IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

CASE NO: 6585/09

In the matter between

GONASEELAN RUNGASAMY **Plaintiff**

and

ROAD ACCIDENT FUND **Defendant**

J U D G M E N T

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1. This is a collision case.

2. Before I deal with the merits, it is necessary for me to make some observations about Rule 37.

3. That is because, at the commencement of the hearing, when I called for the pre-trial conference Minute, I was handed various Rule 37(4) notices and responses thereto, exchanged between the parties (part of which included fairly detailed requests for particulars or admissions). The Minutes of the conference (produced simultaneously) simply reflected responses to some of the Rule 37 notices previously exchanged

between the parties (at a time when they were represented by different Counsel).

4. The upshot of this was that I was required to compare a series of exchanges in different documents in order to find out what was agreed and what not.

5. This practice, I am sorry to say, seems to have found favour with practitioners and it has become common for parties to produce Rule 37(4) exchanges in lieu of proper Minutes.

6. In **Paterson NO v Kelvin Park Properties CC 1998 (2) SA 89 ECD**, Leach J had occasion to express his displeasure about a similar approach adopted in that matter. Leach J felt that the notices and replies were all superfluous and should not have been filed. (At **104H**).

7. Rule 37(4) makes provision for the issue of a notice giving indication to the other party of specific admissions, enquiries and other matters sought to be raised **during the conference**. What is envisaged is not a non-specific, standard, applies to all cases or general invitation to meet to discuss **issues, particulars and other matters**. No purpose is served by such a notice and no client can be expected to pay for a notice that achieves no object.

8. What is, clearly, envisaged is for the representatives of the parties, having advanced to the point in their preparation where they can meaningfully consider means by which to streamline the trial and reduce issues, to reduce to writing trial specific proposals to achieve this.

9. These may include proposals on:

- admissions
- reduction of issues
- definition of issues
- onus on issues
- separation of issues
- duty to begin

- duration
- preparation of bundles
- the status of bundles
- exchange of expert reports
- meetings between experts
- compliance with formalities
- plans/photographs/diagrams/dimensions
- confirmation of readiness
- questions of prejudice
- procedure to deal with interlocutory disputes relating to things like:
  - security
  - jurisdiction
  - special Pleas
  - adjournments
  - applications to compel
  - exceptions
  - late amendments
- settlement
- alternative dispute resolution
- desirability of transfer
- evidence by affidavit.

10. A number of other procedural issues may come to mind upon mature case specific consideration by Counsel.

11. The Rule 37(4) Notice begins an important process which culminates in the conference and, often, has a direct effect on the smooth commencement and running of the trial. It is therefore necessary for the notices to be exchanged timeously and for them to be given the consideration which they deserve so that, during the conference, the parties will come prepared to respond.

12. All of this is self evident.

13. Rule 37(6) and (7) refer to the need for the **minutes of the pre-trial conference** to be prepared, signed and, in due course, filed with the Registrar. No provision is made for the filing of Rule 37(4) Notices. The reason is obvious. The Court is not concerned with what came before (except in the case of disputes and

where a party might claim prejudice for lack of timeous receipt of a proper Rule 37(4) Notice). The Presiding Judge wants to know about the results and not the (sometimes arduous) route followed in getting there.

14. I have discussed these views with the Judge President in this Division and some of the other Judges. They are in full agreement with the aforementioned remarks.

15. I now turn to the merits.

16. The Plaintiff is a 46 year old unemployed male.

17. It is common cause that, on 21 April 2002, the Plaintiff, as pedestrian, was involved in a collision (on Road 1009 in Woodhurst) with a Toyota Corolla bearing registration mark ND 10699, driven, at the time, by nursing sister Pillay.

18. The Plaintiff apparently fractured his left humerus and sustained associated injuries as a result of the collision.

19. In the circumstances the Plaintiff claimed compensation from the Defendant.

20. The Plaintiff and his common-law wife (Ms Govender) gave evidence in support of the Plaintiff's case and the nursing sister testified in support of the Defendant's case.

21. At the commencement of the hearing, I granted an Order separating quantum.

22. The only issues that remained for determination, were:

(a) whether:

(i) the insured driver was negligent;

(ii) the Plaintiff was also

negligent;

(b) their respective degrees of negligence (in the event of a finding against both).

