



**IN HIGH COURT OF SOUTH AFRICA
(EASTERN CIRCUIT LOCAL DIVISION, GEORGE)**

CASE NO: 21558/09

In the matter between
STEPHANUS FRANCOIS KOTZE

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

JUDGMENT DELIVERED ON 24 JANUARY 2011

YEKISO J

[1] By way of summons issued out of the Eastern Circuit Local Division, George, plaintiff instituted an action for damages arising from an accident which occurred on 27 February 2003, in Platner Boulevard, George, in the province of the Western Cape when a motor vehicle, a Colt bakkie, bearing registration number CAW 44721 ("the insured vehicle"), then driven by Jacobus Frederick Lubbe ("the insured driver") collided with a bicycle then ridden by Stephanus Francois Kotze ("the plaintiff") resulting in the latter sustaining certain bodily injuries for which he had to receive medical treatment.

[2] The plaintiff avers in his particulars of claim that the sole cause of the accident was attributable to the negligence of the insured driver who is alleged to have been negligent in that he drove the insured vehicle at a high speed in the circumstances; that he failed to pay due regard to other road users, in particular, the plaintiff; that he failed to leave a sufficient leeway between the insured vehicle and the bicycle ridden by plaintiff in the course of overtaking same; that he failed to apply his brakes timeously or at all; and that he failed to avoid the accident when, by exercise of reasonable care he should and could have done so.

[3] The defendant admits in its plea that an accident occurred on the date, time and place as set out in the plaintiff's particulars of claim but denies that the insured driver was negligent in any of the respects alleged or at all. In the alternative, it is pleaded on behalf of the defendant that in the event it is found that the insured driver was negligent, which remains being denied, that the negligence of the insured driver was not causally connected to the accident the plaintiff was involved in and any damages that may arise therefrom. In the further alternative, it is pleaded on behalf of the defendant that if it is found that the insured driver was negligent, which still is being denied, and that such negligence was causally connected to the accident and the damages allegedly suffered by plaintiff, that plaintiff contributed to such negligence in that he failed to keep a proper look out; that plaintiff, without prior warning, swerved the bicycle he was riding at the time towards his right and in the path of the insured vehicle which, at the time, was in the process of overtaking the bicycle and, in doing so, collided with the insured vehicle which was travelling from behind; and that plaintiff failed to avoid the accident, the injuries subsequently sustained and the damages arising therefrom when, by exercise

of reasonable care he could and should have done so. At the commencement of the hearing I was informed by the parties that it was agreed, and it was subsequently so ordered, that the question of the defendant's liability first be determined and that the quantum of damages allegedly suffered by plaintiff be determined at a later stage should a need arise to do so.

[4] THE PARTIES

[4.1.] The plaintiff is Stephanus Francois Kotze, a stock control officer then employed at X Development Construction, and who, at the time the accident occurred, resided at 116 Main Street, George, in the province of the Western Cape.

[4.2.] The defendant is the Road Accident Fund, a juristic person established in terms of s 2(1) of the Road Accident Fund Act, 56 of 1996 ("the Act") and has its principal place of business at 6th Floor, 1 Thibault Square, Long Street, Cape Town, in the province of the Western Cape.

[5] INSPECTION IN LOCO

[5.1.] Before the commencement of trial the parties agreed that an inspection in loco of the scene of the accident be held. As pointed in plaintiff's particulars of claim the accident occurred at Platner Boulevard which, at the time of the occurrence of the accident, used to be known as Blanco Boulevard. Platner Boulevard runs in an east-westerly direction and intersects into York Street in an easterly direction. According to the police plan, the width of the road from the southern boundary of the road to the northern boundary measures 8,1m. It is divided into two single lanes, one lane catering

for traffic travelling westwards and the other for traffic travelling eastwards, by way of a broken centre line. At the time of the accident both the insured vehicle and the bicycle were travelling in a westerly direction.

