

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
28 May 2014	<i>EMbusi</i>
DATE	SIGNATURE

28/5/14
CASE NO: 60190/2012

In the matter between:

MARNU LOMBARD

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

J U D G M E N T

KUBUSHI, J

- [1] On or about 19 June 2010 at about 00h25 Angela Marlyn Allan (Allan) was travelling on the M3 highway towards Muizenberg, Cape Town. She was travelling together with her husband who was sitting in the passenger seat and their two children at the back, she being the driver. The speed limit on that road is 100km per hour. The highway consists of two lanes and a yellow emergency lane going in the direction she was travelling and two lanes going in the opposite direction. She was travelling on the left lane of the road at a speed of about 80 to 90km per hour. Along the way she was overtaken by a motor cycle. She does not know at what speed the motor cycle was travelling but it must have travelled at a higher speed than hers because it was able to overtake her. After overtaking her, the motor cycle swerved back into the left lane which is the lane she was travelling in and travelled in front of her. She did not see the motor cycle reduce speed or apply breaks nor did she herself reduce speed or apply breaks after the motor cycle overtook her. Further down the road, in the same direction she was travelling, there was another motor vehicle travelling on the left lane, that is, the same lane she was travelling in together with the motor cycle. She was able to see this other motor vehicle because the road where they were travelling was flat and she could see the motor vehicle's red tail lights. The two motor vehicles and the motor cycle were travelling in the same lane, the left lane, just before the collision. The motor cycle overtook that other motor vehicle. When the motor cycle was travelling in the right lane parallel to the other motor vehicle that motor vehicle, without any warning, swerved to the right lane and back again into the left lane, to avoid being hit by that motor vehicle the motor cycle swerved further right. Once the motor vehicle had passed the motor cyclist tried to swerve back to the correct lane of the road but he lost control of the motor cycle. The motor cyclist fell from the motor cycle rolled and landed in the left lane of the road. The motor cycle fell on its side,

skidded and stopped about 200m from where the motor cyclist fell. Allan parked her motor vehicle on the side of the road, inside the yellow emergency lane, alighted and went to assist the motor cyclist. From the look of things the motor cyclist was injured because he was unconscious and had blood on his neck. Allan used her cell phone to summon an ambulance to the scene of the collision. One of the ladies who stopped at the scene was a doctor and she was able to stabilise the motor cyclist whilst waiting for the ambulance. The motor cyclist regained consciousness at the time he was being placed in the ambulance as a result Allan did not have an opportunity to talk to him. She only got to talk to the motor cyclist when he phoned together with his son to thank her. Allan had given the police her contact details at the scene of the collision. At the time when the ambulance was about to leave the scene of the collision they noticed a body of a man lying on the inside of the yellow emergency lane next to the place where the other motor vehicle had swerved to the right. The motor vehicle which caused the collision proceeded on its way without stopping. The details of the motor vehicle and the driver are unknown.

- [2] The motor cyclist in the collision is the plaintiff in this instance and he is as a result of the said collision claiming damages against the Road Accident Fund for personal injuries sustained when he fell from the motor cycle. I was informed at the commencement of the trial that the plaintiff was badly injured during the collision and has no memory of the collision. Allan was called to give evidence on his behalf.

- [3] The parties agreed at the pre-trial conference that the matter should be heard on the merits only. On application at the start of the trial, I granted leave that the matter be heard on the merits only and quantum be postponed sine die.
- [4] Allen was the only witness for the plaintiff and at the close of the plaintiff's case the defendant's counsel applied for absolution from the instance on the ground that the plaintiff did not testify on his behalf. I refused to grant the application and undertook to give my reasons therefore when I give judgment. It is common cause that the plaintiff sustained head injuries which rendered him unable to remember the circumstances which led to the injuries he sustained. It is indeed so that it is not incumbent on the plaintiff to give evidence when he is not able to do so. What the court has to consider in an application for absolution is whether there is evidence before court upon which a reasonable court might give judgment against the defendant. It is not necessary that such evidence be tendered by the plaintiff personally. Any evidence before court should be considered. In this instance, the plaintiff tendered the evidence of an eye witness Angela Marlyn Allan who was able to put the court into the picture. There is thus evidence before me. What I should consider is whether it is evidence upon which I might give judgment against the defendant. In my opinion the evidence tendered by Allan is evidence which I might grant judgment against the defendant.
- [5] The defendant closed its case without giving evidence.

[6] In argument, the plaintiff's counsel contended that I should find in favour of the plaintiff because the plaintiff's injuries were caused by the sole negligence of the unidentified driver of the unidentified motor vehicle. He argued further that there is no evidence that the plaintiff was travelling at excessive speed. The evidence of Allan shows that the driver of the unidentified motor vehicle did not keep a proper look out. The driver should have seen or been aware of the motor cycle because it had its lights on and at the time he swerved to the right the motor cycle was travelling next to the unidentified motor vehicle.

[7] The argument by the defendant's counsel is that the plaintiff's claim should be dismissed on the ground that the plaintiff must have been travelling at an excessive speed of over 90km per hour at the time he overtook Allan. Plaintiff should have been aware of the lighting conditions and should have kept a proper look out and by reasonable care he should have avoided the collision.

