**IN THE HIGH COURT OF SOUTH AFRICA**

**(SOUTH EASTERN CAPE LOCAL DIVISION)**

**Case no: 3708/06**
**Date delivered: 17.1.2008**

**In the matter between:**

**ROGER THOMAS OLIVIER COLLIER** **Plaintiff**

**vs**

**ROAD ACCIDENT FUND** **Defendant**

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**JUDGMENT**

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A.R. ERASMUS J:

[1] A side road from Kini Bay enters the Seaview-Port Elizabeth main road from the right for traffic travelling towards Port Elizabeth. At the intersection the Kini Bay road is controlled by a stop sign. On 1 January 2003 the plaintiff was driving his vehicle along the main road towards Port Elizabeth when it collided with a motor vehicle ('the insured vehicle') driven by Mrs. Patricia Pause ('the insured driver') travelling into the intersection from Kini Bay.

[2] The plaintiff instituted action against the defendant in terms of the Road Accident Fund Act, 1996, for damages suffered by him as a result of injuries sustained in the collision. The plaintiff bases his cause of action on alleged negligence on the part of Mrs. Pause on grounds set out in the particulars of claim. The defendant opposes the action and denies the allegations of negligence on the part of Mrs. Pause; pleads further, in the alternative, that in the event of it being held that she was negligent, that the collision was due partly to the negligence of the plaintiff and that the plaintiff's damages shall be reduced as the court may deem just and equitable having regard to the degree that the plaintiff was at fault in relation thereto.

[3] At the pre-trial conference in terms of rule 37 it was agreed between the parties that the issues of the merits and quantum be heard separately, the merits to be decided first and quantum to stand over to a later date. At the outset of the hearing, the court ordered accordingly. The issues therefore for the court to decide are twofold: *viz* whether the insured driver was causally negligent in relation to the collision; and, if so, to what degree if at all the plaintiff was at fault in relation to the damages sustained by him in the collision. The plaintiff bears the onus of proving causal negligence on the part of the driver of the insured vehicle, while the defendant bears the onus to prove contributory negligence on the part of the plaintiff.

[4] The plaintiff testified that on 1 January 2003 at about 1h30 he left Beachview for Port Elizabeth driving alone in his motor vehicle. He was aware of the Kini Bay turn-off about two kilometres beyond Seaview and that there was a stop sign for the side road. He was travelling with his headlights on bright. He did not look at his speedometer but estimates that he was travelling at about 80-100 kilometers per hour. He was travelling on the left hand side of the road. Suddenly he saw a vehicle entering the intersection from Kini Bay. The vehicle was half-way into the road and already turning. He tried to avoid the collision by moving to his right but collided with the vehicle. When the impact happened the other vehicle had not completed its turn. He struck it in its right rear. He could not have avoided the collision. He lost consciousness in the collision and woke up in hospital two to three days later. In cross-examination it was put to the plaintiff that Mrs. Pause stopped at the stop sign, looked to her right and through the bushes saw the lights of a vehicle in the distance, then looked to her left before proceeding to turn right onto the main road when a vehicle suddenly appeared from nowhere and drove into the back of her vehicle.

[5] Mr. Robert Manly testified. He arrived at the scene after the collision.

He took photographs. These show tyre and scrape marks on the surface of the road at the intersection.

[6] Mr. Neville Schafer testified. He stated that between 1h00 and 2h00 on 1 January 2003 he was travelling towards Seaview, approaching the Kini Bay intersection. The road makes a slight turn to the left. When he came around the curve he saw two sets of vehicle lights on a collision course. The one vehicle was approaching from the left from Kini Bay, the other from the front from the direction of Seaview. The vehicle coming from Kini Bay was just before the intersection. It did not stop at the stop sign but went right across the road. The vehicles collided. After the collision both vehicles came to a stop. He went to the one vehicle (presumably that of the plaintiff). There was no response from the person behind the wheel. The other vehicle was a Kombi lying on its side facing back towards Seaview. He thereafter drove to the Seaview Police Station. In cross-examination it was put to the witness that the driver of the insured vehicle stopped at the stop line, saw a vehicle (presumably that of the witness) approaching from the right, looked to the left and saw no vehicle, looked to the right and moved to the point of entry into the main road. The witness was adamant that he saw the vehicle moving in a continuous action and that it did not come to a halt.

[7] Mrs. Pause testified for the defendant. She stated that on the night in question she and her family visited friends at Kini Bay. They left at about 1h00 or 1h30. She was driving. It was a dark night. She stopped at the T-junction. She saw the lights of a vehicle approaching from the right far away.

She looked to her left and saw nothing, no headlights. It was safe for her to turn right. She proceeded into the intersection and turned to her right. Suddenly she saw the lights of a vehicle in her rearview mirror. The car drove into the back of her vehicle. In cross-examination she stated that she did not know whether she stopped before or after the stop line. Later she said that she stopped slightly over or at the stop. There was not even a glow of lights to her left. Once she pulled off she did not again look to her left. In reply to questions of the court as to whether she looked once or more times to her left, she replied that it must have been more than once. She then said that she could not recall exactly. She was unsure on this aspect.

