IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 859/2007

In the matter between:

LARINA VENTER N.O.

Plaintiff

In her capacity as *curator ad litem* for
GUSTAVUS WYNAND LOUW

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT: 4 MAY 2011

KATZ AJ

1. On 5 April 2003, at about 14h30 on the R44 Clarence Drive, approximately 10 kilometres from Gordon's Bay, Mr Gustavus Wynand Louw (*"Mr Louw"*), whilst driving a motor cycle with registration number CA441783, was involved in a collision with a motor vehicle with registration number CL38482 (*"the bakkie"*), driven by Mr John Fourie (*"Mr Fourie"*).

2. As a consequence of the collision, Mr Louw suffered damages, both bodily and mental. As a result, it is alleged that he is permanently mentally handicapped.

3. An application was brought to appoint Advocate Larina Venter, an advocate of this Court and a member of the Cape Bar, to institute an action on behalf of Mr Louw in her capacity as his *curator ad litem*. The order appointing her was granted on 4 April 2006 and on 30 January 2007, Adv Venter, as Plaintiff, instituted action against the Road Accident Fund (*"the Fund"*), created/incorporated as from 1 May 1997 by the Road Accident Fund Act No 56 of 1996 for damages suffered by Mr Louw arising from the collision.

4. On 3 December 2009, this Court ordered a separation of issues in terms of Rule 33(4). For purposes of the hearing before me, it is only the merits of the claim, and not the *quantum*, that is to be determined.

5. The collision occurred after the motor cycle, driven by Mr Louw, skidded (after Mr Louw applied its brakes) and collided with the bakkie, which was proceeding in the opposite direction to the motor cycle. The bakkie and the motor cycle (whilst proceeding in opposite directions), were thus involved in a head-on collision while travelling on a two-lane road.

6. It should be mentioned that at the time of the collision, Mr Louw's daughter, an 18-year school girl was riding pillion at the back of his motor cycle. She died at the collision.

7. This Court is effectively to decide what was the cause of the collision.

8. The Plaintiff's version is that the cause of Mr Louw braking was that the bakkie had crossed the white midline in the centre of the road and when Mr Louw saw the bakkie, he suddenly braked. The Defendant avers that Mr Fourie, at all material times, remained in the correct lane and his bakkie at no time crossed the midline.

9. The Plaintiff argues the collision was caused by Mr Fourie's unlawful conduct and the Defendant submits that Mr Fourie was not in any way at fault.

10. I heard oral evidence, attended an inspection *in loco* and had regard to various documents that had been placed in evidence without objection. Adv Theoniel Potgieter SC appeared for the Plaintiff and Adv Murray Bridgman appeared for the Defendant. The attitude of both counsel was helpful and I am appreciative of their efforts, including their heads of argument, in helping me to decide the matter.

11. Five witnesses gave oral evidence. Mr Louw and Mr Fourie both testified, as did Mr Christoffel Beukes who was riding on a motor cycle some distance behind Mr Louw on the day of the collision. An expert

witness, Professor Thomas Prins Dreyer, was called on behalf of the Plaintiff and on behalf of the Defendant Professor Jason Gryzagoridis was called effectively to rebut that which Professor Dryer testified to. Both had provided expert reports constituting of a reconstruction of the scene of the collision.

12. I will briefly summarise the evidence of the various witnesses and turn to some of the exhibits that were handed in at the trial as well as the other documentary evidence, including photographs.

13. Mr Beukes testified that he drove his own motor cycle behind Mr Louw on the day of the collision. They were initially part of a larger group of motor cyclists, but he and Mr Louw fell behind because the others were going faster. Mr Beukes adapted his speed to that of Mr Louw. He could not say exactly what his speed was, but estimated it to be around the speed limit of 70 km per hour and described it as an acceptable, reasonable speed which enabled him to negotiate the upcoming bend, avoid the motor cycle, the bakkie and bodies on the road when he came upon the scene of the collision some moments after it occurred.

14. He did not see the collision because he was about 30 metres behind Mr Louw who had travelled around a bend just before it happened. Mr Louw was travelling in his own lane, took exactly the right line going into and around the upcoming bend and was in full control of his motor cycle while doing so. Mr Louw, according to Mr Beukes, was not

travelling too fast. Mr Louw's motor cycle was still spinning after having collided with the bakkie driven by Mr Fourie when Mr Beukes arrived at the scene.

