

**IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)**

NOT REPORTABLE

CASE NO: 20538/05

DATE: 30/1/2008

In the matter between:

NICOLAAS DANNHAUSER VAN HEERDEN

Plaintiff

and

MINISTER OF SAFETY AND SECURITY

Defendant

JUDGMENT

MURPHY J

1. The plaintiff has instituted action for damages in the amount of R139 294,24 arising out of a collision which occurred between the plaintiff's motor vehicle and a vehicle belonging to the South African Police Service on 1 May 2004 in the district of Van Zylsrust, Northern Cape.
2. The factual background to this matter is largely undisputed. Thus it is common cause that at approximately 09h00 on the morning in question, 1

May 2004, the plaintiff was driving his Toyoto Hilux bakkie returning to Gauteng from the Kalahari Gemsbok National Park. He was travelling on a gravel road between Van Zylsrust and Hotazel, from west to east. The road was approximately 9 metres in breadth. It was a clear morning with good visibility and there were no significant obstructions on the road. The sun was already fairly high and did not require him to use a visor.

3. The plaintiff was accompanied by his parents in law, Mr and Mrs van der Merwe, his wife and his young son.
4. The defendant's vehicle was driven by Inspector Moitsi, who was accompanied by Inspector Louw. Both police officers were in the employ of the defendant and at the time of the collision were acting in the course and scope of their employment.
5. The collision occurred at the crest of a blind rise which the plaintiff approached from a west to easterly direction and the defendant from an east to westerly direction. As will appear more fully presently, the points of contention between the parties relate to the exact positioning of the respective vehicles immediately prior to the collision and the opportunities available to the defendant for taking evasive action. However, it is common cause that when the vehicles came in sight of each other at the

crest of the rise the plaintiff veered to his left in a northerly direction and the defendant veered to his right but also in a northerly direction. This choice by both parties resulted in the defendant's vehicle colliding with the right hand front fender of the plaintiff's vehicle and both vehicles coming to a stand still on the northern shoulder of the road. Inspector Moitsi was flung from his vehicle and was unconscious in the immediate aftermath of the accident and only gained consciousness in hospital at a later stage.

6. Acquaintances of the plaintiff who were travelling in a separate vehicle came upon the accident five or ten minutes after it had happened. One of them took photographs of the scene and the vehicles and these were introduced into evidence as part of exhibit A. From these it is evident that the surrounding countryside was that typical of the Kalahari region consisting of Karoo-like vegetation and sand. The exact nature of the terrain acquired some relevance in relation to the evasive action that was available to the parties.
7. The plaintiff's case is that the collision was caused as a result of the sole negligence of the defendant by veering to his right in a northerly direction across the path of way of the plaintiff instead of veering to the left in a southerly direction, which action had it been executed would have avoided the collision despite involving the possible danger of leaving the gravel

road and traversing the rougher terrain on and beyond the shoulder of the road.

8. The defendant has pleaded that the collision was caused by the sole negligence of the plaintiff. He pleaded in the alternative that in the event of the court finding that the driver of the defendant's vehicle was negligent, and that such negligence contributed towards the collision, that the plaintiff was also negligent, is accordingly a joint wrongdoer, and that any damages which the plaintiff may have suffered should be apportioned between the parties in accordance with the provisions of the Apportionment of Damages Act 34 of 1956. The defendant also filed a counterclaim alleging that the sole cause of the collision was the negligence of the plaintiff and seeking damages arising out of the damage to the defendant's vehicle in the amount of R154 146,43. The essence of the defendant's case is that the plaintiff was driving on the incorrect side of the road, that is on the plaintiff's right hand side on the southern side of the road, as he approached the crest of the blind rise. The driver was thus confronted with a vehicle travelling at approximately 100 kilometres an hour on the wrong side of the road and he took appropriate evasive action.
9. It is common cause that the plaintiff was driving at between 90 and a 100 kilometres per hour and Inspector Moitsi at about 90 kilometres an hour

when the collision occurred.

