FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 904/2006
Appeal Case No.: A98/2012

In the matter between:-

H.C. PRINSLOO Appellant

and

THE ROAD ACCIDENT FUND Respondent

CORAM: C.J. MUSI, J *et*VAN ZYL, J *et* MHLAMBI, AJ

HEARD ON: 11 FEBRUARY2013

JUDGMENT BY: MHLAMBI, AJ

DELIVERED: 16 MAY 2013

INTRODUCTION:

[1] This is an appeal against the judgment of Kubushi AJ (as she then was). Leave to appeal was granted by Jordaan J on the ground that the Court *a quo* failed to make a finding on the question of negligence.

1.1 The appellant, (hereinafter referred to as “plaintiff”) instituted a claim of damages against the respondent, (hereinafter referred to as “defendant”) for personal bodily injuries suffered in a motor vehicle collision which occurred on the 21st of April 2001, a Saturday night, on the N6, a national road between Rouxville and Aliwal North.

1.2 The parties agreed to separate the issues of quantum and merits. Both the plaintiff and defendant led evidence on the issue of negligence only. The Court *a quo* was requested to make a decision in respect of the issue of negligence.

1.3 The Court *a quo* dismissed the plaintiff’s claim on the basis that the plaintiff failed to show a connection between the injuries sustained and the collision.

[2] The grounds upon which the plaintiff relies for this appeal is that the Court *a quo* erred in finding that:

2.1. It was necessary for the plaintiff to show exactly how he sustained his injuries, while the Court was called upon to only adjudicate on the aspect of the merits and more specifically the issue of negligence;

2.2 The plaintiff failed to prove a connection between the collision and the injuries suffered, while such evidence is only necessary for the determination of the quantum of the claim.

ASPECTS THAT ARE COMMON CAUSE:

[3] 3.1 The accident took place a few kilometres outside Aliwal North in the direction of Rouxville on a Saturday night, the 21st of April 2001, at approximately 21h00.

3.2 The road leading up to the scene of the accident consisted of two lanes for traffic from Aliwal North to Rouxville and had a high incline, a bit of a bend to the right with the two lanes divided by a demarcated white line. When one passed the incline where the road made a slight turn, the demarcated white line discontinued and the lanes for traffic from Aliwal North became a single lane.

3.3 The speed limit on this specific portion of the road was 120km/h (one hundredand twenty kilometres per hour).

3.4 In the area where the road still consisted of two lanes, the width of the road was 7.4 metres, being the distance from the yellow line to the middle of the road and from the very edge of the tar to the yellow line the width was 1.5 metres.

3.5 In the area where the accident occurred, the width of the road from the road edge to the yellow line was 2.4 metresand from the yellow line to the middle of the carriageway the width was 6.85 metres for traffic travelling towards Rouxville.

THE PLAINTIFF'S VERSION:

[4] 4.1 Plaintiff received a telephone call from his sister who informed him that she drove her “bakkie” off the road between Rouxville and Aliwal North. Plaintiff was at his father’s farm watching rugby and conceded under cross-examination that he had some alcohol to drink.

4.2 After he received the call, plaintiff phoned the Police at Aliwal North and two towing services. But none of them answered his calls. He further tried to get hold of them via cell phone when he entered Aliwal North, but to no avail.

4.3 He conceded during cross-examination that he could have gone to the police station personally, but explained that at that stage he was concerned about the “bakkie” that went off the road. He would need a police escort to the scene, but as he did not know where the accident took place and believing that the police did not want to assist him, he decided not to ask for their assistance.

4.4 Plaintiff went to his farm and fetched some of his farm workers, who were having a feast and drinking beer. This was confirmed by the witness called by the plaintiff, Mr M. Mkhenku, who testified that he consumed 750ml of beer before plaintiff arrived requesting their help.

4.5 He took a rope and a torch, which he indicated as being big as his hand’s palm, with him to the scene. With him in the red Nissan double cab “bakkie” (hereinafter referred to as

"the Nissan") was his 5 (five) year old son, his father and 5 (five) of his employees.

4.6 At the scene outside of Aliwal North the Ford stood off the road with its nose in a bush about 3 meters from the tarred surface of the road. As it was locked they could not switch on the light. A corner of the back of the Ford was on the side of the tarmac, the back of the Ford was level with the shoulder of the road and predominantly off the road.

4.7 It rained earlier that night and the road surface was wet, but there were no water puddles on the carriageway; there was no moon as it was cloudy. As they retrieved the Ford bakkie, the Nissan bakkie's emergency lights (hazards) were on and the headlights on dim. His father was warning traffic travelling towards Rouxville with a torch, standing about 30 to 50 metres from where they were working. The traffic from Aliwal North could see them from far away and there was ample space for vehicles to pass them safely.

