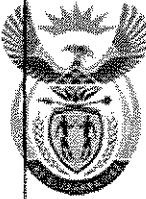


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(1) REPORTABLE: ~~YES~~/NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.

(3) REVISED.



2/12/2011

DATE

SOUTH AFRICAN HIGH COURT, JOHANNESBURG

CASE NO: 01058/2010

In the matter between:

JASON FREDDY BEZUIDENHOUT

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

JUDGMENT

MATHOPO J:

- [1] The Plaintiff sued the defendant for damages arising from a road accident which occurred on the 25th January 2009. At the time of the collision, the plaintiff was a pedestrian when the insured vehicle (minibus taxi) collided with another vehicle (Polo) that in turn collided with the plaintiff.
- [2] At the commencement of the trial and by agreement between the parties I was asked to determine the issue of liability first, the parties undertook to continue discussing possible settlement of the quantum. During the trial I was informed that the quantum has been agreed to in the sum of R2 100 000.00.

[3] The following facts are common cause and not in dispute between the parties

- 3.1 the collision occurred on 25 January 2009 at approximately 19H40;
- 3.2 the collision occurred on Klipspruit Valley Road in Orlando West, immediately after the traffic intersection with Armitage Road;
- 3.3 Klipspruit Valley Road consists of two lanes in either direction;
- 3.4 the following vehicles were involved in the collision: a minibus taxi ("the Taxi"), bearing registration number JRL 496 GO, a VW Polo Playa ("the Polo"), bearing registration number SBW 625 GP, and a VW Jetta ("the Jetta"), bearing registration number CRL 934 GP;
- 3.5 the following sequence of events occurred, the Jetta was towing the Polo, the tow rope broke at or near the intersection, both vehicles were stationary just after the traffic intersection and while the vehicles were stationary, the taxi collided with the Polo;
- 3.6 the plaintiff was between the Polo and the Jetta, fixing the tow rope, at the time of the collision; and
- 3.7 the speed limit on Klipspruit Valley Road is 60km/h.

[4] The plaintiff testified and called 2 witnesses in support of his case i.e. Mr Frances Mabale, an independent witness and Mr Thapelo Modisaemeng, the driver of the Jetta. The defendant called the Insured driver, Mr France Tswai (Tswai) and the Police Officer, Mr Leboho.

Evidence

- [5] Mr Mabale an independent eye-witness to the collision testified about his recollection of the events that occurred on the 25 January 2009.
- [6] Mr Mabale testified that he was travelling along Klipspruit Valley Road on the evening in question in a southerly direction in the left-lane behind a green motor vehicle. He explained that he had decided to move into the right hand lane because he noticed something in front of the green vehicle and also because the green vehicle appeared to be slowing down at the intersection.
- [7] Mr Mabale testified that, upon moving into the right hand lane, he saw that the traffic light at the intersection was in the process of turning amber and then red. Accordingly, he slowed down. Mr Mabale also testified that he noticed a Polo play with flashing hazards stationary at the left-side traffic island immediately next to the traffic light. In addition, he noticed a Jetta at a distance of approximately one to two metres in front of the Polo. Both cars were stationary.
- [8] Mr Mabale then testified that he looked in his rear view mirror while slowing down and noticed that the Taxi was moving up fast behind him. He then stated that the taxi attempted to move in between his car, which was in the right hand lane, and the green vehicle in the left hand lane. He testified that the taxi attempted to do so when the traffic light was red and against him. Whilst attempting to "squeeze" between his motor vehicle and other motor vehicle. The taxi hit the left rear portion of his motor vehicle, a Mercedes Benz, went across the red light intersection, and lost control thereby colliding into the Polo. He further testified that the impact of the collision was such that the Polo was pushed over the left side of the road into a "donga" or "ditch". He testified that the stationary motor vehicle

i.e. Polo had its hazards lights on. This motor vehicle was parked on the extreme left side of the road and near a pavement and about 1 to 2 metres away from the traffic light. After the collision, he parked his car in a safe place and proceeded to the scene and found a male person (plaintiff) lying on the side of the road and noticed the driver of the taxi alighting from his motor vehicle with a cut on his forehead. He described the weather conditions as drizzling and the road was wet and slippery.

