

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No.: 1813/2006

In the case between:-

MAMPEONAE ANNAH RANTHAMA

Plaintiff

and

ROAD ADDIDENT FUND

Defendant

HEARD ON: 21 & 22 AUGUST 2007

JUDGMENT BY: KRUGER J

DELIVERED ON: 30 AUGUST 2007

[1] Plaintiff caused summons to be issued against defendant in respect of a collision on 28 July 2001 at 11 am between the Jetta motorvehicle driven by her husband (who died on the same day) in which plaintiff and her two sisters were passengers, and a Mazda bakkie driven by the insured driver (who had no passengers) on the Congo Main Road, Phuthaditjhaba. This being a dependant's claim, there is no counterclaim. At the outset of the proceedings the parties by

agreement requested an order under Rule 33(4) that issues be separated so that only the merits, as contained in paragraphs 3 and 4 of the particulars of claim and paragraph 3 of the plea be adjudicated. The allegations in the pleadings are of a general nature and no specific acts of negligence are alleged.

[2] Plaintiff's case is that the Jetta was travelling very slowly, about or in fact stationary, behind a stationary vehicle, relatively close to the robot at the intersection in front. The bakkie came from the front and for no apparent reason came onto plaintiff's side of the road and the two right front sides collided.

[3] Defendant's case is that the collision occurred about 200 metres from the intersection. The Jetta straddled the barrier line and overtook a vehicle next to the bakkie. The insured driver attempted to brake and swerve to the left, but could not avoid a collision because the Jetta emerged suddenly from behind the vehicle in front of it coming onto the insured driver's side of the road.

[4] Plaintiff's first witness was her sister, Matshidiso Nketle, who sat in the back left of the Jetta. She testified that they were busy coming to a standstill at the robot. She did not know whether the Jetta's indicator was on. She did not know how many lanes the road has there. She said the collision

occurred on the Jetta's correct side of the road. They were going to turn right at the robot. The final answer of her evidence in chief was that she does not know how the two vehicles collided.

- [5] In cross-examination she said the collision occurred near the robot. She could not estimate any distances. She does not understand metres although she made grade 11 at school. She said the Jetta was stationary at the time of the collision. The vehicle in front of theirs was also stationary. As they approached, the vehicles were already stationary. When the Jetta approached the vehicles were standing still. She denied that the Jetta tried to overtake another vehicle. Mr. Mogagabe, for the defendant, wanted to put a statement she had made to the police to her. Initially I stopped him, but later, with no objection from Mr. Pohl, for the plaintiff, the witness was re-called and her statement was handed in. She said she signed the statement and it was correct. In the statement she says that the Jetta was stationary: "He as

waiting for an oncoming car as the vehicle in front of his car was stationary on the road and he wanted to overtake it.” In her evidence the witness said the statement is incorrect. She did not understand what overtake means. After further questioning, she said she now understands what overtaking means. When it was put to her that earlier she had said she did not know how the collision occurred, she responded that she did not see how the collision happened, she only heard the impact.

[6] I found Matshidiso a particularly poor witness. It was clear to me that she did not pay attention and was simply trying to say that the collision occurred on the Jetta’s correct side of the road. She tried to avoid reference to overtaking, although her statement made in April 2002 mentioned that the driver of the Jetta wanted to overtake the vehicle in front. Very little, if any, value can be attached to her evidence.

[7] The plaintiff was sitting in the passenger’s seat. They had

passed the Congo bridge on their way to the robot. The insured vehicle, the bakkie, came from the front at high speed and came over to their side of the road. They were busy slowing down on their way to the robot, where they were going to go straight through.

[8] In cross-examination plaintiff was asked to point out the distance they were from the intersection at the time of the collision. The distance she pointed out measured 13,1 metres. This differs considerably from the defendant's version that the collision occurred 200 metres from the intersection. She did however say that they were not near the robot yet.

