IN THE HIGH COURT OF SOUTH AFRICA
(WITWATERSRAND LOCAL DIVISION)

Johannesburg

CASE NO: A5039/03

In the matter between:

MATTHEW GULBRANDSEN Appellant

and

THE ROAD ACCIDENT FUND Respondent

JUDGMENT

WILLIS J:

[1] This is an appeal against the judgment of Mlambo J. The plaintiff's claim arose from a collision which, it is common cause, occurred at the intersection of Republic Road and West Avenue, Ferndale, Randburg on 6th March, 1999. The appellant was driving a Nissan Exa having registration number and letters BSK 809 GP and a Toyota Hilux bakkie having registration number and letters BCW 105 GP was driven by John Rankane. Rankane has been referred to as the "insured driver" in all the proceedings in this matter. I shall do so as well. The claim arises in terms of the provisions of the Road Accident Fund Act No. 56 of 1996. At the commencement of the trial an order was granted in terms of Rule 33(4) separating the merits of the claim from the quantum of damages, if any. Mlambo J granted the respondent absolution from the instance with costs. The appellant appeals with the leave of the Court *a quo*. Mlambo J directed that that the appeal was to be heard by the full bench of this division. A factor which influenced the decision of the Court *a quo* to grant leave to appeal was the evidence of the appellant's expert, Professor Hillman.

[2] The collision occurred shortly before 4 a.m. It is common cause that the collision occurred on a Saturday. Republic Road is a dual carriageway. The appellant's version is that on the night before the accident he had attended a dinner party at the Ruimsig Golf Course in the company of a female companion. At this party he had drunk three or four beers. At about 11

o'clock that night, he and his companion left the party and proceeded to the Randburg Inn (which is on the corner of Main Ave and Republic Road in Ferndale) where his companion was staying. There he had coffee which was followed by sexual intercourse with his companion. Thereupon he fell asleep. He woke up between 3 and 3.30 a.m. He decided to return home which, at that time was in Albermarle, Alberton. To do so, he turned right into Republic Road from the robot (presumably at the intersection of Main Ave and Republic Road), and went passed the Randburg Waterfront on his left hand side. He intended to travel past Hans Strydom Drive and to continue to Cresta where he would turn into 14th Avenue and then turn left onto the highway and travel to Alberton. To make this journey, he would have to pass West Avenue which intersects Republic Road, a few avenues west of Main Avenue, where the Randburg Inn is situated. His last recollection, before the collision occurred, is of being at the red traffic light in Republic Road adjacent to the Randburg Waterfront. His next recollection is of waking up in the hospital. He emphatically denied having been travelling in West Avenue, which was the version of the insured driver.

[3] The appellant did not contradict himself or any of his witnesses. His version cannot be dismissed as improbable. On the contrary, it has the ring of truth. The Court *a quo* was critical of the appellant's memory loss. It was also critical of the fact that no medical evidence was led to suggest that the lapse of memory was caused by the collision. The Court *a* quo found that it was "improbable that the plaintiff would simply have no recollection of the collision, of seeing the Hilux at any stage before the collision." I am of the opinion that it

is a notorious fact, of which a Court can take judicial notice, that memory losses of the kind described by the appellant very commonly occur after this type of accident. In ***Minister of Justice v Seametso*** 1963 (3) SA 530 (A), the Court accepted, without hesitation the following evidence of an orthopaedic surgeon:

> "The patient is unable to relate the events immediately preceding or following the impact, as he lost consciousness and woke up in hospital… It is typical of a severe brain injury that they lose their memory of events preceding and also following the injury for a variable time."

