IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NUMBER 17311/2018

REPORTABLE

In the matter between:

SHARON DE KOCK Plaintiff

And

ROAD ACCIDENT FUND Defendant

JUDGMENT DELIVERED ON 20 MARCH 2024

KUSEVITSKY, J

Introduction

[1] This is an action instituted against the Road Accident Fund ("the Raf") in terms of section 17 of the Road Accident Fund Act, No. 56 of 1996 ("the Act") by the Plaintiff following a collision between herself whilst driving her Harley Davidson motor cycle in the vicinity of the Salandra Shell Garage ("the garage") on the R 43 Road between Cape Town and Hermanus ("the roadway") and one Mr Iain Sutcliffe ("the insured driver") on or about 4 December 2016.

[2] The Defendant repudiated the claim and the parties agreed that the issue of merits and quantum be separated which was duly done in terms of Rule 33(4) of the Uniform Rules of Court. The matter accordingly only proceeded on the merits.

[3] It is common cause that the Plaintiff was driving her motor cycle on the R43[1]. The R43 road has a north-south orientation. On the right hand side for southbound road users, the garage is situated to the right of the roadway with a designated entry point for these users at the north entrance of the garage, and an exit point at the south entrance[2] for road users exiting the garage and wanting to proceed in the direction of Hermanus. Adjacent to the garage, there is a painted island covering the expanse of the garage, starting just after the intersection leading to the north entrance of the garage and ending just after the south entrance of the garage. In front of the south entrance, the painted island is interrupted, creating a gap for road users intending to exit the garage to cross the northbound lane and re-enter the roadway in the southerly direction towards Hermanus.

[4] The location of where the collision occurred and the manner in which it occurred is not in dispute. Both the insured driver and the Plaintiff were travelling in the Hermanus direction prior to the collision. The insured driver, driving an A3 Audi, was the front vehicle in a line of three vehicles. Behind it was a Jeep Cherokee

[1] The R43 is a regional route in the Western Cape serving as a feeder route between smaller towns to the national and provincial routes.
[2] The south entrance of the garage is also an entry point for road users travelling from Hermanus in the direction of Cape Town in a northerly direction.

motor vehicle and behind that was a Lexus motor vehicle being driven at the time by Mr Brian Taylor ("Mr Taylor"), who was also the only witness to testify on behalf of the Defendant. Plaintiff was initially travelling behind the Lexus and her husband was on his motorcycle behind her.

[5] It is common cause that the Plaintiff overtook the Lexus and the Jeep, and was in the process of overtaking the Audi of the insured driver on its right side when the insured driver, (who by this time was in front of the Plaintiff), executed a right turn into the south entrance of the garage. The simultaneous action of the insured driver turning right and the Plaintiff who was in the process of overtaking the Audi resulted in the aforesaid collision.

[6] It is Plaintiff's contention that the insured vehicle suddenly and without warning, executed the right hand turn to the garage and across the Plaintiff's path of travel. The Defendant denied that the collision was caused by the sole negligence of the insured driver, pleading contributory negligence on the part of the Plaintiff in the alternative.

[7] This Court therefore has to determine whether the insured driver was solely to blame for the collision or whether there was any contributory negligence on the part of the Plaintiff and if so, the extent thereof.

[8] The Plaintiff called two witnesses, her husband Mr Servaas de Kock and a reconstruction expert, Mr Craig, in addition to herself. The Defendant led the evidence of one eye witness, Mr Brian Taylor.

[9] The Plaintiff started off by saying that she suffers from short term memory loss and as a result, she cannot recall the impact of the collision, but only a few seconds before the impact. She testified that on the day, she and her husband as well as another couple, all on their own motor cycles, were returning home to Stanford from Cape Town. Their friends were moving faster than her and were ahead of her and her husband, who was riding behind her. She says that she was driving at her own pace. She confirms that she knows the road well and it was a clear and beautiful day. At the vicinity of the garage, there is a separate, right turning lane to the entrance of the garage. Further on, there is a separate slip way for vehicles exiting the garage and wanting to proceed in a southerly direction in the direction of Hermanus.

