

REPUBLIC OF SOUTH AFRICA**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 12/35034

DELETE WHICHEVER ONE IS NOT APPLICABLE:

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED

DATE_____
SIGNATURE

In the matter between:

O'BRIEN, MANDY SYLVIA

Plaintiff

And

ROAD ACCIDENT FUND

Defendant

Heard on 13-17 March 2015

Judgment delivered on 25 May 2015

JUDGMENT

VAN NIEKERK J:

- [1] On the afternoon of 28 March 2009, a Suzuki motorcycle driven by Mr. Malcom O'Brien collided with a white Audi sedan driven by Mr. Shane Jupp (the insured driver). The plaintiff is Mr. O'Brien's widow. She sues the defendant (the Fund) for the sum of R 520 000, being loss of support both in her personal capacity and as the mother and guardian of her minor child, and funeral expenses. These proceedings are concerned only with the determination of negligence, the issues of liability and quantum having been separated in terms of an order granted by this court on 12 March 2015.
- [2] The plaintiff contends that the sole cause of the collision was the negligent driving of the insured driver. In particular, the plaintiff contends that the insured driver failed to keep a proper lookout, that he failed to drive the vehicle with sufficient regard to other vehicles on the road and that he failed to avoid a collision when he could have done so by the exercise of reasonable care.
- [3] The collision occurred on Heidelberg Road, a tarred road near Vereeniging, at a point where the road runs flat on a north/south axis, with a single lane in each direction. On the afternoon of the collision, the road was dry and in good condition. Visibility was excellent, with views extending to approximately three

kilometers to the north and a kilometer to the south. There is a slight dip in the road to the north of the accident scene, but this did not impede visibility. Mr. O'Brien was travelling on his motorcycle from the north in a southerly direction; the insured driver was travelling from south to north. The north to south lane is four metres wide; the south to north lane 3.6 metres wide. Two markers to the entrance to the insured driver's residence on a smallholding, each marked with the number '7', are visible from the accident scene and located on the east side of the road, i.e. to the insured driver's right, across the lane of oncoming traffic.

- [4] The insured driver was the only eyewitness to the collision to give evidence. He testified that he was returning home from a nearby shop, with his father in the front passenger seat and his uncle in the rear. He said that as he approached the entrance to his property, he slowed down and brought the insured vehicle to a stop in his lane, indicating that he intended to turn right, across the lane of oncoming traffic, and to the entrance to the smallholding. He had observed a silver motor vehicle (he was unsure of the make) some distance ahead of him, in the oncoming lane. He had a clear view of the road ahead, and waited for the oncoming vehicle to pass. As the vehicle passed him, he saw Mr. O'Brien in front of him, having emerged from behind the oncoming vehicle, as if he was intending to overtake that vehicle. The motor cycle collided with his vehicle, the point of impact being the front of the vehicle, to his left, on the passenger side. Mr. O'Brien was thrown from the motorcycle. Both the insured vehicle and the motor cycle came to rest on the western side of the road, on the gravel adjacent to the edge of the road. Mr. O'Brien died on the scene, as did the insured driver's father. The insured driver was not injured, nor would it appear was his uncle.

- [//] The insured driver made a statement to the SAPS on 8 November 2009, more than seven months after the collision. In his statement, he mentions only that he was the driver of the insured vehicle on the day in question travelling from south to north and that the motorcycle was travelling from north to south on a dry tar road. He states further that *'the driver of the bike drives towards us in front and collided with me from behind head-on collision (sic). My father was sitting in the*

front seat of the motor vehicle and passed away on the scene. The driver of the motorbike was also certified dead on the scene.' The contents of this statement are singularly unhelpful, and provide no assistance to the court. Indeed, the statement is so vague and lacking in value for any conceivable purpose, one wonders why the police officer who prepared it bothered to do so. The insured driver, when challenged on the nature of the statement, could only recall that the statement was made to the satisfaction of the officer recording it.