In the present matter the appellant in fact claims, in his summons, to have suffered a head injury during the collision and, as pointed out by Mr Pieterse who represented him, his direct and unchallenged evidence was that he lost consciousness, only to regain it later, very probably indicative of a head injury. The appellant's assertion of a memory loss was never challenged. Therefore, even if I am wrong in my opinion that a Court can take judicial notice of this kind of memory loss, the appellant's assertion could not be dismissed by the court a quo, nor could it be challenged on appeal. Furthermore, if the appellant's evidence leading up to the collision is accepted (and this, too, was never placed in issue), there would be no advantage for the plaintiff to claim that he had suffered from a loss of memory when this was not, in fact, true. If he was intent on fabricating a version, he would more probably have concocted a version directly involving the insured driver in overt negligence. Mr *Mashabane*, who appeared for the respondent conceded, quite properly in my view, that the Court *a quo* had erred in drawing an adverse inference against the appellant, when the truthfulness of his evidence regarding his loss of memory was never challenged in cross-examination.

[4] Mr Willem Steynberg, a traffic officer in the service of the Randburg Traffic Department, arrived at the scene of the collision at about 4.10 a.m. He recorded the point of impact as being on the right-hand lane of the westbound traffic travelling along Republic Road. This point of impact is also on the lane of southbound traffic travelling on West Ave. The vehicle driven by the appellant was found resting on its side. Its front portion protruded onto the right-hand lane and the rest of the vehicle was on the left-hand lane of westbound traffic in Republic Road The appellant's vehicle had extensive damage. Its whole front and right side were totally damaged. The vehicle driven by the insured driver was found on the right-hand lane of the westbound traffic in Republic Road. Its damage was mainly on the front but more pronounced in the right front region. Its windscreen was damaged on the driver's side. There was no visible damage to its sides. Steynberg did not take any statements. His colleague, Hennie van den Heever, did this. He says that as far as he can remember, there were no passengers in either of the vehicles involved in the collision and that, if there had been, this would have appeared his Officer's Accident Report (OAR). There is no record in this form of any passengers. There are traffic lights at the intersection of West Ave and Republic Road.

[5] Professor Jeffrey Hillman, who holds a directorship at the Engineering faculty at the University of the Witwatersrand, was called as an expert by the appellant. He is a professional mechanical engineer. He holds a master's degree in mechanical sciences from the University of Cambridge. He is a

Fellow of the Institute of Mechanical Engineers and a member of the Institute of Automotive Engineers. He is a chartered engineer in the United Kingdom of Great Britain and Northern Ireland. For many years he held the post of Divisional Head for the vehicle safety research group of the National Institute for Transport and Road Research which is part of the Council for Scientific and Industrial Research (CSIR). He has served on numerous technical committees of the South African Bureau of Standards (SABS) associated with the formulation of compulsory vehicle safety standards for the manufacture of motor vehicles in South Africa. Over the past 16 years he has often testified as an expert in various trials around the country. Having examined the photographs of the vehicles taken after the accident and the sketch plan, he concluded that the version tendered by the insured driver defied the laws of physics. The sketch plan had been agreed between the parties' respective experts. He said that what most probably occurred was that the appellant was indeed travelling west in Republic Road and that the insured driver was travelling east in the same road, slowed down and turned right into West Avenue, with the intention of turning south. This opinion is contrary to the opinion of one JP Verster of whom notice had been given by the respondent that he would be called as an expert. According to the notice, Verster would testify: "Considering the factual evidence on the road surfaces and the final resting positions of the two vehicles as found by the traffic officer on the day in question, it was more probable that the insured driver was travelling on the westbound lane of Republic Road and the plaintiff on West Street and the plaintiff then entering Republic Road. The final resting position of the two vehicles are indicative thereof." Verster's qualifications were not disclosed and

