

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

CASE NO : 18834/05
DATE: 25/7/2008

In the matter between:

MARIA CORNELIA ABETTI

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

MOLOPA J

In this action the Plaintiff has instituted an action against the Defendant for damages arising out of a motor vehicle collision which occurred on 6 November 2003 along the Delmas-Eloff road, in the vicinity of Sundra, between a motor vehicle with registration letters and number CNJ 139MP, (hereinafter referred to as the “insured vehicle”), there and then being driven by one J.J. Kgomo (hereinafter referred to as the “insured driver”), and a motor vehicle with registration letters and

number K LW 360GP, driven by the Plaintiff.

When the trial commenced, the parties by agreement made the application for separation of liability and damages, i.e. separation of merits and quantum in terms of Rule 33(4) of the Uniform Rules of the Superior Court, which order was granted. The matter thus proceeded on the merits only and quantum was postponed *sine die*.

It is common cause that a collision occurred on 6 November 2003 along the Delmas-Eloff road in the vicinity of Sundra between the insured vehicle driven by the insured driver and the vehicle driven by the Plaintiff. It is further common cause that the Plaintiff was traveling on the left side of the road from the Delmas to the Sundra direction (West to East). That the insured driver was overtaking the Plaintiff's vehicle on the right side at the time of the collision. Damage to the Plaintiff's vehicle was at the right front corner, and the damage to the insured vehicle was on the left side doors, that the collision occurred on the right lane of travel and that both vehicles landed on the Eastern (top) corner of the main road and the adjoining side road after the collision.

The issue to be determined is whether the collision occurred due to the negligence on the part of the insured driver, and whether there was any contributory negligence on the part of the Plaintiff.

The first witness to testify for the Plaintiff was John Benjamin Olivier (“Olivier”). Olivier testified that he is employed as a Chief Traffic Officer at Delmas and that he has been in the service of the traffic department since 1993 (i.e. 14 years). He testified that he knows the area around Delmas-Eloff road where the collision in question occurred; that the road goes East to West. He stated that the photographs on exhibit A pages 30 to 36 depicted the road described as Delmas-Eloff road.

He further testified that the T-junction on the left side on the photo on page 31 depicts St. Patricks road. That the photograph on page 32 depicts broken lines for overtaking and around the bend on the road depicted on page 32 there is a barrier line which goes beyond Eloff , and that the speed limit around that area is 60Km per hour.

Olivier further testified that the distance between St. Patricks and the bend is approximately 200m, and that the road sign is 100m from St. Patricks intersection. He stated that the photo on page 33 depicts St.

Patricks road where it connects with the Delmas-Eloff road. That the photo on page 34 depicts the direction of Eloff on top, and St. Patricks on the right side. He testified that the barrier line stops at St. Patricks. That the photo on page 35 depicts a broadening of the road on the St. Patricks' intersection. That the new tar on the road was constructed in 2005.

Olivier further testified that the barrier line referred to above was on that road already in 1993 when he joined the traffic Department, that his department controls the area in question. He stated that the breadth of the tar road is 7m, and that the barrier line is in the middle thus each lane is 3.5m. He stated that the breadth beyond the tar depicted on the photo on page 35 is 2m, and that that is enough to accommodate any vehicle. He testified that in his experience as a traffic officer the reason for a barrier line is to prevent motorists from overtaking in the area of the barrier line thus making it safe for motorists who would turn to the right.

Under cross examination he stated that he has been a Chief traffic officer for seven years, and that that he is aware that in the municipality of Delmas there is a schedule of refurbishment/repairs. He stated that the road in question was not re-tarred prior to the collision, and that the road

is relined every two years.

He testified that in November 2003 the road surface was not the same as depicted in the photos shown on pages 30 to 36 of Exhibit A, but that the barrier lines have always been there. He reiterated that in 1993 when he joined his department the barrier line existed, on the road in question and that it is his job to repaint the lines.

He disputed that the solid/barrier line did not exist on the date of the collision, reiterating that it did exist and that although the road was not in good condition because of the rains he saw to it that the road markings were done.

The next witness was the Plaintiff herself, Maria Cornelia Abetti. She testified that she stays at Eloff, and that on 6 November 2003 she was involved in a collision at Delmas-Eloff road. That she was driving a red BMW 530i and the insured vehicle was a BMW 520. That she was injured as a result of the collision in question as set out in paragraph 6 of the particulars of claim.

