REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 29208/13

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

....
DATE SIGNATURE

In the matter between:

MOGALE: MATLOU DANIEL Plaintiff

And

ROAD ACCIDENT FUND Defendant

JUDGEMENT

CARSTENSEN AJ:

1. In this action, the Plaintiff instituted a personal injury claim against the Road Accident Fund for past hospital and medical expenses, future hospital, medical and related expenses, past loss of earnings, future loss of earnings and general damages.

2. The action arose out of a collision on the 26th of February 2012 between two motor vehicles on a straight road, namely Miles Stocker Drive in Roodepoort.

3. The Plaintiff, an adult male sales representative aged 57 years, having been born on the 26th of November 1957, was driving a 4X4 SSangYong with registration letters and numbers M……..1GP and the insured driver, namely Innocent Xaba, drove an Audi A4 with registration letters and numbers TN……..GP.

4. Both the driver and the passenger in the insured vehicle were killed in the collision.

5. The Plaintiff was alone in the vehicle and was charged with culpable homicide, but acquitted.

6. The blood alcohol level of the insured driver was 0.3%, six times over the legal limit.

7. All of the facts mentioned above were common cause between the parties.

8. Before the commencement of the trial the Defendant admitted and

the parties agreed general damages in the amount of R750 000.00 and during the course of the trial, admitted past medical expenses in the amount of R278 600.04 and past loss of earnings of R70 000.00.

9. The Defendant also furnished an undertaking in respect of future medical and hospital expenses, but the percentage to borne by the Defendant was in dispute.

10. In addition, the following factors were admitted:

10.1. The actuarial assumptions made by Whittaker in his actuarial report, although the contingency percentage remained in dispute.

10.2. That the Plaintiff, having regard to the collision, will retire at 65 years, but it was in dispute when the Plaintiff would have retired, but for the collision.

11. In addition, a number of bundles and the documents contained therein were admitted into evidence, including:

11.1. the joint minute of Prof Foster and Dr Maxwell Matjane, the psychiatrists;

11.2. the industrial psychologist reports of Mrs B Donaldson and Ms T Gama;

11.3. the agreements reached and reflected in the joint minutes of the orthopaedic surgeons, namely Dr G A Versfeld and

Dr J J Van NIeker;

11.4. a letter form the Plaintiff's employers, which is signed by the group HR Manager, Susan Farrell, and reads that the letter confirms that CST Electronics (Pty) Ltd (the Plaintiff's employers) has no fixed retirement age policy and that an employee may continue to work for the company as long as he or she is able to perform to the management's satisfaction the standards in the position they hold with the company.

12. In paragraph 1.6 of the pre-trial minute, the parties agreed that the following documents would constitute evidence at the trial:

12.1. in the merits dossier, bundle D: the officer's accident report duly completed and dated 26th February 2012;

12.2. an affidavit by the Plaintiff dated 26th March 2013;

12.3. the statement by the Plaintiff, dated 11th of May 2012;

12.4. the motor vehicle all owner query form for M…… dated The 7th of August 2013;

12.5. 4 colour photographs of the damaged motor vehicle, M……GP undated;

12.6. the Roodepoort SAPS docket, 1092/02/2012 dated 26th February 2012;

12.7. the medical dossier, bundle G, which included the RAF1 medical report dated 26th September 2012;

12.8. the Life Flora Clinic records dated the 23rd of May 2012;

12.9. the Life Flora Clinic records dated the 15th of May 2012;

12.10. the clinical records, bundle H, which includes the clinical notes of Dr Franel and Rochards, dated 27th February 2012;

12.11. the radiological report of Dr A Du Plessis dated 27th February 2012;

12.12. the radiological report of Dr C Du Toit, dated 28th February 2012;

12.13. the medical certificate by Dr UNF Ukunda dated 14th July 2012;

12.14. the medical certificate of Dr UNF Ukunda dated 27th July 2012;

12.15. 6 colour photographs in respect of the injuries received by the Plaintiff;

12.16. the employment dossier, bundle I, of the Plaintiff which included the Plaintiff's curriculum vitae and payment slips of CST Electronics (Pty) Ltd for the 25th March 2012, 25th

May 2012, 25th June 2012, 25th July 2012, 25th September 2012, 25th October 2012, 25th November 2012, 25th February 2013 as well as the Plaintiff's IRP5 forms for 2011, 2012, 2014.

