

9/12/08
NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
NORTH GAUTENG HIGH COURT, PRETORIA

CASE NUMBER: 58643/08

In the matter between.

CHARMAIN VAN DYK

AND

ROAD ACCIDENT FUND

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO.	PLAINTIFF
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	
(3) REVISED.	
29 Dec 2010	<i>[Signature]</i>
DATE	SIGNATURE

DEFENDANT

JUDGMENT

TLHAPI J

[1] The plaintiff instituted action against the defendant for injuries sustained in a collision between a motor cycle of which she was the driver, bearing registration number MYN 338 GP and the motor vehicle driven by the defendant, bearing registration number WDX 967 GP. The collision occurred on the 7 January 2008 at the intersection of Pretoria and Dykor streets in Silverton. Plaintiff claimed damages in the amount of R 3 121 659.30. The parties agreed on the quantification of issues relating to the plaintiff's past private hospital and medical expenses in the sum of R39 535.91 and past medical expenses in the sum of R21 935.00.

The defendant offered an undertaking in terms of section 17(4) (a) of the Road Accident Fund 56 of 1996. Furthermore the contents of the agreements contained in the joint expert minutes were to stand as evidence and there was no need for the actuary to be called but that his calculations were to be regarded as accurate. The issues that remained to be determined related to that of liability, loss of earnings and general damages.

Initially there was an application for a postponement by the defendant in order to secure the attendance of its witness, Mr Neethling. This application was denied. The issues in this regard will be dealt with when the evidence of Mr Neethling is considered.

The plaintiff alleged that the accident was caused solely by the negligence of the driver of the insured vehicle who was negligent in one or more of the following respects:

- 4.1 he failed to keep a proper lookout;
- 4.2 He failed to apply the brakes of the vehicle concerned timeously alternatively sufficiently, further alternatively at all;
- 4.3 He drove without paying regard to, alternatively any proper regard to the rights of other road users;
- 4.4 He drove too fast in the prevailing circumstances; and
- 4.5 He executed a right hand turning in front of oncoming traffic when it was unsafe to do so."

As a result plaintiff sustained the following injuries:

6.1.1 Abdominal injury;

6.1.2 Abrasions on the left knee;

6.1.3 Fractured left femur;

6.1.4 Pelvic fracture;

6.1.5 Head and brain injury;

⊕ The defendant denied that the collision was caused solely by his negligence but that it was caused solely by the negligence of the plaintiff in that:

“4.2.1 she failed to keep a proper lookout;

4.2.2 she failed to apply her brakes timeously or at all;

4.2.3 she failed to exercise proper or adequate control over her motor cycle

4.2.4 she failed to avoid the collision when by the exercise of reasonable care and skill, she could and should have done so;

4.2.5 she drove at an excessive speed under the circumstances;

4.2.6 she failed to obey the prevailing road traffic signs, rules and markings;

4.2.7 she failed to take any, alternatively, sufficient cognizance of the presence on the road surface, the actions and the visibly intended, alternatively, probable actions of the insured driver;

4.2.8 she failed to note the presence of the insured on the surface of the road, alternatively, to timeously note its presence;

Further Alternatively

4.3 In the event of it being held that the insured vehicle was negligent... Defendant avers that the plaintiff was also negligent and that his negligence contributed to the collision.

5] The plaintiff testified that she was in the company of her cousin and they were travelling to work on her 120 cc motorcycle at about 7.45 on the morning of the collision. She did not possess a licence for the motorcycle but had used it to work for quite some time before the collision. She was travelling in the fast lane along Pretoria Street. She could not remember the speed at which she was travelling. As she approached the intersection she noticed that the robot was green and it only turned amber when she was in the middle of the intersection. She testified that she could not recall how the accident occurred and whether or not she swerved or applied her breaks. When she came to, she was lying on the ground and she heard the sound of sirens coming. A man held her head and the emergency personnel gave her an injection. She did not have medical aid and was admitted to the Pretoria Academic Hospital (HF) for six days. Plaintiff returned to work six months after the collision.

6] Plaintiff testified that she sustained the following injuries:

1. A fracture to her left femur; after three days she was operated upon and screws were implanted. She later developed an abscess in the upper thigh and calve (and not on the site of the surgery); She had to be drained under general anaesthetic;
2. She had an open book fracture of her pelvis and no surgery was recommended. She was immobilized for about five to six months at her parental home and spent about 80% of that time in bed :

3. She sustained a mild abdominal injury and her bladder was also Injured.
4. Her left knee was injured

Plaintiff testified that she did not know what type of injuries she sustained to her head because she wore a helmet on the day of the collision. She also developed blood clots and had to receive blood thinning medication (wafrin), which treatment was continued for a period of five months after her return to work. She had to take pain tablets because she suffered lower back pain and occasionally pain in her leg. She had developed a sleeping disorder for which sleeping tablets were prescribed. She was badly scarred on her left thigh as a result of the surgery.