[9] Plaintiff's statement in which she said that the Jetta was stationary at the time of the collision was put to her. She denied it. They were moving at a slow pace, the vehicle ahead of them was at a standstill. Asked what caused the bakkie to leave its lane and come over to their side of the road she said she did not take notice of that. The car ahead of them was 5,1 metres ahead of the Jetta. Now she said the vehicle in front of them was moving slowly. In paragraph 2 of plaintiff's police statement made on the 29th July 2001,

the day after the collision she says in paragraph 2:

“There was a car that we were following, our driver tried to overtake it but it was late for him as there was a car that was coming to the opposite direction and it was where the two vehicles collided.”

In her statement made in 2004 plaintiff said that her police statement is not correct.

“5. Die polisie het ook ‘n verklaring by my afgeneem maar die inhoud van daardie verklaring is nie korrek nie. Die verklaring is geskryf soos die poliesman wat dit afgeneem het gedink het gebeur het. Dit was ook kort na die ongeluk (ek was nog deurmekaar en in die hospitaal) toe ek nog baie seer was en hartseer oor die dood van my man.”

Plaintiff now said she never told the policeman what happened in the accident. This “comes out of the mind of the policeman” she said. No-one came to the hospital where

she was after the collision, and introduced himself as a policeman. No statement was read back to her in hospital. Plaintiff said she did not agree with the statement where it is stated that they were overtaking. She suggested that the signature on the police statement was not hers. A plan which was apparently drawn during plaintiff's consultation with her attorneys was put to her and handed in as exhibit "A". That plan depicts the bakkie coming over onto the Jetta's side, and hitting the Jetta virtually at the intersection. She said the collision occurred further from the intersection than depicted on "A". It was put to her that no objection was ever raised and she was asked why she did not point out to her attorneys that their plan was incorrect. It forms part of documents discovered by plaintiff.

- [10] Plaintiff, although a better witness than her sister, was not a good witness. Material discrepancies in her evidence relate to the question whether the Jetta was stationary or not at the time of impact; and whether she told the police that they

intended to overtake the car in front of them. It is significant that the overtaking is also mentioned by Matshidiso in her statement made in 2002 (a year after the collision). In court both deny any question of overtaking. The most unsatisfactory part of plaintiff's evidence is that on her version there was no reason for the bakkie to come to their side of the road and collide with a stationary, or semi-stationary vehicle which caused him no problem.

- [11] The insured driver, who drove the bakkie, Maseko, got his drivers licence in 1999, two years before the collision. On the day in question he was delivering goods. He had passed the road earlier the same day, and there was a road block some distance from the intersection. He was travelling slowly, about 50 – 60 km per hour. He turned right at the intersection. About 200 metres from the intersection when he was in line with a vehicle travelling in the opposite direction, a Toyota Venture, the Jetta came out behind it and overtook the Venture and their right front sides collided.

Maseko tried to swerve, but it was too close. At that point there is a barrier line prohibiting the Jetta to overtake. He was travelling in the middle of his lane. He said the Jetta was wholly in his lane, but in cross-examination it was pointed out to him that the left part of the Jetta was probably still on its correct side. Nothing turns on this. The Jetta was travelling at high speed.

In cross-examination it was put to Maseko that there is an emergency lane of 2,1 metres, and next to that about 2 metres of gravel to which he could swerve. He confirmed that there were no stationary or moving cars in either of those, there no obstruction for him. He simply had no time to swerve. It was put to him that he moved onto the incorrect side of the road and hit the Jetta (no reason was advanced as to why he should have done so). He denied it. He stressed that he had no time to get out of the Jetta's way.

[12] It so happened that the vehicle immediately behind Maseko

was a police vehicle. It was a single cab bakkie with a canopy, a marked police van. Inspector Moloi, the driver, has since passed away. Next to Moloi was Inspector Stemmer, and on the left hand side, Inspector Mphanya. Both testified.

