

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

Case No 06/14110

Date:14/06/2010

In the matter between:

ALTA KILIAN

First Plaintiff

HERMANUS FOURIE

Second Plaintiff

HEIDENE FOURIE

Third Plaintiff

and

ROAD ACCIDENT FUND

Defendant

MEYER, J:

[1] This action is for the payment of compensation for damages as a result of bodily injuries caused by a serious collision that occurred in the early evening on 16 April 2005 in Roodepoort. The severity of the impact caused passengers including children to be thrown out onto the tarmac, some of the drivers needed

to be cut out of their vehicles, many of those involved were seriously injured and were airlifted to hospital, and a multiplicity of claims were subsequently lodged against the defendant.

[2] The claims of the second and third plaintiffs were settled. The only issue before me is the liability of the defendant *vis-à-vis* the first plaintiff, to whom I shall hence on refer as the plaintiff. By agreement between the parties I ordered that this issue be decided before and separately from the issue of *quantum*.

[3] In its plea the defendant baldly denied that the plaintiffs have complied with the provisions of the Road Accident Fund Act 56 of 1996 (“the Act”), and, at some stage during the trial, the defendant sought to amplify such denial by an averment that the plaintiff had not complied with the provisions of s 9(1)(f) of the Act. Such attempt at an amendment was abandoned due to the defendant’s eagerness to obtain a judgment on the issues of negligence and contributory negligence, which, I was informed by Adv. A. Combrink for the defendant, will assist the defendant in its dealing with the other pending claims arising from the same collision. Accordingly the issues of negligence and of contributory negligence require decision at this stage.

[4] The plaintiff commenced and proceeded to call Mr. Christiaan Izak Delpont, who was a police officer on the staff of the accident investigation unit of the Johannesburg Metropolitan Police Department; Mr. Barry Grobbelaar, who

undisputedly is a duly qualified expert with vast experience in the reconstruction of motor vehicle accidents; Mrs. Alta Kilian, who is the plaintiff and who was the driver of a Volvo motor vehicle with registration letters and number RRS 173 GP (“the Volvo”) at the time of the collision; and Ms. Heidene Fourie, who is the plaintiff’s niece and who was the only passenger in the Volvo at the time of the collision. The defendant called as witnesses Mr Randal Paul Douman (Jnr.), who is the insured driver and who was the driver of the insured vehicle, which was a Mazda Drifter double cab 4 x 4 pick-up van (“the Mazda”) at the time of the collision; Mr. William Benjamin Douman (Snr), who is the father of the insured driver and who was the front seat passenger in the Mazda at the time of the collision; and Prof. Gerald Lemmer, who similarly undisputedly is a duly qualified expert with vast experience in the reconstruction of motor vehicle accidents. The facts of this matter are largely common cause and I accordingly, except for the disputed issues, briefly refer thereto.

[5] The collision occurred on Fifth Avenue, Roodepoort at the du Toit Street intersection. Fifth Avenue runs east to Florida and west to Roodepoort. It is 11.1 metres wide and divided into two lanes. The lane for eastbound traffic travelling in the direction of Florida is 5.6 metre wide, and the lane for westbound traffic travelling to Roodepoort is 5.5 metres wide. Traffic along Fifth Avenue turns north into du Toit Street. There are no stop signs for traffic along Fifth Avenue turning into du Toit Street. The speed limit on Fifth Avenue is 60 kilometres per hour and there are accesses to residential properties. There are street lights

along Fifth Avenue in the vicinity where the collision occurred. Travelling in an easterly direction along Fifth Avenue and approaching the du Toit Street intersection, a vehicle travels around a left hand bend and then over a rise. The rise prohibits visibility for vehicles travelling in both directions. Going over the rise, vehicles travelling in an easterly direction have at least 100 metres of unobstructed visibility to the intersection and vehicles travelling in a westerly direction similarly have an unobstructed visibility of at least 100 metres from the intersection. Du Toit Street has a centre island with two lanes for northbound traffic and two lanes for southbound traffic. The width of du Toit Street for northbound traffic is 7.2 metres and the width for southbound traffic is the same. There are stop signs on du Toit Street for southbound traffic entering Fifth Avenue.