4.8 During cross-examination, he conceded that this was insufficient warning and that they were ill-equipped for the task at hand as they did not have any recovery equipment on the Nissan, but maintained that it was practical. Even though he conceded that it was a dangerous place to retrieve the Ford, he did his best to avoid an accident with the warning signals that he used.

4.9 Plaintiff decided to pull the Ford bakkie from where it was standing on the side of the road onto the road surface and to assess the damage to it. Whilst he retrieved the Ford from the thorn bush, plaintiff realised that the Ford's wheels were turned and locked ("ge-crank") to the right and that the front right wheel was flat. He tried to retrieve the Ford with the rope and repair it himself with the assistance of his employees.

4.10 A taxi stopped at the scene and offered assistance. During this period three to five vehicles, coming from the direction of Aliwal North, reacted to the warning signals and slowed down.

4.11 Plaintiff made two attempts to pull the Ford out of the carriageway, and before the third attempt, the collision occurred. At this point the Ford was facing oncoming traffic and stood at an angle of 45 (forty five degrees) into the carriageway.

4.12 Plaintiff conceded that the carriageway became a single lane, its width narrowing before the place where they were busy working. The Nissan's right wheels were on the yellow line with the rest of its body in the carriageway. The Nissan was approximately 1,6 metres in width and stood in the lane of oncoming traffic with its lights shining directly into the lane of oncoming traffic.

4.13 The Ford was about 5 metreslong, stood behind the Nissan with its nose in the traffic lane and its front wheels about one meter into the traffic lane. He conceded that the Ford's Nose was approximately 500mm – 750mm in thecarriageway. At this point the carriageway's width decreased by almost 0.55 metres.

4.14 The process to retrieve the Ford from the ditch and onto the road surface took about 5 (five) minutes before the collision occurred.

[5] 5.1 Mr M. Mkhenku(hereinafter referred to as "Mkhenku")an ex-employee of plaintiff testified and confirmed that he was one of the 5 (five) employees that assisted plaintiff in retrieving the Ford from the side of the N6.

5.2 On their arrival at the scene where the Ford left the road, plaintiff instructed him and the other employees to push the Ford up to the surface. The Nissan that was pulling the Ford was behind the yellow line, with its hazards on and the head lights apparently on dim. Plaintiff's father was in front of the red vehicle; he could not remember the model but it was plaintiff's vehicle. He further confirmed the prevailing weather conditions.

THE DEFENDANT'S VERSION:

[6] [6.1] Mr D.F. van der Merwe, (hereinafter referred to as the "insured driver"), testified for defendant. He and his former

wife, Ms P.C. van der Merwe, went to Aliwal North to fetch their daughter who was on her way back from Queenstown, where she took part in a hockey tournament.

6.2 It rained when they picked up their daughter and the insured driver decided that it would be better for his daughter to sit in front on his wife's lap in the passenger seat as it was too cold to sit in the back of the Corsa "bakkie". The rain stopped as they left Aliwal North. The road was still wet due to the rain that fell earlier.

6.3 As they travelled out of Aliwal North towards Rouxville, the insured driver drove in the left lane of the unlit double carriageway towards Rouxville.

6.4 He drove at a speed between 90 to 110 km/h as the Corsa did not have enough power to drive faster than 100 km/h up the incline of the road.

6.5 In cross-examination he conceded that he reduced his speed by 10km/h, taking his foot off the accelerator because of an approaching vehicle whose lights were on bright, but confirmed that everything happened so fast that there was no time to use his brakes. He also stated that he could not remember whether he had used his brakes or not. At the time he thought he did, but realised that if he had used his brakes he would not have been able to swerve the Corsa to the left and would have collided with the motor vehicle which was in front of him. He conceded that he drove at a speed of

90 to 95 km/h when he saw the approaching vehicle whose lights were on bright.

6.6 He had driven on the left lane throughout. The two lanes ultimately became a single lane. Close to the area where the collision occurred, he thought he saw the lights of a motor vehicle which seemed to be on the white line of the road,even though he did not know whether it stood still or was approaching him.Just before the entrance to Goedemoed he saw the lights of this vehicle which were on bright. In cross-examination he indicated that he saw these lights for the first time at a distance of +/- 600 to 800 meters, but could not remember if the approaching vehicle was moving or standing still, as the road made a bend and they were half blinded by the approaching lights.

