

**IN THE HIGH COURT OF SOUTH AFRICA  
WESTERN CAPE HIGH COURT, CAPE TOWN**

**CASE NO: 13024/07**

**MALIBONGWE MESHACK MVIMBI**

Plaintiff

**v**

**ROAD ACCIDENT FUND**

Defendant

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**JUDGMENT DELIVERED ON THIS 26<sup>TH</sup> DAY OF MARCH 2010**

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**FORTUIN, AJ:**

[1] This is an action for damages resulting from a motor vehicle collision in which the plaintiff, Mr Malibongwe Meshack Mvimbi, suffered various injuries.

[2] The parties have reached agreement on most of the issues. At the trial before me the only outstanding issue which remained for adjudication was whether the driver of the plaintiff's vehicle was also negligent and whether damages, if awarded, ought to be apportioned.

[3] It is undisputed that, on 14 May 2005, at the intersection of Eisleben and Symphony Roads, Phillippi East (the intersection), a motor vehicle bearing registration number CA 176129 (the insured vehicle) and driven by Mr Timothy Michaels (the insured driver), collided with a motor vehicle bearing

registration number PYM 082 GP (the other vehicle), in which the plaintiff was a passenger. Before the collision and before the insured vehicle turned to its right, both vehicles drove in the same direction. It is further undisputed that the insured vehicle belonged to Golden Arrow Bus Services, and that Mr Timothy Michaels has been in their employ as a driver for a period of 24 years.

[4] It is further undisputed that as a consequence of this collision, the plaintiff sustained a number of bodily injuries.

[5] Eisleben Road runs from west to east with the township Mitchell's Plain to the east of the intersection. On the way to Mitchell's Plain is a bridge over a railway line approximately 500m from the intersection. Eisleben intersects with Sheffield/Symphony Road. On the north side of the traffic-light controlled intersection is Sheffield Road, and on the south side of the intersection Sheffield Road becomes Symphony Road. All four roads leading into and out of the intersection are single lanes.

[6] On the morning of 14 May 2005, at approximately 05h10, Mr Michaels drove the insured vehicle from the Golden Arrow depo down Sheffield Road in a southern direction and turned left (east) at the intersection into Eisleben Road. Approximately 40m from the intersection of Eisleben and Symphony Road, the driver of the insured vehicle made a u-turn at a bus stop to return to the intersection. When he completed the u-turn and as he was turning right into Sheffield Road, the collision occurred.

[7] It was submitted on behalf of the plaintiff that the driver of the insured vehicle, Mr Michaels, did not keep a proper look-out when he made the u-turn, that he did not keep a proper look-out as he approached the intersection and that he did not keep a proper look out as he was turning right and that he failed to take any or adequate steps to avoid the collision.

[8] It is the defendant's case that the driver of the plaintiff's vehicle was negligent in that he failed to keep a proper look-out, he drove at a speed which was excessive and/or unsafe in the prevailing circumstances, he failed to apply the brakes of the vehicle adequately or timeously or at all, that he failed to avoid the collision, he failed to pay adequate regard to the presence of the insured vehicle upon the road and he failed to give adequate or proper or any warning of his approach.

[9] It was further submitted on behalf of the defendant that the driver of the plaintiff's vehicle was driving at such an excessive speed, that the driver of the insured vehicle could not see him while he travelled between the bridge and the intersection. As a result he only had one opportunity to observe the vehicle as it was approaching the intersection.

[10] Mr Michaels, the only witness, testified that, when he made the u-turn approximately 40m from the crossing, he did not see any cars on Eisleben Road. He further testified that the streetlights were off at the time of the accident. When he completed the u-turn, he saw the lights of a motor vehicle approaching in a distance on the bridge approximately 500m behind him. He

did not see the lights again after this. He further testified that he was sure that his indicator was switched on when he made the u-turn and when he turned into Sheffield Road and that he did all the normal observations. He then turned right into Sheffield Road. He only became aware of the other vehicle again when it collided with his vehicle on its right side.

[11] He was mid-way through his turning manoeuvre, in the lane carrying traffic in the opposite direction to the north. He testified that he did observe properly before he turned, and that he could not do anything to avoid the accident.

[12] Mr Michaels conceded during cross-examination that he would have seen the vehicle approaching from behind if he was looking in his rear-view mirror again.

[13] In considering the merits of both of these submissions, I shall first deal with the question whether the driver of the insured vehicle, Mr Michaels, on his own version failed to keep a proper look-out and as a result was negligent.

[14] The law with regards to the duty of a driver is trite, i.e. that a driver should scan the road ahead continuously for obstructions or potential obstructions. In **Nogude v Mniswa** 1975(3) SA 685 (A) at 688D a "proper look-out" was described as follows:

*"More than looking straight ahead it includes awareness of what is happening in ones immediate vicinity. He (the driver) should have a view of the whole road from side to side."*

[15] The duty to keep a proper lookout includes the duty to look into the rear-view mirror when he intends stopping or deviating from his course or turning right.