[5.2.] Each one of the parties to the accident pointed out different points of impact. The point of impact pointed out by plaintiff is on the southern most surface of the road, a distance of somewhat $\frac{1}{2}$ m from the pavement whilst the point of impact pointed out by the insured driver is somewhat in the middle of the lane, a distance of more or less 2,3m from the pavement.

[5.3.] Further down from the two respective points of impact and on the pavement on the northern boundary of the road there was pointed out a visible damage on the pavement, ostensibly caused by the right rear wheel of the insured vehicle when the insured driver lost control thereof after impact. The distance between the damaged pavement and the point of impact pointed out by the plaintiff is 27m, whilst the distance between the damaged portion of the pavement and the point of impact pointed out by the insured driver is 23,6m.

[5.4.] There was also pointed out at the scene the position at which the insured vehicle came to a complete stop after the accident. The insured vehicle came to stop on the opposite lane catering for traffic travelling in an easterly direction. The distance between the position where the insured vehicle came to a complete stop and the point of impact pointed out by the plaintiff is 85,6m, whilst the distance between the insured vehicle at the point where it came to a complete stop and the point of impact pointed out by the

insured driver is 82,7m. A rough plan, drawn not according to scale, and agreed to by the parties depicting the various points mentioned above was handed in at the commencement of trial as exhibit "A".

[6] EVIDENCE LED AT TRIAL

[6.1.] In an attempt to discharge the onus resting on him to prove his case the plaintiff called the following witnesses who tendered *viva voce* evidence, namely, Johannes Andries Theron, an independent witness; plaintiff's father, Theunis Gerhardus Kotze; Professor Thomas Dreyer (who testified as an expert witness) and plaintiff himself, who testified in his own case.

[6.2.] On the other hand, the following witnesses were called to testify in the defendant's case, namely, the insured driver, Jacobus Frederick Lubbe; Johannes Stephanus Nagel, a passenger in the insured vehicle at the time of the accident; and Lionel William Gordon, who testified as an expert witness in the defendant's case.

[7]

[7.1.] Apart from *viva voce* evidence tendered at trial, there was handed in at trial two sets of bundle of documents, marked bundle 2 and bundle 3. Bundle 2 consists of copies of various notices each one of the parties served on the other whilst bundle 3 consists of a number of documents such as previous written statements obtained from lay witnesses referred to in paragraphs [7.1] and [7.2] above; an Officer's Accident Report form (OAR) duly completed, a Police Plan, drawn not according to scale, as well

as a key thereto and a set of photographs of the insured vehicle and several other photographs depicting the scene of the accident.

[7.2.] Of significance in the OAR is paragraph 38 thereof which depicts visible damage to the insured vehicle noted in the course of the inspection thereof shortly after the accident. Visible damage is depicted on the left mid-front and on the right rear of the insured vehicle. Photograph 4 at p44 of Bundle 3 depicts damage caused to the pavement on the northern boundary of Platner Boulevard whereas photographs at pp47 and 49 of the Bundle depict damage on the left front and left rear passenger door of the insured vehicle.

[7.3.] During the course of trial the parties consulted Vuyani Stephen Tatana, a traffic officer who attended the scene of the accident with regard to the alleged damage caused to the left front mudguard of the insured vehicle. As regards this latter alleged damage, it was placed on record by the parties that if indeed there was such damage in the form of a black mark on the left front mudguard, Tatana would have made a note thereof on the OAR form. No such damage is noted in the OAR form.

