IN THE NORTH GAUTENG HIGH COURT, PRETORIA

[REPUBLIC OF SOUTH AFRICA)

CASE NUMBER 72217/2009

29/1/16

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

IN THE MATTER BETWEEN:

MQWAITSA JACOB TSOTETSI PLAINTIFF

And

ROAD ACCIDENT FUND DEFENDANT

JUDGMENT

Mavundla, J.

[1] This is a dependant's claim arising from a motor vehicle accident collision that occurred around Vrede on the 16 June 2008 between motor vehicle with registration number […], the insured motor vehicle, then and there driven by Mr Brian Coleman, the insured driver, and motor vehicle with registration number […], then and there driven by the deceased Mr Albert Bassie Tsotesti.

[2] The liability of the defendant arises from its statutory duty in terms of the Road Accident Fund Act 56 of 1996, to compensate for damages for loss of support, suffered by the minor child of the deceased, as the result of the death of the deceased, caused by the injuries he sustained in the aforesaid motor vehicle collision. The plaintiff need only prove 1% negligence on the part of the driver of the insured vehicle driven by Mr. Coleman.

[3] By agreement between the parties separation of the merits from the quantum was granted in terms of rule 33(4) and the quantum related issues were postponed *sine die* and the matter proceeded on merits related issues only.

[4] Exhibit "A" was by agreement handed in. It contained, *inter alia,* the police accident report containing,*inter alia,* a sketch plan of the accident. There was no key to the police accident sketch plan. There were also discovered colour photographs which show the road along which the accident occurred. From the photographs it is clear that the road is tarred, consisting of one lane carrying traffic in either opposite direction. From the police sketch plan, the lanes each carrying traffic in the opposite direction, are separated by a broken median lane. From the sketch plan the following is common cause: the accident happened on a straight road, with one lane each carrying traffic in either opposite direction, separated by a broken median lane. Motor vehicle "A" is positioned diagonally on the outside of its lane of travel. Motor vehicle is positioned in the lane carrying traffic travelling in its opposite direction, in other words in the lane of motor vehicle "A". There are arrows starting from the lane of travel of motor vehicle "B", showing the path of travel of motor vehicle "B" crossing over the median lane. Motor vehicle "B"'s end position was facing in the direction it came from but in the lane of travel of motor vehicle "A". Point X is shown next to the right rear end of motor vehicle "B" on the lane of travel of motor vehicle "A". From the sketch plan it is clear that the accident occurred on the lane of travel of motor vehicle "A", meaning that vehicle "B" encroached into the path of

travel of motor vehicle "A". The description of the accident as noted in the police accident report was that motor vehicle "A" was travelling towards South while motor vehicle "B" was travelling towards North. Vehicle "A" it was alleged in the police accident report that it overtook a truck and collided with the oncoming vehicle "A".

[5] The plaintiff called only one witness Mr Isaak Leaha Tsotetsi, who testified that the deceased was his brother. He came to know that the deceased passed away because. on the day the deceased left, he called the deceased to ascertain whether he reached his destination but he did not respond. The deceased left Qwaqwa to Standerton, in Mpumalanga where he worked at the mines. They tried to no avail to locate him; until Tsotetsi received a call from the police informing them he was involved in an accident and was at the mortuary. The accident occurred on the 16 June. On the 17 June 2008 he proceeded to the scene of the accident where he found pieces and debris of glass concentrated in the middle of the road, much in the opposite side of the other vehicle.

[6] Tsotetsi placed point "lX" ahead of the two motor vehicles in the lane occupied by both motor vehicles after the accident. The concentrations of the debris are in the lane of travel of motor vehicle 'A". The road was straight where he placed Xl. It was put to him that according to the police the accident happened at dusk and at about 6 pm in the evening. He further said that his brother left from home at about 15h00 it is possible that the accident happened about 18hrs. Considering that the accident happened in winter it is possible that it was dusk when it happened. His brother was a driver of a "tipper". Tsotetsi went to view his brother's vehicle where it had been towed to after the accident. His brother's vehicle was damaged all over, but mostly with its front portion pushed inside, indicating a head-on collision. He did not see the other vehicle which was also involved in the collision. The road was a tarred.