[16] This duty, which rests on the driver of a vehicle intending to turn right, was discussed in the matter of **Potgieter v AEG Telefunken (Edms) Bpk** 1977 (4) SA 3 ECD as follows:

*"Verweerder moes seker maak dat die omstandighede dit geleë maak vir hom om met veiligheid te kan draai. Indien verweerder weer teruggekyk het soos hy moes gedoen het, sou hy besef het dat sy vroeëre indruk dat dit veilig was om die draai uit te voer, foutief was. "*

[17] The matter was also discussed in the WLD decision in **Bata Shoe Co-Ltd. (South Africa) v Moss** 1977 (4) SA 16(W) where the following was said:

*"His further obligation is to refrain from making the turn until an opportune time, to use the phrase which the Appellate Division has used in that regard."*

[18] On Michael's own version he saw the approaching vehicle only once after he completed his u-turn. Also on his own version, which version is completely in line with the probabilities, he would have seen the approaching

vehicle if he looked in his rear-view mirror again. Michaels testified that he did look in his rear-view mirror more than once, but did not see the approaching vehicle again. I am of the view that he did not look into his rear-view mirror again, because if he did, the probability is that he would have been seen the vehicle. His evidence was that he did not see him until the collision occurred. The impression one gets from his evidence was that the last time he observed his immediate vicinity was when he completed the u-turn. Michaels was therefore clearly negligent as he turned when the time was not opportune and his failure contributed to the cause of the collision.

[19] Michael's further testified that he switched on his indicator when he made the u-turn and again when he turned into Sheffield Road.

[20] In order to determine the percentage of negligence, if any, to be apportioned to the insured driver, I now turn to the conduct of the driver of the plaintiff's vehicle. The duty of an overtaking driver was discussed in **Cooper: Delictual Liability in Motor Law** at p165 as follows:

*"An overtaking driver must keep a vehicle about to be overtaken under observation and he should not overtake when the vehicle ahead is turning, or the driver has indicated his intention to turn, to the right."*

[21] Because Michaels was the only witness, the behaviour of the driver of the other vehicle can be summed up as follows from Michaels' testimony. The lights of the other vehicle were switched on as the vehicle was visible to Michaels when he completed the u-turn. In fact, on Michaels' own version, he

saw the lights of the vehicle as it was approaching after he completed the u-turn, approximately 500m behind him.

[22] The duty of a following motorist was discussed in the later decision in **Hobson and Another v National Employers General Insurance Co Ltd** 1982(1) SA 205 (E) on p208 C-D as follows:

*"The crucial enquiry, however, is whether the reasonable man in the plaintiff's position would have considered it reasonably possible that the driver of any vehicle following Collier would overtake in the circumstances and manner in which Yoyo did so. Fundamental to the answer is the fact that the law does not, generally speaking, oblige one to anticipate possible recklessness on the part of ones fellow motorists."*

[23] It was Michaels' testimony that he was mid-way through his turning manoeuvre in the lane carrying traffic in the opposite direction when the collision occurred. If the court accepts this version, it means that the approaching vehicle was not in the left-lane immediately behind Michaels, but busy overtaking him at the intersection. In my view, this behaviour was reckless. It is not expected of the insured driver to anticipate possible recklessness from the other driver.

[24] A similar position with regards to the insured driver was held in this division in **Boots Co (Pty) Ltd v Somerset West Municipality** 1990(3) SA 216 (C) at p226I - 227A where the following was stated:

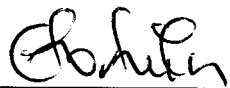
*"Regarding Julies, I cannot fault the way in which he drove. His indicator was flashing for a considerable distance. He saw the Jetta in his rearview mirror quite far back. He looked again in his rearview mirror immediately before commencing the turn, by which time the Jetta had almost caught up. There was no indication from the Jetta that it was about to overtake the truck. Julies assumed and, in my view, he was reasonably entitled to assume in the circumstances that the Jetta had seen his signal and would respect that signal."*

[25] The facts of this case is similar to the facts of the Boots matter in that no evidence was presented that the vehicle in which the Plaintiff was travelling, indicated that it was about to overtake. This court accepts Mr Michaels' testimony that he indicated his intention to turn right. In my view, Mr Michaels could reasonably assume that the other vehicle would respect his intention to turn right. What makes this case distinguishable from the facts in the Boots matter however is the fact that the insured driver in the Boots matter did look in his rear-view mirror again before he made the turn to the right. It was based on that evidence that Comrie, J found that the insured driver was in no way negligent. In *casu*, the evidence was that the insured driver did not look into his rear-view mirror again. Accordingly, I am of the view that this failure by the insured driver contributed to the collision.

[26] I am of the view, in line with the decision in **Boots Co (Pty) Ltd v Somerset West Municipality**, *supra*, that the plaintiff's negligence was the overwhelming cause of the collision, but that Michael's failure to look into his

rear-view mirror again before he turned to his right, contributed in a small way to the collision.

[27] In the circumstances, the apportionment of negligence of the insured driver is 30% and 70% to the plaintiff. The defendant is therefore responsible for 30% of the plaintiff's damages.

A handwritten signature in cursive script, appearing to read 'AJ Fortuin', is written over a horizontal line.

**FORTUIN, AJ**