[//] The court also heard the evidence of Ms. Prinsloo, a tow truck operator, who arrived on the scene shortly after the collision. She stated that when she arrived in the accident, she encountered a police officer, one Wentzel. She observed that the motor cyclist and the passenger in the front seat of the insured vehicle were deceased. She was approached by a person who said that he 'didn't see the bike' and that he 'didn't see that bike come from that side'. She assumed that the person, whom she recalled as Shane or Shaun, and who later identified himself to her as the driver of the insured vehicle, thought that she was a paramedic (she was wearing a reflective jacket commonly worn by paramedics). The driver of the insured vehicle later requested her to tow the insured vehicle to his residence, indicating the beacons marked '7' on the opposite side of the road. She thereafter towed the insured vehicle, using a sling, proceeding directly across the road from the point at which the insured vehicle came to rest onto the gravel on the eastern side of the carriageway, and from there through the entrance into the insured driver's property. Prinsloo was very particular about this - she said that she could not have towed the vehicle diagonally across the road since there was traffic on the road and that in any event, the yellow reflective cones that had been placed on the white lines and the middle of the road had not yet been removed and would have prevented her from towing the vehicle diagonally across the road toward the opposite side. In her view, and from her personal observation of the markings on the road, the markings on the road that appear on photographs marked exhibits PR 8, 9 and 10 are tyre marks, marks which could not have been made by the insured vehicle when was towed. In her view, the insured vehicle had been pushed back by the force of the impact from the point of

collision to its resting place. She was of the opinion that the tyre marks that she observed indicated that at the time of the collision, the insured vehicle had encroached into the right-hand lane to turn into the entrance to the smallholding. In cross-examination, when it was put to her that the insured driver's version would be that he was stationary in his lane, waiting to turn right across the oncoming lane, when he suddenly saw the bike moving at high speed towards him, Prinsloo specifically disputed that version by reference to the markings on the road, which she stated were in the north-south lane, which indicated to her that the insured vehicle had encroached onto the north-south lane. She had addressed an email to the plaintiff on 23 May 2009 where she said, amongst other things, *'I am not a specialist but where the Audi was turning I could see that he was on the wrong side of the road'* and *'On the accident scene we could see that the Audi 100 did already turn to his right to turn into the gate where he was headed. So he was on the right side of the road where Malcolm was coming (sic) from.'* When she was shown the exhibit marked SAPS photograph 5, Prinsloo identified the tyre mark and stated that in her view, the collision had occurred between the yellow and red cones featured on the photograph, i.e. closer to the centre line than indicated by the cone marked 'C' on the photograph, which the SAPS had used to indicate the point of collision. In response to the proposition that the insured driver would say that he was stationary and that he did not cross the centre line, Prinsloo stated that she did not believe him. Prinsloo recalled the incident clearly – it was the first motorcycle accident that she had attended and her memory of it was clear.

[//] Warrant Officer Chomane, who took photographs of the accident scene for the SAPS, testified that he arrived on the accident scene at approximately 16h00 on the afternoon of the collision. His sketch plan places the insured vehicle some distance from the entrance to plot 7, the insured driver's residence. His assessment of the point of impact correlates with that of both experts; this was marked with a cone and reflected as pint 'C' on SAPS photograph 5 presented by him. Chomane testified that the point of impact was 1.3 metres measured from the centre (white) line into the south to north lane. He agreed that this distance

was less than the width of the insured vehicle. In other words, at the time of the collision, the insured vehicle had encroached into the lane of oncoming traffic.