She testified that the collision occurred at approximately 7.30am

and that it was a beautiful summer, sunny clear day without rain and that she could see properly. That before the accident she was on her way from dropping her children at Delmas and was coming back to Eloff. That from Delmas to Eloff she uses the Railway avenue which eventually turns into St. Patricks. That prior to the accident she was driving from Delmas towards Eloff. That she turned right into St. Patricks. She said that at the bend coming towards the junction there was no oncoming vehicle from the opposite direction nor any vehicles behind her. That from the bend to the junction she reduced her speed from 60km per hour to 20km per hour and that she reduced the speed from the road sign showing 60km per hour depicted on the photos on pages 31 and 32 of Exhibit A. She reiterated that she checked all her mirrors and she did not see any cars following her. She then turned right. That prior to turning right, she gave an indication that she was going to turn by using her right indicator for about 100m from the middle of the road from the 60km board referred to above, to the junction/intersection.

She said that she almost came to a standstill (as she reduced her speed) because the road in question is full of potholes and that vehicles usually come out with speed from Eloff. She stated that she did not proceed to turn before she had had a proper lookout. That she checked her

side mirrors and the middle mirror, she did not see any cars then she proceeded to turn to her right. She testified that the part of her vehicle which was damaged in the collision was the nose/right front part of her vehicle and the insured driver's vehicle was damaged on the left side passenger door.

She said that she did not see the insured driver/insured vehicle, not even on the blind spot. She only noticed him on impact. She testified that the insured driver came from Delmas to Eloff, from the same direction as her. That after the collision her car ended up approximately two vehicles' length next to the grass where marked with an X on the photo on page 35. She testified that before turning, she heard no hooter nor any braking noise. That looking at her mirrors there was no indication that another vehicle wanted to overtake. That there was no chance that she could have avoided the accident, that the accident occurred unexpectedly.

She testified that she knew the road very well; she drove through that road for approximately three years in the mornings and afternoons when taking her children to and from school and when she was going to and from work. She stated that the barrier line was definitely there on the road and that it was clear/visible.

Under cross examination she confirmed that it was a normal summer day, she could see for approximately 200m, that had there been any cars following her she would have seen such cars. She stated that she switched her indicators approximately 100m from the stop street and that she was driving approximately 30km to 40km per hour. She said that she checked her mirrors and she could not see the insured driver. That her indicator was on before she turned and there was no vehicle behind her. She disputed the insured driver's version that he was driving behind her, that when he noticed her reducing speed he decided to overtake her because she was not indicating that she was going to turn. She reiterated that there were no vehicles behind her. She stated that she did not see the insured driver, not even on her blind spot.

She disputed that after the collision she pleaded with the insured driver not to report the accident to the police, nor that she apologized to the insured driver for having caused the accident. She testified that after the collision they all went to Sundra to report the accident where the accident report form was compiled.

That concluded the evidence for the Plaintiff.

The first witness for the Defendant was Jan Johannes Kgomo (the insured driver). He testified that he has been staying in Delmas since birth. That an accident occurred at Eloff when the vehicle which he was driving behind collided with him. He said that he was driving behind a red BMW 530 and he was driving a black/charcoal BMW 525.

He testified that he started following the red BMW for the first time next to the vegetable stall about 180m from St. Patricks. That he was driving below 60km per hour. That the red BMW he was following was about a car length from him, he was literally following the red BMW.

He testified that the surface of the road was bad, it had potholes and he could not travel at high speed. That there were no road markings on the road surface. He stated that he followed the red BMW until he overtook it. That he started overtaking it behind a vehicle appearing on the photo on page 31 of Exhibit A (next to the road sign showing 60 km per hour). He decided to overtake since it had been a while that he had been driving behind the red BMW. He said that there was no oncoming traffic before he overtook, that there were no cars behind him and that it

was safe for him to overtake.

He testified that when he overtook the red BMW it was moving forward, there was no indication that it was executing a turn, that there was no indicator flickering nor any brake lights.

He testified that he maneuvered to overtake, the two cars collided and his vehicle was hit on the two left side doors. He testified that when the collision occurred his vehicle was parallel to the red BMW, when the Plaintiff turned and hit him. He testified that he saw when the red BMW came towards him; he saw it and drove off to ward off the collision. He maneuvered his vehicle to the right hand side, to the edge of the road. That he did not swerve completely out otherwise he would have fallen into a ditch. That when the Plaintiff collided with him they had passed St. Patricks (intersection). That the point of impact was as depicted with an X on photos on page 34/35, and the vehicles stopped at the same place marked by the Plaintiff on page 35.

He testified that at the time of the collision there was no barrier line as depicted on the photo on page 35, that there were no road markings preventing him from overtaking, stating that overtaking was permitted

and that prior to overtaking he warned the front driver i.e. Plaintiff, by indicating that he was going to overtake. That when he maneuvered to overtake the distance between him and the red BMW allowed him to overtake. He said that he did nothing wrong when he overtook, that he did not contribute to the collision.