[10] The Plaintiff confirms that she was riding behind the Audi of the insured driver when he passed the first right hand intersection to the garage and says suddenly and without warning, he turned right at the second intersection. She testified that there was no indication from the insured driver that he was going to turn right; he did not indicate and she did not see any brake lights. She assumed that he would have used the first entrance and had assumed that he was proceeding straight. She was waiting for the oncoming traffic to pass before she could overtake the Audi. She collided with the Audi with the impact on the ride side of the vehicle although she cannot recall the impact.

[11] During cross-examination, she admitted that prior to the accident, that she had overtaken two vehicles, a Mercedes and a Jeep before attempting to overtake the insured driver. When asked if the Audi moved over in order for her to overtake, she testified that the Audi did move over to the left. She said that she was not driving directly behind the insured vehicle but more to the right hand side to middle of the road. When it was put to her that an independent witness would testify that when she overtook him and the Jeep, that she was travelling fast, she admitted that she had slowed down considerably after she had passed the Jeep. It was then put to her that she did not take note of what the Audi was doing because she was observing the oncoming traffic in order to overtake, she conceded that at no time did she see the Audi turn to her right. She also admitted that she overtook these cars on the yellow painted island.

[12] The husband of the Plaintiff, Mr. Servaas de Kock testified that they had returned from Cape Town after having attended an audition for a motorcyclist to appear in a movie. He confirms travelling with friends although they were ahead of them. They have been riding Harley Davidson's since 1983. They always ride in a group. He has a good recollection of the day. He says he always rides behind his wife so that he can see what is happening in front. He noticed the Jeep and the Audi. His wife was riding in front of the Jeep and he was behind her – the distance between them was approximately a car length. He testified that there was a silver vehicle in front of them and a few other vehicles although he cannot recall how many. He explained that they always ride on the inside of the road so that they are

visible to vehicles in front of them. It also provides them with a wider view of the road ahead and one cannot get that riding exactly behind a vehicle.

[13] Just before the accident, his wife was behind the Audi. There were oncoming cars in the other lane and they passed the entrance to the garage, which had a dedicated right turning lane. He says the next moment he saw the Audi taking a right turn in front of his wife. She hit the Audi at its wheel arch and somersaulted over the vehicle, landing in a ditch on the opposite side of the road. He did not see any indicators and even confronted the insured driver about this before going to check on his wife. He also had nothing obstructing his field of vision. With regard to the condition of their motor bikes, he says that he keeps them in tip-top condition. The headlights, or riding lights, also comes on automatically when it is started. He usually drives with his on dim, but he is unsure what hers was on. The motorcycles were also modified in that they exchanged their factory fitted exhaust pipes for much louder ones.

[14] During cross-examination when it was put to the witness that he claimed to have not been in a hurry, yet managed to overtake three vehicles, the witness stated that their friends were in front and they like to travel together. He said that he did not see the Plaintiff overtaking, he merely saw her in front of him and behind the Audi. When put to him that an independent witness says that everybody in front of them were slowing down as if something was happening in front, the witness agreed that he noticed the Jeep had slowed down and he too had started slowing down. He said that it all happened very quickly, they were all driving in a line and the next moment she was over the vehicle. He denied that they were riding fast. He stated that the

insured driver did move over to the left, indicating that he needed space to make the turn. He concluded that his wife did not have enough time to react and that the insured driver turned across her path.

[15] The third witness to testify on behalf of the Plaintiff was an accident re-construction expert, Mr John Craig. He confirmed that the dedicated right turning lane allowed, and was designed, to get vehicles out of the way of the operating speed limit of the road safely so as not to pose a danger to them. The area of the impact is determined by the position of the Audi after the accident; the damage of the Audi and the resting position of the Plaintiff. Mr Craig compiled an accident reconstruction report. According to the report and the photographs provided, he stated that it was clear that the motor cycle collided with the right rear fender of the Audi causing both lateral and longitudinal damage to the area of the vehicle. Mr Craig opined that the fact that there was inward crumpling as well as longitudinal damage with the area of damage being relatively confined, confirms that the Audi had turned sufficiently to be at a significant angle to the motorcycle when the impact occurred. In his report, he stated that it was not possible to determine the exact angle, however it was likely to have been in excess of 45 degrees and less than about 70 degrees. In his testimony, he however stated that the Audi would have turned a sharp 90 degrees cutting across the oncoming lane, or 120 degrees. He also stated that if the impact had occurred just after the Audi had commenced turning with the vehicle at a small angle to the direction of travel of the motorcycle, there would have been less inward crumpling and more longitudinal damage on the Audi. In his report he states that it is likely that the Plaintiff had sufficient opportunity to commence a swerve towards her right and this would have reduced the angle of