he was not called as a witness in order for his version to be tested. No explanation was given as to why he was not called as a witness. There has never been any suggestion that Professor Hillman was not an honest witness. We were referred by counsel for the respondent to certain well known cases in which the Courts have expressed a preference for the evidence of eye-witnesses over the opinion of experts (See, in particular ***Mapota v Santam Versekeringsmaatskappy Bpk*** **1977 (4) SA 515 (A) at 516 E**), to which the Court *a quo* itself referred. In this case, however, Professor Hillman did not merely express an opinion has to how the accident occurred.. He adamantly, emphatically and categorically rejected the insured driver's version as being contrary to the laws of physics. The Court *a quo* found that there were "probabilities other than the one tendered by Professor Hillman." Nevertheless, I do not think one needs to be a physicist or an engineer to have serious difficulties with the version of the insured driver, which I shall deal with immediately below. If the insured driver's version is to be believed, then the vehicle in which he was travelling would have had extensive damage on its left-hand side -- not its right-hand side. Moreover, the insured driver's version is irreconcilable with the extensive damage to the appellant's vehicle on <u>both</u> the whole front and right side. It is irreconcilable with the insured driver's vehicle being to the north of the appellant's when they finally came to rest.

[6] The insured driver's version is that he was travelling in a westerly direction along Republic Road (curiously the same version as that of the appellant). He was going to "drop off" his girlfriend in Randpark Ridge. She was going to her

work. He was also going to his work. His work is that of a driver. He lives in Jean Road, Blairgowrie. The appellant's vehicle approached him from the insured driver's left hand side, travelling at high speed in West Avenue. His girlfriend was not called as a witness. The insured driver has lost contact with her. The last he heard of her was that "she was somewhere in Krugersdorp, I do not know exactly where." The following was put to the insured driver under cross–examination: "Yes and you will agree with me that from the intersection from west and Republic Road, if you go into West Street in a southerly direction and you then go into Charmaine Street, that will take you into Jean Street in Blairgowrie, correct?" To this question the insured driver replied,"Yes". In an affidavit in support of his own claim, the insured driver had said that he did not know where the appellant's vehicle came from. He was also unable to explain why in this affidavit he made no mention of his girlfriend. The best he could do was to say: "She was not my wife." The insured driver's version that he was travelling in a westerly direction along Republic Road and that the appellant was travelling in West Ave is inconsistent with the report which he made at the scene of the accident and which is recorded in the OAR. In the OAR in which the insured driver's version is recorded, it is said that the appellant turned "right out of West Avenue from north to East into Republic Road." It has to be taken into account that Mr Van den Heever, who recorded this statement, was not called as a witness and could not be tested as to whether he correctly recorded what the insured driver said to him, but on the other hand the respondent argued that reliance could be placed on this recording of the insured driver's version as proof that his version in court was not a recent fabrication. In the OAR there was, as

mentioned earlier, no mention of the plaintiff's girlfriend having been a passenger. Even if the plaintiff's girlfriend received no injuries at all (and this is the explanation for why there is no record of her as a passenger), the OAR specifically and in imperative terms seeks details of persons who could be called as witnesses. She does not appear in that form as a person who could be a potential witness.

[7] The Court *a quo* found in respect of the insured driver: "I found no contradictions nor inconsistencies in the insured driver's evidence. He came across as honest and answered all questions in a straightforward manner. He impressed me as a witness and his demeanour was of someone who was describing something that he saw. It remains for me to state that I could find nothing inherently improbable in the insured driver's version that the Exa entered the intersection at high speed from West Street. This version is also inconsistent with the objective factors already discussed in this judgment."

[8] As the Court *a quo* observed, one is confronted with two mutually destructive versions. Nevertheless, the cumulative weight of the following persuades me that that the Court *a quo* erred and fundamentally misdirected itself in finding that the appellant had "failed to prove that the collision occurred as a result of the insured driver's negligence":

(i) There were no contradictions, inconsistencies or improbabilities in the evidence of the appellant: indeed, as I have already said, it has the ring of truth;

(ii) If, as was undisputed, the appellant had spent time with his female companion at the Randburg Inn and thereafter was travelling on his way home to Alberton, he would have been obliged to have entered into Republic Road on which the Randburg Inn is situate and would indeed have needed to be travelling along Republic Road in a westerly direction- in other words, he would have had no reason to be travelling in West Avenue;

(iii) The conclusions as to probability by the highly qualified, experienced and impressive expert, Professor Hillman;

(iv) The emphatic rejection by Professor Hillman of the insured driver's version being contrary to the laws of physics;

(v) The damage concentrated on the right front of the insured driver's vehicle is objectively inconsistent with the insured driver's version that the appellant's vehicle approached from the left hand side of the insured driver;

(vi) The OAR makes no mention of the insured driver's girlfriend;

(vii) The insured driver made no mention of his girlfriend being a passenger in his affidavit in support of his own claim.

