

FORM A
FILING SHEET FOR EASTERN CAPE JUDGMENT

ECJ NO: 84

PARTIES:

- Registrar CASE NO: **19/02**
- Magistrate:
- Supreme Court of Appeal/Constitutional Court: **SECLD OF THE
HIGH COURT**

DATE HEARD: **22 November 2005, 29 & 30 May 2006, 01 & 02 June 2006**

DATE DELIVERED: **29 August 2006**

JUDGE(S): **DAMBUZA J**

LEGAL REPRESENTATIVES -

Appearances:

- for the State/Plaintiff(s)/Applicant(s)/Appellant(s): **Adv Paterson**
- for the accused/defendant(s)/respondent(s): **Adv Scott**

Instructing attorneys:

- Plaintiff(s)/Applicant(s)/Appellant(s): **Burmeister De Lange Inc**
- Respondent(s)/Defendant(s): **Pillay Meyer Boqwana**

CASE INFORMATION -

- *Nature of proceedings* : **DAMAGES**

Topic:

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

CASE NO: 19/02

In the matter between:

ZWELOMNTU MORRIS VENA

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

DAMBUZA J:

1. Plaintiff claims damages against defendant in respect of injuries sustained by him in a motor vehicle collision on 12 February 1997. At the start of the proceedings I granted an order in terms of an agreement between the parties that merit and quantum be separated. At this stage, the case is before me for consideration on the issue of merits.
2. The collision occurred during the early morning of the 12 February 1997 along **Studebaker Road** in the **Markman Industrial Area, Port Elizabeth**. Plaintiff was on his way to work at **Exotan**, a tannery with premises along **Studebaker Road**.

3. At about 500 metres towards the point of collision (in a South to North direction), **Studebaker Road** curves to the left for about 60metres and then runs straight for a distance of about 400 metres and a further distance of about 600 metres beyond the point of collision. The road is flanked by industrial buildings on each side. The tarred road is about 8 metres wide and consists of a single lane each way (i.e. to the North and to the South). There is a wide area of gravel between the tarred road and the Industrial properties on each side of the road. It appears from the photographs that form part of the record that vehicles are sometimes parked on the gravel part of the road. As one travels along the road towards the North, **Exotan** is to the right of the tarred road.
4. Plaintiff testified that he was to start work at 7:30 on the morning of the collision and would have remained at work until 4:30 in the afternoon. He travelled to work in a bus which dropped him off opposite "Gate 3", that being the entrance which the workers used to access **Exotan**. Gate 3 was used by employees of **African Hide**, another factory with its premises along side of **Exotan**.
5. It was a clear morning and the sun had already risen. According to plaintiff the bus came to a stop about one meter outside the tarred road. About 20 to 40 people got off the bus. Plaintiff had to exchange his old tickets for new ones with the bus driver. As a result he got left behind from other passengers who were getting off the bus. After he had exchanged his tickets he disembarked from the bus, walked to the front thereof and proceeded to cross the road. Before crossing the road (i.e. tarred road) he looked to his right. He saw the insured vehicle travelling towards him. At that stage it was at a distance of about 75 metres from him. He looked to his left; there was no oncoming traffic. He again looked to his right and then proceeded to cross the road. He did not observe where the insured vehicle was

when he looked to his right for the second time. He had continued to walk at a steady pace as he looked in each direction for oncoming traffic. About 2 metres into the tarred road the insured vehicle collided with him. He immediately lost consciousness. The road had no road markings at the time of the collision.

6. **Ncedisile Krwaxa** testified on plaintiff's behalf that he witnessed the collision. At the time of the accident he worked at the **African Hide Factory**.
7. On the day of the collision he travelled on the same bus as plaintiff. Opposite gate 3 to **Exotan**, the bus came to a stop on the gravel part of the road, next to the tarmac. **Krwaxa** alighted together with other passengers ahead of plaintiff who got delayed as he was exchanging tickets with the bus driver. After disembarking from the bus **Krwaxa** stood next to it for a while. As he stood there he saw plaintiff alighting from the bus walking to the front thereof towards the tarred road and proceeding to cross the road. Before crossing the road plaintiff stopped on the verge of the tarmac for a short while, then he proceeded to walk across the road.
8. As plaintiff crossed the road **Krwaxa** noticed the insured vehicle travelling along **Studebaker Road**, from South to North (the same direction as the bus). When plaintiff was about to reach the middle of the road, he collided with the insured vehicle. The collision occurred directly opposite Gate 3 to **Exotan**. After plaintiff collided with the insured vehicle he landed some distance from the point of collision.
9. **Krwaxa** crossed the road and went to stand next to gate 3 where a group of other employees had gathered. He remained there until the police and an ambulance arrived at the scene. He did not speak to the

police about the accident.