[7] Under cross examination he conceded that the concentration of the debris was on the opposite of the path of travel of the deceased, on the side of oncoming traffic in relation to his brother's path of travel. The debris was next to the demarcation line but on the side of oncoming traffic. Asked by the Court he said that the debris concentration was about less than a meter from the median lane.

He conceded that he did not witness the accident. He cannot say whether the

concentration was there when the accident occurred. He conceded that the accident occurred on the side of the oncoming vehicle but insisted that the deceased's vehicle was close to the demarcating line. To the Court's question he estimated the distance of the concentration of the debris, which he marked Xl on the police accident report to be less than a meter from the centre lane.

The case of the plaintiff was closed. The defendant asked for the absolution on the basis that the concentration of the debris occurred on the opposite side of the path of travel of the deceased and there was no evidence showing any negligence on the part of the insured river.

[8] The test to be applied when absolution from the instance at the close of the case for the plaintiff is 'whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should nor ought to) find for the plaintiff...' *Vide Claude Neon Lights {SCA} Ltd v Daniel*[1] approved by the *Supreme Court of Appeal* in *Gordon Lloyd Page & Associates v Riever and Another.*[2]

[9] It is trite that in a claim for damages arising from negligent driving,the plaintiff must prove negligence on the part of the insured driver. *In casu,* the claim is on behalf of a dependant of the deceased, in which instance all that needs to be proven is 1% negligence on the part of the insured driver.

[10] I must hasten to refer to the matter of Mcintosh *v* Premier, KwaZulu-Natal and Another where Scott JA stated, *inter alia,* that:

> "As is apparent from the much-quoted dictum of Holmes JA in Kruger *v* Coetzee 1966 (2) SA 428 (A) at 430E - F, the issue of negligence itself involves a twofold inquiry. The first is: was the harm reasonably foreseeable? The second is: would the diligens paterfamilias take reasonable steps to guard against such occurrence and did the defendant fail to take those steps? The answer to the second inquiry is frequently expressed in terms of a duty. The foreseeability requirement is more often than not assumed and the inquiry is said to be simply

[1] 1976 (4) SA 403 (A) at 403G-H.

whether the defendant had a duty to take one or other step, such as... perform some or other act positive act, and if so whether the failure on the part of the defendant to do so amounted to a breach of that duty."

Scott JA further proceeded to state that:

"The crucial question, therefore, is the reasonableness or otherwise of the respondent's conduct. This is the second leg of the negligence inquiry. Generally speaking, the answer to the inquiry depends on a consideration of all the relevant circumstances and involves a value judgment which is to be made by balancing various competing considerations, including such factors as the degree or extent of the risk created by the actor's conduct, the gravity of possible consequences and the burden of eliminating the risk of harm. See Cape Metropolitan Council v Graham 2001 (1) SA 1197 (SCA) para 7

[11] It is trite that every driver bears a duty of care towards other motorist, to keep a proper lookout, to take reasonable steps to avoid a collision. However, a person alleging negligence on the part of a driver must however place evidence before the court demonstrating that the said driver failed in one or other way to take reasonable steps to avoid the collision and that such failure was the proximate or contributory to the collision.

[12] *In casu,* it is common cause that the accident occurred on the incorrect side of the deceased. The inference is that he was negligent in straying off his path of travel and resulted in the head-on collision. The question to be decided is in what way, can it be said that the insured river was negligent and his negligence contributed in the collision. The plaintiff in this regard need only prove 1% contributory negligence on the part of the insured driver.