Although she had gone up to standard 6 she was employed as a manager at the Willow Way Spar and she retained that position after the collision. She had aspired to be elevated into the position of a PA but realized that it would not materialize due to the collision. Her work load and responsibilities at the work place had increased due to the fact her employer had acquired other businesses and she had to endure long work hours. As a result of the collision it now took her longer to perform and to complete her tasks because her concentration and energy levels had deteriorated: she suffered constant pain in her lower back and leg and could not properly cope with the physical demands of her job she was forgetful and sometimes had to be assisted at work.

According to Mr Voschenk, and prior to the accident, plaintiff was a good

worker, and was highly motivated. She would have been promoted to the position of assistant store manager by January 2009. Furthermore she had the potential of progressing in the work place to a position of either a store manager (earning a salary of R7000.00 per month) alternatively to the position as his professional assistant (earning a salary of R10000.00 per month). With the experience gained she could have worked till her retirement alternatively she had potential of securing better employment. He testified that since the accident, her performance had deteriorated, she was slower in all tasks, made errors, was unable to concentrate for long, her lack of mobility and constant pain caused her much frustration and she had experienced outbursts of anger : lacked motivation and absented herself more frequently from work. He testified further that her future employment with him depended on her recovery and personal approach. Ms van Zyl, the Industrial Psychologist testified that it was unlikely that plaintiff would find employment in the competitive market and that she a poor prognosis for finding better employment

Mr Meiring witnessed the collision. There were two lanes going east and two lanes going west in the opposite direction. He followed behind the plaintiff in a direction west to east along Pretoria Road. He travelled at a distance of about 2 km, at a speed of 60km per hour and maintained a following distance of about 50 meters behind her. As the plaintiff approached the intersection of Dykor and Pretoria Roads he saw the robot go green and when she entered the intersection and was between the pedestrian crossings situated on either side of the intersection, the robot turned amber. He also saw the vehicle of the insured driver ('Nissan Tiida') which had come from the east and was already in the intersection awaiting an opportunity to turn right into Dykor Road. He

saw the vehicle drive across the intersection in front of the motor cycle into Dykor Road. According to him there was no time to avoid the collision, the motor cycle collided with the vehicle on the left passenger back door. Plaintiff and companion were flung over the roof of the vehicle. Mr Meiring pulled to the side of the road. Mr Meiring did not converse with anyone but heard the lady who was a passenger in the vehicle say 'my husband did not see them'. Although there was a tree to the right next to the intersection it did not pose an obstruction and the collision could have been avoided.

It was alleged on behalf of the defendant that Mr Neethling had undergone an operation and was in hospital at the commencement of the trial hence the application for a postponement. The application having failed, the evidence of several witnesses was called and Mr Neethling was called after close of the plaintiff's case. It was only during his cross examination that it became apparent that his wife (the lady referred to in Mr Meiring's evidence as the one who said 'my husband did not see them') had been subpoenaed by the plaintiff, that she was present at court on the first day of the trial and that she was informed that they would no longer call her as a witness and released. Mr Neethling testified that he had not been subpoenaed by the defendant, that he too was present and had just accompanied his wife to court. He did not recall if he was ever consulted before by the defendant except that he received a call on the evening of the day preceding his testimony and was only then consulted.

Mr Neethling was the driver of the insured vehicle. He testified that he was alone in his vehicle travelling east to west. He kept to the right lane because he intended turning right at the intersection into Dykor road but because the

robot was green he had to wait for the vehicles travelling west to east in the other lane to pass by. When the robot turned amber the vehicles in the other lane (west-east) began to stop. He observed that in the left lane was a taxi and two vehicles behind it. He saw the motorcycle driven by the plaintiff for the first time when it came out of the left side of the taxi. It was too late to avoid the collision. The motorcycle collided with his vehicle on the left front passenger door.