10. After **Krwaxa** had testified plaintiff closed his case. An application for absolution from the instance was brought on defendant's behalf. I refused the application and undertook to furnish my reasons for my decision in the body of the main judgment. These are the reasons:

- 10.1 The main basis for the application was that plaintiff had failed to prove that it was the insured driver's negligence that caused the collision. **Mr Scott** who appeared on behalf of the defendant submitted that there was no evidence on how the defendant could have avoided the collision. There was no evidence, so the argument went, regarding the distance between the insured vehicle and plaintiff when the latter started crossing the tarred road or when plaintiff looked to his right for the second time. There was no evidence that when the insured driver saw plaintiff on the road he (the insured driver) could have avoided a collision.

- 10.2 It was common cause that where the collision had occurred, on **Studebaker Road**, the road was clear; there being no other traffic thereon. The evidence was that the weather was clear, the sun had already risen and there were no obstructions on the road. Consequently the insured driver had a clear view of the road ahead of him for about 400 metres leading to the point of the collision and another 500 to 600 metres beyond the point of collision.

- 10.3 On the evidence before me at the close of plaintiff's case my view was that a reasonable driver in the place of the insured driver would have observed the bus and anticipated that there

could be pedestrians who had disembarked therefrom or were in the process of doing so. A reasonable driver would have anticipated that some of those pedestrians might try and cross the road and would have observed plaintiff about to cross the road. He would also have observed that plaintiff was not stopping prior to crossing the road.

10.4 A reasonable driver would then have regulated the speed of the insured vehicle so as to avoid the collision and/or take any other reasonable evasive action in an effort to avoid the collision. I could find no reason why, such evasive action would have failed if the insured driver saw plaintiff at a distance of 75 metres or a few seconds thereafter. The point of collision was about 2½ metres from the outer edge of the tarred road (on the North bound lane of the road); plaintiff having crossed the tarred road from the North bound lane. There was no evidence that the insured driver had applied brakes, hooted or swerved the insured vehicle away from plaintiff. In the circumstances my view was that the insured driver had to explain how and/or why he failed to avoid the collision.

10.5 The parties were in agreement and it is trite that the relevant test when considering an application for absolution from the instance is whether there is evidence upon which a court could or might find for the plaintiff. **Mr Paterson** who appeared for the plaintiff correctly submitted that credibility only becomes relevant when plaintiff's witnesses have palpably broken down or where it is clear that what they have said in evidence is not true. He conceded that **Krwaxa's** evidence could be faulted on some parts. However, he submitted and I agree that other parts of his evidence were common cause; for example the point of impact.

10.6 I was persuaded by **Mr Paterson's** submission that on consideration of plaintiff's evidence alone, the insured driver was required to explain how the collision occurred other than as a result of his negligence or some negligence on his part. In my view another court could draw from the evidence an inference that the insured driver was negligent. **See: Gandy v Makhaya 1974 (4) SA 853 (N) at 856B.**

11. After I had refused the application for absolution from the instance the insured driver **Ignatius Magnus Heyns** testified that on the morning of the collision he was driving a **Toyota Hilux Bakkie** (the insured vehicle) on his way to work at **Coalcor**, not far from where the collision occurred. He used to travel along **Studebaker Road** everyday on his way to work. On the day of the collision he saw a stationery bus at a distance of about 60 metres ahead of him on the left hand side of the road. The bus had stopped either with its right wheels on the tarred road and its left wheels on the gravel part of the road or with all its wheels on the tarred road. He was driving at about 50 to 60 km/hr. Stray animals and pedestrians were a usual feature on the road. On seeing the bus he reduced his speed to 40 km/hr. As he came nearer to the bus, he looked underneath it to see whether there would be pedestrians alighting from it and/or people who were going to cross the road. He could not see any sign thereof. He swerved to the right, allowing a distance of about a metre to 1½ metres from the bus.

12. As he passed the bus driver's door plaintiff came running from the front of the bus into the road. The insured driver tried to apply brakes in vain. Plaintiff collided with the insured vehicle. When the insured vehicle came to a stop, plaintiff fell on the road. The insured driver got out of his vehicle and observed that plaintiff was injured. He asked the

few people who were at or near the scene whether they had witnessed the collision. No one had.

13. According to the insured driver only a “split of a second” passed between plaintiff coming into his view and the collision occurring. When he tried to apply brakes, the insured vehicle skidded. He realized after he had finally managed to bring it to a stop that some substance on the road, consisting of pieces of meat, and hair had caused the insured vehicle to skid when he tried to apply brakes. This substance was waste product from **Exotan** and **African Hide**. He had been aware, prior to the accident, that such waste usually spill onto the road from trucks that came to remove it from these factories.