23. Minor factual disputes arose between the two versions (like the colour of the Plaintiff's clothing). More significantly, however, there was a dispute about the location of the collision and the respective movements of the Plaintiff and the vehicle immediately before impact.

24. Road 1009 is a typical suburban road of tarred surface in an area with houses and businesses on both sides. (The photographs produced during the trial demonstrate a reasonably busy environment with a garage, a church, a library and various entrance routes in the immediate vicinity of the collision).

25. The Plaintiff and his wife testified that they had been walking on the pavement on the right hand side of the road (facing oncoming traffic). His wife then crossed the road. He checked right and left, saw no danger and began to cross. Whilst he was still on the **safe** lane, he heard a sound and, looking to his left, saw a red vehicle approaching at speed. (At this point he was still a meter or so short of the lane of travel of that vehicle). He got a fright and quickly ran forward to stand on the white barrier line. That is where, according to him, he was then struck by this vehicle. He claims to have lost consciousness as a result thereof.

26. The Plaintiff's wife seemed to confirm his version (except to add that, afterwards, the Plaintiff was dragged some distance - maybe as much as 50 metres) towards the service station exit where the vehicle finally came to a halt. She also confirmed that there was no danger of vehicles on the lane which the Plaintiff had first crossed and that there was, accordingly, no reason for the Plaintiff to **dash** onto the barrier line.

27. The insured driver put the point of impact right at the exit to the Engen Garage (some 50 metres away from where it was placed by the Plaintiff and his witness). According to her, she observed the Plaintiff and his wife walking on the opposite pavement in the same direction in which she was travelling. The wife then crossed the road (near the Engen Garage entrance) and she reduced her speed, half expecting the Plaintiff to do likewise. When he continued walking, she continued driving until, suddenly, he was virtually in front of her vehicle. She hooted, swerved right, observed oncoming traffic and, therefore, swerved left again and hit the Plaintiff with the left side of her vehicle. (Later she added that she had also braked). She stopped her vehicle virtually there where the impact occurred. Afterwards she rendered some assistance, found the Plaintiff smelling of alcohol and conscious and angry.

28. In the circumstances there are clear factual disputes on the location of the impact and the circumstances giving rise thereto.

29. The Plaintiff and his wife had poor educational qualifications, displayed some difficulty expressing themselves and clearly did not have the intelligence and command of language of the insured driver. Their demeanour also did not impress. Since neither education nor intellectual capacity is a yardstick for honesty and because demeanour is a poor substitute for analysis on the probabilities, I prefer to resolve the factual disputes with reference to the inherent probabilities.

30. The Plaintiff’s version is clearly improbable. In spite of looking right then left, before he commenced crossing, the Plaintiff never saw the approaching vehicle. On his version, the insured driver struck him on the barrier line in spite of having travelled on her lane, with enough space comfortably to do so and in the absence of any indication that she needed to overtake, turn or,

for some other reason, leave her lane. When the Plaintiff suddenly saw the vehicle approaching on his left, at speed, he quickly moved forward (closer to the danger zone) to go and stand on the barrier line, in spite of the fact that there was no other traffic presenting any danger on that lane. In addition the Plaintiff's wife described how the insured driver (somewhat callously) continued to drive the vehicle some distance and dragged the Plaintiff along, before she finally stopped at the point where it was common cause that the vehicle and the Plaintiff were found immediately afterwards. All of this sounds very improbable when compared to the insured driver's version.

31. The insured driver is a highly qualified nurse, who came across as a compassionate person (a mental picture which is difficult to reconcile with her driving along unperturbed dragging the Plaintiff along the tarred road).

32. I was left with the clear impression that she had tried her best to give me an honest recollection of events which occurred a long time ago. She conceded that she had been travelling along a busy environment, with children playing on the sides of the road and other pedestrians in the vicinity of the Engen Garage. She was fair enough also to concede that, notwithstanding the slightly busy environment, nothing obstructed her view of the Plaintiff where he continued to walk with his back to her.

33. It is important that, having observed the Plaintiff on the opposite pavement, she next saw him when he was virtually in front of her trying to cross from her right to left.

34. It was suggested to her that she was negligent in swerving first to the right, then to the left and in not stopping her vehicle in time to avoid a collision.