15. It must be emphasised that Mr Beukes made a good impression on this Court. He testified in believable manner and made it clear as to exactly what he remembered and why he remembered it. The collision took place nearly 8 years before the evidence was given. I accept, as did counsel, that the evidence of Mr Beukes was of good quality and it can be relied upon.

16. Mr Louw testified that Mr Fourie's bakkie had crossed the midline in the centre of the road (the midline) and that when he came around the bend, he saw the bakkie in his own lane, that is the incorrect side of the road. Mr Fourie, on the other hand, testified that his bakkie at no stage crossed the midline. He said that his bakkie was at all times in its correct lane.

17. In my view, the evidence of Messrs Louw and Fourie was not of good quality. Although counsel for the parties disagreed as to how much weight I could give to either version presented, I find that I could place little reliance on either of the witnesses.

18. The reason I find that limited weight can be attached to that which Mr Louw testified to, is on two main bases.

19. First, it cannot be gainsaid that he, like Mr Fourie, gave evidence which was self-serving. I take note that most evidence given by witnesses is self-serving in that a witness would be disinclined to testify to facts, certainly 8 years after the event, which may have adverse consequences for him or her. However, it seems difficult to imagine that Mr Louw can remember what happened 8 years ago in the manner in which he testified. He gave the impression of trying too hard to appear to be honest and reliable. He was unequivocal on one, and only one aspect; that the bakkie had crossed the midline, while his memory on other aspects was at best scratchy. He gave the distinct impression that he thought that it was crucial for the Plaintiff's case that he testify that the bakkie crossed the midline. That being so, he was at pains to say that he clearly remembered the bakkie on the wrong side of the road, while he could remember little other detail involving the collision.

20. Secondly, and in any event, he testified in what can appropriately be described as a child-like manner. Mr Louw displayed distinct and clear signs of being mentally disabled as a consequence of the collision. It is noted that there is medical evidence that was made available to the Court to suggest that although he has been brain damaged, he nevertheless could remember the relevant events. At times Mr Louw, in answer to simple questions, gave long, garbled, rambling answers, which had little to do with the question. He could not remember what happened after his motor cycle skidded and collided with the bakkie.

21. I take note that on his recollection, the bakkie which he saw approaching him had crossed the midline and that is why he manoeuvred his motor cycle in such a way to avoid the oncoming bakkie. His movement caused the motor cycle to fall over and skidded into the bakkie.

22. I cannot, on the basis of Mr Louw's evidence alone, find that as a fact the bakkie had crossed the midline.

23. On the other hand, difficulties also apply in respect of Mr Fourie's evidence. He was emphatic that he remembered that his bakkie had not crossed the midline. His explanation for his memory in this respect was not impressive. He stated that he had never crossed a midline as a driver after his father, who had passed away some years ago, had told him not to do so. By the nature of things, motor vehicles do cross the centre white lines in certain circumstances. Indeed, during the inspection *in loco*, at the scene of the collision, a number of motor vehicles that passed the place at which counsel, my registrar and I were situated, crossed the centre white line in question.

24. Also, Mr Fourie took some time after the collision to make a statement to the police. His explanation was that he had a family member who was an attorney and he wanted that attorney to be present when he made his statement to the police. As it turned out, he made his statement to the police without an attorney present. The statement he

gave to the police was different to the evidence he gave to this Court in a number of significant respects. On the one hand, he explained that he was proceeding slowly because the road was winding and on the other that he was driving slowly because his young son was sitting next to him and there was a bucket of prawns on the floor of the cabin of the bakkie, which needed protecting. His manner of testifying did not instil confidence.

25. In briefly touching upon Messrs Louw and Fourie's evidence in this judgment, I must not be taken to have ignored their testimony as a whole. I had regard to their demeanour, body language and general attitude while testifying to evaluate the cause of the collision and whether the bakkie had crossed the midline. I find that both could not be believed on those important aspects of the case.

26. Professor Dreyer explained the accident scene plan drawn up by the police was not accurate because of inconsistencies with photographs taken on the scene of the collision and his physical examination of the scene. For example, a photograph of the collision scene (taken on the day of the collision), makes it clear that the scrape marks (sliding along the road) of Mr Louw's motor cycle do not continue after the midline, whereas on the police plan, the scrape marks continue beyond the midline. Also, the measurements set out in the police plan were inaccurate. Professor Dreyer explained why in some detail.

27. Professor Dreyer's conclusion in his report and his testimony was that when Mr Louw saw the oncoming bakkie, he, for an unknown (onbekkende) reason, braked and the motor cycle fell onto its left side.