[//] Both parties called an expert witness; Mr. Strydom for Ms. O'Brien, and Mr. Grobbelaar for the defendant. Before the hearing, the experts filed a joint minute, which records the matters on which they agree and those on which they differ. The latter far outweigh the former. The experts are agreed that the impact damage to the motorcycle is severe and to the front of the motor cycle, and that the motor cycle had the greater momentum at the point of collision; some four to five times greater than that of the insured vehicle. They are also in agreement that the impact damage to the insured vehicle is severe and to the left front of the vehicle. They agree too that there is impact damage to the right side of the roof of the vehicle, which damage is more or less in line with the damage to the right front of the vehicle and more or less parallel to the centre line of the vehicle. While the experts agree that the collision occurred in the insured vehicle's lane of travel, they disagree on the precise point of impact and position of the insured vehicle. Strydom's opinion is that the insured vehicle straddled the centre line when the collision occurred; Grobbelaar's view is that the insured vehicle was within its lane of travel.

[//] The basis of the disagreement between the experts relates to marks visible in the north-south lane, i.e. the line in which the motorcycle was travelling. Strydom first visited the accident scene more than two months after the collision, and bases his report to a large extent on photographs taken by the SAPS shortly after the accident, photographs taken by Ms. O'Brien some seven weeks later on 15 May 2009 and marked 'PR' and statements made by various people to the SAPS. He stated that on his first visit to the accident scene, oil patches indicating the final resting positions of the insured vehicle and the motor cycle were still visible, as were what he described as tyre and scuff marks on the road surface.

[//] Strydom observed what he referred to as a tyre scuff mark measuring 7.4 m in the north to south lane. The starting point of this tyre mark is some 3.1 m from the eastern side of the roadway and 900 mm from the white centre line. The end

of the tyre mark is some 3.5 m from the eastern side of the roadway and 500 mm from the white centre line. At the end of the tyre mark, Strydom observed what he referred to as a yaw mark, which leads to the final resting position of the insured vehicle. In Strydom's opinion, the tyre scuff mark was deposited by the right front tyre of the insured vehicle. From this he concludes that the insured vehicle was partially in the oncoming lane at the time of collision, and that the insured vehicle was impacted rearwards along the mark after which it curved rearwards across its correct lane and came to a rest on the side of the road as can be observed in the SAPS photographs.

[//] Strydom's sketch of the accident, based on his observations and measurements, shows the insured vehicle encroached by some 900 mm into the oncoming lane, with the point of collision on its left hand (passenger) side. It also places the insured vehicle, at the point of impact, some 6.5 metres from the first marker to the entrance to the insured driver's smallholding.

[//] Strydom's concluded that it was probable that the driver of the insured vehicle was travelling from south to north and wished to turn right into the entrance marked '7', that he must have noticed the approaching motorcycle, misjudged the speed and distance of the motorcycle and moved over into the north to south lane. The motorcyclist swerved at the last moment into the south to north lane but failed to avoid a collision with the insured vehicle. Strydom expressed the opinion that the insured vehicle was moving very slowly at the time of the accident, and estimated the motorcyclist speed to be in the order of 128 km/h at impact.

[//] Grobbelaar agreed that the impact damage to the insured vehicle demonstrated a bias to the left front and also to the left of the roof, more or less parallel with the vehicle's longitudinal axis. In his view, it was likely that the motorcycle collided with the left front of the insured vehicle and that the direction of travel of the motorcycle was more or less parallel to the longitudinal axis of the insured vehicle at impact. Grobbelaar refers in his report to a telephonic consultation with the insured driver who told him that he was stationary in his correct lane at the

time of the collision with his indicator on, waiting to turn to his right into the smallholding's entrance. A motor vehicle was approaching from the north in the opposite lane and as it passed him, he saw the motorcycle coming at him as if it were going to overtake this vehicle. It seemed to him as if the motorcycle rider got a fright and tried to swerve to his right when the collision occurred. The motorcyclist was close to him when he saw it coming across the road towards him; it was travelling at high speed. (It warrants mention that when the insured driver gave evidence, he could not recollect this telephone conversation with Grobbelaar, but what is recorded in Grobbelaar's report broadly accords with the insured driver's evidence.)