THE PLAINTIFF'S VERSION OF THE ACCIDENT

JOHANNES ANDRIES THERON

[8] The first witness called to testify in plaintiff's case was Johannes Andries Theron. The evidence of Johannes Andries Theron ("Theron"), is intended to show, how, on the plaintiff's version, the accident occurred on the date and place in question. Theron states that he had initially driven along York Street, George in a southerly direction. As

has already been pointed out, Platner Boulevard intersects into York Street in an easterly direction. At this intersection the traffic lights were green for traffic travelling in a south-northerly direction. When the lights turned red, a green arrow paved way for vehicles travelling into Platner Boulevard and to proceed in a westerly direction. Theron turned right into Platner Boulevard. A white bakkie (the insured vehicle) was travelling ahead of him. Both vehicles, i.e., the one driven by Theron and the one driven by the insured driver, turned right into Platner Boulevard. Before turning right, the insured vehicle (the bakkie) swerved towards the left lane at the intersection, and once again swerved back onto the lane turning into Platner Boulevard and thereafter proceeded down Platner Boulevard in a zig-zag manner. Theron testified that the insured vehicle swerved from right to left and from left to right as if the driver thereof had lost control. The insured vehicle was travelling much faster than him. In the course of such swerving movement, the insured vehicle swerved towards left and, in the process, collided with a cyclist travelling towards the same direction. The insured vehicle collided with the cyclist with its left hand side. As a result of impact, the cyclist went to land on the pavement on the southern end of the road. Before impact, the cyclist was travelling alongside the pavement on the southern boundary of the road and almost 50cm to almost a meter from the boundary of the road; that the impact on the insured vehicle was on the left front and left rear passenger doors. Under cross-examination he disputed a statement suggested to him that when the insured vehicle was about 2m to 3m behind the cyclist, the latter suddenly swerved towards right and, in doing so, came on the path of the insured vehicle. Theron insisted in his response that it is the insured driver that had swerved towards his left and hitting the cyclist in the process. In support of this

contention, Theron stated that no damage was caused to the front of the insured vehicle to suggest that the damage was caused by an object on the path of the insured vehicle.

STEPHANUS FRANCOIS KOTZE

[9] The version of Stephanus Francois Kotze, the plaintiff in these proceeding, is simply that he had initially emerged from the gymnasium at the George Tourist Resort; that he had thereafter travelled on his bicycle on the left hand side in a northerly direction along York Street; from York Street he rode through the parking area at the Game shopping complex and towards Platner Boulevard. In Platner Boulevard he turned left and proceeded westwards; he travelled on the left hand side of the road about 30cm to 50cm from the pavement. He was on his way to visit a friend when, as he was riding along, he suddenly felt an impact from behind on the right hand side of his bicycle. He did not see the insured vehicle before it collided onto him. He lost consciousness and cannot give an account of what happened after impact. He regained consciousness in hospital a few days after the accident. He denies having suddenly swerved right in front of the insured vehicle when this was suggested to him under cross-examination.

THEUNIS GERHARDUS KOTZE

[10] The evidence of Theunis Gerhardus Kotze, the plaintiff's father, was limited to the damage caused on the bicycle. He testified that he went to collect the bicycle from the police a few days after the accident. The police officer who handed the bicycle to him came pushing it on its wheels. There was only slight damage on the rims otherwise the wheels turned normally. The handle bars were turned about 90° parallel to the body of

the bicycle but that these were not damaged. After the slight damage was repaired, he had the bicycle sold. This then constitutes the totality of the evidence by lay witnesses who testified in plaintiff's case.

THE DEFENDANT'S VERSION OF THE ACCIDENT

JAKOBUS FREDERICK LUBBE

[11] Jakobus Frederick Lubbe ("Lubbe") was the first lay witness to be called to testify in the defendant's case. He confirmed in his evidence that he was the driver of a motor vehicle bearing registration no: CAW 44721 (the insured vehicle). He confirms the collision with a cyclist who was cycling in a westerly direction along Platner Boulevard. He further confirms that the accident occurred at about 18h15 on the date and place in question. He further confirms in his evidence that he initially travelled along York Street in a southerly direction; that at the intersection between York Street and Platner Boulevard he turned right into Platner Boulevard. He states that once he was in Platner Boulevard he did see the cyclist travelling ahead of him; that the distance between his vehicle and the cyclist when he first saw it was about 10m to 15m in front of him; that the cyclist was travelling ahead of him on the left hand side of the road and at a distance of somewhat 0,7m to 0,8m from the pavement; he went on to say that the cyclist could well have been a distance of about a meter from the pavement. Visibility was good as it did not rain at the time. After he had seen the cyclist he reduced speed and moved further to the right in order to provide sufficient space between his vehicle and the cyclist. He cannot recall at what speed he was driving. When the cyclist was about 3m to 4m ahead of him, the cyclist suddenly swerved right in front of his motor vehicle. He immediately swerved right in an attempt to avoid the accident. He