- [13] Mphanya testified that they stopped at the robot and turned left in the direction of Makwane on the Congo main road. The traffic was not very busy. There was a Mazda delivery van (the vehicle driven by Maseko) right in front of them. About 200 metres from the robot, when they were not at speed yet – as he put it they were probably still changing gears from third to fourth or in that vicinity, all of a sudden a Jetta appeared from the front, overtaking a vehicle and it struck the bakkie in front of them. Mphanya described it as the type of manoeuvre used in Johannesburg, overtaking quickly. At the time of the collision the bakkie was about 4,6 metres away from them. The bakkie was driving in the middle of its lane, neither to the left, nor to the right. The

Jetta was obscured from Mphanya's view. As it appeared it was so close that it was impossible for the Jetta to overtake, and it was impossible for the bakkie to move off to the left. When the Jetta tried to overtake the distance between the Jetta and the bakkie was such that the Jetta could not execute its overtaking manoeuvre, and the bakkie could not get out of the way. The Jetta was travelling at a high speed and executed the manoeuvre in a sudden manner. The Jetta could not overtake. The Jetta was about 4,5 metres from the front part of the bakkie when it started to overtake. The accident happened in the wink of an eye (the interpreter used the word "blitsvinnig" which he said rendered an accurate description of what the witness was saying in Sesotho). Mphanya does not know the plaintiff. He met the insured driver, Maseko, on that day for the first time. Mphanya was together with the deceased in the police college and they were colleagues. Mphanya was very upset when he went to speak to the driver of the Jetta and noticed that it was the deceased, a person known to him.

[14] In cross-examination Mphanya said that on the particular day he was not wearing a uniform because his uniform was too small for him. Stemmer and Moloi were both in uniform. Mphanya held the highest rank among the three. The accident did not occur in the area of their police station but in that of Phuthaditjhaba. He does not know who was appointed investigating officer and did not follow further events in relation to the accident. According to Mphanya the Jetta after the collision stayed on its correct side of the road and just turned around so that it was facing to the direction that it was coming from. This evidence differs from the evidence of the plaintiff and Matsidiso. Maseko did not go to the Jetta after the collision and he was busy uncoupling the battery of his car. Stemmer, the other police officer, also said that the Jetta after the accident went to the wrong side of the road. On photograph 71.1 the Jetta is on its incorrect side of the road. To this Mphanya said that the fire brigade possibly moved the Jetta. On the probabilities Mphanya's

evidence that the Jetta remained on its side of the road is incorrect. It is probable and I find that the Jetta did in fact veer onto its incorrect side of the road.

[15] In Mphanya's police statement, which he made on the day of the accident, he does not mention anything about an overtaking manoeuvre of the Jetta. The statement simply states that the Jetta was driving towards them and the Mazda was on its way to the industrial area. The Jetta was damaged on the right hand side, rescue services were called and applied first aid to Ranthana, the driver of the Jetta, but declared him dead. The three ladies who were in the Jetta were taken to hospital. Maseko, the driver of the bakkie was injured on his right leg. That is what the statement says. Asked why no mention is made of overtaking, Mphanya explained that the investigating officer tends to re-take statements. His view was that at that stage the police should not say what the cause of the collision was, because the case will still go to court. His statement was not, he said, in

a form ready for investigation. Further investigation must follow. A further factor influencing the contents of his statement was that the driver of the Jetta was known to him. It was a former colleague of his. When one comes across such situation, you require counselling, he said. He agreed that the point impact indicated by him on photograph 78.4 is about one and a half pace from the centre white line of the road. Asked whether in that case the left wheels of the Jetta were on or over the white line, Mphanya said when one vehicle overtakes another, the overtaking vehicle can be wholly or partially on the other side of the road. As to debris indicating the point of collision, he said that he thought that the debris was at the place he was standing on photograph 78.4 as the point of impact, although he was not cock-sure. He insisted that the glass was on the bakkie's side of the road. When it was put to him that the fact that he did not refer to overtaking in his police statement indicated that he did not see the accident, he responded that he saw the accident with both eyes.

Asked whether the bakkie swerved, Mphanya said he did not swerve, he did not have an opportunity to do so. The Jetta's speed appeared to be quite high, it could be 70, 80 or 100km per hour. The last time the Jetta would have to stop coming from the direction it did, was quite far away thus the Jetta would have had time to build up speed. Asked again whether he was sure about the distance between the bakkie and the Jetta before the impact, Mphanya said the distance was such that it was impossible for the Jetta to overtake.