[//] Both experts referred to a series of photographs that were produced in evidence. Certain of these were taken on the day of the collision. These include photographs MFD 1 and 2, taken by the Midvaal fire department. They also include photographs taken by the South African Police Services, the most significant being what was referred to as photograph 5. Regrettably, none of these photographs provide a clear and detailed picture of the point of collision and the marks on the road at that point. In particular, none of them provide clear and detailed pictures of any tyre marks in the north-south lane, i.e. the lane in which the motorcycle was travelling. A series of photographs marked 'PR' were taken by Ms. O'Brien, as I have indicated, some seven weeks after the accident. Of these, particularly relevant are photographs PR7 to PR10.

[//] Grobbelaar disagrees with Strydom that the marks visible in the motorcyclist's lane in photographs PR 7 to PR 9 are tyre scuff marks with a yaw mark. Grobbelaar proffered a number of reasons for his inability to agree with the conclusions reached by Strydom. First, he noted that the mark observed by Strydom is not visible in the police photographs, especially SAPS photograph 5. It is also not visible when comparing photograph PR 9, which shows the mark referred to by Strydom crossing the end of the broken centre line, whereas photograph MFD 1 shows no mark on the motorcycle's lane in the vicinity of the end of this broken line. On this basis, Grobbelaar concluded that the mark is

indicated by Strydom was not deposited at the time that the vehicles were still on the scene when the police photographs were taken; they were deposited at some later stage. Further, in his view, it is unlikely that the mark visible in the motorcycle's lane in photographs PR 7 to 9 is a tyre mark since it consists of three distinct parallel striations. Were the mark to have been deposited by tyre tread, one would expect to observe more distinct tyre tread patterns. Further, at the point where the mark crosses the centre line, it changes character to one single solid mark of approximately half the width of the three parallel marks. In Grobbelaar's opinion, this is not consistent with the appearance of a tyre mark. Grobbelaar referred to photographs BG1 to BG4, being enhanced digital photographs of photographs PR7 to PR10 respectively. In his view, the photographs exhibit two distinct marks indicated by him as marks A and B. Mark B is a circular mark deposited in the line of travel of the insured vehicle and has its origin well into the insured vehicle's lane, curves towards the centre line and continues curving backwards and authorised on the insured vehicle is correct side of the road we came to rest. This mark, in Grobbelaar's view, is consistent with the circular deposit of debris that can be seen in the insured vehicle's lane in SAPS photograph 5 and was probably deposited along the trail of debris during and after the collision of the motorcycle than the insured vehicle. It also probably indicates the path of the front of the insured vehicle as it was impacted rearwards to the position where it came to rest, originating as it does well into the lane of travel of the insured vehicle. Further, Grobbelaar expressed the opinion that the tyre mark referred to by Strydom did not have its origin approximately 3.1m from the edge of the road in the north-south lane as indicated by Strydom but is visible much further into the motorcycle's lane and closer to the edge of the road. The insured vehicle would therefore have had to have had its right wheel closer to the edge of the road in the incorrect lane at collision for this mark to have been deposited by that wheel. This is unlikely for a number of reasons, the main one being that there is no debris deposited on the north-south Lane. The curved mark in the insured vehicle's lane (mark B on photograph BG 3) can in Grobbelaar's opinion clearly not have been deposited at the same time as the mark indicated

by Strydom as having been deposited by the right front wheel of the insured vehicle since they converge on one another in the vicinity of the centre line. In Grobbelaar's view, these two marks were deposited at different times with the curved mark B probably deposited during the accident in question and the alleged tyre mark indicated by Strydom (which Grobbelaar considers to be a fluid mark) probably having been deposited at a later stage.

