

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

Case No.: 06/15685

Date:06/09/2007

In the matter between:

CHRESHENDA GARDNER

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

PA MEYER, AJ

[1] It is common cause between the parties that on 7 December 2003, along Paul Kruger Road, near the intersection with Main Reef Road, Dersley Park, Springs, Gauteng Province, a collision occurred between motor vehicle LNG 980

GP driven by Mr J Maluleka who was the insured driver, and a motor cycle KBY 277 GP driven by the plaintiff. The plaintiff instituted this action against the defendant wherein she claims payment of the sum of R282 748,78, as well as interest and costs, in respect of damages suffered by her as a consequence of the collision.

[2] At the commencement of the trial, application was made by agreement between the parties that the issues of negligence and contributory negligence (paragraph 5 of the plaintiff's particulars of claim and paragraph 5 of the plea) be decided before and separately from the other issues between them. I ordered such separation. The parties, represented by Adv I Smith for the plaintiff and Adv EF Serfontein for the defendant, also informed me that the averments contained in paragraph 4 of the plaintiff's particulars of claim were common cause between them. The plaintiff commenced and proceeded to call Mr Michael James Gardner as a witness, whereafter the plaintiff also testified. The defendant called the insured driver, Mr Johannes Maluleka, and the owner of the insured vehicle, Mr Jimmy Boy Makgota, who was also a passenger in the insured vehicle at the time of the collision, as witnesses.

[3] In paragraph 5 of her particulars of claim, the plaintiff has made the following averments:

"5. Maluleka's negligent driving was the sole cause of the collision. He drove negligently in one or more of the following respects:

- 5.1 *He failed to keep a proper lookout;*
- 5.2 *He failed to exercise proper control over his motor vehicle;*
- 5.3 *He failed to apply the brakes of his motor vehicle timeously, if at all;*
- 5.4 *He drove his motor vehicle at an excessive speed in the circumstances;*
- 5.5 *He drove his vehicle across the path of travel of motor cycle KBY 277 GP when it was unsafe to do so;*
- 5.6 *He changed lanes without indicating his intention to do so;*
- 5.7 *He drove his vehicle from the left hand to the right hand lane when it was unsafe to do so;*
- 5.8 *He failed to avoid the collision when by the exercise of reasonable care, he could and should have done so.*

[4] In paragraph 5 of the plea, the defendant has pleaded as follows to the plaintiff's aforesaid averments:

- "5.1 Each and every allegation contained herein is denied as if specifically traversed and the Plaintiff is put to the proof thereof. The Defendant specifically denies that the accident occurred as a result of any negligence on the part of the insured driver as alleged or otherwise.*
- 5.2 *Alternatively, in the event of the above Honourable Court finding that the insured driver was negligent, which is still denied, then in that event the Defendant denies that the said negligence caused and/or contributed to the collision aforesaid and the Defendant specifically avers that the*

collision was caused by the exclusive negligence of the Plaintiff who was negligent in one or all of the following aspects:

- 5.2.1 she failed to keep a proper lookout;*
- 5.2.3 she failed to use her senses to ascertain whether any motor vehicles, and in particular the insured motor vehicle is approaching;*
- 5.2.3 she failed to acquaint herself with the vicinity and scan the road so as to ascertain whether any motor vehicle on the road may be an actual or potential risk to her safety;*
- 5.2.4 she failed to adhere to the rules of the road;*
- 5.2.5 she failed to avoid the collision when, by the exercise of reasonable care and skill, she could and should have done so; and*
- 5.2.6 she exposed herself to the risk of colliding with passing vehicles, in particular, the insured vehicle.*
- 5.3 Further alternatively, and in the event of the above Honourable Court finding that the insured driver was negligent and that the said negligence caused and/or contributed to the collision, all of which is still denied, then in that event, the Defendant pleads that the Plaintiff was negligent in one or more or all the aspects set out in paragraph 6.2 (this is clearly a wrong reference to paragraph 5.2) hereinabove and that such negligence by the Plaintiff contributed to the collision and that the Plaintiff's claim be reduced in terms of the provisions of the Apportionment of Damages Act No. 34 of 1956 taking into consideration the degree of negligence of the Plaintiff."*