impact. The fact that the two vehicles were still at a significant angle at impact confirms that the Audi had turned significantly when the impact occurred. He confirmed that the damage profile was not consistent with speed. This is apparent from the fact that the Plaintiff projected over the Audi and came to rest on the side of the car. Had there been speed, the rider would have been projected 30 to 40m in front. This is also indicative of the fact that the Audi was not displaced, it merely came to a standstill, so he estimated that the insured driver was doing between 30 – 40 km p/h when he took the turn and the collision occurred.

[16] Mr Craig also opined that given the standard Perception Reaction Time, which is established to be 1.5 seconds according to research, there was insufficient perception reaction time for the Plaintiff to have avoided the turning Audi, who appears to have given no prior warning of its intention to turn right using the right indicator. When asked about the possibility that the Plaintiff might have been in the Audi's '*blind spot'*, Mr Craig stated that the blind spot is between the middle and the front and when the Plaintiff moved past the Audi if commenced overtaking, the Plaintiff would have been visible to the insured driver in the right hand mirror. He concluded in his report that it appeared as if the insured driver made a very late decision to turn right into the filling station across the path of the motorcycle approaching from the rear without activating his right indicator. The entrance into which the insured driver turned is intended to be used for southbound vehicles exiting the Service Station or northbound vehicles entering it. Southbound vehicles are intended to use the northern access, which has a right turning lane. He however conceded in his testimony that nothing prevented the insured driver from turning right into the south entrance and that there was nothing illegal about it. There was

insufficient time for the Plaintiff to have avoided the collision and had the insured driver checked his side mirror prior to turning, he would have seen the Plaintiff and had sufficient time to abort the right turn, in which case the collision would not have occurred. In his evidence, he stated that once the insured driver had committed to the turn, the collision was unavoidable.

[17] During cross-examination, Mr Craig was questioned about the assertion that it was safer for the Plaintiff to ride in the centre of the painted island to get more visibility and that this was not a sudden emergency in terms of Traffic law, the Plaintiff overtook over a painted island and in circumstances when it was not safe to do so. He stated that the island is there to protect vehicles; it prevents northbound vehicles collecting head-on and also provides a refuge for those turning right since there is a 4m wide gap in the island. The island has nothing to do with someone turning right. In any event he opined, it was strange behaviour for the insured driver to have passed the designated turn and essentially cause a concertina effect. He confirmed that the Audi crossed the path of the Plaintiff. He had an obligation to check his mirrors and once he turned, neither of them could have avoided the collision. Counsel for Defendant however put to the witness that had the Plaintiff not been driving on the painted island, the Audi would have made his turn and she would have proceeded in the normal course. During re-examination, the witness explained that whilst the Plaintiff would have been overtaking, she would have increased her speed in anticipation of overtaking and one thus forgoes the following-distance if one is overtaking the vehicle.

[18] The Plaintiff closed her case after Mr Craig's evidence. Mr Brian Taylor was the first and only witness for the Defendant. He was driving back to Hermanus from Bot River. As they were nearing the garage, there was a grey Audi travelling in front of a Jeep and he was behind the Jeep, driving a Lexus Hybrid. He said as he approached the garage, the speed limit decreases from 120 k/m to 100k/m and the traffic was slowing down considerably. As he approached the yellow boxes, he saw in his rear view mirror a motorcycle coming fairly fast on his right hand side. He testified that the traffic was slow and he saw the Audi turn right at an intersection between the yellow boxes of the painted island. He says that as the Audi turned, the motorcycle had passed the Jeep and collided with the Audi as it was turning right. The Plaintiff was catapulted over the Audi. He stopped at the scene as he had first-aid experience. He stated that the motorcycle was travelling very quick when it collided with the Audi, having overtaken three vehicles before hitting the Audi. He says that the motorcycle was travelling in the painted island[3].