- [9] Under cross examination, the version was put to Mr Mabale that the insured driver was not speeding. Mr Mabale denied this and remained adamant that the insured driver was travelling at a high speed. Another version was put to Mr Mabale that the Taxi never collided with the rear of his vehicle. Again, Mr Mabale denied this and reiterated that the first contact ensued between the taxi and his vehicle as a result of which the taxi lost control.
- [10] During cross examination he disputed a version put to him that the insured driver did not collide with his motor vehicle. He was adamant that after the taxi first collided with the rear of his motor vehicle, the driver lost control and in an attempt to try and squeeze between the motor vehicle and green motor vehicle which was stationary on the left side of the road at the intersection, he collided with the Polo which had its hazards on.
- [11] Furthermore during cross examination, he denied that his motor vehicle obscured the view of the taxi from the Polo. He also denied that the Insured driver was travelling on the right hand lane and moved to the left side because he had applied brakes and specifically denied that the Insured driver was trying to avoid colliding with him. It was put to him that the insured driver applied brakes when he changed lanes. He denied this proposition and stated that the insured driver was travelling very fast on a wet and slippery road.

- [12] Lastly, the allegation was put to Mr Mabale that the plaintiff was the driver, rather than a passenger, in the Jetta. Mr Mabale's response was that he did not know who had been driving the Jetta as he could not see that person and furthermore, when he eventually parked, got out, and attended the scene, various people were already at the scene.
- [13] The next witness for the plaintiff was Mr Modisaemang. He testified that he was the driver of the Jetta on the day of the collision. He explained that he and his friends were towing the Polo, in which his friend Peter was driving. He further explained that the reason why the Polo was being towed was because it has not been idling properly.
- [14] Mr Modisaemang testified that he was travelling slowly along Klipspruit Valley Road while towing the Polo. He also confirmed that the hazard lights of the Jetta and the Polo were on at all relevant times. He stated that he recalled looking in his side and rear view mirror at various points and confirmed that he could see the flashing hazard lights on the Polo behind him. This was the position before and after the collision.
- [15] Mr Modisaemang stated that when he pulled away from the intersection at Armitage Road, where the traffic light has turned green in his favour, the tow rope snapped. He then explained that he pulled the Jetta up against the left-side traffic light island and the Polo, which had some momentum, managed to pull up behind him.
- [16] Mr Modisaemang then testified that, a few seconds after he had stopped by the island, the plaintiff got out of the left passenger door of the Jetta as he was a front seat passenger in such vehicle and moved behind the Jetta to fix the tow rope, a collision occurred seconds thereafter. He explained that the taxi collided with his vehicle after it had first collided with the Polo

and, as a result, he could not open his door but rather had to alight through the front passenger door.

[17] As regards the aftermath of the collision, he recalled two significant issues. First, he recalled the plaintiff lying on the pavement on the other side of the traffic-light island, namely in the slip-road of Armitage Road entering Klipspruit Valley Road, this according to him suggest that the Plaintiff was away from the intersection when the taxi collided with him. And further confirms that the Polo and Jetta were parked on the extreme left lane. Secondly, he recalled the Polo being pushed to the extreme left side of the road and down into a ditch. He specifically recalled the hazard lights of the Polo still flashing at the time while it was in the ditch. During cross examination, he disputed the version of the insured driver that the hazards lights of the Polo were not on at the time of the collision. He conceded during cross examination that the Polo was partially in the intersection and in a dangerous position, however he was adamant that, that place was safe enough for him to stop there. No version was put to Mr Modisaemeng that plaintiff was driver of motor vehicle instead of pedestrian.

[18] The Plaintiff himself, a 35 year old married adult male who has three children, who as a result of the injuries sustained in the collision was rendered a paraplegic was also called as a witness.