nonetheless could not avoid the accident. In the process the cyclist collided on to his motor vehicle.

[12] Once he had swerved right he simultaneously applied brakes. Because he had lost control after the impact the right rear wheel of his vehicle went to collide onto the pavement on the northern boundary of the road. Once this had happened he swerved his vehicle towards left simultaneously releasing his foot from the brake pedal. He applied his hand brake in an attempt to bring the vehicle under control. The vehicle ultimately came to a complete stop on the right hand side of the road on the lane catering for traffic travelling in an easterly direction. Once the vehicle had come to a stop, he alighted therefrom and proceeded to the cyclist who was lying on the road surface and, according to him, at a distance of about 1,5m from the pavement. He saw that the cyclist was injured. He was not under influence of intoxicating liquor at the time of the accident.

[13] He states in his evidence that, after the accident, he noted a black mark on the left front side of the front mudguard. The mark was consistent with a mark caused by a rubber object which could have collided against the mudguard. He states that he removed the mark concerned when he washed the vehicle at home shortly after the accident. The vehicle was subsequently handed over to the police for purposes of inspection in the course of investigation. He denies in his evidence that he drove the motor vehicle in a manner suggested by Theron. He confirms in his evidence that there were visible brake marks on the road as indicated in the police plan. Asked under cross-examination whether it is possible that he could have driven above the speed limit of

60km/h, he replied in the affirmative. The cross-examination of this witness centred around attempts by him to avoid the accident; various points indicated on exhibit "A" as well as the police plan; attempts by him to bring his vehicle under control; the speed at which he was driving at the time and, ultimately, a suggestion to him, under cross-examination, that the accident was in fact as a consequence of negligence on his part.

JOHANNES STEFANUS NAGEL

[14] Johannes Stefanus Nagel ("Nagel") was a passenger in the motor vehicle driven by the insured driver when the accident occurred. He saw the cyclist travelling along Platner Boulevard whilst they were on top of the hillock. He had thereafter bent downwards in order to remove a CD from the shuttle. Whilst doing so the insured driver suddenly swerved the insured vehicle to his right. When he raised his head he saw the cyclist fling past the front passenger window, hitting the left outside mirror in the process. The insured vehicle had swerved to the right hand side of the road, once again onto the left hand side of the road and ultimately stopped on the right hand side of the road on a lane catering for traffic travelling eastwards. He did not see the collision itself. That is about the totality of the evidence tendered in the defendant's case based on the evidence of lay witnesses and also the totality of the evidence tendered by lay witnesses on basis of which the negligence of the insured driver has to be determined.

[15] I do not propose to summarise the evidence tendered by the expert witnesses as I am of the view that the issues in dispute are well capable of determination solely on the evidence of lay witnesses. However, a reference will be made to such portions of the

evidence by the experts which tend to corroborate objective evidence and facts found to be proved.

THE APPLICABLE PRINCIPLES

[16] It is trite that in matters such as the one before me, the plaintiff bears the onus to prove, on a balance of probabilities, that the driver of the insured vehicle, Johannes Frederick Lubbe, through his negligence, in one or more of the respects alleged in plaintiff's particulars of claim, was the cause of the accident which is the subject of this claim.

[17] The test for negligence is still as set out by Holmes JA in *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E-G where the learned judge of appeal observes:

"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."