[5] Mr Gardner and his younger sister, the plaintiff, testified that on the morning in question they had breakfast at the East Rand Mall whereafter they were travelling to their mother who lives in Springs. They were travelling along Paul Kruger Road in the direction of Springs, which road has two lanes for traffic in each direction in the vicinity where the collision occurred, as well as an Excel Petrol Station on either side. The petrol station, which is immediately to the left of Paul Kruger Road as Mr Gardner and the plaintiff were travelling, has a triangular island at its entrance or exit and one exits the garage along a slipway of approximately 80 metres according to Mr Gardner, and approximately 60 – 70 metres according to the plaintiff, which slipway runs parallel to and joins the left lane of Paul Kruger Road. These facts were not disputed, except for the insured driver saying that the slipway was approximately 5 metres. The plaintiff testified that the speed limit was 100 km p/h and it has since been reduced to 80 km p/h. When he gave his evidence in chief, Mr Maluleka testified that he was familiar with the particular road and that the speed limit was 70 km p/h at the time of the collision, but under cross-examination he conceded that he did not know whether the speed limit was more than 80 km p/h at the time of the collision and whether it has since been reduced to 80 km p/h. Mr Gardner was travelling on a motorcycle with the plaintiff also travelling on a motorcycle approximately 100 metres in front of him. There is a robot controlled intersection some distance before the petrol station in the direction in which they were travelling.

[6] The plaintiff testified that she was initially travelling in the left hand lane, and, before she reached the robot, she moved over to the right hand lane when she saw the insured driver about to come out of the petrol station as a precautionary measure in case he did not look. The robot was green. Mr Gardner testified that he was approximately 200 metres away from the point where the insured vehicle intended to enter Paul Kruger Road and the plaintiff approximately 100 metres away. Mr Gardner testified that he was still on the other side of that intersection, and as a precautionary measure he, like his sister, also went into the right hand lane. There was a clear view to the slipway without any obstruction and nothing prevented the plaintiff from seeing the insured vehicle from a distance of 100 metres and closer. The road was clear and not wet.

[7] Mr Gardner and the plaintiff testified that the insured vehicle did not travel along the slipway to join Paul Kruger Road, but instead went across and into Paul Kruger Road immediately when it got passed the triangular island. Mr Gardner testified that when he first noticed the insured vehicle as a possible danger and when it entered Paul Kruger Road, he, Mr Gardner, was approximately 200 metres away and the plaintiff approximately 100 metres away from the point where the insured vehicle entered Paul Kruger Road. They both were travelling at a speed of approximately 80 - 85 km p/h. The insured vehicle, according to Mr Gardner, was not travelling fast – it had just pulled off from the petrol station and if it was doing 40 – 50 km p/h it would have been much. The

plaintiff, under cross-examination, was not sure and could not tell how far she was away from the insured vehicle at the point when she saw it was not following the slipway and entering the left lane of Paul Kruger Rd. The plaintiff testified that she was travelling at a speed of approximately 80 km p/h and the insured driver at approximately 30 – 40 km p/h.

[8] Mr Gardner testified that the insured vehicle proceeded at an angle into Paul Kruger Road and “*straight across*” over into the right hand lane “*literally in front*” of the plaintiff. The plaintiff testified when giving her evidence in chief that the insured vehicle came out across the slipway and “*across*” the left hand lane into the right hand lane. Under cross-examination her version on this issue included statements that she could not remember at what angle the insured vehicle was going across, that it appeared to her that the insured vehicle was pointing across the road, that she could not say for sure that the insured driver was driving across the road diagonally as was depicted by her in her sketch plan, that it appeared that the insured vehicle did not follow the left hand lane, and that it looked more to her that the insured driver went into the left hand lane and straight into the right hand lane. Propositions put to the plaintiff by the defendant’s counsel that the insured vehicle was not directed or “*angled*” to go into the left hand lane and that no movement of the insured vehicle indicated that it was going into the left hand lane, were met by evasive and somewhat contradictory answers by the plaintiff. She also mentioned that she could not remember at which angle the insured vehicle was travelling. Mr Gardner

disagreed with the proposition that was put to him under cross-examination that when the insured vehicle commenced crossing the left hand lane it was travelling in such a fashion that it was clear that it was going to the right hand lane, and he testified that there was still the possibility that the insured vehicle would stay in the left hand lane.