[19] He testified that he was a front-seat passenger of the Jetta, a motor vehicle that he owned, which was being driven by Mr Modisaemeng. The plaintiff explained that the Jetta was towing the Polo and that the tow rope broke at or near the intersection with Armitage and Klipspruit Valley Roads, thereafter both vehicles came to a stop next to a concrete traffic island. The plaintiff stated that he quickly exited the Jetta through his front-seat passenger door in order to fix the tow rope. He said that he

intended to do so quickly so that the cars could get moving again, especially as they were stationary on a busy road.

- [20] The plaintiff explained that while he was leaning down fixing the tow rope and facing the Jetta the collision occurred. He testified that he never saw the Taxi which struck the Polo and he also never heard the noise of brakes being applied by any vehicle prior to the collision. As far as time is concerned, the Plaintiff explained that it was a matter of seconds from exiting the Jetta to starting to fix the tow rope to the collision. He acknowledged that his conduct was dangerous and that he did not give too much thought as he wanted to effect the repairs quickly. He said things happened very quickly.
- [21] Under cross examination, the plaintiff conceded that the situation of getting out of the vehicle to fix the tow rope was somewhat dangerous. Furthermore, he conceded that no warning triangle had been placed behind the Polo and no person was standing flashing his arms warning oncoming traffic of the stopped vehicles. But he explained that the main purpose behind getting out and attempting to fix the tow rope was to the motor vehicle out of the way and moving so that the dangerous situation of stationary vehicles could be alleviated. It would seem that there was not time to take any precautions because the accident happened within seconds.
- [22] It was not put to the plaintiff that he had actually been the driver of the Jetta and not Mr Modisaemang instead it would seem that the defendant accepted the version of the plaintiff that he was the front seat passenger in the Jetta. This put paid to the Defendants submission that plaintiff was driver of the motor vehicle (Jetta).

Evidence of the Defendant

- [23] Mr Tswai, the insured driver testified that on the evening of 25 January 2009 he was knocking off his shift as a taxi driver and had two passengers in vehicle and was driving down Klipspruit Valley Road. He explained that on that particular evening, it was dark, the visibility was bad, the road was wet and it was raining. He testified that he was driving at 60km/h, the maximum speed limit allowed on that road. He was familiar with Klipspruit Valley Road because as a taxi driver, he drove along that road several times.
- [24] He explained that he was travelling in the right hand lane of Klipspruit Valley Road in a southerly direction and when he was approaching the intersection with Armitage Road, a Mercedes Benz motor vehicle moved into his lane of travel (right hand lane) and then started to apply its brakes. Mr Tswai explained that he moved into the left hand lane and proceeded through the Armitage Road intersection, which he contends was green in his favour.
- [25] Mr Tswai testified that he became aware of the Polo in the left hand lane at a distance of about 4 to 5 metres, the Polo did not have any lights on at all and he believed the Polo was moving and part of it was still in the intersection. He then testified that he later became aware that the Polo was stationary and tried to move to the right but he could not do so because there were vehicles and then tried to apply brakes, but skidded and went into the back of the Polo. A passenger who was seating behind him, hit (bumped) him from behind and as a result of this impact pushed him forward and he went through the windscreen and landed on the ground where he lost consciousness and could not see what happened thereafter. He denied that he was travelling at a high speed and also denied that he first collided with Mabale's motor vehicle.

- [26] During cross examination he conceded that the conditions were bad for driving on the evening of the collision and conceded that despite having passengers in the Taxi he elected, to drive at the maximum speed limit allowed for that road. He confirmed that he was not wearing a seat belt because the motor vehicle was not fitted with any.
- [27] He alleges that he could not see the Polo until the last possible moment and the Polo did not have any lights on and also that the lighting and visibility was poor on the evening of the accident. When asked how he thought the Polo was moving, he responded by saying that he saw it in front of him when he switched on his bright lights. He was asked why it was not put to the witnesses that he switched on the bright lights prior to the collision, he could not give plausible explanation save stating that this is what happened on the night in question.
- [28] During questioning by the court, he testified that he first saw the Polo and thought it was moving when he was a distance of approximately 4 to 5 metres from the Polo. He then had time to apply his bright lights. Later on when pressed further he stated that he thereafter realised the Polo was not moving when he was about 1.5 metres from the Polo and since it was dark he tried to move across and then reduced his speed to 50km/h, applied his brakes but struck the Polo because the road surface was slippery. He testified that after the collision, the entire front portion of his motor vehicle was pushed in and that the taxi was as a result rendered inoperable. When asked why he did not bring his motor vehicle to a complete stop, he responded by saying that he reduced the speed, lift up the accelerator, applied brakes. The essence of his evidence is that save the foregoing factors, he could not do anything further to avoid the accident.