[16] Mphanya was a loquacious witness. He gave long answers which often did not address the question. He was wrong about the final position after the collision of the Jetta, but that cannot detract from his evidence. The events occurred in 2001, six years ago. There was criticism against him for not mentioning overtaking in his police statement. To my mind he explained that omission satisfactory:

- i) The case was still to be investigated; it is undesirable for police officials to apportion blame in their statements.
- ii) The driver of the Jetta, who had been very seriously injured and died on the scene, to whom he spoke on the scene, was a person with whom he had been in the

police college and a former colleague of his. Mphanya needed counselling, it was a disconcerting experience.

In these circumstances it was natural that Mphanya did not want to say that the Jetta was the cause of the collision. On the positive side, he is a police official with 18 years' experience. He has a drivers licence. He is impartial. He knew the driver of the Jetta. If anything, one could expect him to be biased in favour of the plaintiff who is the widow of his former colleague. He had a ringside view of the collision. He was adamant that the Jetta appeared suddenly; it could not execute the overtaking manoeuvre; there was nothing the bakkie could do.

- [17] The other police official, Inspector Stemmer was seated in the middle of the police vehicle next to the driver. He saw two vehicles approaching. Then the Jetta attempted to overtake a vehicle approaching and collided with the van in front of them. They avoided hitting the bakkie or the Jetta by

moving off the road to the left. Before the collision their vehicle was 6,7 metres from the bakkie. When the Jetta tried to overtake, it was a car length from the bakkie. Both the bakkie and the police van were travelling at a slow speed; the Jetta at a high speed. Stemmer did not have a driver's licence at the time, he only got one in 2004.

Asked whether in his view it was possible for the driver of the bakkie to avoid the collision, his response was that he could do nothing about the accident. Both the bakkie and the Jetta ended up on their incorrect sides of the road. The impact was on the bakkie's side of the road. Stemmer regulated the traffic after the collision, he did not look for debris on the road and did not speak to anyone.

[18] In cross-examination he said he could not remember how far from the centre line the collision occurred. He differed from Mphanya as to the area of the collision. Whereas both Mphanya and Maseko said the collision occurred 200 metres

from the intersection, he felt it could be 500 metres. In this respect Stemmer is clearly mistaken. It appeared from the evidence that the points indicated by Mphanya and Maseko were about 200 metres from the intersection. Stemmer testified that the Jetta left its lane and went to the side of the road where the accident happened. The bakkie never left its side of the road. Stemmer said that on photograph 78.4 Mphanye was pointing to where the collision occurred (i.e. further away from the intersection). In re-examination it became clear that he was not present when photo 78.4 was taken, and did not know where Mphanya was pointing.

- [19] Stemmer was a good witness. The only criticism against him is that he put the area of the collision 500 metres from the intersection, not 200. Nothing turns on this. Another factor is that he did not have a drivers licence at the time of the collision. Again, on the positive side he is a policeman, impartial, had a bird's eye view of the collision happening right in front of him. He made it clear that the Jetta was a car

length from the bakkie when it attempted to overtake. There was nothing the driver of the bakkie could do.

[20] In argument Mr. Pohl, for the plaintiff, submitted that this is a type of accident which happened near the centre of the road and in such case both drivers are normally considered negligent. At a collision between vehicles travelling in opposite directions very near to the centre of the road and both failed to realise the danger of the situation that is in all likelihood due to the failure of both to keep a proper lookout

(CANTAMESSA v REINFORCING STEEL COMPANY

LIMITED 1940 AD 1 at 6 – 7; **VAN ECK v SANTAM**

INSURANCE CO LTD 1996 (4) SA 1226 (C) at 1230 B – D).

If a driver on his correct side sees the other travelling on his incorrect side, or was about to cross over to his incorrect side, it would be negligence on his part if he failed to take all reasonable steps to avoid a collision (**JADEZWENI v**

SANTAM INSURANCE CO LTD AND ANOTHER 1980 (4)

SA 310 (C) at 311H).

[21] Mr. Mogagabe, for defendant, submitted that the cases referred to by Mr. Pohl are not in point. This is not a case where the principles relating to collisions in the centre of the road will determine the situation. It is an overtaking case, and the reasonable man test applies: was the driver of the insured vehicle able to do anything to avoid the collision. He pointed out that there is a barrier line which prohibits drivers in the position of the Jetta to overtake because of the incline.

