

FORM A
FILING SHEET FOR EASTERN CAPE JUDGMENT

ECJ NO: 73

PARTIES:

Registrar CASE NO: **EL 472/03**

ECD 872/03

- Magistrate:
- Supreme Court of Appeal/Constitutional Court: **ECD OF THE HIGH COURT**

DATE HEARD: **22 November 2006**

DATE DELIVERED: **12 December 2006**

JUDGE(S): **DAMBUZA J**

LEGAL REPRESENTATIVES -

Appearances:

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

Instructing attorneys:

- Applicant(s)/Appellant(s): **Messrs Yazbeks**
- Respondent(s)/Defendant(s): **Nompozolo & Gabelana Inc**

CASE INFORMATION -

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

**IN THE HIGH COURT OF SOUTH AFRICA
(EAST LONDON CIRCUIT LOCAL DIVISION)**

**CASE NO: EL 472/03
ECD 872/03**

In the matter between:

NOT REPORTABLE

**PETRUS JOHANNES VAN STADEN *obo*
BRUNO SHELVE VAN STADEN
PLAINTIFF**

and

**ROAD ACCIDENT FUND
DEFENDANT**

JUDGMENT

DAMBUZA J:

1. This is a claim for damages arising from a motor vehicle collision which occurred on the main road in **Gonubie, East London** on 18 May 2002.
2. At the start of the proceedings I granted an order in terms of **Rule 33**

(4) of the Rules of this Court, pursuant to an agreement between the parties, that the merits be separated from quantum. At this stage the matter is before me for determination of the merits.

3. When the proceedings were instituted **Bruno Shelve van Standen** was a minor. Hence the proceedings were instituted by his father. By the time of the trial he had become a major. The summons was accordingly amended and **Bruno** was substituted as the plaintiff in the place of his father **Petrus Johannes van Staden**.

4. The accident on which the plaintiff's claim is founded occurred at about 23H00 during the night of 18 May 2002. The plaintiff and his friend **Rion Henning** were driving motorcycles along the main road in **Gonubie**. **Henning** was at a distance of about 30 metres ahead of the plaintiff.

5. The **Gonubie** main road (the road) is a very wide road with a single wide lane in each of the easterly and westerly directions. The road is straight in the vicinity of the collision. No measurements of the width of the road or the lanes thereof were tendered in evidence.

Each lane can accommodate two motor vehicles at a time. A number of streets, being the first to the Eleventh (11th) Avenues branch off the road, in the southerly direction (or to the right) as one travels in the easterly direction.

6. On the night of the collision, the weather was clear, the road was dry and the street lamps were on.

7. The plaintiff's evidence was that he was driving a **50cc** engine motorcycle which he had recently sold to **Henning**. Both the plaintiff

and **Henning** had their motorcycle headlights on. Along the road they both stopped at a robot controlled intersection. The insured vehicle also stopped at the intersection behind them. The road was quiet. After they drove-off from the intersection the insured vehicle overtook them on the left hand side of the east bound lane. Some distance down the road, the plaintiff saw the insured vehicle ahead of him. At that stage the plaintiff was driving at a speed of about **50km/h**, the speed limit in the vicinity being **70 km/h**. The insured vehicle was driving slowly on the far left hand side of the east bound lane. The motorcycles were rapidly getting close to it. **Henning** overtook the insured vehicle on its right hand side. The plaintiff also decided to overtake the insured vehicle as **Henning** had done. He switched the indicator of the motorcycle on and committed the motorcycle to overtaking. As he was doing so, he noticed that the indicator of the insured vehicle was on, and it was turning to the right. By this time plaintiff's motorcycle was very close to the insured vehicle. The plaintiff swerved the motorcycle to the right in an effort to avoid collision. However the right front fender of the insured vehicle collided with the motorcycle.