13. The remaining issues therefore were:

13.1. the merits;

13.2. the extent of the undertaking for future medical expenses and in particular, the percentage thereof;

13.3. the issues relating to future loss of earnings but only:

13.3.1. but for the collision, what age would the Plaintiff have retired;

13.3.2. having regard to the collision what contingency should be applied.

14. The Plaintiff argued that the onus to prove its case rests on the Plaintiff on the balance of probabilities, particularly on the merits to the extent of what is the most likely scenario in the circumstances, but whether there was any negligence on the part of the Plaintiff was an onus which rests on the Defendant.

15. The first issue determined in respect of the merits was the cause and liability of the Plaintiff *vis a vis* the insured driver.

16. It is common cause and appeared from the photographs:

16.1. that at the point of the collision and before that point the road (in the Plaintiff's direction of travel) was straight;

16.2. that approximately 80m before (in the Plaintiff's direction of travel) the point of impact, a blind rise was evident;

16.3. on the Plaintiff's left hand side of the single lane, there was a metal barrier; and

16.4. the speed limit was 60kmph.

17. The Plaintiff gave evidence that:

17.1. the collision occurred between 19h30 and 20h30 on the evening of Sunday 26th February 2012 in fine weather, but dark conditions;

17.2. he was travelling on his side of the road in an east to west direction, towards Roodepoort CBD and that he knew the road well and travelled on it "quite a lot";

17.3. he was travelling slightly below the speed limit;

17.4. his side of the road constituted one lane, whereas the opposite side constituted 2 lanes in a west to easterly direction;

17.5. as he crested the blind rise he saw on his side of the road

bright lights approaching him;

17.6. he reacted by applying brakes harshly but the other car was coming too fast and a collision occurred;

17.7. he did not have an opportunity to swerve and lost consciousness, waking up in hospital the following morning;

17.8. he could not estimate the speed of the other car, but stated that it was travelling fast;

17.9. subsequent to seeing the bright lights and applying the brakes, he had no recollection of the collision.

18. The evidence also established that the insured driver's car was travelling from a direction where the car would have travelled on a road which curved to the left in a west easterly direction and this appears from the photographs.

19. During cross examination of the Plaintiff, issues relating to the fact that he did not mention the bright lights in certain of his police statements, neither did he mention that he had slammed on brakes, indeed in his first statement, which was dated the 16th of April 2012 he had mentioned the lights, but had not mentioned it in a further statement on the 19th of November 2012.

20. In any event, as the Plaintiff points out, he mentioned all of this

during the criminal trial. He confirmed that he does have an independent recollection on the bright lights. In any event the only alternative, in my view, seems to be that the insured driver was driving with his lights off. This was not suggested by any party.

21. The Plaintiff confirmed that he had little time to react and cannot remember swerving or turning the steering wheel. All he remembered was that he braked harshly. He also did not notice any other cars and did not recall hearing skidding or skreetching of the tyres. Cross examination of the Plaintiff relating to the damage to the vehicles was, in my view, inconclusive.

22. During cross examination no doubt, in my view, was raised on the Plaintiff's evidence, or his version of the collision and there was no reason arising out of cross examination why his version should not be accepted in its entirety. The Plaintiff made a good impression in the witness box and the Defendant's counsel correctly conceded that the Plaintiff was an honest man who made an excellent impression on the court.

23. In support of the Plaintiff's version Mr Grobbelaar, gave expert accident reconstruction evidence for the Plaintiff, although extensively cross examined, gave impressive evidence and consistently, to my satisfaction, answered questions put to him. His evidence was clear, concise, well-reasoned and compelling.

23.1. He had investigated the actual scene and he had also had

access to the accident report, the police photographs, the police sketches and the statements of the Plaintiff.

23.2. He took measurements and photographs and these were all consistent with the police plan.

23.3. He also relied on aerial views of the accident scene which were most useful.

24. He analysed the damage to the SSangYong and the damage to the Audi and concluded that the SSangYong had collided with its front against the right front corner and right front side of the Audi.

25. He concluded that the fact that there was no impact damage to the right side of the SsangYong and the impact damage to the Audi extended from the right front corner, along the right front side of the Audi to a position including the right front door means that there was a substantial angle between the vehicles at the point of impact.