- [29] When it was put to him in cross examination whether the Mercedes Benz obscured his view or not, he disavowed the version put to the Plaintiff's witnesses by stating that it disturbed him when it moved to the right hand side and in a attempt to avoid colliding with it, he applied is brakes and changed lanes. He denied noticing any car at the intersection save the Polo. In essence, he denied that there was a green colour vehicle at the intersection as testified by Mabale.
- [30] Finally it was put to him that the reason why he was thrown through the window is because he was travelling very fast and in excess of the speed limit and further that his excessive speed caused the damage to the entire front portion of his taxi which was pushed in, thus making the taxi inoperable. It was further suggested to him that it is because of the excessive speed and force of his motor vehicle that the Polo was pushed further away from the road into the ditch. He denied these propositions.
- [31] The last witness for the defendant was Constable Leboho, he testified that he attended the scene of the collision and spoke to Mr Mabale. Constable Leboho simply repeated what he was allegedly told by Mr Mabale on the date of the collision. He was then referred to an affidavit he had made contemporaneous with the time of the collision. The affidavit also included a sketch that Constable Leboho created in respect of the collision. The affidavit supports Mr Mabale's version regarding the Taxi approaching from behind and hitting the left back side of his vehicle. He confirmed that Mabale showed him the left side of his motor vehicle which was hit by the taxi and he noticed what he described as a dent on the left rear.
- [32] This affidavit confirms the correctness of Mr Mabale's version that the taxi lost control after hitting his vehicle and went straight into the Polo and also confirms that the collision occurred while the vehicles were parked right next to the concrete island. This witness conceded that he did not ask

Mabale many questions because this was the task of the Investigating Officer. This witness did not advance the case of defendant at all. On the contrary he supported the plaintiff's case.

Submissions by the Parties

- [33] In the light of the totality of the evidence, counsel for the defendant conceded correctly in my view that the insured driver was negligent but submitted that the Plaintiff was also negligent and that his claim and damages should be apportioned in terms of the Apportionment of Damages Act. According to his argument, the vehicle in which the Plaintiff was travelling (Jetta) stopped on a yellow line next to the traffic island on the main road at the edge of the intersection and the vehicle which was being towed (Polo) stopped behind it with its latter part protruding into the intersection. Counsel submitted that the vehicles were parked in a dangerous position and unlawfully. Applying the reasonable man test counsel argued that because the plaintiff acknowledged in evidence that his conduct was dangerous because he did not give much thought to the surrounding circumstances as he just wanted to fix the snapped rope quickly, his conduct amounts to negligence.
- [34] In support of his argument, he submitted that a reasonable man in the position of the plaintiff being aware of the fact that the vehicles were parked at an intersection, thus creating a source of danger, would not have come out of his motor vehicle at a busy intersection without taking the necessary precautions. He argued that given the fact that it was dark, drizzling and road surface wet and slippery, a reasonable man would not have placed himself in a dangerous position. According to counsel, this conduct falls short of a reasonable man and submitted that he contributed materially to his injuries. In the light of the foregoing factors, he contended that the plaintiff was 30% negligent.