[6] The collision occurred during the early evening of the 16th April 2005, between 19h10 – 19h25. Fifth Avenue in the vicinity of the collision scene was a tarred road with a good surface. It was dark, the vicinity of the collision scene was lit by street lamps, and the illumination was good. The weather was fine and the road was dry. Immediately before the collision, the Mazda travelled in a westerly direction along Fifth Avenue. An Isuzu vehicle with registration letters and number N984G (“the Isuzu”), which was driven by Mr. Petrus Christoffel Kleynhans, was also travelling in a westerly direction along Fifth Avenue at some distance behind the Mazda. The Volvo travelled from the opposite side in an easterly direction along Fifth Avenue. The collision between the Mazda and the

Volvo was close to a full blooded head-on with a right front to right front impact. After impact the Volvo continued in an easterly direction, its left rear tail lamp cluster collided with a street lamp pole on the north-eastern corner of the intersection, and it finally came to a stop against a pavement on the northern side of Fifth Avenue facing in an easterly direction. After impact, the Mazda was forced essentially rearwards, it rotated clockwise away from the area of impact into the lane for vehicles travelling in a westerly direction, which was the lane of travel of the Isuzu at the time, a collision between the Mazda and the Isuzu occurred, and the Mazda finally came to stop on the eastern side of the intersection and southern side of Fifth Avenue facing in a westerly direction. The Isuzu came to stop on the western side of the intersection and on the grass section on the southern side of Fifth Avenue facing in a northerly direction.

[7] The insured driver testified that he was travelling with his family and friends in the Mazda along Fifth Avenue in a westerly direction with the intention of turning south into du Toit Street. Approximately a kilometre before the point of collision, the insured driver overtook a pick-up van which was also travelling west along Fifth Avenue. This pick-up van was on the extreme left of the road as they were travelling, it moved into a bus stop area to the left as they were travelling, and the insured driver was accordingly able to remain in his lane when passing it. In preparing to turn right into du Toit Street, the insured driver started to brake, he put the Mazda's indicator light on, and he brought the Mazda to a complete standstill in a parallel position at the centre line and on its correct side of Fifth

Avenue at a point virtually across from the centre island on du Toit Street. When the Mazda came to a standstill it was passed by an oncoming vehicle which had been travelling east along Fifth Avenue. The headlights of the Mazda were on dim, because of the oncoming vehicle that had passed it. The insured driver noticed the lights from another oncoming vehicle and as it was nearing he could see it was a white vehicle. The next moment was the impact. The Mazda remained stationary before the collision and the insured driver never executed his intended right turn into du Toit Street. The white vehicle, which was involved in the collision, turned out to be the Volvo. The evidence of Mr Douman (Snr.), who sat in the front passenger seat of the Mazda at the time of the collision, corroborated that of his son, the insured driver, in certain material respects.

[8] The plaintiff testified that on the evening in question at approximately 19h10, she was driving the Volvo in an easterly direction along Fifth Avenue. She was accompanied by her niece who sat in the front passenger seat. The plaintiff confirmed that she had at least 100 metres of visibility to the du Toit Street intersection as she was travelling along Fifth Avenue. When she travelled over the rise, she noticed two sets of lights which blinded her. The lights were from oncoming vehicles from the opposite direction and, as she was travelling, the one set of oncoming lights was on the left side of the road and the other on the right. Under cross-examination the plaintiff said that she then realized that there was an oncoming vehicle in her lane of travel. She lifted her arm to her face to block out the lights, and the impact occurred immediately. She had no

time to brake or to swerve out. The plaintiff was in her correct lane of travel and she collided with the set of lights to her left. According to the plaintiff she and her niece were driving unhurriedly immediately before the collision and she denied profusely that she would have travelled at speed. She was, however, unable to say at what speed she was travelling. It was put to the plaintiff that she was travelling at a very high speed and that Prof. Lemmer's estimate of her speed is approximately 115 kilometres per hour, to which she replied that she does not know and that she is not going to lie. In her evidence, the plaintiff's niece, Ms Fourie, confirmed that she was a passenger in the Volvo when the collision occurred, but she had no significant recollection of the events and her testimony was of no value in determining the issues.

[9] The Isuzu was probably the vehicle which the insured driver had overtaken before he reached the intersection. The second set of lights that the plaintiff had seen to her right when she travelled over the rise was probably those of the Isuzu, which vehicle had been travelling in a westerly direction along Fifth Avenue at some unknown distance behind the Mazda and subsequently collided with the Mazda immediately after the impact between the Mazda and the Volvo.