10. The plaintiff called two witnesses, namely, the plaintiff Mr ND van Heerden and an expert witness, Prof. Lemmer.
11. The defendant called five witnesses: Mr van der Merwe, the father in law of the plaintiff who was travelling in the vehicle with the plaintiff and who the plaintiff elected not to call but made available to the defence; Inspector Moitsi, the driver of the defendant's vehicle; Inspector Louw, the passenger in the defendant's vehicle; Inspector Kotze, a police officer from Van Zylsrust involved in the investigation of the accident and Mr Strydom, an expert in collisions.
12. As I have already intimated, there are two factual disputes requiring determination. The first relates to the respective positions of the two vehicles immediately prior to the collision. The plaintiff, Mr van Heerden, testified that as he approached the crest of the blind rise his vehicle was on the correct side, the northern side of the road, his left, with the right hand side of his vehicle towards the middle of the road. As he approached the rise he observed the defendant's vehicle in the middle of the road. According to him, had he not veered towards the north, or his left, then his right hand headlight would have struck the right hand

headlight of the defendant's vehicle. His testimony further was that had the defendant remained in his trajectory and not swerved to the north, the collision would have been avoided as a result of the plaintiff's vehicle veering towards the left. Accordingly, he stated that the accident was a direct consequence of Inspector Moitsi veering also to the north across his path.

13. The photographic evidence, as confirmed by the experts, indicates the point of collision between the two vehicles to have been the right hand front of both vehicles.
14. Mr van Heerden further testified that the defendant's vehicle was not entirely on the southern side of the road, but was more in the middle. His evasive action and Inspector Moitsi's veering to the north resulted in the defendant's vehicle striking the plaintiff's vehicle at the point just before the right hand front wheel.
15. Mr van Heerden was adamant that as a careful driver approaching a blind rise he kept to the left hand side of the road as much as possible. His testimony was confirmed by Mr van der Merwe, his father in law, who testified that they were travelling towards the middle of the road on the left hand side with the right side of the vehicle towards the middle of the road.

He further confirmed that the plaintiff veered to the left in a northerly direction and that Inspector Moitsi veered to the right also in a northerly direction. Under cross-examination he stated that had neither vehicles swerved it was most probable that they would have collided at the point of their right headlights. He placed the defendant's vehicle towards the middle of the road with his right hand side towards the middle.

16. Prof. Lemmer, a reconstruction expert with impressive qualifications and experience in the reconstruction of motor vehicle accidents, was of the opinion that it was unlikely that the plaintiff was driving on the southern side of the road, that is the incorrect side. Had that been the case, in his opinion, there would have been a component of momentum from both vehicles towards the northern side which would have resulted in the vehicles ending up further off the road on the northern shoulder. He conceded that it was difficult to quantify exactly the ultimate positioning. Nevertheless, had there been a swerve on the part of both vehicles from the southern side of the road towards the north the collision would have been of such a nature, taking account of the direction and momentum, that the vehicles would have ended up further into the bush on the northern shoulder. His opinion is consistent with the probability that in approaching a blind rise it is unlikely that a driver would move completely to the incorrect side of the road unless there was a compelling reason to do so

and hence in his opinion it was more probable that the vehicles were in their correct lanes with their right hand sides perhaps more to the middle of the road.

17. In his evidence in chief, Inspector Moitsi testified that when he first saw the plaintiff's vehicle, as he approached the crest of the rise, it was in the middle of the road. In cross-examination he was confronted with a statement he made shortly after the accident in which he stated inconsistently:

“While driving up the ridge a motor vehicle suddenly appeared before me on my side of the road (my left hand side).”

18. Before being confronted with this contradiction Moitsi had confirmed that the plaintiff was indeed driving in the middle of the road. He was unable therefore to offer an explanation for why the investigating officer who had taken his statement had recorded that the plaintiff was on the incorrect side of the road.
19. Inspector Louw testified that the plaintiff's vehicle was on the incorrect side of the road. He could offer no explanation for why Inspector Moitsi testified under oath that the plaintiff's vehicle was in the middle of the

road.

20. The defendant's expert, Mr Strydom, testified that on Friday, 22 June 2007, a few days before the trial, he visited the collision scene accompanied by the defendant's legal representatives, Inspector Moitsi, Inspector Louw and Inspector Kotze. He made detailed observations about the state of the road and the surrounding terrain. The difficulty with his testimony in this regard is that the inspection took place three years after the accident. Roads of this kind, situated in the Kalahari, are susceptible to changing conditions from moving sand, vehicle use, grading of the road and so on. His testimony was to the effect that he observed an unusual patch or donga of deep sand on the northern side of the road approximately 45 metres west of the final resting positions of the vehicles. The patch of sand was in the travel lane of traffic travelling from west to east, that is the direction of travel of the plaintiff. This patch of sand measured approximately 30 metres in length, was approximately 3.7 metres wide and averaged 200 millimetres deep. In his opinion the patch of sand constitutes a danger for traffic travelling east. Considering the road surface condition, Mr Strydom concluded that it is probable that the plaintiff moved towards the middle of the road. In his written opinion he made the more general observation that considering the road surface on both sides of the road that it was probable that both drivers were travelling

in the middle of the roadway.