[18] Cooper: *Delictual Liability in Motor Law* at p164 observes that before overtaking another vehicle the driver is under a duty to satisfy himself that it is safe to do so. At p165 the learned author observes:

"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.

The overtaking vehicle should pass the vehicle being overtaken at a safe distance: an overtaking driver must leave a sufficiently wide berth between his vehicle and the vehicle being overtaken. What is a reasonable distance must depend upon the circumstances of each case. A factor of importance is the degree of lateral movement to be expected from the vehicle being overtaken. In the case of pedal cycles and horse-drawn vehicles a greater degree of lateral movement must be expected than in the case of a motor vehicle and the overtaking driver must make due allowance therefore."

It is on the basis of the principles set out above that I will evaluate the evidence tendered at trial with a view to determining if the plaintiff has succeeded to discharge the onus resting on him to prove that the insured driver, through his negligent conduct, was the cause of the accident the plaintiff was involved in.

EVALUATION OF EVIDENCE

[19] In this matter there was tendered at trial, amongst other evidence tendered, the evidence of two eye witnesses in the person of Theron and the insured driver whose respective versions of the event are mutually destructive. The gist of the evidence of Theron is that right from the intersection of York Street and Platner Boulevard the insured driver was travelling at a high speed and in a manner which posed a potential danger to the persons using the road. It is common cause that the speed limit in Platner Boulevard is 60km/h. Theron testified that the insured driver was executing swerving

movements as he was driving along to an extent that he had a distinct impression that the driver concerned was probably under the influence of intoxicating liquor. In the course of such swerving movements, the driver ahead of him, who ultimately turned out to be the insured driver, swerved towards the pavement on the left hand side of the road and, in the process, collided with a cyclist travelling along the pavement and towards the same direction the insured vehicle was travelling.

[20] The insured driver does confirm in his evidence that the accident did in fact occur except that, according to him, the cyclist suddenly swerved right as he was riding along and, in so doing, came on to the path of the insured driver. The insured driver states in his evidence that in an attempt to avoid the accident he lost control of his vehicle, went to collide on to the pavement on the right hand side of the road, which is a distance of somewhat 23,6m from the point of impact pointed out by the insured driver and 27m from the point of impact pointed out by the plaintiff. The point at which the insured driver came to a complete stop is 85,6m from the point of impact pointed out by the plaintiff and 82,7m from the point of impact pointed out by the insured driver. In the police plan there are indicated brake marks on the right hand side of the road commencing at a distance of 2,8m from the centre line and measuring 11,7m which clearly shows the vehicle was in motion for a distance of at least 11,7m whilst the brakes were effectively applied. The points I have referred to in this paragraph, coupled with a concession by the insured driver that, prior to the collision, he could well have been travelling at a speed higher than the restriction of 60km/h leads to the only inescapable inference that the insured driver, prior to the accident, could have been travelling at a high speed in the circumstances. Otherwise it is difficult to understand how the insured driver,

travelling on the road with a 60km/h restriction, could lose control of the vehicle in the manner he did, causing brake marks, on the wrong side of the road, measuring 11,7m in length and come to a complete stop at a distance in excess of 80m from the point of impact.

[21] The version of the insured driver as regards how the accident occurred is not born out by the facts and objective evidence. According to the insured driver's version, the cyclist was between 3m to 4m ahead of him when the cyclist suddenly swerved to his path of travel. The insured vehicle was of course not stationary prior to the accident. If it is assumed that the insured vehicle was travelling at 60km/h at the time, according to the evidence of Prof Dreyer, the insured driver could have had 1,5 seconds reaction time and the insured vehicle would have had to travel a distance of 25m before the insured driver could have executed any avoidance action. That then would have meant the cyclist would have been thrown over the bonnet of the insured vehicle and, in the process, projected to the windscreen. It is a fact that no damage was caused on the bonnet of the insured vehicle, nor anywhere on the front of the insured vehicle for that matter, in support of the version contended by the insured driver.

