred with one lane carrying traffic on each opposite direction with a wide gravel side of the road that is referred to by the Defendant's insured driver as 'the shoulder" on either side of the tarred road. The accident happened during the night at a very dark area with no lighting.

EVIDENCE

[6] Each party had only one witness testifying, the Plaintiff and on behalf of the defendant the insured driver was the only witness.

[7] Plaintiff's testimony was that he is a single, self employed bricklayer and stays at Kameeldrift. Since the accident he has not done any work, so effectively he is unemployed. On Sunday 31 August 2008 at noon, he went to a shop nearby where he spent the day playing pool with his friends until late at night. At approximately 21h00, he left the shop with one of his friends and together they walked back home on Moloto Road. The friend left him behind when he stopped to assist a certain lady they encountered on the road, stuck in a car. He thereafter started jogging to try and keep pace with his friend and had also during that time crossed the road from the right of the gravel side to the gravel on the other side of the road, proceeding northerly towards the direction of Pretoria from the direction of Umhlanga. As he was passing plot no 47, he saw his friend disappearing near plot 41. He continued jogging on the gravel side of the road and as he was passing near the gate of plot 37 he was hit by this vehicle. He confirmed that the tarred road is for the motor vehicle traffic and the gravel side of the road where he was

hit by the vehicle is used by pedestrians. Also that the lights of the on-coming cars on the right hand side were shining on him and that at the time he was wearing sky blue pants and a striped cream white shirt.

[8] He further testified that he did not see the car that knocked him down because he lost consciousness immediately. The driver of the vehicle, as he learnt later, stays in Plot 37 and is the one who phoned the ambulance and the police. He was badly hit and his injuries were so serious that he stayed in hospital for 2 months and 3 days. In illustrating the point of impact where the accident occurred Plaintiff pointed at a photo I have marked as exhibit 1 which is photo no 3 on page 20 of the index of documents submitted by the parties. The photo shows a tarred road from the southerly (Umhlanga) to the northerly direction (towards Pretoria) with a wide gravel side of the road ("shoulder"). Approaching the point of impact as illustrated by the Plaintiff the road is level and straight and at approximately a distance of a metre or more from the said point the single lane to the direction of Pretoria becomes a dual lane. He indicated a position of just about a metre and a half away from the tarred road as where he was hit by the car.

[9] Under cross examination he denied the suggestion that the insured driver could have been driving very slowly and stated that, that was inconsistent with his injuries that were too severe. He also suggested that for the insured driver not to have seen him and to have been driving in that speed on the side of the road used by pedestrians, he must have been drunk. He said he was flung to a tree and fell down on the grass away from the gravel shoulder. The tall grass is next to the wide gravel shoulder. He denied a suggestion that he might be the one who was

drunk stating that the pool shop did not sell liquor on Sundays. He was questioned on the contents of a statement he made to his attorneys in which he stated that on the date of the accident he was walking and from work, contrary to his testimony that he was running and from the shop and he pointed out that it was a Sunday and he definitely was not from work and at the time when he was hit by the car he was jogging. The questioning did not take the matter further.

[10] The insured driver testified that he lives on Moloto road where the accident occurred and drives on that road everyday. On that particular night and time he was with his son in his Toyota Corsa bakkie driving along Moloto road from the direction of Umhlanga towards Pretoria, which is towards the northerly direction. He was about 150 metres from his plot when he started reducing speed and suddenly hit something. He was totally not aware what it was, so he immediately drove off the road and walked backwards where he thought he had hit the object but could not find anything. He then drove into his property to get somebody with a torch and came back to the area again. They searched for nearly ten minutes without finding anything until he saw, away from the gravel shoulder, a person lying in the long grass. The person was badly injured so he immediately phoned the police and the ambulance. He decided to have a proper look at the injured person whilst he was being taken away in a stretcher and smelt from him a strong smell of alcohol. The person was wearing dark blue suit pants and he could not make out what colour the shirt was because it had a lot of blood. He denied that he probably swayed off the road and hit the Plaintiff on the gravel shoulder and also that he might have been drunk. His car had damages on the windscreen, left hand side of the bumper, side mirror and bonnet. There were damages also on the

panel. He alleged that the place visited by the Plaintiff on the day is not a shop but a café that has a pool table on the stoep (referring to a veranda) and a shebeen that sells liquor everyday on the same premises.