21. The difficulty with Mr Strydom's evidence, as I have already suggested, is that it is predicated on the assumption that the condition of the road surface on 22 June 2007 was the same on 1 May 2004. There is no evidence to support that assumption. Indeed, if one has regard to the photographs taken on the day of the accident a donga of a kind described by Mr Strydom is not immediately apparent. Perhaps the best photograph of the road west of the scene of the accident, thus being the approach to the crest taken by the plaintiff, is exhibit A29, photograph 11 of the police photographs. The road on that photograph appears to be well graded, with the exception of some loose sand on the northern shoulder. It is not immediately evident from the photograph or the evidence how far this patch of loose sand was from the crest of the hill. Moreover, and in any event, I am not persuaded that the only legitimate inference to be drawn from the presence of such sand is that the plaintiff would have been compelled to move to the middle of the road. The plaintiff was driving a 4x4 vehicle and loose sand would have posed no serious obstacle or danger.
22. Be that as it may, Mr Strydom in any event conceded during his testimony that the final resting place of the vehicles supported the version proffered

- by the plaintiff that he was driving on the correct side of the road. He in effect agreed with Professor Lemmer that had both vehicles been driving on the southern side of the road the probabilities were strongly that the vehicles would have ended up further to the north than they actually did.
23. In the result, therefore, the evidence of Van Heerden, Van der Merwe, Moitsi, Lemmer and Strydom supports the finding that the plaintiff was driving on the correct side of the road, the northern side, with the right hand side of his vehicle towards the middle of the road. The only witness to testify that the plaintiff was driving on the wrong side of the road, the southern side, was Inspector Louw. Accordingly, I find on a balance of probabilities that the plaintiff was driving on the left hand side of the road with the right side of his vehicle towards the middle of the road and similarly that the defendant's vehicle was driven on the southern side of the road with its right side towards the middle.
24. The other factual question for determination is whether the collision could have been avoided had Inspector Moitsi simply continued travelling in the path of way in which he was as he approached the crest of the rise or had simply veered to his left in a southerly direction.
25. Inspector Moitsi testified that on reaching the crest of the ridge he noticed

a car and swerved to his right hand side. He explained that his reason for swerving to the right was that the left side of the road was highly dangerous because of rocks and sand, but that he could see on the right side there was less danger. He claimed to have looked beyond the oncoming vehicle to see whether any other vehicles were coming from behind and proceeded once he considered it was safe to do so. He contended that had the plaintiff not veered to the left he would have avoided the accident. He stated also that he thought twice to three times before swerving out to the right.

26. The plaintiff, Mr van der Merwe and Inspector Louw all confirmed that Inspector Moitsi had veered to the right towards the northern side of the road.
27. Under cross-examination Inspector Moitsi conceded that had he moved half a metre to his left he would have avoided colliding with the plaintiff's vehicle. In this regard it is important to note that it is common cause that the road was 9 metres wide, as measured by Mr Strydom. The width of the defendant's vehicle was estimated to be about 1,8 metres. Meaning that Moitsi would have had about 2.7 metres or more to his left side had he been towards the middle of the road, as I have found. It is thus correct that had he moved half a metre towards the left he would have avoided

the collision and not even have moved out on to the shoulder of the road. His justification for swerving to the right, namely that the terrain adjacent to the gravel road was so rough as to constitute a greater danger than swerving to the right, is of questionable validity.

28. Professor Lemmer testified that in his opinion, from observing the photographs, there is probably very little difference between the road and the verge in this region. Swerving to the right or to the northern side of the road on the other hand was basically asking for a head-on collision.
29. The photographic evidence of the scene, consisting of the photographs taken on the day of the accident, particularly exhibit A37 and exhibit A29 give a reasonably clear picture of the conditions on the southern side of the road. The level of the surface of the shoulder is in line with the surface of the road. There does not appear to be any significant embankment requiring a vehicle leaving the road to either descend or ascend. The ground itself looks reasonably compacted, is covered in grass and is less graded than the road surface itself. Nevertheless, I agree with Professor Lemmer that the shoulder and the terrain immediately adjacent to the shoulder could have been traversed by a 4x4 bakkie such as the defendant's vehicle with relative ease without posing any significant hazard to the occupants of the vehicle.