14. The insured driver also testified that he was a trained motor vehicle driving instructor, having received training from the **National Road Safety Council in Pretoria**.

15. A large portion of the evidence led in this case was common cause. The main features thereof are:

15.1 That on the morning of the collision the bus in which plaintiff travelled to work came to a stop opposite gate 3, the main entrance used by the employees to access **Exotan** and **African Hide** at the time;

15.2 The time was between 7:00 and 8:00 in the morning;

15.3 There was no other traffic on the tarred road except the insured vehicle;

15.4 The weather was clear and the sun had already risen; and

- 15.5 Plaintiff collided with the insured vehicle about two to two and a half metres from the outer edge of the north bound lane of the road.
16. The material differences between plaintiff's version and the version of the insured driver relate to:
- 16.1 The position where the bus was parked relative to the tarred road;
- 16.2 The condition of the road surface; (according to plaintiff the road surface was dry; the insured driver suggested that it was either wet or somewhat slippery);
- 16.3 The pace or speed at which plaintiff crossed the road.
17. **Krwaxa's** evidence lends no further weight to plaintiff's evidence on the disputed issues. There is a material contradiction between plaintiff's evidence and the evidence of **Krwaxa** regarding whether plaintiff stopped before crossing the tarmac. **Krwaxa's** evidence is fraught with inconsistencies and improbabilities. However, I have no reason to reject his evidence that he had been in the same bus as plaintiff and that he disembarked at the same place as plaintiff. The only conclusion I can draw from the improbabilities and inconsistencies in his evidence is that he was alerted to the accident by the sound of the collision or heard about it from other people. I find no explanation, why, having seen plaintiff colliding with a motor vehicle, **Krwaxa** would not go to him to ascertain the extent of the injuries he might have sustained or whether he was even alive and also not assist the police by telling them how the collision occurred. This is particularly so in the

light of **Krwaxa's** evidence that minutes prior to the collision plaintiff had woken **Krwaxa** up when he (**Krwaxa**) was asleep in the bus.

18. I agree with **Mr Paterson's** submission that plaintiff's evidence was clear, coherent and accords with logic. I cannot find that the inconsistencies between his evidence and the evidence of **Krwaxa** are indicative that plaintiff's evidence is unreliable. I am persuaded that the probabilities favour the version that the bus would be parked completely on the gravel part of the road. This version was not disproved on cross examination. In my view this version is consistent with relevant facts that are common cause; particularly regarding where plaintiff crossed the road and the point of impact.

19. I now turn to the issue regarding the manner or pace at which plaintiff crossed the road. The evidence of the insured driver was that plaintiff collided with the insured vehicle roughly at a distance of about 1½ metres of coming into the insured driver's view. It is not clear whether this would be when plaintiff came into the view of the insured driver he was still in front of the bus or he had walked the full breadth of the bus. The insured driver did not know whether the bus was partly or wholly on the road. I have difficulty in determining where exactly, on his own version, the insured was driving on the road. Consequently I am unable, on this version, to conclude that he had allowed sufficient distance between the bus and the insured vehicle to ensure that he would be able to see a pedestrian crossing the road in time for him to be able to take action to avoid colliding with the pedestrian.

20. Further difficulties I have with the evidence of the insured driver are that:

20.1 He only observed the bus when he was at a distance of about

60 metres from it. He could not explain why he did not observe it earlier in view of the straight road ahead of him leading to the point of collision and absence of traffic on the road.

20.2 During cross examination it was never suggested to plaintiff that the road was slippery due to waste deposits on the road surface. Plaintiff's evidence was that on the day of the collision the road surface was dry. This was not disputed. It was only when **Krwaxa** testified that it was put to him that the road was wet, having been washed by **Exotan** employees. When the insured driver testified, this version changed to there having been sticky waste deposits on the road that caused the road to be slippery. The evidence of the insured driver was that these deposits could be seen from Gate 3 all the way down Studebaker Road on the South bound lane of the road. Even if I were to accept that there were such waste deposits on the road, on his own evidence, the insured driver should have observed such deposits for some distance prior to reaching the bus and should have realized that he needed to exercise a high level of caution. He testified that he only realized that the deposits had stuck to the wheels of the insured vehicle after the vehicle had stopped. From his evidence I gained, the impression that waste deposit would be mainly on the South bound lane of the road. The insured vehicle travelled on the North bound lane and the collision occurred on the North bound lane. I have difficulty in understanding when the waste deposits stuck to the wheels of the insured vehicle. I am not persuaded that there was such slippery substance on the road or that there was any other problem with the road surface. In my view this part of the insured driver's evidence was merely designed to explain his failure to apply brakes to try and avoid the collision.

20.3 During cross examination the insured driver was confronted with a statement he had earlier made to the short term insurer of the insured vehicle in which he had said he applied brakes after colliding with plaintiff. On being confronted with this statement he admitted that he applied brakes after the collision.