[9] Mr Gardner had no idea how long it took the insured vehicle to clear the left hand lane and he was unable to say how long the insured vehicle spent in the left hand lane. The plaintiff's evidence also brought no clarity on this issue. Under cross-examination she said that the insured driver came out across the slipway, without following it, and across the left lane. She kept the insured vehicle under surveillance and noticed it came across and into the left hand lane. She also said that she remembered the insured driver more from the left lane going into the right lane in front of her. When giving her evidence in chief, the plaintiff could not tell exactly how far the insured vehicle was away from her when it crossed over into the right hand lane, but she testified that it was very close – a few metres away. Under cross-examination the plaintiff testified that the insured vehicle was still in the left hand lane and about 6 metres away from her when she realized that the insured driver was coming from the left into the right hand lane. The insured vehicle was extremely close to her - she pointed out 2 to 3 metres – and diagonally oriented on the road when she applied brakes and swerved. The plaintiff said that she did not expect the insured vehicle to come into the right hand lane and there was no way for her of taking avoiding actions sooner. Mr

Gardner testified that the plaintiff tried to evade the accident by trying to go into the left hand lane, but the distance between her motorcycle and the insured vehicle was not enough. However, when asked during re-examination how far the plaintiff was away when the insured vehicle came in front of her, Mr Gardner was unable to say.

[10] The plaintiff testified that she braked hard with both brakes and swerved to the left while the insured vehicle was still at an angle. Mr Gardner and the plaintiff testified that by the time of the impact the insured driver had finished turning into the right hand lane and was facing its direction. The plaintiff testified that she collided with the insured vehicle at its left rear and Mr Gardner also testified that the damage to the insured vehicle was at its rear left. The plaintiff incurred injuries in the collision.

[11] The insured driver, Mr Maluleka, testified that he exited the Excel garage by travelling along and to the end of the slipway. Only under cross-examination did he mention that he stopped at the end of the slipway. When he got to the end of the slipway he looked to see whether it was safe to enter Paul Kruger Road when he noticed that the robot, which was approximately 45 metres away to the right of him, was red, that there were about 6 or 7 motorcycles in both lanes reducing speed as they were approaching the robot. The plaintiff's motorcycle, according to him, also approached the robot and was approximately 7½ metres away from it. He did not see whether the motorcycles stopped at the

robot. He entered into and proceeded for some distance – approximately 22 to 23 metres – in the left hand lane on Paul Kruger Road before he changed to the right lane while he was travelling at a speed of approximately 40 km p/h. He intended to execute a U-turn further ahead where there was a break in the paved island, which separated the lanes going into the opposite directions on Paul Kruger Road. Before crossing over to the right hand lane, he put on the indicator light of the insured vehicle and then looked in both his rear and side view mirrors to ascertain whether it was safe for him to change over to the right hand lane. He noticed that the approaching motorcycles were crossing the robot. He considered it safe, crossed over to the right hand lane where he proceeded for approximately 15 metres. Under cross-examination Mr Maluleka mentioned for the first time that while he was travelling in the right hand lane he also looked in his rear view mirror and noticed that two motorcycles, one ahead of the other, were travelling very fast, but he thought they would overtake him on the side, because a motorcycle is “*a small thing*”. The plaintiff collided into the insured vehicle, was flung over it, landed ahead of it, and Mr Maluleka swerved to prevent going into her. According to Mr Maluleka, the damage caused by the collision was in the centre of the rear of the insured vehicle. It was put to Mr Maluleka that the plaintiff was travelling at a speed of 85 km p/h and his reply was that she must have travelled at a speed faster than that when she was approaching him after he had crossed over to the right lane.

[12] There were obvious contradictions and adjustments in the evidence of Mr Maluleka, which negatively impacts upon the credibility of his testimony, but I do not consider it necessary to analyze his evidence in any detail in view thereof that I can in any event attach very slight importance to his evidence for two reasons: Mr Maluleka repeatedly qualified his evidence relating to distances and measurements by saying that he is not good at estimating distances or measurements and that he could be estimating incorrectly. Under re-examination he also testified that he had no training in calculating speed or distances and at the time of the collision he did not calculate the speed. His estimation of distances and speed are critical in the assessment of his version, and I must reject all his estimates as pure reconstruction and unreliable. Secondly, Mr Maluleka's version was never put to Mr Gardner and essential parts thereof were also not put to the plaintiff. In re-examination an attempt was made to explain this by Mr Maluleka testifying that he had only consulted with the defendant's legal representatives once the plaintiff had already been excused from the witness stand, which was also after Mr Gardner had already testified. The defendant's election to conduct the trial in such a way, however, does not detract from the principle that it should be made clear under cross-examination which evidence *"...is to be challenged.."* and *"...also how it is to be challenged..."* in order to afford a witness the opportunity *"... to deny the challenge, to call corroborative evidence, to qualify the evidence given by the witness or others and to explain contradictions on which reliance is placed."*

[*President of the RSA v South African Rugby Football Union 2000 (1) SA 1 (CC)* at pp 37 – 39, paras 61 – 65].