30. Mr Strydom, however, who visited the scene more than three years after the accident, testified that the southern shoulder, unlike the northern shoulder, was very uneven. However, under cross-examination he conceded that the less hazardous option for a reasonable driver would have been to go off the left side of the road and to risk “a few stones there or maybe little heaps of hardened sand”. He further conceded, on the assumption that Inspector Moitsi was travelling in the middle of the road, that had Moitsi veered to the left he would have avoided the collision and not necessarily have left the road or moved on to the shoulder. In other words, there was enough room on the road for Moitsi to veer to the left, avoid the collision and remain on the road. Having made that concession, Mr Strydom was then compelled to conclude that Inspector Moitsi took the wrong option by swerving to his right.
31. According to Professor Lemmer the vehicles were travelling towards each other at a speed in the region of 90-100 kilometres per hour, which is 25 metres a second. The gap was closing between them therefore at a rate of 50 metres a second and thus on the evidence it was likely that the drivers had no more than two seconds to react on encountering each other. Inspector Moitsi testified that he was able to think two or three times before exercising the choice that he did. Although the reaction time

was extremely short, it was not such as to preclude all opportunity to assess the danger.

32. As a general principle a driver of a motor vehicle who is faced with an oncoming vehicle which has encroached upon the middle of the road or even entered its incorrect lane of travel must, as a general rule, avoid swerving to its incorrect lane as its primary course of action. The appropriate evasive conduct is to swerve away to the left. *Kleinhans v African Guarantee and Indemnity Co Ltd* 1959 (2) SA 619 (E) at 624F; *President Insurance Co Ltd v Tshabalala and Another* 1981 (1) SA 1016 (A) at 1018F-H and 1020C; *Burger v Santam Versekerings Maatskappy Bpk* 1981 (2) SA 703 (A) at 708A; and *Road Accident Fund v Grobler* 2007 (6) SA 230 (SCA) at 233D.

33. Counsel for the defendant has argued that Inspector Moitsi was confronted with a sudden emergency and that this offered a sufficient defence to the incorrect choice that he made. A defence of sudden emergency must in the first instance be pleaded. The defendant raised the plea for the first time in argument. However, even if it had been pleaded, a defence of sudden emergency before it can absolve the wrongdoer from negligence must be predicated upon an emergency that is unexpected and sudden and be one that could not have been avoided

through reasonable care and skill in the circumstances. On the assumption that the plaintiff's vehicle was towards the middle of the road, which would be normal on a road of this kind, it can not be said that such constituted a sudden emergency. In any event, it is common cause that had Inspector Moitsi not veered towards the north, the accident would not have occurred. A reasonable driver in the position of Inspector Moitsi, who after all is a police officer, would have exercised skill and care in approaching the crest of the rise by maintaining his position on the left. Moreover, his veering to the right was an error of judgment which a reasonable driver would not make in the circumstances in which he found himself. Moving further to the left, perhaps even onto the shoulder of the road, posed much less of a danger than veering to the right. His conduct was not that of a reasonable driver. Accordingly, I am of the opinion that the accident was caused by the negligence of Inspector Moitsi.

34. The question remaining is whether the conduct of the plaintiff constituted contributory to negligence. The plaintiff was travelling at a speed of between 90 to 100 kilometres an hour. This one may assume fell within the speed limit on the road in question. The testimony of all the witnesses except Inspector Louw, was that the plaintiff was on the correct side of the road with his right hand side towards the middle of the road. As I have found, there is no conclusive evidence that the plaintiff had entered upon

the incorrect lane. When the plaintiff encountered the defendant's vehicle coming over the rise he took appropriate evasive action by veering to the northern side of the road and would have avoided the accident but for Inspector Moitsi turning into him. I am accordingly of the view that the defendant has not proved contributory negligence on the part of the plaintiff. In the absence of any negligence on the part of the plaintiff, the counterclaim cannot succeed.

35. During argument counsel for the defendant contended that the counterclaim had not been proceeded with and hence costs should not be awarded in respect of it. At the commencement of the trial the parties agreed that both the question of negligence and the quantum of damages remained in issue in relation to the counterclaim. Accordingly, the counterclaim stands to be dismissed with costs.

36. In the result, the following orders are issued:

- a). The defendant is ordered to pay the plaintiff an amount of R139 294,24 as damages together with interest at a rate of 15.5% from the date of demand to the date of final payment;
- b). The defendant's counterclaim is dismissed

- c). The defendant is ordered to pay the costs of both the action and the counterclaim.

JR MURPHY
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
TRANSVAAL PROVINCIAL DIVISION

Date Heard: 25 June 2007

For the Applicant: Adv E Ferreira, Pretoria

Instructed By: Gildenhuis, Lessing Malatji Inc., Pretoria

For the Respondent: Mr K.M. Mokotedi, Pretoria

Instructed By: The State Attorney, Pretoria