[10] A neurosurgeon, Dr Edeling testified on behalf of the plaintiff with regard to plaintiff's brain injury. He was assisted in his diagnosis by the records pertaining to the treatment of the plaintiff at the Academic Hospital, Wilmed Park Hospital, the report of Drs Burger and Matthews and he also held interviews with the plaintiff's mother and had a consultation with the plaintiff and his prognosis and recommendations are documented in his report annexed to the record. Although the hospital and subsequent clinical records did not report any head injury, the fact that the casualty records reflected an impaired level of consciousness, this coupled with the plaintiff's report of amnesia for the impact, meant that plaintiff had suffered a mild primary brain injury during the collision and that the brain injury had become moderate before surgery. The brain injury progressed to being more severe as a result of the post-operative complications and his final prognosis was that the plaintiff suffered of a Post-Traumatic Organic Brain Syndrome. Dr Edeling testified that the neurological sequelae of her brain injury had stabilized and become permanent, that this would hamper the treatment of her depression and recommended further treatment and therapy by all the experts who attended to her. The clinical psychologist Dr Cathy Angus also testified to the presence of a moderate brain injury.

The liability of the plaintiff and the insured driver is determined from the evidence of the plaintiff, Mr Meiring and Mr Neethling and it revolves around what happened as they approached the intersection: furthermore what happened in the intersection prior to the collision and at the time of the collision.

Plaintiff testified that as she approached the intersection she noticed that the robot was green, whereas Mr Meiring testified that he noticed the robot go green as she approached the robot. Although the plaintiff did not testify in her evidence in chief to having seen the Tiida, she testified in cross examination that she had been travelling along the left lane and had switched to the right lane as she approached the intersection. She saw the Tiida and noticed that it had indicated, intending to turn right, she however did not recall if she continued to travel at the same speed at which she was travelling. Mr Meiring testified in cross examination that the motorcycle was between the two pedestrian lines before the intersection and that he did not notice at which point the Tiida started moving into the intersection but he confirmed that the Tiida had already turned into the intersection when it collided with the motorcycle, that is, it was crossing the intersection on the right lane crossing over into the left lane.

Now, the entire version of Mr Neethling's testimony was not put to the plaintiff or to Mr Meiring. It was submitted for the plaintiff that no application was made to have the said witnesses recalled in order to put the version of Mr Neethling to them and that a failure to do so would prevent the defendant from disputing the truth of the witnesses evidence. It was submitted by the

defendant that the plaintiff had deliberately concealed the presence of Mr Neethling on the first day of the trial and that the court had to consider whether or not this action should adversely affect plaintiff's case. It was correctly submitted on behalf of the plaintiff that an application emanating from the defendant to recall the witnesses could have addressed the situation, however that the defendant would first have to cross the hurdle whether or not Mr Neethling was in hospital when the application for a postponement was made. I am of the view that in the absence of such an application it would be improper for me to make any finding of improper conduct on the part of anyone because it was only by way of the application that the court would have been appraised of all the facts. However, having considered Mr Neethling's explanation about his encounter with the defendant, I can only conclude that there was no preparation for the case by the defendant and the plaintiff cannot be blamed in this regard.

12 In my view, the most important issues that could have been cleared by such cross examination of the plaintiff and Mr Meiring related to Mr Neethling's evidence on the following issues:

1. That the plaintiff's motorcycle was not in the right lane, but that it had suddenly emerged from the left of the stationary taxi which was also in the left lane; that the motorcycle entered the intersection from the wrong side this situation was depicted according to the sketch by Mr Neethling on page 8 of bundle B, showing a taxi in the left lane and of the approach of the motorcycle on its left;
2. Mr Neethling testified in cross-examination that the motorcycle entered

the intersection in the red situation; that the robot was definitely red when he turned right into the intersection and moved on;

3. That he did not see any vehicles approaching from the west except for the stationary taxi and the two vehicles behind it.

[12] A reasonable driver in the position of the plaintiff and the insured driver is expected to observe and to put into operation certain established principles with regard to his or her approach to an intersection. Although the plaintiff could not recall the speed at which she was travelling, Mr Meiring testified that he maintained a speed of 60km per hour behind her, for about 2km and at a following distance of 50 metres. They both saw the insured driver's vehicle (Tiida) as they approached the intersection and in particular the plaintiff saw that the insured driver had indicated to turn left. The robot lit amber when the motorcycle entered the intersection. In my view, and having regard to the evidence of the speed at which Mr Meiring was travelling (60km), on a balance of probabilities, plaintiff could not reasonably have avoided the collision at that point. In *Bata Shoe Co Ltd.(South Africa) v Moss* 1977(4) 16 (WLD) at 22 A-B reference was made to *RvMiller* 1957 (3) SA 44 (T):

"The motorist must make sure that he can execute a right-hand turn without endangering either oncoming or following traffic. Generally speaking he can only do this by properly satisfying himself that such traffic has observed and is responding to his signal or that it is sufficiently far away or slow moving not to be endangered or unless some special circumstances exist."

(And)..... a right hand turn.

“ is a manoeuvre inherently dangerous in its nature unless executed with scrupulous care.”