[11] Under cross examination his evidence was that before he reduced the speed he was travelling at 80 km/h and had reduced it down to 30km/h. When the accident occurred his speed was between 70 and 80 km/h. He explained that he was initially driving at 80 km/h and then he put his foot off the petrol paddle, the speed was then between 80 and 70 km/h and his headlights were on but he did not see anything on the road. He could only see the road in front of him where he was heading. He confirmed that he only heard a bang but did not see anything and therefore could not comment on the clothes Plaintiff was wearing at the time. He explained that the Plaintiff landed on the grass even though he was driving at a speed of between at 70 - 80km/h probably because the gravel shoulder is about 1 and a half metre to the grass and the Plaintiff was lying 4 to 5 metres away from the edge of the road. He denied colliding with the Plaintiff on the gravel and stated that he hit the Plaintiff whilst he was driving on the tarmac. When he was asked to indicate exactly where on the tarmac he then said he could not say and admitted that it must have been on the side of the tarmac. He further stated that he was surprised that it happened and only realised after it had happened that he must have hit the Plaintiff on the side of the tarmac. He said he did not explain this to his lawyers because he was asked only a day before the trial to come and testify and his son who was with him in the car at the time was not asked to come and testify. The Plaintiff was bleeding profusely from his head, upper torso as well as forehead and his leg was broken.

NEGLIGENCE

[12] The main issue that was in contention after the Plaintiff has testified and at the beginning of the insured driver's evidence was the locus in quo. According to Plaintiff's evidence he was hit by the insured car on the gravel side (shoulder) of the road and near the gate of plot 37, which was denied by the insured driver in his evidence in chief. The contention was however resolved by the insured driver's evidence under cross examination when he conceded that the collision must have happened on the gravel, even though he initially thought he collided with the Plaintiff on the tarred road. He confirmed that he was surprised when he realised after the accident that it indeed happened on the side of the road. His concession makes sense and gives credence to his allegation that he was travelling at a speed of approximately between 70 to 80 km/h when he collided with the Plaintiff and explicable that Plaintiff would then be thrown and be found 2 and a half metres into the grass away from the gravel shoulder. The alternative that the insured driver was driving on the tarred road at the time would have meant that the insured driver's speed was way in excess of 80 km/h, for Plaintiff to land at a distance of 4 to 5 metres from the edge of the road. Insured driver's surprise and struggle to accept the turn out of events is understandable if like he testified he did not see the Plaintiff. Although his evidence might have seemed to be a little wobbly under cross examination, I do find him to be a credible witness and his evidence reliable.

DETERMINATION OF LIABILITY

[13] The insured driver's concession that the collision occurred on the gravel side of the road establishes a prima facie inference of negligence on his side that is normally explained as a rebuttable presumption that the injury arose as a result of his negligence.

[14] Although the onus of proving negligence still remains with the Plaintiff, the establishment of prima facie inference of negligence on the part of the insured driver places the evidential burden on the defendant to adduce and tender rebuttal evidence which negates the prima-facie negligence. It becomes the case of *res ipsa loquitur*. The question of the requisite evidence in rebuttal is more enunciated in ***Sardi and others v Standard and General Insurance Co Ltd 1977 (3) SA 776 (A)*** at 780 C-H. According to ***Cooper, Motor Law Principles of Liability Volume 2, Juta 1987*** page 99, for this doctrine to apply there must be two basic requirements:-

[14.1] the occurrence must be of such a kind which ordinarily does not occur unless someone has been negligent, and

[14.2] it must be due to a thing or means within the exclusive control of the defendant.

[15] The burden of disproof applies to the defendant until the end of the case, placing his (the insured driver's) whole conduct under scrutiny. Therefore it would not be discharged by proof that Plaintiff as the pedestrian was negligent. Such proof can

only be significant in determining the extent of liability to be attributed to the defendant.

[16] In establishing the negligence required to determine liability in civil actions a simple test that involves the standard of care and skill that would be observed by a reasonable man applies, which also depends on the atypical circumstances of each individual case. See ***Flanders v Trans Zambezi Express 2008 ZASCA 152.*** In carrying out this judicial analysis the following factors will be decisive in this matter:

[16.1] If the insured driver adhered to his ongoing obligation to keep a proper lookout in all the circumstances.