[8] S 17 (1) (b) of the Road Accident Fund 56 of 1996 reads that

“(1) *The fund or an agent shall –*

(a) ...

(b) subject to any regulation made under section 26, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of neither the owner nor the driver thereof has been established, be obliged to compensate any person (the third party) for any loss or damages which the third party has suffered as a result of any bodily injury to himself or herself or the death of or any bodily injury to any other person, caused by or arising from the driving of a motor

vehicle by any person at any place within the Republic, if the injury or death is due to the negligence or other wrongful act of the driver or of the owner of the motor vehicle or his or her employee in the performance of the employee's duties as employee.

(2) ...”

[9] From the above it is evident that the Fund will be able to compensate a victim of a motor vehicle collision for damages which that person suffered as a result of bodily injuries sustained due to the negligent driving of a motor vehicle even where neither the driver of such motor vehicle nor the motor vehicle itself has been identified. It is common cause that in this instance the driver of the motor vehicle and the motor vehicle he or she was driving were not identified. What is in issue is negligence.

[10] According to the plaintiff's counsel the collision was caused by the sole negligence of the unidentified driver who was negligent in one or more of the grounds set out in the plaintiff's particulars of claim, namely, that the unknown driver –

- 10.1 failed to keep a proper, alternatively any proper lookout;
- 10.2 failed to keep his vehicle under proper, alternatively under any proper control;
- 10.3 drove at an excessive speed in the circumstances;
- 10.4 drove into the plaintiff's path of travel, causing plaintiff to swerve to try avoid the collision;
- 10.5 failed to have regard, alternatively any proper regard to the rights of other road users;
- 10.6 failed to avoid the collision where by the exercise of reasonable care he could and should have done so.

[11] The defendant's counsel on the other hand submits that the collision was caused solely by the negligence of the plaintiff on the grounds as set out in the defendant's plea, namely

11.1 He failed to keep a proper lookout.

11.2 He drove his motor vehicle at an excessive speed.

11.3 He failed to keep the motor vehicle he was driving under proper control;

11.4 He failed to avoid the collision when by exercise of due and reasonable care he could and should have done so;

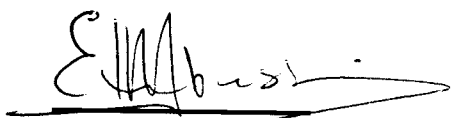
[12] The credible evidence of the plaintiff's witness is uncontested. The witness is an independent eye witness to the occurrence of the collision. She did not know the plaintiff at the time of the collision. There is no reason why she would opt to lie. It was also not suggested during cross examination that her evidence might not be true. I therefore have to accept her evidence as the truth of what happened.

[13] Allan's evidence shows that the collision was caused by the driver of the unidentified motor vehicle who swerved into the path of travel of the plaintiff when it was not opportune to do so. The plaintiff was at that time travelling parallel to the unidentified motor vehicle and its driver ought to have seen him. My view is that the unidentified driver also failed to keep a proper lookout. The evidence is that that part of the road where the collision occurred is semi-rural and does not have lights and I would infer that at that time of the night it would have been dark. The unidentified driver should as a result have been more cautious. It is possible that the unidentified driver saw the body lying on the side of the road and tried to avoid

it. If he or she was cautious and kept a proper lookout he or she would have been able to pass that body without swerving to the right and as such go into the path of travel of the plaintiff causing the plaintiff to swerve and lose control of the motor cycle. Allan's evidence is that the body was lying inside the yellow emergency lane; the unidentified motor vehicle should therefore have easily passed the body whilst still travelling on the left lane. If he or she had kept a proper lookout he or she would have seen the plaintiff coming up to him or her and overtake the unidentified motor vehicle because the lights of the motor cycle were on. If he had kept a proper lookout he or she would as such been aware that the motor cycle was about to overtake. The unidentified driver would also have been able to avoid swerving to the right by applying breaks and allow the plaintiff to pass before swerving into the right lane or should have stopped.

- [14] There being no other evidence to countenance that of the plaintiff my view is that the unidentified driver is the sole cause of the collision. There is also no evidence that the plaintiff might have contributed to the cause of the collision. Immediately before the collision the plaintiff had indicated his intention to overtake the unidentified motor vehicle by moving to the right lane. The unidentified driver ought to have seen him because the motor cyclist's lights were on. At the time of the collision the plaintiff was already travelling parallel to the unidentified motor vehicle. There was no way he could have avoided the collision other than to swerve further to the right. The uncontroverted evidence of Allan is that the unidentified motor vehicle swerved to the right without any warning. It is my view therefore that the defendant is liable to compensate the plaintiff for the injuries sustained.

[15] Consequently the plaintiff's claim succeeds with costs including the costs of Angela Marlyn Allan (to be taxed) as a necessary witness.



EM KUBUSHI

JUDGE OF THE HIGH COURT

HEARD ON THE

: 21 MAY 2014

DATE OF JUDGMENT

: 28 MAY 2014

PLAINTIFF'S COUNSEL

: ADV J J WESSELS, SC

PLAINTIFF'S ATTORNEY

: MUNRO FLOWERS & VERMAAK

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