20.4 The insured driver did not make a good impression on me as a witness. His answers, on cross examination were often incoherent and evasive. For example; he had testified that the road was clear and there was no traffic. On being questioned as to why he had not observed the bus earlier, he responded that he might have been looking out for other obstructions on the road.

20.5 On the version of the insured driver he would have had opportunity to observe plaintiff over a distance of about a meter and a half. It is, in my view, improbable that he would have had sufficient opportunity over that distance (about a metre and a half) to determine whether plaintiff was walking or running.

21. I am therefore not satisfied that the version of the insured driver can be conclusive on the manner in which the collision occurred.

22. I now turn to consider whether plaintiff's version does prove negligence on the part of the insured driver. Ordinarily, what the insured driver would observe at a distance of about 400 metres would be a bus parked next to the road, opposite the entrance to the **Exotan** and

African Hide Factories. As I have already mentioned, he would anticipate that persons disembarking from the bus might try and cross

the road. I find no basis on which he would be entitled to assume that this was not likely. Plaintiff would come into his view at a distance of about 75 metres. His attention would be drawn to plaintiff and he would observe that plaintiff was not stopping before crossing the tarmac.

23. A reasonable driver in the position of the insured driver would observe plaintiff at the distance of 75 metres or immediately thereafter; he would then take evasive action; that could be either to apply brakes, swerving to other side and/or hooting. I find no evidence that the insured driver took any of these or other usual measures to try and avoid collision.

24. Even if I were to accept the version of the insured driver I am persuaded that he was negligent, at least to some extent. He observed a bus parked on the road at a distance of 60 metres. He reduced his speed to about 40km/hr and veered to the right to a distance of about 1½ metre from the bus. He was aware of the possibility that pedestrians could possibly try and cross the road; hence he looked under the bus to see if he could see feet of people disembarking from the bus. It was agreed that the bus only had a clearance of 51 cm from the ground. This means that as the insured driver approached the bus it became increasingly difficult for him to see underneath it. Further, he could not see (underneath) the front of the bus. Therefore he must have realized it might be difficult for him to observe people who would have disembarked from the bus and that by the time they came into his view they would be relatively close to the insured vehicle. He should then have ensured that he was driving at such a speed that he could be able to take reasonable, effective, avoiding action. My view is that on his own evidence he could not have been in a position to do so.

25. He was also aware of the additional danger resulting from the slippery road. When plaintiff came into his view he could neither apply brakes, nor swerve further to the right. I agree with by **Mr Paterson's** submission that the insured driver could have driven wider than he did so that he had more time to observe a pedestrian who would be crossing or attempting to cross the road. Because he drove close only 1½ metres from the bus, he should have been driving at a slower speed than he did in anticipation of pedestrians who would emerge at a close range from him. His failure to allow more than 1½ metres between the bus and the insured vehicle and/or the speed at which he drove the insured vehicle amounted to negligence which, to an extent, was the cause of the collision.
26. The case of **President Insurance Co v Dlamini 1982(1) SA 1** on which **Mr Scott** largely relied in his submission that there was no legal duty on the insured driver to take further precautions than he did, is distinguishable from this case in the following material aspects:
- 26.1 In **Dlamini's** case the plaintiff had run recklessly into the road. (Even in **Dlamini's** case, the court found that there may be cases in which the overtaking driver should be on his guard against reckless conduct on the part of the pedestrians). (*my emphasis*).
- 26.2 In **Dlamini's** case the collision occurred in the middle of the road, with the insured vehicle straddling the broken middle white line in the centre of the road;
- 26.3 In **Dlamini's** case the road was busy with traffic ahead of and in the direction opposite to that of the insured driver.

27. I am satisfied that in this case the insured driver was negligent in the manner in which he drove the insured vehicle and that his negligence contributed to the collision.
28. It is clear that, on his own version, plaintiff was negligent in entering the road as he did without stopping and ascertaining, as he looked to his right for the second time, the distance between himself and the insured vehicle, prior to crossing the road. It is, mainly his own negligence that caused the accident.
29. In my view a fair assessment of the extent of plaintiff's negligence as the cause of the collision is 70%.
30. On the question of costs I find no reason why the costs already incurred should not be awarded at this stage. **See** the case of **Beetge v Road Accident Fund Case No: 1970/03**, an unreported judgment of the Eastern Cape Division delivered on 20 October 2003, together with other authorities cited therein.

In the result the following order will issue:

- (a) That the defendant shall pay 30% of such damages as plaintiff may prove;
- (b) That defendant shall pay plaintiff's costs.

N DAMBUZA

JUDGE OF THE HIGH COURT

25 August 2006

Plaintiff's Counsel:

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