- [//] Grobbelaar further observed that the left front wheel of the insured vehicle deposited a mark to its position of rest as demonstrated by photograph MFD 1, and that there was a fluid trail deposited parallel to this mark. In photographs PR 7 to PR 10, this left front tyre mark is no longer visible, whereas the other marks are. In Grobbelaar's opinion, this indicates the likelihood that the mark still visible on the road surface in the PR series of photographs are fluid marks and not tyre marks.
- [//] Further, the curved mark B in the PR series of photographs and indicated as such in the photographs BG1 to BG4, as well as the curved path of the debris as can be observed in police photograph 5, could not have been deposited in a curved manner as suggested by Strydom - in the sketch prepared by Strydom, there is no such circular motion of the insured vehicle possible in the reconstruction reflected by the sketch. It is unlikely that the straight mark A in photograph BG3 would have been deposited as the insured vehicle was impacted rearwards, since it is in a straight line and thereafter 70 curves across the centreline into the position of rest of the insured vehicle.
- [//] Finally, the location of the debris and in the line of travel of the insured vehicle, the curved path of insured vehicle to its position of rest as well as the implication of the collision having occurred well into lane of travel of the insured vehicle, would be consistent with the vision of the insured driver that he was stationary in his correct lane of travel when the collision occurred. Grobbelaar notes that Strydom's reconstruction, i.e. that the insured vehicle was straddling the centre line at the point of collision, is not consistent with the insured driver's version.

- [//] The cross-examination of Strydom primarily constituted a challenge to his assertion that the mark visible in photographs PR 7 to PR 10 were tyre marks as opposed to oil marks deposited after the collision. When it was suggested to Strydom that the marks were not tyre scuff marks but oil marks deposited after the event when the insured vehicle was towed away to the insured driver's residence on the opposite side of the road, Strydom was adamant that this was 'totally impossible' since the damaged undercarriage of insured vehicle would have left scrape marks on the road surface when it was towed from its resting position to the entrance of the insured driver's residence.
- [//] When a court is faced with conflicting expert opinions on, as in this case, the manner in which the collision occurred, it is for the court to decide which, if any, to accept. The Supreme Court of Appeal has recently affirmed that before any weight can be given to an expert opinion, the facts upon which the opinion is based must be proved, if only to recognise that a reconstruction may rest on an imperfect factual foundation and to ensure that any assessment is conducted with due regard to the degree on which the reconstruction is based on ascertainable and measurable facts and the application of scientific principles to those facts. (See *Romans Transport v Zihlwele* [2015] ZASCA 13 (16 March 2015) and *Biddlecombe v Road Accident Fund* [2011] ZASCA 225 (November 2011)).
- [//] Grobbelaar's opinion and in particular, his opinion regarding the markings evident from the photographs (especially photographs marked PR 7 to PR9), is predicated on facts conveyed during a conversation with the insured driver (a conversation, as I have noted, that the insured driver could not recollect). That opinion must be tested against the factual foundation disclosed by all of the evidence before the court. If the evidence is assessed to the exclusion of the opinions expressed by either expert, it is more probable than not, given the testimony of warrant officer Chomane that the insured vehicle, being 1800 mm wide, had encroached by at least 500mm into the oncoming lane at the point of impact. Warrant Officer Chomane's undisputed evidence also places the point of

impact some 26 to 30 m from the entrance to the insured driver's property. It is unlikely in the circumstances that the insured vehicle was, as the insured driver testified, opposite the entrance and stationary, indicating an intention to turn.