26. He then compared the damage to:

26.1. the position in the police photographs where the vehicles came to rest. The SSangYong came to rest across the right hand lane, travelling along the direction of the Audi and the Audi came to rest on its correct side, but off the road and back along its path of previous travel;

26.2. the point of impact, as marked by the police photographs

and the police sketch plan;

26.3. the tyre marks which commenced in the SSangYong's lane and continued into the Audi's lane;

26.4. the police photographs which showed tyre marks crossing from the lane of travel of the SSangYong into the Audi's lane at an angle, to where the collision occurred.

27. He was of the view that seen in conjunction with the tyre mark, the Plaintiff's right hand front wheel locked up and this meant that it is unlikely that the Plaintiff's vehicle could have swerved to the right, even had the driver applied a right steering action as the locked wheels had ceased to rotate.

28. The fact that the tyre marks commenced well into the SSangYong lane shows conclusively, in my view, that the SSangYong driver applied brakes harshly whilst in his lane.

29. Consequently, in considering the substantial angle between the vehicles at the point of impact, but a relatively small angle of the tyre marks from the original direction when compared to the lane markings, he found that it was probable that the Audi was also at a substantial angle to its left at the time of impact, i.e. travelling across its lane from its right to its left.

30. He explained this carefully during his evidence and there is no doubt left in my mind that at the time of impact, the Audi was swerving to

the left as depicted in his schematic visualisation diagram in his report. He concludes therefore, as do I, that the Audi was either in a left turn or left swerve when the collision occurred. In fact, on the facts before me, his reconstruction of the accident is logical and appears to be common sense.

31. His conclusion, which I accept was that when the SSangYong crested the blind rise the Audi was on the wrong side of the road and when the Audi noticed the SSangYong, it swerved back into its own lane but at the time it was too late to avoid the impact. The SSangYong, on seeing the Audi, applied brakes harshly but could not avoid the impact.

32. It is my view therefore that on the balance of probabilities the sole cause of the collision was the negligence of the Audi driver, the insured driver.

33. I do not believe that any negligence can be attributed to the Plaintiff who applied brakes harshly, he could not swerve to the left due to the barrier marking, and, his manoeuvring to the right may have been caused either by his harsh braking, or by him attempting to avoid the vehicle travelling in his lane.

34. Much was made during argument and cross examination of the Plaintiff of an “appropriate instinctive reaction” and it was suggested to the Plaintiff that instinctively he ought to have swerved to the left.

35. I am not prepared to take judicial notice of what was instinctively appropriate and there was no evidence relating to how persons instinctively react in this situation.

36. The Defendant's counsel, Mr Louw, argued that the fact that the collision occurred on the wrong side of the road draws a presumption that the Plaintiff was negligent. He argued that there were no scientific principles to support Grobbelaar's reconstruction and that Grobbelaar's opinion was tailored to suit the Plaintiff.

37. In my view, Grobbelaar's evidence was fair and unbiased and he fulfilled his duties as an expert witness to the court. (Schneider v AA, 2010 (5) SA 203 at 211 E - J)

38. In fact, Grobbelaar analysed and compared the damage to the vehicles, the police sketch, the police photographs, the damage to the road at the point of the collision, the point of collision, the tyre marks, the nature and dimensions of the road, the length of the tyre marks, the barrier line and surrounding circumstances and the blind rise.

39. Louw posed certain possibilities to Grobbelaar and to the court, but none of these were accepted by Grobbelaar as being realistic.

40. Louw argued that the Plaintiff was negligent as a consequence of:

    40.1. The fact that his speed was excessive. This was not established in evidence. The Plaintiff gave evidence that

the speed limit was 60kmph and that his speed was slightly less than that. There is nothing to gainsay that. Grobbelaar conceded that the speed of the Plaintiff would have been similar to the speed of the insured driver, and those speeds could have been anywhere between 50 and 80kmph, but he placed it no stronger than that. It was thus not established that the speed was excessive and in any event, I agree with Mr Chaitowitz, as was conceded by Mr Louw, that speed in itself is not negligence. The Defendant would have had to show that the Plaintiff's speed, whatever it was, if lower would have enabled him to avoid the collision and that was not established.