[22] The first point to be decided is whose version to accept. The plaintiff and her sister tried to put the accident close to the intersection, so as to put the Jetta at a virtual or absolute standstill. Photograph 71.1 shows where the Jetta was after the collision that is not in the proximity of the intersection. Furthermore there are two serious criticisms against the plaintiff and her sister:

- (i) In their police statements both say that their driver wanted to overtake the vehicle in front of them. In

court both denied that there was attempt to overtake.

Plaintiff implied that her signature had been forged.

Matsedisoi's explanation was that the statement was not correct, and at the time she did not know what "overtake" means.

(ii) On plaintiff's version no reason at all is given for the bakkie to move over to its incorrect side of the road.

A further criticism against plaintiff's case is that the version advanced for the defendant, that of the insured driver, Maseko, is supported by two independent police witnesses. I have no hesitation in rejecting the plaintiff's version.

[23] The next question is whether, on the defendant's version Maseko was negligent. This being a defendant's claim, the plaintiff only needs to prove the theoretical 1% of negligence on Maseko's part.

[24] This is an overtaking situation, not one, as Mr. Pohl would have it, dealing with a collision close to the centre of the

road. In what Mr. Pohl called the *locus classicus* on such cases, **CANTEMESSA** (above) the centre of the road was not marked by means of white lines (page 3 of the report: the accident occurred in 1937). Overtaking is a potentially dangerous manoeuvre (**KRUGER v VAN DER MERWE AND ANOTHER** 1966 (2) SA 266 (A) at 273 C – E). The question is whether there was a failure to keep a proper lookout and whether that failure was causally connected to the collision (**GUARDIAN NATIONAL INSURANCE CO LTD v SAAL** 1993 (2) SA 161 (C) at 163 B – D). The plaintiff has to prove that had Maseko reacted when the reasonable man would have reacted, the collision would probably not have occurred (**DIALE v COMMERCIAL UNION ASSURANCE CO OF SA LTD** 1975 (4) SA 572 (A) at 578 F). The question is whether Maseko ought reasonably to have become aware at a stage when avoiding action could still be taken, that the Jetta was coming into his line of travel (**BAY PASSENGER TRANSPORT LTD v FRANZEN** 1975 (1) SA 269 (A) at 277 B – C). The first question is whether Maseko

was keeping a proper lookout (**GUARDIAN NATIONAL INSURANCE** above at 163 B – D). Having found a failure to keep a proper look-out, the court still needs to make a finding that such failure was causally connected to the collision (*loc cit*). Overtaking is an inherently dangerous manoeuvre. The photographs depict a slope in the road; the Jetta was coming up-hill towards the intersection. One cannot fault a person in Maseko's position for not being able to swerve and avoid the collision. The driver of the Jetta created a dangerous situation by straddling the barrier line. The following evidence is important:

1. The Jetta was on all accounts travelling at high speed. This was the evidence of Maseko as well as the two police witnesses.
2. On the evidence of Maseko as well as of the two police witnesses the Jetta appeared suddenly from behind the vehicle it was overtaking. The evidence seems to

indicate that the Jetta simply launched into the overtaking manoeuvre without looking at all.

3. Both police witnesses were adamant from their very favourable vantage point that there was nothing which Maseko could do to avoid the collision.

[25] Mr. Pohl says that Maseko had an unobstructed emergency lane of 2,1 metres, with next to it a gravel shoulder of about 2 metres to veer to; out of the way of the Jetta. Maseko conceded that the emergency lane was open; he says he simply had no time. He attempted to swerve to the left but there was no time. Mr. Pohl therefore says that Mphanya failed to keep a proper lookout because if he had he would have seen the Jetta and have taken avoiding action by veering to the left. Both Mphanya and Stemmer confirm that Maseko had no time to veer to the left. Once Maseko had no time to react, it is irrelevant how much space he had to his left.

[26] On the facts as they appear from the evidence the plaintiff has failed to establish any negligence on the part of the insured driver.

[27] The plaintiff's claim is dismissed with costs.

A. KRUGER, J

On behalf of applicant:

Adv.

Instructed by:

BLOEMFONTEIN

On behalf of the respondent:

Adv.

Instructed by:

BLOEMFONTEIN

/em