[//] The evidence of the insured driver is not particularly helpful. He was hesitant, and clearly did not have a clear recollection of events; indeed, he admitted as much. For example, he could not recall speaking to Grobbelaar, whose report is based largely on factual assumptions derived from a conversation that he had with the insured driver. Further, the version proffered by the insured driver bears little if any relation to the statement he made to the police some months later. In that statement, made at a time when he must have been aware that the determination of any liability on his part for the accident was at stake, the insured driver failed to mention that he was stationary at the time of the collision, that there was an oncoming vehicle for which he had stopped, that he was in his lane at all times, and that the motorcyclist appeared to be overtaking the oncoming vehicle. The insured driver's attempts to exculpate himself from any liability also characterised his account of his conversation with Prinsloo at the scene of the accident. When it was put to him that Prinsloo had testified that he had said to her that he did not see the motorcyclist, he replied that he would not have said that. The insured driver's evidence that he was stationary, opposite the entrance to Plot 7 is not supported by any of the other witnesses. Prinsloo testified that the point of impact was not directly opposite the entrance; Warrant officer Chomane put the distance at some 27 – 30 meters. Finally, the insured driver's evidence that he had not encroached into the oncoming lane stands in stark contrast to the direct evidence to the contrary given by both Prinsloo and Chomane, both of whom were on the accident scene soon after the collision. This is not to suggest that the insured driver was deliberately placing a version before the court that he knew to be false – the fact remains that the accident occurred some six years ago, and its consequences for the insured driver were traumatic.

[//] In contrast, Prinsloo was an impressive witness. She gave evidence clearly and confidently and with a clear recollection of the accident. Although she is not an

expert, she clearly has significant experience of accident scenes. She was certain that the marks on the road surface that are the subject of dispute between the experts were tyre marks, and that she observed these on the road surface after the collision but before she towed the insured vehicle. She also observed that the tyre marks clearly indicated that the insured vehicle had encroached onto the oncoming lane. Her evidence that the insured driver, having mistaken her for a paramedic, told her that he did not see the motorcycle and that he was on his way to the entrance to his property which he pointed out a distance ahead of the point of collision, renders it more probable that the accident occurred some distance from the entrance to the insured driver's property, at a point where the insured vehicle was moving slowly but had already encroached onto the oncoming lane.

[//] Prinsloo's evidence as to the manner in which the insured vehicle was towed from the point at which it came to rest to the insured driver's residence was not seriously disputed under cross-examination. As I have mentioned, she clearly recalled the accident, and that both traffic and the position of the yellow cones placed on the scene by the fire department prevented her from towing the vehicle in any direction other than directly across the road, onto the gravel on the opposite side and by travelling north (off the road, on the gravel and against the flow of oncoming traffic) toward the insured driver's residence. I have no hesitation in accepting this evidence.

[//] The necessary implication, of course, is that the facts disclosed by the evidence cannot support the conclusion reached by Grobbelaar and thus the basis on which the defendant's case primarily rests, i.e. that the marks were deposited by one of the rear tyres of the insured vehicle while the vehicle was being towed from its resting place to the insured driver's residence.

[//] The relevant legal principles are well-established. It is incumbent on the plaintiff to establish that the collision occurred as the result of the causal negligence of the insured driver. It is the duty of road users to keep a proper lookout; this involves the physical act of looking but also a reasonably prudent action to what

might be seen. The notional reasonable person in the position of the insured driver, wishing to execute a turn across the path of travel of oncoming vehicles would observe the approach of any oncoming vehicles, respect the right of way and allow them to pass before executing the turn. There is a long line of cases to suggest that to do it across the line of oncoming traffic is an inherently dangerous manoeuvre and that there is a stringent duty on a driver who intends executing such a manoeuvre to do so only after properly satisfying him or herself that it is safe and choosing the opportune moment to do so (see *AA Mutual Insurance Association Ltd v Nomeka* 1976 (3) SA 45 (AD) at 52E).

[//] For the reasons reflected above, in my view, the probabilities are that the insured driver proceeded to cross the centre line, in anticipation of turning across the oncoming lane to reach his residence, and that he failed to keep a proper lookout and failed to notice the motorcyclist in the oncoming lane, who took emergency evasive action by swerving to the right, resulting in a collision that was unavoidable. The insured driver was negligent, and the plaintiff is therefore entitled to the damages that she is able to prove.

I make the following order:

1. The defendant is ordered to pay 100% of such damages that the plaintiff may prove.
2. The defendant is ordered to pay the costs of these proceedings.

ANDRÉ VAN NIKERK
ACTING JUDGE OF THE HIGH COURT

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