- [35] On behalf of the plaintiff it was submitted that in the light of the weather conditions, visibility, condition of the road and the fact that the Insured driver was approaching the intersection at a high speed clearly shows that he was entirely to blame for the accident and that no negligence could be attributed to the plaintiff because in an attempt to “squeeze” between Mabale’s motor vehicle and the green car (which he alleges he did not see), the insured driver collided with Mr Mabale’s motor vehicle and lost control of his motor vehicle went against the red robot, and collided with the Polo which later on hit/collided with plaintiff who was busy fixing the snapped towing rope. Counsel submitted that at that time other motor vehicles i.e. Mabale’s car and the green colour motor vehicle were still stationary at the intersection, yet the insured driver proceeded in reckless disregard to the traffic sign (red robot)..
- [36] It was further argued that since the taxi collided with the Jetta and Polo, seconds after the plaintiff had alighted from the car to fix the rope, given the short space of time, it is improbable that any warning triangle or any other form of warning could have been placed in time to warn approaching motorists before the collision occurred. To expect the plaintiff to have taken any precautionary measures at that time would be unreasonable.
- [37] Counsel further submitted that the actions of the plaintiff were reasonable because being aware of the weather conditions, position of the motor vehicle and the locations of the motor vehicles, by quickly getting out of the motor vehicle to try and fix the rope as efficiently as possible demonstrates that, he wanted to minimise the risks and this does not amount to any contributory negligence at all.
- [38] Finally, counsel for the plaintiff submitted that since the plaintiff never saw or heard the taxi approaching or applying brakes, plaintiff could not have

avoided the collision because when the impact occurred he as bending down facing the Jetta while fixing the tow rope and at that time was not on the intersection but on he left hand side next to the concrete island. The accident happen very quickly before he could do anything.

- [39] It was urged upon me to reject the defendants argument that negligence of the plaintiff could be found, on the basis that he acknowledged that the position where he was prior to the collision was a dangerous one, counsel contended that this argument is dispelled or destroyed by fact that the collision occurred within seconds after the plaintiff had alighted for his motor vehicle. And that the insured driver went against the red robot. Evidently so, the argument goes, there was nothing which a reasonable man in the position of the plaintiff could do in the circumstances to avoid the collision.

Assessment of the evidence

- [40] The plaintiff and his witnesses made a good impression to the court, their version was consistent, coherent logical and did not contradict each other. I accept as correct and credible the plaintiff's case that the accident happened whilst their motor vehicles were parked on the extreme left lane on the island just after the intersection. The evidence of Mabale that the insured driver first collided with his motor vehicle and lost control and collided into the Polo, is supported by the defendant's witness who in the affidavit completed shortly after the accident stated that he was shown a dent on the left rear of Mabale's motor vehicle caused by the insured driver.
- [41] I also found as undisputed that the weather conditions were bad, because it was drizzling and road surface was wet. I fail to understand given the compromised weather conditions, why the insured driver drove at an

excessive speed in the circumstances. It is abundantly clear to me that the sole cause of the collision is the excessive speed and the fact that he did not keep a proper look out. I say this for the following reasons:

- 41.1 Firstly according to the insured driver's evidence, he acknowledged poor weather conditions, yet he persisted driving at an excessive speed. His evidence that he was travelling at 60km/h has no ring of truth in it, because despite being a regular user of that road as a taxi driver, he could not give us the maximum permitted speed limit in the area, contending himself with the response that he does not know. It is strange that he did not know maximum speed limit in the area given the fact that he used that road regularly. This demonstrates that he is a witness upon whom it is dangerous to rely.
- 41.2 Secondly he (insured driver) stated that the first time when he observed the Polo it was at a distance of between 4 to 5 metres from him and at that time he was travelling at 60km/h and thought it was moving. If he had been keeping a proper look out he would have realised that the motor vehicles were stationary on the road and taken evasive action. He did not do so. He further stated that when he realised that the Polo was stationary the distance was 1.5km/h and at that time he was travelling at 50km/h, and thus could not do anything to avoid the accident. This again illustrates that he was travelling very fast and not keeping a proper lookout.
- 41.3 Thirdly according to Mabale, the robot was red and other motor vehicles were stationary at the robot, the insured driver saw a different colour (green) of the robot. In my view, I am convinced that following Mabale's evidence, the insured driver went against the red robot and collided with the Polo. Even though it may be

assumed in his favour that his was the position. His conduct in entering the intersection failed to meet the standard required of a duty of motorist who approaches an intersection and enters it with the green light in his favour. He clearly failed to have regard to the reasonable possibility that traffic which entered the intersection lawfully could still be in the intersection. He did not regulate or reduce his speed, nor did he keep a proper look out. That he thought the Polo was in motion at a distance of 4.5 metres and only realised at a distance of 1.5 metres that it was stationary clearly borders on recklessness. In **Santam Insurance Co Ltd v Gouws 1985 (2) 629 AD**, the court held that:

*The duty of a motorist who approaches an intersection and enters it with the green light in his favour is to have regard to the reasonable possibility that traffic which entered the intersection lawfully, may still be in the intersection. He should therefore regulate his speed and his entry into the intersection in such a manner as not to endanger the safety of such other traffic. The closer the motorist is to the intersection when the traffic light turns green in his favour the more likely it is that the intersection may not be completely clear of traffic. See **Doorga and Others v Parity Insurance Co. Ltd 1963 (3) SA 365 (D) at 367F-368**; **South British Insurance Co. v Barrable 1952 (3) SA 239 (N) at 242F-G**; **Cockram v Durban City Council 1965 (1) SA 795 (N) at 802A-B**.*

- 41.4 On this basis alone, no negligence could be attributed to the plaintiff despite his admission that the place where the motor vehicles were is dangerous. The question whether the plaintiff was negligent or not must account for all the proven facts. One does not draw an inference of negligence on a piecemeal approach or piece of evidence. A trier of fact must consider the totality of all the

sustained those injuries. I accept that Mabale saw him at the scene with those injuries and reject his evidence as unreliable and untrustworthy that he was rendered unconscious after the accident.

- [43] Another reason that supports the notion that he must have been travelling very fast is the damage to his motor vehicle and the fact that the Polo was pushed into the ditch after the collision. The only inference that can be drawn is that the force or impact of the taxi must have been very strong to push the Polo into the ditch.
- [44] On the analysis of the evidence, I am satisfied that the Polo had hazards on at the time because according to Mr Modisaemang, the hazards could still be seen flashing when the Polo was in the ditch. This is another evidence which supports the plaintiff's case and destroys the defendant's case. I accept the evidence of the plaintiff and his witnesses, as clear, credible, reliable and probable and reject the evidence of the insured driver.
- [45] I am unable to agree with counsel for the defendant that it was reasonably within the plaintiff's foresight that the stationary vehicles parked on the left side of the road near the island, were likely to constitute a danger. In my view the conduct of the insured driver, viewed as a whole, constitutes negligence. I agree with counsel for the plaintiff that no amount of contributory negligence could be attributed to the plaintiff.
- [46] In the result I make the following order:
1. The Defendant is ordered to pay to the Plaintiff a capital amount of R2 100 000.00 in full and final settlement of the Plaintiff's claim. Payment to be made to the Plaintiff's attorneys, by payment into their trust account, details as follows: **Raphael Kurganoff Trust**

Account, First National Bank, Rosebank Branch, Account number: 50650111260, Branch Code: 253305.

2. The Defendant is ordered to furnish the Plaintiff with an Undertaking in terms of Section 17(4) (a) of the Road Accident Fund Act, 56 of 1996, for the costs of the future accommodation of the Plaintiff in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to him arising out of the injuries sustained by him in the motor vehicle collision of 25 January 2009, after such costs have been incurred and upon proof thereof;
3. That the Defendant will pay the agreed or taxed party and party High Court costs of the action up to 02nd December 2011, such costs to include:
 - 3.1 The costs attendant upon the obtaining of payment of the capital amount referred to in paragraph 1 above;
 - 3.2 The preparation expenses of the Plaintiff's experts Mr M Scher, Dr D Shevel, Prof. S Saffer, Mr D. Rademyer, Ms L. Hunter, Ms K. Nieuwoudt, Ms C. du Toit and Mr G. Whittaker if any as may be agreed or allowed by the Taxing Master.



R MATHOPO J
JUDGE OF THE HIGH COURT

Appearances:

For the Applicant	:	Advocate Anderson
Instructed by	:	Raphael Kurganoff Inc.
For the Respondent	:	Advocate Snoyman
Instructed by	:	Molefe-Diepu Attorneys
Date of hearing	:	25 November 2011
Date of Judgment	:	02 December 2011