(viii) If the insured driver was travelling from his residence in Jean Street to Randpark Ridge, he could, on his own admission, have been travelling along West Avenue;

(ix) Similarly, if he was returning from Randpark Ridge, having "dropped off" his girlfriend, he could have been travelling in an easterly direction along Republic Road and then turned right into West Avenue to make his way home (this route was Professor Hillman's hypothesis);

(x) The damage to the vehicles is consistent with the appellant having travelled in a westerly direction along Republic Road and the insured driver having travelled from south to north along Charmaine Street and then linking up with West Ave to travel from south to north in that avenue at the intersection with Republic Road;

(xi) The objective evidence agreed between the experts on each side as to the position of the vehicles after the accident;

(xii) In an affidavit in support of his own claim, the insured driver had said that he did not know where the appellant's vehicle came from but in his testimony in the trial, he says that the appellant's vehicle approached him from the insured driver's left hand side.;

(xiii) The discrepancies between the insured driver's version in the trial and that recorded in the OAR as having been said by him shortly after the accident;

(xiv) The unexplained failure to call the expert, Mr Verster, on behalf of the respondent;

(xv) The plaintiff's last recollection, before the collision occurred, is of being at the red traffic light in Republic Road adjacent to the Randburg Waterfront: the probabilities are, therefore, that if the traffic lights had been against him at the intersection of West Ave and Republic Road, he would also have stopped there.

[9] The evidence indicates that the Court *a quo* erred in accepting the evidence of the insured driver: the accident could only have occurred because the insured driver wrongfully turned into oncoming traffic which had the right

of way. Once negligence on the part of the insured driver has been established it is for the respondent to prove any contributory negligence on the part of the appellant (See ***Mantawule v Van Zyl NO and Others*** 1992 (1) SA 317 (E) at 316H-317A). Clearly, the respondent fails in this regard. In my opinion, the appellant succeeded in proving, on a balance of probabilities, ` that the accident was caused solely through the negligence of the insured driver.

[8] The following order is made:

(1) The appeal is upheld.

(2) The order of the Court *a quo* granting the defendant absolution from the instance with costs is set aside.

(3) The following is substituted for the order of the Court *a quo*:

"(a) The collision which occurred at the intersection of Republic Road and West Avenue, Ferndale, Randburg on 6th March, 1999 between a motor vehicle which was a Nissan Exa having registration number and letters BSK 809 GP, driven by the plaintiff and a motor vehicle which is a Toyota Hilux bakkie having registration number and letters BCW 105 GP driven by John Rankane, was occasioned solely through the negligence of the aforesaid John Rankane ("the insured driver");

(b) The defendant is liable to pay the plaintiff for 100% of the damages which the plaintiff has suffered as a result of the aforesaid collision;

(c) The defendant is to pay the plaintiff's costs in this suit."

(4) The respondent is to pay the appellant's costs in this appeal.

DATED AT JOHANNESBURG THIS 15TH DAY OF SEPTEMBER, 2004

N.P. WILLIS

JUDGE OF THE HIGH COURT

I agree.

K. M. SATCHWELL

JUDGE OF THE HIGH COURT

I agree.

W.H.G. VAN DER LINDE

ACTING JUDGE OF THE HIGH COURT

Counsel for Appellant: *J. C. Pieterse*

Attorneys for Appellant: Monique Woods

Counsel for Respondent: *Q.R. Mashabane*

Attorneys for Respondent: MF Jassat Dhlamini and Associates

Date of hearing: 3rd September, 2004

Date of Judgment: 15th September, 2004