35. I have no doubt that, at this stage, the insured

driver faced somewhat of an emergency. The Plaintiff was virtually in front of her, trying to **dash** across and she instinctively swung right and would, apparently, have missed the Plaintiff if it wasn't for the approaching traffic which had made her swing left immediately. The Plaintiff just failed to make it and her vehicle struck him on the left front side.

36. I do not think that the insured driver can be criticised for what she did <u>at this stage</u> of the incident. She was travelling around 40 kilometres an hour (which was not too fast for the circumstances) and immediately reacted when faced with the situation. I have little doubt that she would not have been able to avoid the collision if that was all to it.

37. That, however, is not the end of the enquiry. I need to consider her conduct at the earlier stage when the Plaintiff left the pavement and crossed the opposite lane of travel before he reached the point of emergency.

38. The insured driver explained that she did not, at any stage, see the Plaintiff leave the pavement or cross the opposite lane of travel. After seeing him earlier, walking along the pavement, her next mental picture is of him **already on my path**.

39. It is true that a motorist is not required always to make allowance for the reckless conduct of others. I guess the duty arises only when such reckless conduct may reasonably be expected. In a modern city environment it is not uncommon (and, regrettably, seems to be the rule nowadays) for pedestrians recklessly to run across roads. In the circumstances faced by the insured driver, she had already received some indication of association between the Plaintiff and his wife (who, significantly, had crossed moments before) and nothing prevented her from maintaining at least peripheral vision of the Plaintiff so that, if he followed suit, she could immediately take evasive action. (As I said, on her own version,

there was nothing that otherwise engaged her attention and nothing to prevent her from maintaining such peripheral lookout). It must follow that the insured driver did not maintain the lookout, possibly because of a lapse of concentration and that, if she had done so, she would have observed the Plaintiff as he left the pavement to cross the road. In not doing so she was, in my view, negligent since, as I have said, she, firstly, had reason to be alive to this possibility, secondly, nothing obstructed her view, thirdly, she must have been mindful of the risk of such conduct by pedestrians in a busy suburban environment and, fourthly, she could easily have maintained the lookout whilst continuing along her way.

40. The insured driver was honest enough to concede that, had she maintained a lookout, she would have seen the Plaintiff leave the pavement on the opposite side and that she may well have succeeded in avoiding the collision. I am satisfied that this concession was not just honestly but, equally importantly, correctly. Having regard to the road width available, the distance between the approaching vehicle and the Plaintiff on the opposite side of the road, the low speed at which she was travelling and the ease with which she could have swerved to the left or hooted earlier, I am satisfied, on the probabilities, that she would have been able to avoid the collision if she had noticed the Plaintiff leaving the pavement.

41. On the (more probable) insured driver's version, there can be no doubt that the Plaintiff was also negligent. In spite of having equal opportunity to observe her approach, he entered directly into her lane of travel.

42. It is necessary therefore to compare the degrees of blameworthiness.

43. It cannot be doubted that the Plaintiff was reckless. He was about to enter a busy road (with traffic flowing in both directions), immediately

opposite a filling station and had every opportunity to look in both directions and wait for approaching traffic before crossing the road. In spite of this opportunity, the Plaintiff, recklessly, crossed first the one and then, part of the other lane, apparently without even looking into the direction from which the insured vehicle had come (at least not until the last moment). In other words, he **blindly** walked into a busy road and crossed in front of another vehicle without maintaining any lookout. Compared to this the insured driver's negligence simply lies in her failure to maintain peripheral observation of the Plaintiff so that, if he were to act in such a reckless manner, she could immediately take evasive action. On her version, she observed the wife crossing, reduced speed, thought that the Plaintiff might do the same and then, momentarily, seemed to lose concentration when, against expectations, the Plaintiff carried on walking on the opposite pavement.

44. If I were to compare the respective degrees of negligence, I would conclude that the Plaintiff was almost twice as negligent as the insured driver.

45. In the circumstances I would assess the respective degrees of negligence 60% : 40% in favour of the insured driver.

46. In the circumstances I find the Defendant liable for 40% of the damages suffered in consequence of the injuries sustained by the Plaintiff on 21 April 2002 and I consequently direct the Defendant to compensate the Plaintiff accordingly.

47. Costs are reserved.

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MARAIS AJ
ACTING JUDGE
23 OCTOBER 2009