[13] It is trite that every driver has a duty to scan the road ahead of him at all times, and to avoid a collision happening. In the matter of *Road Accident Fund v Grobler* (96/06) ZASCA 78; (2007] SCA 78 (RSA); 2007 (6) SA 230 (SCA) (31 May 2007), the Supreme

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[2] 2001 SA 88 (SCA) at 92E-93A.

Court of Appeal held that in a situation similar as *in casu,* the proper approach is not to confine the inquiry into the negligence to the conduct of the driver from the moment they became embroiled in an emergency. The inquiry must extend to cover what steps a driver took to avoid the impending emergency. If he/she had an opportunity to take measures ahead of the emergency to avoid the accident, and he/she failed to do what a reasonable person in similar circumstances would have done, then he /or she would have been negligent.

[14] In the matter of *Road Accident Fund v Grobler* (96/06) ZASCA 78; (2007] SCA 78 (RSA); 2007 (6) SA 230 (SCA) (31 May 2007) the Supreme Court of Appeal held that:

> "[19] It is clear from the evidence that the respondent was plunged into a situation of sudden emergency, that he had no more than a second within which to escape that emergency, and that he effectively was given a choice between danger, or veering away from it and hoping that it would not follow him. He did the latter. In *Rodrigues v SA Mutual & General Insurance Company Ltd* 1981 (2) SA 274 (A) Van Heerden AJA stated the following on 280H-281A:
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> "Where the evidence indicate that the accident occurred on the correct side of the insured driver and suggesting that the latter was plunged in a situation of sudden emergency as the result of the negligence on the part of the other driver who veered off his path of travel into the incorrect path, the former is in my view duty bound to show what steps he nonetheless took to avoid the accident.

[15] *In casu,* the collision occurred on the side and path of travel of the insured driver. I accept on inferential basis, premised from the facts placed before this Court, that the vehicle of the deceased left its path of travel and encroached into the path of travel of the insured driver, regard being had to the point of impact as demonstrated in the police sketch plan and also as pointed out by the witness for the plaintiff, the insured driver was plunged into a sudden accident. There is no evidence placed before the court as to what steps the insured driver took to avoid the imminent sudden emergency he found himself in. The insured driver is the person who could have told the Court what steps he took to avoid the collision as he was duty bound to, but was not called to do so.

[16] The sketch plan shows the vehicle "A" of the insured driver positioned diagonally outside its lane of travel but on the left and outside of the road. From the photos which were discovered it is clear that there is a large space from the yellow lane to the edge of the road where the macadam ends, which allows a vehicle to park there without encroaching into the lane of travel. From the edge of the road to the border fence there is also a large of space which is not tarred. It does not appear that there were any trenches on the outside of the road where the accident occurred. Besides, the road at that point seems to be straight and flat. In my view nothing would have impeded the insured driver swerving in time, upon seeing the deceased's vehicle veering out of its path of travel. Nothing seems to have presented an obstacle preventing the insured driver from swerving to his left to try to avert the collision. I find that the insured driver failed to take evasive action, which he was duty bound to have taken. I find that his failure to avoid the accident constituted negligence on his part and contributed to the collision. I further find that the proportion of his contributory negligence, in relation to that of the deceased, was 10%. I find that the deceased's contributory negligence was 90%.

[17] In the light of the above findings, I make the following order:

1. That the application for absolution is dismissed;
2. That the insured driver was negligent, and his negligence was 5% contributory to the collision;
3. That the defendant is 100% liable for the proven damages of the plaintiff;
4. That the defendant to pay the costs of the plaintiff.

N M MAVUNDLA

JUDGE OF THE HIGH COURT

HEARD ON THE: 14/01/2016
DATE OF JUDGMENT: 29 / 01/2016
APPICANT'S ADV: ADV. K. M. RÖNTGEN
INSTRUCTED BY: RÖNTGEN & RÖNTGEN INC.
RESPONDENTS' ADV: ADV. H. VERMAAK

INSTRUCTED BY: DYASON INCORPORATED