28. While I cannot find as a fact that Mr Fourie's bakkie did cross the midline on the basis of Mr Louw's evidence, I similarly cannot find that Mr Fourie's bakkie did not cross the midline on the basis of his (Mr Fourie's), evidence read with Professor Dreyer's evidence.

29. Professor Dreyer suggested that the collision occurred on or near the midline and it could not be excluded that the bakkie had crossed the midline.

30. Professor Gryzagoridis, in his expert report did not agree with the conclusions of Professor Dreyer. He explained that he did not understand why the police report was defective. However, during cross-examination, he accepted that if the police report was inaccurate, then the basis of his report and findings in general were flawed. Professor Gryzagoridis based his findings on the inaccurate police report. I gained the impression that by the end of the cross-examination, he accepted that the police report was not accurate and accordingly his critique of Professor Dreyer's report is to be considered in that context.

31. At the inspection *in loco*, the Court witnessed a motor cycle of similar engine size travelling at approximately 70 km per hour into the bend which Mr Louw entered immediately prior to the collision.

32. As stated above, some of the traffic that passed on the day of the inspection *in loco* crossed the midline at the point of the collision. What is of interest is that the motor cycle used at the inspection had no difficulty in negotiating the bend at the speed at which Mr Louw was travelling when he entered the bend.

33. A meeting took place between the two professors on 15 February 2010. The minutes of the meeting reflect that they agree that *"the collision point was on or slightly to the west of the dividing line (in the bakkie's lane)"*.

34. Documentary evidence, including, *inter alia,* the inquest findings into the death of Ms Michelle Louw, as well as the sketches drawn by the two professors, photographs of the scene of the collision and the police plan of the collision scene were handed in. I had regard to all the evidence submitted.

35. On the basis of all the evidence tendered, I find that the bakkie may well have crossed the midline and that the chances are even that it did. However, I cannot find that on a balance of probabilities that it did cross the midline prior to the collision. I must and do conclude that the collision occurred on or very close to the midline.

36. Mr *Bridgman* argued that because no negligence could be attributed to Mr Fourie, the Plaintiff's case should be dismissed with costs. It was accepted that if Mr Fourie is found to have been negligent then it would be difficult to apportion any blame to Mr Louw.

37. Mr *Potgieter* on the other hand argued that Mr Louw's version was consistent with inferences to be drawn from the objective facts, and with the probabilities. The bakkie crossed the midline, causing Mr Louw on his motor cycle to take corrective measures, which had as a consequence the tragic collision. It was contended that no contributory negligence could be attributed to Mr Louw.

38. As an alternative argument, it was submitted on behalf of the Plaintiff that if the Court could not find that the bakkie had crossed the midline, then it must be found that the bakkie was on or near the midline at the time of the collision and on the authorities this Court ought to make a fifty/fifty award.

THE LAW

39. I turn now to the submissions by counsel concerning the legal position to be adopted in this matter.

40. The Defendant submitted that I should have regard to the principles set out in the cases where it is made clear that inevitably expert evidence based on reconstruction cannot bear the same weight as direct

eyewitness testimony of the event in question. Thus, in the case of *Van Eck v Santam Ins Co Ltd* 1996 (4) SA 1226 (C), Van Zyl J stated:

> *"It is not unusual for parties to tender expert evidence in cases such as the present. Their evidence, however, is inevitably based on reconstruction and cannot conceivably bear the same weight as direct, eyewitness testimony of the event in question".*

41. Reference was then made to what was stated by Eksteen J in *Motor Vehicle Assurance Fund v Kenny* 1984 (4) SA 432 (E) at 436H-I where the learned Judge stated:

> *"Direct or credible evidence of what happened in a collision must, to my mind, generally carry greater weight than the opinion of an expert, however experienced he may be, seeking to reconstruct the events from his experience and scientific training. Strange things often happen in a collision and, where two vehicles approaching each other from opposite directions collide, it is practically impossible for anyone involved in the collision to give a minute and detailed description of the combined speed of the vehicles at the moment of impact, the angle of contact or of the subsequent lateral or forward movements of the vehicles".*

Reference was also made to *Abdo N.O. v Senator Insurance Co Ltd and Another* 1983 (4) SA 721 (E) at 725D-726F.

42. The *Van Eck* case dealt with a collision in which a BMW 320 motor vehicle collided with an Opel Cadette that was driving in the opposite direction. The Court stated that the *locus classicus* on the negligence giving rise to a collision between vehicles proceeding in opposite directions was *Cantamessa v Reinforcing Steel Company Ltd* 1940 (AD) 1.