[13] The defendant also called Mr Makgota, who commenced giving his evidence on Friday afternoon, which was the 31st August 2007. When the trial resumed on Monday morning the 3rd September 2007, I was informed by counsel that Mr Makgota had failed to appear, but that the defendant had elected to conclude the matter without his evidence and that I should disregard the evidence that he had given on Friday afternoon. Mr Smith also informed me that the plaintiff had no objection thereto. I accordingly ignore the evidence that was given by Mr Makgota.

[14] Adv Serfontein confined his argument for the defendant essentially on the version of the plaintiff and of her brother, and he submitted that the plaintiff has not discharged the onus of establishing causal negligence on the part of the insured driver and that she has not rebutted the presumption that arises in rear end collisions. Adv Smith submitted that the plaintiff has discharged such onus and that the presumption relied upon by counsel for the defendant was only operative where there was no evidence to rebut it. Adv Smith further submitted that the evidence establishes that Mr Maluleka crossed over in front of the plaintiff at an inopportune moment when there was no opportunity for the plaintiff to avoid the collision. Both counsel referred me to *Isaacs and Leveson: The Law of Collisions in South Africa by HB Kloppe 7th Ed*, at p 78 where reference is

made to the principle that a driver who collides with the rear of a vehicle in front of him is *prima facie* negligent unless he or she can give an explanation indicating that he or she was not negligent.

[15] Regrettably, the only plan used in evidence is a sketch plan drawn by the plaintiff, which depicts the vicinity of the place of the collision, the path of travel of the insured vehicle and of the plaintiff's motorcycle, and the point of impact. On the plaintiff's own version, however, the plan is merely a rough sketch, is not drawn to scale and does not necessarily reflect the path of travel of the insured vehicle accurately. The plan does not even contain any distance measurements. The plan is accordingly not very helpful in the determination of the issues under consideration. Also no evidence was presented by the plaintiff on various critical issues, viz. the width of the lanes on Paul Kruger Road, where on Paul Kruger Road the collision occurred, and the distance between the point where the insured driver entered Paul Kruger Rd and the point of impact. The evidence on other critical issues is confusing and uncertain, such as the manner in which the insured vehicle crossed over Paul Kruger Road, whether its movement indicated that it was on its way to the right hand lane, and the distance it travelled on the left hand lane or across the left hand lane before it became clear to the plaintiff that he was going to go over or swerve in front of her. I also find the plaintiff's version on some of the critical issues, such as the manner in which the insured vehicle crossed over the left hand lane, to be unreliable. She also experienced difficulties at times at furnishing estimates of distances.

[16] I am unable to find causal negligence on the part of the insured driver on meagre evidence, such as that the plaintiff was approximately 100 metres away from the insured vehicle and travelling at a speed of 80 – 85 km p/h in the right lane of Paul Kruger Road when the insured vehicle commenced crossing over Paul Kruger Road at a speed of 30 – 40 km p/h while the plaintiff was keeping the insured vehicle under surveillance without reducing her speed and only realizing that it was going to cross-over to the right hand lane in front of her when she was only approximately 6 metres away from it. On the evidence before me I am also unable to come to a finding whether the possibility and later on the probability created by the insured driver, while the plaintiff was covering a distance of approximately 100 metres excluding an distance which the insured vehicle might have travelled in the same direction, that he was going to go across the road and into the right lane, was or was not ignored by the plaintiff, whether or not the plaintiff reacted too late, kept a proper look-out, and could or should have reduced her speed and/or swerved to the left at an earlier stage.

[17] I am accordingly of the view that the plaintiff failed to discharge the onus upon her to establish any of the grounds of negligence as averred in paragraph 5 of her particulars of claim on the part of the driver of the insured vehicle. The explanation given by the plaintiff and by Mr Gardner is also in my view insufficient to enable me to determine whether the plaintiff was not negligent.

[18] In the result the following order is made:

- a) Absolution from the instance is granted against the plaintiff; and
- b) The plaintiff is ordered to pay the defendants' costs of this action.

P.A. MEYER AJ
ACTING JUDGE OF THE HIGH COURT