8. The plaintiff could not recall whether, in trying to avoid the collision, he applied brakes or sounded the motorcycle hooter. During cross-examination he testified that he could not recall whether **Henning** encroached on the western bound lane when overtaking the insured vehicle. He, however, thought that was unlikely, as the insured vehicle had been travelling on the far left hand side of the east bound lane and there was sufficient space for a vehicle to overtake the insured vehicle on the same lane.
9. **Jaco Dreyer**, the insured driver testified that on the night of the collision, he was driving the insured vehicle along the main road

Gonubie, taking a friend home to the **11th Avenue**. He was familiar with the road and knew where he was going. He became aware of the cyclists when he saw them at a filling station next to the road. Sometime later **Henning** overtook him on the road. When **Henning** overtook him, the insured vehicle was travelling very close to the centre line of the road; to the extent that **Henning** had to encroach on the side of the oncoming traffic in order to safely overtake him. At about 10 metres before reaching the **11th Avenue** junction, he indicated his intention to turn right into **11th Avenue**. It was after **Henning** had overtaken him and he (the insured driver) was in the process of turning right into the **11th Avenue** that the collision occurred.

10. As he turned into **11th Avenue** he heard the sound of the motorcycle, and he saw it almost at the same time that it collided with the right front fender of the insured vehicle. After the collision, the plaintiff landed on the pavement.
11. The insured driver conceded, on being cross-examined, that for the last 100 metres leading to the point of collision, he never looked in the rear view mirror of the insured vehicle. Had he done so, he probably would have seen the plaintiff's motorcycle. He also conceded that he only started indicating his intention to turn right at a late stage in the process of turning. He admitted that he might have been driving further from the centre line than he had earlier testified.
12. The version of the plaintiff and that of the insured driver regarding where the insured vehicle had been travelling, shortly prior to the collision, are mutually destructive.
13. The plaintiff was a good and honest witness. His evidence was clear and consistent. He readily admitted that he could not recall certain details regarding the accident.

14. The insured driver also readily made concessions and admitted that he acted negligently in some respects when driving the insured vehicle. The difficulty I have with his version, is insofar as it does not, in my view, accord with the probabilities.
15. Firstly, his evidence that when **Henning** overtook him, he was driving very close to the centre line does not, in my view explain, how he was not reminded or alerted, by the overtaking motorcycle, to look in the rear view mirror, to see if there might be another vehicle coming from behind. According to him, he intended to turn to the right shortly; he had earlier seen the two motorcyclists (plaintiff and van Henning) at a garage up the road. It was put to the plaintiff, during cross-examination, that as the defendant approached **11th Avenue** the first motorcycle "*went flying past him.*" One would expect that the insured driver would have been reminded that there had been two motorcyclists and that the probability was that the second motorcycle was also coming close behind him. This, together with the fact that he would shortly be turning to the right would remind him to look in the rear view mirror. I can only conclude that the reason why the insured driver failed to look in the rear view mirror is that he had not been keeping a proper look-out and was not aware that he would have to turn to the right shortly. Hence he continued to travel on the left hand side of the lane. (I am, however, not persuaded that he drove to the left of the lane in order to execute a sharp turn to the right as **Mr Louw** suggested).
16. According to the insured driver, **Henning** overtook him when he was about 120 metres from **11th Avenue**. There is no explanation why he waited until he was 10 metres from **11th Avenue** to indicate his intention to turn into right into that street.

17. **Mr Kincaid** submitted that the plaintiff's evidence was a rationalized reconstruction of the collision rather than independent memory. This submission seems to be founded on the plaintiff's inability, for example, to give exact distances between the motorcycle he was driving and that the one driven by **Henning**; the distance of the insured vehicle from the motorcycle at various stages prior to the collision and on the plaintiff's assumption that he would have applied the brakes of the motorcycle to try and avoid the collision.
18. I am not persuaded that the plaintiff's version amounts to a rationalized reconstruction as submitted. Indeed the responses given by the plaintiff in respect of a number of questions on cross-examination were assumptions on his part as he could not recall some of the details. Estimates of distances are a common feature of evidence in cases involving motor vehicle collisions. Such evidence was reasonable in this case, as the collision occurred at night. As **Mr Louw** submitted, on behalf of the plaintiff, the plaintiff's evidence in this regard is in line with the probabilities. It seems quite reasonable that the plaintiff, having observed that "*his*" motorcycle was about to collide with the insured vehicle, would, in the few seconds preceding the collision, engage in a flurry of panic driven activities to try and avoid the collision. The fact that he does not recall all the details thereof is not unreasonable in my view.
19. For these reasons I am not persuaded that the probabilities favour the defendant's version as submitted by **Mr Kincaid**.
20. On the plaintiff's version, what he observed as he drove along **Gonubie Road**, was a motor vehicle which had earlier overtaken him. He observed that it had now slowed down, still driving on the far left