[16.2] If the insured driver kept a reasonable speed (within the range of his vision) immediately before the collision.

[16.3] the visibility of the pedestrian Plaintiff, was he in plain view of the operators of motor vehicles proceeding on the road thus wearing light coloured clothing?

[16.4] If the insured driver or Plaintiff each met the duty to anticipate a reasonable apparent risk and take appropriate precautions?

[16.5] The time of day at which the accident occurred, the location of the collision, the speed involved?

[16.6] Did alcohol, drugs or other types of impairment maybe play a role to deprive either driver or pedestrian of the ability to avoid the collision.

[17] The upshot of this inquiry, in order to exonerate the defendant completely should therefore indicate that, after careful consideration of the whole evidence, the defendant could not have avoided the accident even by exercise of reasonable care but that the plaintiff by his conduct, contributed in a material way to the accident. Griesel AJA in *Flanders* paragraph 14 illustrates the predicament of a defendant in the circumstances of the insured driver exceptionally well when he states that:

> "It has frequently been argued that a driver who collides with an unobserved obstruction at night finds himself on the horns of a dilemma: if he had kept a proper look- out and been travelling at a reasonable speed in the circumstances, he would have been able to pull up before the vehicles collided, since admittedly he could not do so, he was either travelling too fast in the circumstances or failed to keep a proper look out.

[18] In ***Manderson v Century Insurance Co Ltd 1951 (1) SA 533 (A) at 538,*** Van den Heever JA indicated how the defendant may escape this dilemma stating that:

> 'if however, he travels along a frequented road upon which he should have foreseen the likelihood of there being animals, pedestrians or stationary vehicles and he takes the risk of travelling through the section of the road which he has not probed with his eyes, at a speed which does not permit of

his drawing up before reaching any object which suddenly appears within the range of his vision and an accident results, I have difficulty in seeing how as a matter of reasoning, not law – he can escape from the dilemma. Of course when other factors, which such a person cannot reasonably have foreseen, contribute towards the collision, other considerations will enter into the inquiry'.

[19] The accident occurred at night and at a very dark place where there are no lights and on a frequented road that insured driver is familiar with and drives on every day and more importantly, happened on the side of the road that is used by pedestrians, off the tarred road. The insured driver submits that he had his head lights on and he, notwithstanding, did not see anything when he collided with the Plaintiff and was surprised when he realised that he must have collided with the Plaintiff and on the gravel side of the road, confirming his affirmation that he was totally unaware when the events unfolded. So the question that arises is whether was it because of his own negligence that he did not see the Plaintiff and therefore caught by surprise when the accident happened.

[20] Plaintiff's evidence was that he was wearing sky blue pants and a cream white striped shirt at the time of the collision. The insured driver confirmed that the Plaintiff was wearing blue pants but could not confirm if the shirt was indeed cream white with stripes as he only observed the Plaintiff's clothes after the collision and Plaintiff's upper body and clothing was so full of blood that it was difficult to ascertain what colour it was. Plaintiff confirmed that when he was given back his clothes at the hospital, the shirt was torn and full of bloodstains. It

is therefore reasonable, if the shirt was torn and full of blood after the collision that the insured driver was not able to ascertain its colour. I accordingly accept Plaintiff's unchallenged and direct evidence that on the night of the collision he was wearing a white striped shirt, which would have made him visible to other road users.

[21] As a result, the prevailing circumstances at the time when the collision took place, particularly the fact that it was at night and on the side of the road that is used by pedestrians, demanded of the insured driver as a reasonable man to anticipate the possibility of there being a pedestrian and as a result thereof to take the necessary reasonable steps to guard against the apparent risk. The first step under the circumstances was to, in time, reduce the speed to a reasonable level that will enable him to brake or stop before a collision occurs if he is confronted with the anticipated risk and to stop when he does encounter the danger. His speed must allow him enough opportunity to scan the area on his way of travel and within his range of vision and to in due course brake or stop.