[10] The two essential issues are accordingly the speed at which the Volvo was travelling and the position of the Mazda immediately prior to and at the time of impact between the Volvo and the Mazda.

[11] I do not accept the plaintiff's testimony that she and her niece were driving unhurriedly immediately before the collision. Her evidence on the issue of speed contains obvious internal contradictions. Under cross-examination she first profusely denied that she was travelling at a very high speed, and later on she testified that she does not know.

[12] Both Prof. Lemmer and Mr Grobbelaar were *ad idem* that the plaintiff travelled at a very high speed. They used the same methodology in their determination of the probable speed at which the Volvo was travelling before and after the collision. In short, their evidence on this issue was that in such a collision the vehicles acquire the same speed by virtue of the fact that they are in contact with each other for a finite time. The mass ratio for the Mazda and Volvo is approximately 1.4, with the Mazda therefore being 1.4 times heavier than the Volvo. By conservation of momentum, which is a fundamental principle governing all collisions, the speed of the Volvo before the impact would be 2.4 times the speed of the vehicles after impact. In order to determine the speed of vehicles after impact one has regard to their masses, the distances of their post impact movements, and their decelerations on route to their ultimately coming to a standstill.

[13] Mr Grobbelaar assumed a retardation coefficient varying between 0.3 and 0.5 for the post impact travel of the Volvo and of the Mazda, which lead him to estimate the impact speed of the Volvo at between 76 and 98 kilometres per

hour. In estimating the retardation coefficients at between 0.3 and 0.5, Mr. Grobbelaar *inter alia* took the downhill gradient of 6% into account and he criticized the opinion of Prof. Lemmer for not taking it into account. Under cross-examination, however, Mr Grobbelaar conceded that it made very little difference to the calculated impact speed. When confronted under cross-examination with the severity of the damage to both vehicles, Mr Grobbelaar conceded that the Volvo's speed on impact was probably more in the region of 98 kilometres per hour.

[14] Prof. Lemmer assumed a retardation coefficient of 0.6 for the post impact travel of the Volvo and the Mazda, which lead him to estimate the impact speed of the Volvo to have been at least 115 kilometres per hour. Mr Grobbelaar's concessions and Prof. Lemmer's convincing evidence on this issue lead me to prefer the reasoning and opinion of Prof. Lemmer on the Volvo's impact speed. His opinion is that it is very reasonable to assume an average deceleration of at least 6m/s^2 . He supports his opinion on the grounds that the post-collision distances of 15,3 metres for the Volvo and 14,5 metres for the Mazda should, in the light of their ultimately coming to a standstill forcibly, be regarded as minimum distances; that, with reference to the various gauge, scrape, skid and broadside marks on the road surface as well as the post impact clockwise rotation of the Mazda and the approximate 90° rotation of the Volvo from impact to the lamp pole, an inference is justified that both vehicles underwent significant

decelerations en route to their ultimate stopping places; and the severity of the collision damage to both vehicles.

[15] I accordingly find as a matter of probability that the Volvo travelled at a speed of at least 115 kilometres per hour immediately prior to and at the time of impact. But even if I am wrong in this assessment, a speed of between approximately 100 to 115 kilometres per hour remains an extremely high speed on a road running through a residential area with a maximum speed limit of 60 kilometres per hour. The undisputed evidence is that had the plaintiff been travelling at a speed of 80 kilometres per hour and had she observed the Mazda on its incorrect side of the road from a distance of 100 metres away, she would, including reaction time, have been able to bring the Volvo to a complete standstill within the distance of 100 metres. Travelling at a higher speed, she would have been able to pass the Mazda to her left in her lane had she reduced her speed.

[16] This brings me to the position of the Mazda immediately prior to and at the time of impact. I do not accept the insured driver's testimony on this issue. It is refuted by objective evidence in the form of the scrape, gouge and tyre marks found on the road surface shortly after the collision, and by the convincing evidence and views of Mr Delport and Mr Grobbelaar on this issue. The insured driver conceded that it is possible that he might have brought the Mazda to a standstill "*a few millimetres*" over the centre line onto its incorrect side on Fifth Avenue.