side of the lane on which he was also driving. There was no indication that it intended to change its path of travel, to the right.

21. In **Mabaso v Marine & Trade Insurance Co Ltd & Another 1963 (3) SA 439 at 440 James J** held that:

“He saw that the cars he was about to pass were slowing down and pulling off to the left and the road ahead was straight and clear. Anyone who has travelled on modern highways must appreciate that faster cars will seize the opportunity to overtake and pass slower cars when the road is clear ahead, and the drivers of slow-moving cars have long since learned to expect to be passed without warning in these circumstances. If every fast-moving vehicle was obliged to hoot before overtaking, the cacophony of sound coming from busy national roads would be so continuous and deafening that the warning given by sounding a hooter in a genuine emergency would be lost in the general din. The passing motorist is entitled to assume that the slower traffic being overtaken will continue in its course on the left of the road, and the hooter should only be used to warn such a driver if he manifests an intention to stray from his proper course. Unless some emergency making it necessary to give a specific warning, arises, the overtaking car should remain mute. In the present case an emergency only arose when the Opel (i.e. A) started to move to its right. At that stage a warning hoot could not have prevented an accident.”

I align myself with the views expressed by the learned Judge in **Mabaso’s** case and find that they are equally applicable in this case.

22. **Mr Kincaid** submitted that the insured driver’s late signal of his impending right turn did not necessarily constitute negligence. In this regard he relied on **Orne-Gliemann v General Accident Fire and Life Assurance Corporation Ltd 1981 (1) SA 884 ZIM** in which the court held that even without a prior signal by the car driver, of an intended right-hand turn, the plaintiff, who was aware of the intersection, should

have been warned of that possibility under all the circumstances and had been causatively negligent in seeking to overtake as and when he did, without any indication that his presence and his intention were known to the driver of the car.

23. **Orne-Gliemann's** case is, however, distinguishable from this case in that, the insured vehicle in this case had, shortly before the collision, been travelling to the left of the lane, thus giving sufficient berth to other road users to overtake on its right hand side within the same lane as itself (the insured vehicle). In **Orne-Gliemann's** case, the motorcyclist had been travelling directly behind the insured vehicle. The road consisted of a single lane in each direction. The plaintiff therefore had a duty to ensure that the insured vehicle was aware of his presence.
24. I am satisfied that in this case the plaintiff was entitled to assume that he could safely overtake the insured vehicle. I can find no basis on which the plaintiff could have anticipated that the insured vehicle was not aware of his presence behind him. The headlight of the motorcycle was on in the darkness of the night. Had the insured driver been keeping a proper look-out, he would have easily observed the motorcycle behind him.
25. The emergency in this case started when the plaintiff saw that the indicator of the insured vehicle was on. This was more or less simultaneous with the turning of the insured vehicle. By that time, the plaintiff had already committed the motorcycle to overtaking the insured vehicle and had almost reached it. I am not persuaded that, at that stage, the flickering of the motorcycle headlight or the sound of a hooter could have avoided the collision. Consequently, I cannot find that the plaintiff was negligent in the manner in which he overtook the

insured vehicle.

The following order shall therefore issue:

- (a) It is declared that the sole cause of the collision on 18 May 2002 was the negligence of the insured driver. The defendant is accordingly liable for damages suffered by the plaintiff as a result of the collision;
- (b) The defendant shall pay plaintiff's costs for the hearing;
- (c) The matter is postponed *sine die* for determination of the quantum.

N DAMBUZA

JUDGE OF THE HIGH COURT