[19] During cross-examination, it was conceded that the Plaintiff was approaching wanting to overtake him and the Jeep and as she approached the Audi, it executed a right turn. The witness testified that one couldn't see the Audi as the Jeep was much bigger and driving fairly close to the Audi. He also reiterated that the three vehicles closed the gap pretty quickly. When it was put to the witness that there was nothing the Plaintiff could have done to avoid the collision, the witness stated in summary: the Plaintiff should not have overtaken in the first place; he did not see whether the Audi's indicator was on or not; the cars in front of him were slowing down and the motorcycle was closing in; the Audi was well into his turn, horizontal, when the

[3] The witness referred to it as the 'yellow box'

collision occurred. According to his statement as recorded in Mr Craig's reconstruction report, he saw the Audi slowing down to turn into the garage as the Jeep in front closed the gap very quickly to the Audi. He then suddenly noticed two motor cyclists on Harley Davidson's travelling on his right-hand side and travelling towards Hermanus. The two motorcyclists were travelling on the painted island and ended up on the wrong side of the road. The driver then executed his turn and the motor cyclists at the front then impacted the Audi towards the back on the driver's side.

Evaluation

[20] The classic test for negligence was formulated in *Kruger v Coetzee 1966 (2) SA 428 (A)*[4] where the court stated that for the purpose of liability, *culpa* arises if a *diligens paterfamilias* or reasonable person in the position of the defendant would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and would take reasonable steps to guard against such occurrence; and the defendant failed to take such steps. Whether a *diligens paterfamilias* in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend upon the particular circumstance of each case. No hard and fast basis can be laid down.

[21] It is trite that the onus rests on the Plaintiff to prove the Defendant's negligence which caused the damages suffered on a balance of probabilities. In

[4] at 430E-G

order to avoid liability, the Defendant must produce evidence to disprove the inference of negligence on its part, failing which they risk the possibility of being found to be liable for damages suffered by the Plaintiff.

[22] On the other hand, where the Defendant has in the alternative pleaded contributory negligence and an apportionment, the Defendant would have to adduce evidence to establish negligence on the part of the Plaintiff on a balance of probabilities[5].

[23] Section 1(1)(a) of the Apportionment of Damages Act 34 of 1956 gives a discretion to the trial court to reduce a plaintiff's claim for damages suffered on a just and equitable basis and to apportion the degree of liability. Where apportionment is to be determined, the court is obliged to consider the evidence as a whole in its assessment of the degrees of negligence of the parties. Writers have opined that apportionment of liability should only generally be considered where it can be proven that the plaintiff was in a position to avoid the collision.[6] In this instance in order to prove contributory negligence, it is necessary to show that there was a causal connection between the collision and the conduct of the Plaintiff, this being a deviation from the standard of the *diligence paterfamilias*.

[24] In argument, counsel for Plaintiff argued that it was not in dispute that the insured driver did not have his indicator on as testified by Mr. de Kock and Mr.

[5] Johnson, Daniel James v Road Accident Fund, Case Number 13020/2014 GHC at para 17 confirming Solomon and Another v Musset and Bright Ltd 1926 AD 427 and 435.
[6] The Law of Collisions in South Africa by Isaac Isaacs, Geoffrey Leveson, HB Klopper, 2012 at 85

Taylor could not say whether it was on or not. He also argued that the reason that there was no indicator used, was because this was a late decision by the insured driver to turn and that it was a fairly quick maneuver. Thus, Plaintiff had no way of anticipating that the vehicle was about to turn. Counsel for Defendant on the other hand disputed this assertion relying on the evidence of Mr. Craig who conceded that the speed at which the Audi executed the right turn was not very high, estimating it to be between 30-40km/hr.

[25] He also argued that the insured driver failed to use the designated right turn and as a result, Plaintiff had assumed that the insured driver would continue with his travel. Furthermore, the insured driver failed to observe his side mirror – she was not on his tail and she was not in his blind spot. He also argued that there is no evidence that it is unlawful to cross the painted island, relying on Mr. Craig's evidence that it was safer to travel on the yellow island which creates a wider berth. He concluded that merely because one infringes a regulation of the Road Traffic Act[7], did not mean that one is negligent in doing so. Thus, even if the Plaintiff was not meant to overtake there, so the argument went, she was not negligent and there was no contributory negligence.