40.2. His turning right towards the accident, instead of left. Again, there is no evidence of this. It seems on the balance of probabilities that the Plaintiff did not in fact turn right, but that his right hand front wheel locked under braking, drawing his vehicle to the right. This is consistent with the Plaintiff's version, who stated that he did not turn right (or at least has no recollection of turning right).

40.3. The fact that the accident occurred on the incorrect side of the road. That is not a conclusion which can be drawn from these facts. The reason why the collision occurred on the right hand side of the road was fully explained by

Grobbelaar. When the Plaintiff applied brakes, he was undisputedly on his correct side of the road. The only reason why he applied brakes harshly was that he saw lights on his side of the road. This is the most probable scenario.

41. Finally, Mr Louw argued that the Plaintiff could have avoided the collision as the collision occurred approximately 80m from where he first saw the lights, however:

41.1. Grobbelaar's evidence was that a normal person's reaction time is 1.5 seconds, and that increases at night to between 1.5 and 2.5 seconds.

41.2. The distance it takes at 60kmph to travel 60m would be 2.3 seconds, and to travel 80m would be 3 seconds.

41.3. Taking into account a reaction time of 1.5 to 2.3 seconds to apply the brakes, thereafter the time it takes to stop the car, it is quite clear that the evidence established that the Plaintiff did not have time to avoid the accident.

41.4. Thus, I cannot agree with Mr Louw that the Plaintiff was 80% to blame.

42. Of course, one must take into account the common cause fact that the insured driver's blood alcohol level was 6 times over the legal limit. This probably resulted in him not reacting, by applying brakes.

However in my view, if the insured driver found himself on the incorrect side of the road he probably would not have applied brakes, but probably would have swerved to the left to get back on his correct side, this would accord with Grobbelaar's opinion.

43. In addition, the skid marks show that the Plaintiff reacted on his side of the road. This draws one to the conclusion that there was no negligence on his part.

43.1. Particularly, if the skidding and the locking of the front rear tyre caused his vehicle to drift to the wrong side of the road.

43.2. If, however, he turned to the right in order to avoid a car approaching him on his side of the road with bright lights, then I must agree with Mr Chaitowitz that this would be the case of sudden emergency and the Plaintiff would be a person who, by reason of the insured driver's want of care, found himself in a position of imminent danger and as a consequence, cannot be "guilty" of negligence merely because he did not act in the best way to avoid danger.

44. Consequently, in my view, it has not been established that the Plaintiff contributed towards the collision in any way.

45. The next issue relates to quantum. The first question is what the Plaintiff's retirement age would have been but for the collision. The

Plaintiff suggests that he would have continued to work until 70. In support of this, the evidence was:

45.1. that he was held in high regard by his employer;

45.2. that he had been employed there since 1998;

45.3. that his employer had no fixed retirement age;

45.4. the letter handed in in evidence which suggested that he would continue to work, as long as he was able to perform to management's satisfaction, which the Plaintiff appears to have done;

45.5. that due to the cost of living, he would have continued to work past 65;

45.6. he enjoyed his work;

45.7. he has a grandchild to support who is currently 4 years of age and thus, it is probable that he would continue to support her until she reaches majority;

45.8. that prior to the collision, he was a healthy man who enjoyed playing soccer.

46. The Defendant argued that the usual retirement age was between 60 and 65 years and that the Plaintiff's assessment that he would have retired at 70 was too high and that consequently, the Defendant's

submission was that the Plaintiff would retire at 62.5 years, being the medium between 60 and 65 years of age and if one then arrived at a medium between 62.5 and 70, that medium would be 66.25 years. Consequently, that I should find that the Plaintiff would have retired at 66.25 years.

47. There is in fact no evidence to support this and thus I am left, on the balance of probabilities, that the Plaintiff would have retired, but for the accident, at the age of 70.

47.1. I also agree with the statement of Barbara Donaldson in the joint minute that although the normal retirement age is considered to be 65, those people who retire before that time do so at considerable disadvantage. In fact it is my view, (although irrelevant in light of what I have set out above), that persons who retire at 65 in today's economic climate, also do so at considerable financial disadvantage, and that people today are healthier and continue to work after the age of 65.