[22] The insured driver further states in his evidence that when cleaning the insured vehicle at home before it was taken to the police for inspection and further investigation, he noticed that there was a black mark on the left front mudguard consistent with a mark caused by a rubber object. According to his evidence there was no such mark on the insured vehicle prior to the accident occurring. The mark, if indeed there was such a mark, probably could have been caused as a result of an impact with either of the

wheels of the bicycle or the rubber surface of the handle bars.. The insured driver did not bother to take photographs of the mark concerned or bring it to the attention of the investigation authorities but, instead, removed it in the course of cleaning the vehicle. In any event, according to Tatana, who inspected the insured vehicle shortly after the accident, had there been such a mark on the insured vehicle, he would have made a note thereof in the OAR.

[23] The visible damage to the insured vehicle, after impact, was on the right rear wheel and on the left hand side of the vehicle. The damage on the latter side consist of a mark which runs across the left hand side of the insured vehicle from the left front passenger door and proceeds through to the left rear door. The marks on the left passenger doors are clearly inconsistent with the insured driver's assertion that the cyclist suddenly swerved to the path of the insured vehicle, or otherwise, had the collision occurred in the manner contended for the by the insured driver, the damage would have been caused on the front of the insured vehicle.

[24] The version of Theron, on the other hand, is simply that the insured driver, in driving the insured vehicle in the manner he did, swerved towards his left, and in the process went to collide with the cyclist who, because of the impact, went to land on the pavement on the southern end of the road. The insured vehicle could have collided with the cyclist with its left mid front and, in my view the damage on the left front and left rear passenger doors of the insured vehicle is consistent with the version proffered by Theron.

[25] Furthermore, Theron had no interest in the matter. He only happens to have been in the vicinity when the accident occurred. He had nothing against the insured driver and the latter could not proffer any explanation as regards why Theron would implicate him in the manner he did. The version proffered by Theron is not only supported by objective evidence, as for an example, marks on the left mid front of the insured vehicle, but is more probable than the version proffered by the insured driver. I accordingly accept, and indeed I do find that the accident occurred in a manner contended in the evidence tendered by Theron.

[26] Based on the evidence tendered at trial, I accordingly find that the accident which occurred on 27 February 2003 in Platner Boulevard was as a result of the negligent conduct on the part of the insured driver, in that he drove the insured vehicle at a high speed in the circumstances; he drove the insured vehicle in a manner which posed danger to other road users; he failed to provide a sufficiently wide berth between the insured vehicle and the cyclist in the course of overtaking same; and that he could easily have avoided the accident had he exercised reasonable care and drove the vehicle he was driving at the time properly.

[27] To the extent that it is alleged that plaintiff was negligent in the manner suggested in the defendant's plea, I find that there is absolutely no evidence to suggest that the plaintiff was negligent in the manner alleged or at all. Accordingly, I find that there was no contributory negligence on the part of plaintiff and that whatever injuries sustained in the accident and any subsequent damage suffered, were as a direct consequence of

negligence on the part of the insured driver who was negligent in the manner stated in paragraph [26] hereof.

[28] In the result, therefore, the following order, in the form of a determination, is made:

[28.1.] It is hereby determined that the accident which occurred on 27 February 2003 in Platner Boulevard, George was caused as a result of negligence on the part of the insured driver, Jacobus Frederick Lubbe;

[28.2.] Arising from the negligence of the said Jakobus Frederick Lubbe it is hereby declared that the defendant is liable to compensate plaintiff, Stephanus Francois Kotze, for damages suffered as a result of injuries sustained arising from the collision which occurred on 27 February 2003;

[28.3.] The further hearing of the matter is postponed to a date to be arranged for the hearing of evidence as to the quantum of damages;

[28.4.] The costs of the trial thus far incurred are reserved for later determination after hearing of evidence as to quantum of damages or after settlement of quantum, whichever event shall occur.



N J Yekiso, J