6.7 The said vehicle's lights blinded him about +/-300 to 400 meters away even though he could not estimate the distance well.

6.8 As he approached the vehicle he dimmed his lights, but the vehicle in front of him did not dim its lights. The reason why he dimmed his lights was to see if the other vehicle would also dim its lights. Just as he passed the vehicle, he turned his lights onto bright and saw another vehicle standing right across the road in front of him, about 6 to 8 meters away.

6.9 There was nothing else on the road, only the two lights coming from the vehicle approaching. There were neither objects nor pedestrians on the left side of the road.

6.10 He immediately swerved to the left and collided with the Ford. The insured driver conceded that if the vehicles stood as indicated on exhibit “B”, he would have been able to pass safely on the right hand side. But the vehicle he passed was more to the middle of the carriageway.

6.11 He conceded that one did get pedestrians and cyclists on the shoulder of this road and that it was foreseeable that one could encounter a vehicle parked on the shoulder of the road from time to time. One should be on the look-out for such vehicles.

[7] 7.1 Ms P.C. van der Merwe testified for the defendant. She confirmed that she was a passenger with her daughter and there was nothing impairing her view. The radio was off and they did not really talk while the insured driver was driving.

7.2 She leaned a bit to her right so that she could have a clear view of the road in front of her.

7.3 The Corsa was in a very good condition; the windscreen was clean and had no cracks.

7.4 She confirmed that they drove at about 100 to a maximum of 110 km/h and it didn’t feel as if they were driving fast. The

insured driver reduced his speed by approximately 10 km/h because of the approaching vehicle whose lights were on bright, blinding them.

7.5 As they were driving along this road towards Rouxville, she saw bright lights and it looked as if these lights were approaching them from the opposite direction. The insured driver dimmed his lights but the other approaching vehicle did not dim its lights.

7.6 She testified that she saw this vehicle's lights at a distance of about 250 meters from the scene of the accident and it was difficult to determine the distance because it was dark. There were no other lights on the road nor anything obstructing the beam of light coming from the vehicle approaching them.

7.7 In cross-examination she re-affirmed that she saw the lights at +/-250 meters. She further confirmed that when they passed this vehicle that looked like approaching traffic, the insured driver switched the Corsa's lights to bright. Throughout her testimony, she stated that it was difficult to determine whether this vehicle, which had its lights on bright, moved or stood still.

7.8 As the insured driver switched his lights to bright, having passed the vehicle whose lights blinded them, she saw a vehicle standing right across the road in front of them in their carriageway. This vehicle was about 8 to 10 meters in front of them as its lights were off.

7.9 One would have seen the Ford standing across the road surface if it were not for the lights coming from the opposite direction. There were no other warning lights as one approached the area where the collision occurred.

7.10 She confirmed that everything happened in a matter of seconds and the insured driver acted on instinct as he executed the manoeuvre to the left.

7.11 After the collision, she ran after her daughter and saw a black man running around with a torch enquiring about their safety. In her opinion, the plaintiff should be held responsible for the collision because there were no warning signs.

ABSOLUTION FROM THE INSTANCE

[8] The defendant applied for absolution from the instance. In dismissing the application the Court *a quo* stated the following:

> "In this instance the Plaintiff has the onus to prove negligence on a balance of probabilities. The test for proving negligence is set out in the case of **Kruger v Coetzee**1966 (2) SA 428 (A)at page 430 E-H …..The plaintiff acknowledged in his evidence that he foresaw that his conduct as explained in paragraph 5 above, would put other road users in danger and according to him he took the necessary steps to guard against such danger. The plaintiff's evidence is that his red bakkie had its hazards and dim lights on. His father was standing in front of the red bakkie with a torch which he was flickering to make other road users aware of the danger and that one of his employees was directing traffic

to pass on the right side of the bakkie. He was satisfied that he had taken reasonable steps to warn the oncoming traffic of the danger.

The evidence also indicates that before the collision there had been other motor vehicles that had passed the scene and had been able to avoid a collision. According to him this collision was caused by the negligence of the insured driver in that he drove at a very high speed and was thus unable to avoid colliding with the plaintiff.

This is the evidence before me and I have to decide whether with this evidence the plaintiff has succeeded to establish negligence on the part of the insured driver or not. It must be remembered though that the test applicable at this stage is not whether the evidence established what would finally be required to be established, but whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might, not should or ought to, find for the plaintiff. I refer in this regard to Erasmus, *Superior Court Practise*, page B1/292 – B1/292A and the case is quoted there.