43. To quote from *Van Eck* concerning *Cantemessa* at 1230B-1230D:

> *"In this case the Court held, per Centlivres JA, that the vehicles in question were, on a preponderance of probabilities, travelling very near the centre of the road, one of them probably being somewhat over the centre. Their respective courses were such that they would inevitably collide unless the driver of the one or the other took steps to avoid a collision by moving towards his left. Neither of them, however, appeared to be aware of the impending danger and the inevitable ensued. It was held therefore, that the collision was due to their joint negligence".*

44. The English matter of *Baker v Market Harbourer Industrial Co-Operative Society Ltd, Wallace v Richards (Leicester) Ltd; Wallace v Richards (Leicester) Ltd* [1953] 1 WLR 1472 (CA), was also considered in *Van Eck*. Denning LJ is quoted at 1477 to say:

> *"So much seems so clear on principle that it is unnecessary to go further, but I would like to say that the evidence to my mind*

makes it more likely that both were to blame than that one only was to blame. It shows that each driver kept his course, with his offside wheels on or over the centre line of the road. There was room for each of them to pull in to his nearside of the road, but neither did so. There was not the slightest trace of any avoiding action taken by either – no brake marks; no swerves; no hooters; nothing. Assume that one of the vehicles was over the centre line a few inches and thus to blame, why did not the other one pull in more to its nearside? The absence of any avoiding action makes that vehicle also to blame. And once are to blame, and there are no means of distinguishing between them, then the blame should be cast equally on each".

45. In *Jadezweni v Santam Insurance Co Ltd and Another* 1980 (4) SA 310 (C), Watermeyer JP also referred to the *Baker and Wallace* matter. The headnote states:

"Where a head-on collision occurs more or less in the middle of the road the court is entitled to infer that both drivers were at fault. If either of the vehicles was across the centre line at the time of the collision the inference would be that the driver of that vehicle was negligent. If one of the drivers was on his correct side and saw that the other was travelling on his incorrect side or was about to cross onto his incorrect side it would be

negligence on the former driver's part if he failed to take all reasonable steps to avoid a collision".

46. I turn now to an analysis and draw certain conclusions.

47. Whilst the principles set out in *Cantemessa, Van Eck* and *Jadezweni* are not directly applicable in the sense that the head-on collision that occurred between Mr Louw's motor cycle and Mr Fourie's bakkie had as its genesis Mr Louw braking and then skidding into the bakkie, I accept Mr Potgieter's submission that they are useful to utilise as analogous.

48. The collision occurred on or near the midline and the objective evidence is that Mr Fourie could have, but did not, take evasive action of moving to his left. It is accepted that even if he had done so, the motor cycle may well have collided with his bakkie if not at the front right wheel, but at the rear wheel. That is not conclusive on the point. If Mr Fourie had taken evasive reasonable action by turning to the left and had taken other action, his bakkie may have avoided the collision entirely. What is clear is that he did not take all reasonable action and accordingly, on the authorities set out above, he is to be held to be negligent to some degree. Similarly in respect of Mr Louw this Court cannot be certain why Mr Louw braked sharply as he entered the bend.

49. Whilst it is difficult for a Court to come to a definitive decision as to what exactly happened leading up to the collision, what one can

conclude is that where a collision of the sort occurred in its context, both drivers were somewhat causally linked to the collision.

50. As Van Zyl J in *Van Eck* commented:

> *"It would hence appear that there might indeed have been a distraction for both drivers, however slight and for however short a period of time, directly before the collision".*

51. There may be some merit in Mr *Bridgman's* contention that each case must be judged on its own merits and that the present case is not one which falls within the *Cantamessa, Van Eck* and *Jadezweni* line of authority because the collision occurred only after Mr Louw had caused his motor cycle to skid into the collision state.

52. However, taking a conspectus of the evidence, it seems that those cases are in no way authority against a finding that the collision was caused by Mr Louw and Mr Fourie's joint negligence.

53. In the circumstances, I conclude that Plaintiff succeeds on 50% of her claim. This is consistent with Mr *Potgieter's* alternative argument.

54. In the circumstances, I make the following order:

(1) The Plaintiff succeeds on 50% of her claim, with costs.

(2) The qualifying fees of Professor Dreyer are allowed as part of the costs awarded to the Plaintiff.

BY ORDER:

KATZ AJ

3 May 2011