[17] Mr Delport, who was an inspector at the time of the collision and well experienced and qualified in investigating collisions, including the taking of relevant measurements, the observation of marks, the gathering of evidence, and the determination of probable points of impact at scenes of collisions, and Mr Grobbelaar both expressed the view that the probable point of impact was at a point which was referred to as X1. This point represents the positioning of the Volvo's right front wheel at the time of impact. It is 0.7 metres north of the centre of the centre line on Fifth Avenue, in other words well within the lane for eastbound traffic which was the Volvo's lane of travel. The width of the Volvo is approximately 1.71 metres and the Mazda approximately 1.67 metres. Both the Volvo and the Mazda display severe damage to their right fronts up to approximately the centre fronts of each vehicle. This is indicative of a right front to right front impact, and it means that the Mazda was probably positioned at a point which was across from the du Toit Street intersection and approximately 1.5 metres onto the lane in which the Volvo was travelling immediately before and at the time of the impact.

[18] Both Mr Grobbelaar and Prof. Lemmer were *ad idem* that in this type of head-on collision vehicles cannot go through each other, they push each other apart, and impact is accordingly followed by a sideways displacement of the vehicles – each to its left. Prof. Lemmer suggested that the marks at point X1 could have been made by the Volvo after it had suffered the sideways

displacement and in such event the point of impact would be slightly closer to the centre of the road, but still within the Volvo's lane of travel. Under cross-examination Prof. Lemmer conceded that, even if point X1 does not represent the point of impact but the marks made by the Volvo after its sideways displacement, the Mazda nevertheless at the time of impact would probably have crossed over the centre line into the Volvo's lane at a distance of more than half the width of the Mazda. Prof. Lemmer further conceded that the marks at point X1 are indicative of the point of impact even if they were caused by the Volvo after its sideways displacement.

[19] I accordingly find as a matter of probability that immediately before and at the time of the impact the Mazda was positioned at a point which was across from the du Toit Street intersection and approximately 1.5 metres onto the lane in which the Volvo was travelling.

[20] The plaintiff and the insured driver were, in my view, negligent. It is an inevitable inference from the evidence that the plaintiff must have seen the Mazda obstructing her lane when she was approximately 100 metres away from it. She did not apply brakes nor did she deviate from her course. Whether her failure to take avoiding action was due to the excessive speed at which she was travelling or whether she simply failed to keep a proper look-out or both is impossible to say. Her conduct, in my view, clearly fell short of what is to be expected of the reasonable driver under the prevailing circumstances. By

stopping the Mazda in the intersection on his incorrect side of the road and onto the lane of oncoming traffic, the insured driver also, in my view, fell short of what is to be expected of the reasonable driver under the prevailing circumstances.

[21] Adv. Combrink submitted that the negligence of the insured driver did not contribute causally to the collision. I disagree. If the Mazda was not positioned approximately 1.5 metres onto the lane in which the Volvo was travelling, the collision would probably not have occurred. Also, if the plaintiff was not travelling at an excessive speed or was keeping a proper look-out and took appropriate evasive action by applying brakes and either stopping or passing the Mazda at a much slower speed to her left, the collision would probably not have occurred. The negligence of each was linked to the collision sufficiently closely or directly for legal liability to ensue. The insured driver's negligence contributed to the collision, the harm was caused directly to the plaintiff, was reasonably foreseeable, could easily have been avoided, and no *novus actus interveniens* was proved. The same considerations apply equally to the plaintiff. [See: International Shipping Co (Pty) Ltd v Bentley 1990 (1) SA 680 (A) at p 700E - J; Road Accident Fund v Sauls 2002 (2) SA 55 (SCA), at pp 61 – 62, paras 12 – 13; Road Accident Fund v Odendaal 2004 (1) SA 585 (W), at p 592, para 16].

[22] In my assessment, the plaintiff and the defendant deviated to the same extent from the norm of the reasonable driver. I consider the plaintiff to have

been 50 per cent at fault and any damages which the plaintiff may prove in due course should be reduced accordingly.

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

1. The defendant is liable to the first plaintiff for payment of 50% of her proven damages;
2. The defendant is ordered to pay the first plaintiff's costs of the hearing on the issue of liability.

PA MEYER
JUDGE OF THE HIGH COURT