[22] The insured driver's evidence is that he was initially driving at a speed of 80 km/h and had started reducing his speed by removing his foot on the paddle when he collided with the Plaintiff. So, even if it is accepted that he in fact removed his foot on the paddle, it clearly did not have any significant consequence on the speed to reduce it to a level that the situation demanded at the time. This is substantiated by his further evidence that he was in fact driving at a speed of at least 70km/h when he collided with Plaintiff. The speed was obviously excessive for travelling on a dark and unlit area that is used by pedestrians and consequently

did not allow him proper observation of what was in his vicinity and way of travel to be able to stop or brake immediately if confronted by a situation within his range of vision that required him to do so. See ***Road Accident Fund v Landman 2003 (1) SA 610*** ©.

[23] The fact that his speed was indeed excessive is borne out by his evidence that he did not see or observe the Plaintiff in his vicinity or path of travel and consequently could not avoid the collision. The intensity of the impact and severity of the injuries sustained by the Plaintiff and the fact that he was thrown to a distance of at least more than 1 and a half metre away (which is the estimated width of the gravel shoulder) to the grass also attests to the excessiveness of the insured drivers speed at the time and is inconsistent with a slow speed that was dictated by the circumstances. He unquestionably failed to take the necessary precaution as necessitated by the situation, accordingly failing to perform his duty to take due care as a reasonable man. It is as a result of this failure that he could not avoid colliding with the Plaintiff.

[24] He was also required to be on continuous alert in anticipation of a possibility of coming upon a pedestrian on the side of the road keeping a proper look out all the time. In other words he should have foreseen the likelihood of pedestrians on the road and exercised the necessary caution by being in constant look out for them, all the time. Yet his testimony was that he was caught by surprise when he realised what has happened as he did not see anything and was not aware of Plaintiff when he collided with him, despite his headlights being on and Plaintiff being visible. He therefore in breach of the duty that he carried as a result of

driving at night and on the side of the road used by pedestrians, did not take the extra precaution required to keep a proper look out all the time. In ***Nogude v Union and South West Africa Insurnace Co. Ltd 1975 (3) SA 685 (A)*** at 668A – C the description ascribed to a proper look out was that;

"A proper look out entails a continuous scanning of the road ahead, from side to side, for obstructions or potential obstructions....
Driving with virtually blinkers on (***Rondalia Assurance Corporation of S.A. Ltd v Gonya, 1973 (2) SA. 550 (A.D)*** at p554B) would be inconsistent with the standard of the reasonable driver in the circumstances of this case."

[25] Accordingly, the insured driver's conduct and explanation of the occurrence is inconsistent with the exercise of due care, he evidently failed to appreciate the potential risk and to take the necessary precautions required of a reasonable person under the circumstances. My conclusion is that, had he slowed down and in anticipation of the apparent risk and kept a proper look out, the collision would not have happened. See ***Manderson v Century Insurance Co Ltd 1951 (1) SA 533 (A)*** at 537H – 538D.

[26] The Defendant has consequently not discharged the onus of rebuttal as per the established prima facie case of negligence. I am in converse satisfied that the plaintiff has established on a preponderance of probability that the collision in question was caused by the sole negligence of the insured driver.

[27] The Defendant's counsel submitted that it was probable the Plaintiff was drunk at the time since the insured has alleged that he smelt of alcohol. No conduct that is outside his nature that could be attributable to him possibly being drunk at the time has been alleged by the defendant as could have been the cause or contribution to the causation of the accident. He was jogging on the side of the road where he was supposed to be and therefore carried the paramount right and entitled to preference of its usage. The principle was clearly enunciated in ***Solomon and Another v Musset and Bright (1926) AD 427*** on p433 that:

"The general rule under such circumstances is that persons using the road upon their proper side have the paramount right and are entitled to preference, so that, in case of danger of a collision, it is the duty of those on their wrong side to give way first".

[28] I accordingly find that the insured driver was the sole cause of the collision and make the following order:

[28.1] The Defendant is ordered to compensate Plaintiff for 100% of his proven or agreed damages.

[28.2] The Defendant is ordered to pay Plaintiff's costs to date.

N KHUMALO

ACTING JUDGE OF THE NORTH GAUTENG HIGH COURT

Appearing for Plaintiff:	Advocate Z O Mashigo
Instructed by:	Makgoka Sebei Inc, Johannesburg
Appearing for Defendant:	Advocate J P Nel
Instructed by:	Mothle Jooma Sabdia Inc, Pretoria