Under cross examination the insured driver stated that the collision occurred when he was overtaking the Plaintiff's vehicle, he was on the right side of the road, going on the same direction, the Plaintiff executed a right turn, he (the insured driver) attempted to move to the far right to avoid the collision but could not and in the course of turning right part of her (Plaintiff's) vehicle collided with his left side doors. That when the collision occurred his vehicle was initially in the middle of the opposite lane, but he swerved out.

He reiterated that the point of impact was as depicted with an X on the photo on page 35 of Exhibit A, (after having passed the St. Patricks intersection). That the point of impact, i.e. where he made an X, is approximately 20m from the intersection. When put to him that it was improbable that the impact was where he made the cross, he stated that it

was so because the Plaintiff had forgotten to turn. That she (Plaintiff) had told him that she was sorry she had not seen him because she had forgotten that she was supposed to turn. He said that he does not know why the Plaintiff wanted to turn into the veld.

He disputed that the collision occurred at close proximity to the intersection as depicted on the photo on page 31, reiterating that the collision occurred where he marked with an X on the photo at page 35 (after the intersection).

He stated that he first saw the Plaintiff's car when he was opposite the tomato stall, approximately 180m from the intersection. That he followed the Plaintiff's car at a distance of approximately one car length, on a two way road.

He stated that the Plaintiff's vehicle was driving slow; it did not reduce speed (it was simply driving slow). That it (Plaintiff's vehicle) was driving approximately 30km per hour and to overtake it he had to drive faster. That when he moved to the right hand lane to overtake he was far from the turn off. He stated that he was aware that there was a turn off, he knew it very well. That the distance from the turn off, when

he started overtaking, was somewhere near the vicinity of the speed limit sign (depicted on photos on page 31 and 32 of Exhibit A: approximately 100m from the intersection).

He stated that he kept his vehicle on the right hand lane while overtaking from the speed limit sign to the intersection, i.e. approximately for 100m. That after the intersection he was parallel to the Plaintiff's vehicle when she suddenly turned to the right. That when overtaking he was driving at a speed of approximately 65km per hour, and that Plaintiff must have been driving below 60km per hour, her vehicle speed was low, she maintained her low speed until she turned. He said that he cannot remember if she at any stage reduced her speed, he did not see that, that is why she just turned and hit him.

He stated that although the road was bad that one cannot drive above 60km per hour, while overtaking he had to drive with more speed. He further stated that throughout overtaking he had taken cognisance of the Plaintiff's vehicle and that had she indicated her intentions to turn he would have been aware. That he was conscious of both the Plaintiff and oncoming vehicles, that the Plaintiff never at any stage put her indicator on.

He stated that it could have been possible/easier to accelerate quickly to overtake the Plaintiff and return to his left lane of travel before the intersection but that because there was nothing approaching from the opposite direction in front of him he took his time. That had the Plaintiff indicated her intention to turn he would have either slowed down or accelerated to pass her quickly and safely return to the left lane before the intersection.

The insured driver reiterated that there was no barrier line towards the intersection. That the tar was new on the road and only after the new tar road were there road markings, before then there were no lines on the road, there were potholes.

He stated that for years before the collision in question he frequented the road in question, he however cannot say what markings were on the road. He stated that he cannot dispute Olivier who stated that the barrier lines have been in existence for at least 14years since when he joined the traffic department, but that on the day of the collision there was no barrier line otherwise he would not have overtaken on a barrier line, and that even if there had initially been a barrier line, because of wear and

tear it was no longer there.

The next witness for the Defendant was Betty Josephine Kgomo, the wife to the insured driver.

She testified that the collision in question occurred at Eloff. She was a passenger in the insured vehicle sitting on the left front passenger seat. That where she was sitting she had a view of the road in front of her.

She testified that she first saw the red BMW with which they collided near the right hand vegetable stall, that there was no other car between them; she could not see the occupant of the red BMW. That they drove behind the red BMW for a long distance before the collision.

She testified that they followed the red BMW until when the insured driver started overtaking it. That when the insured driver was in the process of overtaking she saw the red BMW turn towards them to the right side, the insured driver tried to avoid it but their car was hit by the Plaintiff on the two doors on the left side with her right front bumper. That the two vehicles ended up outside the road surface (just past the intersection) where marked with an X on the photo on page 30.

She testified that she cannot remember where the impact occurred but that they had already passed the intersection. That the surface of the road was damaged, had potholes on both lanes.

She testified that she did not see the indicators of the red BMW before they overtook it. That her (Plaintiff's) speed was slow, she never saw the red lights of the red BMW before overtaking and if they had been on she would have seen them. She reiterated that prior to the collision/overtaking they had been driving behind the Plaintiff, otherwise where would they have come from.