[8] Mr. Pause, the husband of the insured driver, testified that he was in the seat behind the driver, in the middle. He is a nervous passenger and likes to get involved. They stopped at the intersection. There was an approaching car far away to their right. On the left there was absolute blackness. His wife pulled out, and turned right. He was suddenly aware of bright lights behind him. There was a loud bang. In cross-examination he stated that at the time of the collision there was more vegetation on the left than there was during the inspection held by the court the previous day. This vegetation obstructed his view. His wife stopped at the stop line, not in front of it. He looked twice to his left, while the vehicle was stationary, not again when it was moving.

[9] The defendant called a further two witnesses who that evening proceeded separately from Beachview and came upon the accident. They both described to the court the erratic and fast driving at Beach View of a vehicle which – so they suggested – must have been the vehicle of the plaintiff. They could however not positively identify it as such. Their evidence, in any event, does not contradict the evidence of the plaintiff in regard to the collision itself.

[10] During the trial, at the request of counsel, the court held an inspection in loco. At the inspection counsel took measurements. (This of course could and should have been done before trial.) These measurements were reduced to writing in a note of inspection. I refer to these notes where necessary.

[11] All the witnesses delivered their evidence in a satisfactory manner bearing in mind that they testified in regard to traumatic events that occurred suddenly and unexpectedly almost four years ago. The court has no reason to doubt the credibility of any of the witnesses.

[12] The only apparent conflict is between Mr. Schafer as against Mr. and

Mrs. Pause, on the question whether the insured vehicle stopped before entering the intersection. I accept the evidence of Mr. and Mrs. Pause that she did stop at the stop line. This line is 4.1 meters from the point of entry into the main road. It is quite possible, indeed probable, that Mr. Schafer saw the insured vehicle immediately after it pulled away from the stop line and that he gained the impression that it entered the intersection without stopping. He was, presumably, unaware of the fact that the stop line was set back from the main road.

[13] I also accept the evidence of Mrs. Pause that at the stop sign she looked to her left and saw nothing coming before driving forward. It is probable that at that point her view to the left was obstructed by the bushes on the side of the road. The critical point was however not when she took off from the stop line, but rather when she entered the intersection 4.1m thereafter. She did not again look to the left at that point. Instead she proceeded into the intersection, into the path of travel of the oncoming motor car. A driver who enters a main thoroughfare from a side road is under a clear and grave duty to ensure that it is quite safe to do so. The insured driver failed in that duty. I find therefore that the plaintiff has succeeded in proving that the driver of the insured vehicle was negligent in one or more of the respects alleged, viz that she failed to keep a proper lookout and that she entered the intersection without ensuring that it was safe to do so.

[14] The plaintiff must, further, prove a causal connection between the negligent act of the insured driver and the collision. No precise evidence was placed before the court as to the distance that an oncoming vehicle would have been visible to Mrs Pause as she entered the intersection at night. Inspection note 9 states: 'From a point in centre of intersection along road curvature to T-junction sign – 137,5m'. At the inspection counsel for the defendant pointed out the sign to me. It was visible from the intersection. Presumably, therefore, an oncoming vehicle would have been visible at least

this distance for a vehicle entering the intersection. At a 100kph the plaintiff would have travelled at 27.7m per second. At that speed he would have taken about 5 seconds to travel the 137.5m from the T-junction sign to the intersection. It would, I should think, have taken Mrs. Pause less than 5 seconds to drive across the point of entry onto the main road and turn to the right prior to being hit. I find on the probabilities that had she looked to the left immediately before driving into the intersection, she would have seen the oncoming vehicle. And having seen the vehicle she would or should not have proceeded onto the main road. It follows that her negligent failure to look to the left prior to entering the road was a cause of the collision. I find therefore that the insured driver was causally negligent in regard to the collision.

[15] I deal next with negligence of the plaintiff. He testified that the Kini Bay access road is well known to him. He described the intersection as follows. Approaching the intersection the main road makes a blind curve to the right then a left curve. On the side of the road at the intersection there were bushes and grass. Visibility of the intersection was limited. One cannot really see the intersection until one sees a car. To his knowledge therefore, the intersection constituted a traffic hazard. He however failed to take any steps to guard against the danger of a vehicle entering the road from Kini Bay. A driver who approaches an intersection on a through street does not have an absolute right of precedence, nor is he relieved from the duty of keeping a proper lookout (*Franco vs Klug* 1940 AD 126, 135; *National Employers'*

*General Insurance Co Ltd vs Sullivan* 1988 (1) SA 27 (A) 33J-34B). The plaintiff saw the insured vehicle only when it had travelled some distance into the intersection and was turning to its right. The fact that he did not see it sooner must in the circumstances of the case be attributed to his failure to keep a proper lookout and/or not driving within the range of his vision. The fact that he failed to avoid the collision must be attributed to the fact that he was travelling too fast to do so. I find that the plaintiff was negligent and that his negligence contributed to the accident. His fault was however considerably less than that of the driver of the insured vehicle.

[16] In the result, the court orders as follows:

a) that the defendant pay the plaintiff such damages arising from the collision as he may prove or as may be agreed upon by the parties;

b) that such damages be reduced by 25% having regard to the plaintiff's degree of fault in relation to the collision;

c) that the defendant pay the plaintiff’s costs of action.

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**A.R. ERASMUS**
**JUDGE OF THE HIGH COURT**

**DATE:** _____