48. The only remaining issue then is what contingency deduction should be applied to the income it is anticipated the Plaintiff would now earn subsequent to the collision. The Plaintiff contended for a deduction of 25% whereas the Defendant suggests 10%. The Defendant argued that the contingency should not be excessively high and that the Plaintiff would not be required to miss a great deal of work and

consequently, it would be generous to award a contingency of 10%.

49. The Plaintiff argued that 25% was appropriate, taking into account that the Plaintiff was 57 years and is was agreed now that he would probably work until 65 years of age, that he is no longer a fit person and that over the next 8 years, his serious injuries, which were agreed in the joint minute, would in all likelihood adversely affect his work, his commission and his productivity.

50. In the joint minutes, the orthopaedic surgeons agreed that he sustained serious and substantial injury and that provisions would have to be made:

50.1. for the treatment of his hip symptoms, including a possible hip replacement;

50.2. for conservative treatment to his fractures and ligament injuries;

50.3. for the surgery in the form of a total knee replacement;

50.4. for conservative management and treatment of his fractured calcaneus and possible surgical treatment;

50.5. for conservative management of his left ankle fracture.

51. They also agreed that his symptoms and disabilities would adversely affect his work.

52. In light of this, I am drawn to the conclusion that the most reasonable contingency is certainly substantially higher than the 10% contended for by the Defendant, but not quite as high as the 25% argued for by the Plaintiff. It is my view that 20% is appropriate.

53. Relying on Whittaker's calculations, I am of the view that his future loss of income calculation should be as follows:

Value of income uninjured	R3 168 838.00
Less contingency deduction as agreed (5%)	(R158 442.00)
Sub total, uninjured	R3 010 396.00
Value of income injured agreed	R1 940 207.00
Less contingency deduction (20%)	(R388 041.00)
Sub total, injured	R1 552 165.60

54. Consequently, the total net loss of the Plaintiff amounts to R1 458 230.40.

55. Thus, the calculation of the Plaintiff's quantum of damages is as follows:

Past hospital and medical expenses (agreed)	R278 600.04

Past loss of earnings (agreed)	R70 000.00
Estimated future loss of earnings	R1 458 230.40
General damages (agreed)	R70 000.00
TOTAL	**R2 556 830.44**

56. Consequently, I make the following order:

56.1. Defendant shall pay plaintiff a capital sum of R2 556 830.44;

56.2. Defendant shall furnish Plaintiff with an undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act, No. 56 of 1996, to pay 100% of the costs of the future accommodation of 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 she sustained in the motor vehicle collision on 26 February 2012 and the sequelae thereof, after such costs have been incurred and upon proof thereof.

56.3. The aforesaid capital amount and High Court party and party costs are payable to the Plaintiff’s attorneys’ trust account, the particulars of which are:

Joseph's Incorporated Trust Account

RMB Private Bank

Account No. 504 501 03 011

Branch Code: 261 251

56.4. Defendant to pay Plaintiff's taxed or agreed party and party costs on the High Court scale, such costs to include:

56.4.1. the costs attendant upon the obtaining of payment of the full capital amount referred to; and

56.4.2. the costs of the medico-legal reports, joint minutes of Dr GA Versfeld, Dr Gian Marcus, Prof. Meryll Voster, Ms Suzette Murcott and Ms Barbara Donaldson; and

56.4.3. the costs of the radiological report of Dr David Marx, dated 7 February 2013 and the costs of the actuarial reports of Algorithm Consultants & Actuaries CC dated 18 September 2014 and 6 October 2014 and 8 October 2014; and

56.4.4. the costs of the expert report of Mr Barry Grobbelaar dated 5 September 2014, his

preparation fees and his fees for attendance at Court on 7 October 2014.

56.5. Plaintiff shall, in the event that costs are not agreed upon, serve the Notice of Taxation on Defendant's attorneys of record.

56.6. No interest shall run against the Defendant for a period of 14 days from date of this order.

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P L CARSTENSEN
ACTING JUDGE OF THE HIGH COURT

HEARD: 8th OCTOBER 2014
DELIVERED: 14th OCTOBER 2014

COUNSEL FOR PLAINTIFF:	ADV M CHAITOWITZ SC
INSTRUCTED BY:	JOSEPH'S INC., REF. MR CALITZ
COUNSEL FOR DEFENDANT:	ADV LOUW
INSTRUCTED BY:	NOZUKO NXUSANI INC., REF: MR MABASO

(jmt.9.10.14)