The following questions were put to Mr Neethling in cross-examination:

-After the accident happened there were people who had stopped – it is possible that someone stopped. yes:

-If such person does not know any person who is involved would he have any reason to lie about what he saw – no

In his evidence in chief Mr Neethling testified that when he turned into Dykor street, the robot was still green and he had to wait for the vehicles in the left lane to pass. The robot went amber and the other vehicles in the left lane began to stop. It is my view that in that situation he would have noticed the motorcycle which according to his version should have been following behind the last vehicle. Mr Neethling's concession above gives credence to the testimony of Mr Meiring, because he was the only one who witnessed the collision and there was no evidence contradicting the presence of the motorcycle and his vehicle in the right lane.

[13] It was submitted for the defendant that there was no scientific proof that the plaintiff had suffered brain injury because such findings had not been documented in any of the hospital records and doctors reports and that Dr Edeling had not studied the X-Ray reports conducted on the day of the accident at 10h10. Although in cross examination Dr Edeling conceded that other factors could independently cause brain damage, those factors he said did not excluded the possibility that in this instance brain injury was sustained

during impact. These conclusions he derived from hospital records, reports of treatment by other doctors, information that the plaintiff was flung over the Tiida to crash land on the tarmac, the observations of the plaintiff's mother about her condition at hospital, the crushed helmet, the change in the standard of work performance, the observations by the employer of the and from his own consultation with the plaintiff and other factors detailed in his report. The defendant did not retain its own neurosurgeon and other experts such as those called to testify, to refute the diagnosis of the existence of a brain injury. Dr Angus the clinical psychologist testified to the presence of a moderate brain injury. Dr Edeling diagnosed a primary brain injury which had progressed to a moderate one and that the neurological sequelae of her brain injuries had become stabilized and were permanent. In the absence of an alternative expert opinion reliance on any other opinion would be uninformed and speculative.

[4] The plaintiff testified that her lifestyle changed as a result of the collision. She has to endure constant back pain and cannot move around as she used to, she had to deal with her disfigurement and reduced mental capabilities. Her employer testified that continued employment depended upon her full recovery and approach to work. He confirmed that she had become slow and was forgetful. According to Dr Edeling plaintiff will not return to her original self she now has to cope with her mental and physical limitations. On these facts I am satisfied that the plaintiff has made out a case for an entitlement to general damages. It was submitted for the plaintiff that the facts in *Adlem v Road Accident Fund* Volume V at J2/41 bore a resemblance to the injuries and the aftermath suffered by the plaintiff. In my view the facts in this case are distinguishable because the injuries suffered there were more serious than

those suffered by the plaintiff in this matter.

In the *Adlem* matter the plaintiff was admitted to hospital in an unconscious state and detained in the intensive care unit for some time where she was incubated, ventilated and catheterised and she was in hospital for five weeks. Furthermore, she sustained multiple fractures and the disfigurement and loss of amenities of life were of a much more serious nature. Having regard to the *Adelem* matter and to the comparisons of awards therein, I am of the view that a fair award for general damages would be an amount of R400 000.00.

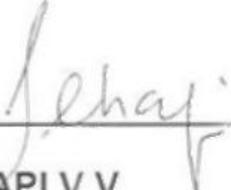
[15] The actuary Mr Whittaker based his calculations on the plaintiff's past and future loss of earnings. The figures being those provided by her present employer and as also testified to by him. The basis for the calculation was on what she would have earned had she been promoted to assistant store manager from January 2009 at R5200.00 per month and, on what she would have earned on January 2010 at R7000.00 per month plus inflation up to her retirement age at 63. Also taken into account was the fact that she only stood a 50% chance of sustaining her present employment due to the injuries suffered, and there being a 50% chance that she would remain unemployable. This fact was confirmed by the industrial psychologist Ms Van Zyl. Having made the necessary contingency deductions the past and future loss of earnings came to a total of R1 633 885.00.

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

The Defendant is ordered to pay:

The Defendant is ordered to pay:

1. Past Hospital expenses in the amount of R39 535.91;
2. Past medical expenses in the amount R21 935.00
3. Past and Future loss of earning in the amount of R1 633 885.00;
4. General Damages in the amount of R400 000.00;
5. The qualifying costs and preparation fees of Drs Birrel, Angus, Sheve Edeling and those of Ms Hattingh, Ms Moreland, Ms Van Zyl and Mr Whittaker
6. Costs including costs of two counsel



TLHAPI V V

(JUDGE OF THE HIGH COURT)

ATTORNEYS FOR THE PLAINTIFF : ERASMUS DE KLERK INC

ATTORNEYS FOR THE DEFENDANT : MF JASSAT DHLAMINI INC