When applying this test, I am satisfied that the facts established by the plaintiff are at this stage enough and that a court applying its mind reasonably thereto might find for him. In my view a *prima facie* has been made and in respect of the defendants second ground the rule has always been that absolution should not be granted at the end of the plaintiff's evidence, except in very clear cases and questions of credibility should not normally be investigated at this stage. It had been held that a court must assume, in the absence of very special consideration such as the inherent unacceptability of the evidence adduced, that the evidence is true. I am inclined in this instance to also accept the plaintiff's evidence as true. There is nothing in the evidence of the plaintiff that makes this evidence to be unacceptable…".

[9] The court went further and said:

> "I do not agree with the defendant's counsel that under cross-examination the plaintiff broke down and could not explain how his sister's bakkie ended in the position in which it was. The plaintiff was in my view able to explain how he hauled the bakkie from the bushes to the surface of the road and as to how it ended in the position it was facing at the time of the collision. Whether this is probable or not is not for this court to consider at this stage. I can also not at this stage consider whether the second witness evidence is reliable or not".

I agree with the court *a quo's* approach in dismissing the application for absolution.

NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE:

[10] The *locus classicus* for the determination of negligence is **Kruger v Coetzee** 1966(2) SA 428 (A).

[11] On page 430 E – F, Holmes J A said the following:

> "For the purposes of liability *culpa* arises if –
>
> - a *diligens paterfamilias* in the position of the defendant –
>
> - would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and

- would take reasonable steps to guard against such occurrence; and

- the defendant failed to take such steps".

On the insured driver's own version, he was blinded by the lights of the other motor vehicle for a considerable distance before the collision occurred; yet he failed to apply his brakes or to stop in order to avoid a possible collision.Defendant's counsel conceded negligence on the part of the insured driver in that he drove a motor vehicle at a speed that he did while blinded by the lights of a motor vehicle from the opposite direction. I agree with him and find that the insured driver was negligent. Negligence having been established, the next step to investigate is whether there was contributory negligence.

[12] As defendant was blinded for a considerable distance, plaintiff's evidence cannot be gainsaid by the defendant in that he had parked the red bakkie as alleged, and that his father had used the torch to warn and guide oncoming traffic. So also Mkhenku's evidence that other vehicles, including a taxi that offered assistance, had passed the scene of the collision safely, smoothly and uneventfully.

[13] The presence of a lit torch on the scene is confirmed by Ms van der Merwe; indicating to me that the plaintiff's version is more acceptable and probable than the defendant's. Taking into account the weather conditions, the speed at which the insured driver drove, his failure to apply brakes, the bend, the condition of the

road, the failure to stop when blinded, the realisation of the Ford vehicle only six to eight metres after putting his lights on bright and before the collision occurred, makes the insured driver to be the major contributor to the causation of the collision.

[14] He conceded that he had no time to think but to swerve his vehicle to the left to avoid the collision. On hindsight and on visiting the scene sometime after the collision occurred, he suggested that it was correct for him to swerve to the left as there were barrier lines on the road where the collision took place. It would therefore not be proper for him to turn right into possibly imminent danger of traffic from the opposite side. This confirms that he was not alert at all times.

[15] The plaintiff conceded that the measures he took to tow the Ford vehicle were not really adequate; but practical, which indicates that he could have done more to ensure safety on the road and exercised the manoeuvres in such a manner as to guard against danger and to ensure his and other road users' safety. The failure by the plaintiff to either enlist the police to be present on the scene to*, inter alia*, control the traffic or to properly illuminate the vehicles and area where the towing took place and/or use effective lights which would have warned other road users of the situation, is to my mind negligent. I am therefore of the view that the plaintiff was 20% and the insured driver 80% negligent as to the cause of the collision.

COSTS:

[16] In the result, costs should follow the event.

ORDER:

[17] 1. The appeal succeeds with costs.

2. The order by the Court *a quo* dismissing plaintiff's claim with costs, is set aside and replaced by the following order:

(a) The insured driver Mr. van der Merwe's negligence contributed 80% and the plaintiff's negligence 20% towards the causation of the collision and the plaintiff is therefore entitled to recover 80% of his damages,if any, from the defendant.

(b) Defendant is ordered to pay the costs of the trial on the merits.

_____

J.J. MHLAMBI, AJ

I concur.

_____

C.J. MUSI, J

I concur.

_____

C. VAN ZYL, J

On behalf of appellant:	Adv. M. D. J. Steenkamp Instructed by: Symington & De Kok BLOEMFONTEIN
On behalf of respondent:	Adv. J. A. Kitching Instructed by: Webbers Attorneys BLOEMFONTEIN