Under cross examination she stated that she often traveled with the insured driver (her husband), and that they frequently traveled the road where the collision occurred. She knew the road and knew the T-junction along that road. She stated that she would not have known why the vehicle in front would slow down, that maybe because of the bad conditions of the road vehicles traveled slow, not at a high speed.

She disputed that she sat through and heard her husband's version when they consulted with the Defendant counsel. That she did not hear

what her husband told counsel, she was not listening, she independently told counsel her version.

She stated that while the insured driver was overtaking the red BMW she did not speak to him because she did not want to disturb him. She maintained her look on the red BMW in front of them since they were following it. That from the time they followed it, it maintained slow speed until they collided with it. It had passed the T-junction when it suddenly, unexpectedly, without indicating turned towards them. She was surprised by this.

She stated that she does not know if there was a barrier line, she did not notice it. That if there was a barrier line, she would have noticed/seen it.

That concluded the evidence for the Defendant.

On a proper analysis of the evidence before court it is clear that both the Plaintiff and the insured driver were not honest to the court. The Plaintiff clearly did not keep a proper look out, even her counsel conceded this in argument, otherwise she would have seen the insured

driver and would thus not have executed a turn to her right side and probably there would not have been a collision. In her evidence she was adamant that when she turned there was no car following her yet it has been shown that the insured driver was following her. I find in this regard that the Plaintiff did not keep a proper look out, otherwise she would have seen the insured driver behind her and besides her prior to executing her right turn. Her conduct in this regard was in my view negligent.

She states in her evidence that she started indicating her intention to turn to her right approximately 100 metres from where she would be turning. In my view, if one looks at the totality of the evidence, in all probabilities she did not even indicate/switch her indicator on for the length she maintains she did, (i.e. approximately 100m). I find that she did not give any and/or timeous signal of her intention to turn right by means of her indicator lights.

On the insured driver's evidence he would have driven behind the Plaintiff for approximately 80 metres before he overtook and at no stage according to him did she indicate/switch on her indicator to show that she would be turning right and that that is the reason why he apparently overtook her when he did, approximately 100 metres prior to the collision. Nor did the insured driver, according to evidence, at any stage

see that the indicator was on while overtaking the Plaintiff. The Plaintiff does not seem to be telling the truth in this regard.

However, even if she did not indicate her intention to turn the insured driver had no right to just ignore the solid line and just proceed to overtake her as he did. He wants the court to believe that he did not know and/or was not aware that where he overtook there was a solid line (barrier line), obviously prohibiting any driver from overtaking. In my view he does not seem to be telling the truth in this regard.

On his own version he travelled that road almost everyday for the past years. He cannot pretend not to know that there was a solid line there, despite the fact that there may have been road works in the area and/or potholes in the area. He actually could not dispute the evidence of Olivier who testified that there has been a solid line on that area of the road for at least the past fourteen (14) years.

The insured driver definitely acted negligently as well by overtaking in an area where he was lawfully not allowed to overtake at, and in that way putting the lives of other motorists, as the Plaintiff, in danger, and had he not overtaken as he did probably there would not have been a collision. His negligence in this regard undoubtedly contributed to the collision.

On his own version he overtook for a distance of approximately 100m (from the road sign to the intersection/junction, and he stated that he took his time since there were no other vehicles approaching from the

opposite direction. He states that he could have accelerated quickly and passed the Plaintiff and there would not have been an accident. In my view it is prudent and safe for any reasonable driver to overtake as quick as possible when it is safe to do so, than just to take one's time because there are no other vehicles coming from the opposite direction, as alleged by him. What about the rights of the other motorists one is overtaking in these circumstances, especially approaching a junction/intersection. In my view the insured driver was also negligent in causing the collision in question, he took too much time overtaking while approaching an intersection for that matter, whereas on his own version he could have taken a shorter time to overtake, more so, he overtook along the solid/barrier line where he was lawfully barred from overtaking.

The evidence of Mrs Betty Kgomo in my view does not take this matter any further. On the evidence of the Plaintiff and the insured driver they were both negligent and contributed to the collision in question.

In my view and on all the facts before court both the Plaintiff and the insured driver are negligent. The question is to what degree is each other to blame.

Both counsel for the Plaintiff and Defendant respectively argued for a lesser degree of negligence on the part of their respective clients in the event of the court finding any negligence on the part of either party.

I am of a considered view that each of the Plaintiff and the insured driver are respectively fifty (50%) to blame for the collision.

In the result the insured driver is fifty (50%) percent to blame/negligent for the collision. The Defendant is thus 50% liable to the Plaintiff. The defendant is ordered to pay the costs of this action, which costs are to include the wasted costs of 07 March 2007 on a party and party scale.

Molopa J

JUDGE OF THE HIGH COURT