[26] In evaluating the evidence, I have to ascertain the culpability of the insured driver, and that of the Plaintiff in response to the claim of contributory negligence based on the evidence at hand, the reconstruction report and affidavits deposed to by the Plaintiff in her prosecution of this claim, against the backdrop of the applicable

[7] No. 93 of 1996

legislation, established principles and thereafter to evaluate which version is the most probable under the circumstances.

[27] The first contention by the Plaintiff is that the insured's driver's failure to use the correct designated entrance was negligent because the Plaintiff was entitled to assume that he would not attempt to execute such a right hand turn at the point where he did. In this regard reliance was placed on the comments by Schreiner JA who stated in *Moore v Minister of Posts and Telegraphs* 1949 (1) SA 815 (A) at 826:

> *Speaking very generally one expects and is entitled to expect reasonableness rather than unreasonableness, legality rather than illegality from other users of the highway.*

[28] Mr. Craig's evidence in this regard conceded that nothing prevented the insured driver from turning right where he did at the south entrance and that there was nothing illegal about that action. I am therefore not persuaded by the argument that the insured driver was negligent for his failure to have used the designated entrance.

[29] The second aspect is whether the insured driver was negligent in failing to indicate his intention to turn right. Mr. de Kock testified that he was riding behind the Plaintiff and did not see the insured driver engage his indicators, whilst Mr. Taylor did not see whether his indicators were on or not. I accept the evidence of Mr. de Kock in this regard, especially in light of his testimony that he in fact confronted the

insured driver to reprimand him about this fact prior to ascertaining the condition of his wife. I therefore accept that the insured driver was negligent in this regard.

[30] The third aspect is whether the insured driver was additionally negligent in that he failed to look in his side mirror before he commenced executing his right-hand turn. If he had, so it was submitted, then he would have seen the Plaintiff's motorcycle approaching him from behind, on his right hand side. Reliance was placed on *R v Miller* 1957 (3) SA 44 (T), where the Court reiterated that a motorist who intends to execute a turn across following traffic must, by the use of a properly adjusted rear-view mirror, observe whether a following car is close behind and travelling at such a speed that it may be endangered by a right-hand turn and whether it is responding to a signal either by moving to the left or by decelerating. If this cannot be done in the particular circumstances, then the turn should not be executed at all. It is a manoeuvre inherently dangerous in its nature unless executed with scrupulous care.

[31] In the case of *Brown v Santam Ins Co Ltd* 1979 (4) SA 370 (W) a collision occurred between a motor vehicle turning right from a major tarred road into a road leading off at right-angles and a following overtaking vehicle. The Court held that even if driver of the former had given a signal to show that he was going to turn right, he had nevertheless been negligent in concluding that the motorist behind had observed his signal and in failing to look again in his rear-view mirror. The Court considered the facts and found that it had not been established that the former had given warning signals of any sort.

[32] Mr Taylor's evidence was that he observed the Plaintiff approaching and overtaking in his side mirror and therefore the contention is that, if Mr Taylor had seen the Plaintiff in his side-mirror, then it must have been reasonable to expect the insured driver to also have observed her. According to the evidence, it would have been reasonable for Mr Taylor to have seen the two motor cyclists, including the Plaintiff in his side mirror since nothing was obstructing his view to the rear. On his own evidence, he said that he could hardly see the Audi since the Jeep, who was in front of him, was so much bigger. It would therefore be reasonable to infer that perhaps the insured driver did not see the oncoming motor cyclists approaching, not behind the vehicles as reasonably to be expected, but riding in the middle painted centre island as is apparent from both Mr de Kock's evidence, as well as Mr Taylor's. However, in the absence of evidence of the insured driver in this regard, this would be mere speculation. In any event, it has been constantly restated that the duty of a driver who is about to execute a right-hand turn across a busy public road is to take considerable care to ensure that he chooses a safe and opportune moment to cross. A driver who intends to turn should also ascertain whether there is following traffic, signal his intention to turn clearly and must refrain from turning until an opportune moment. A driver should look attentively in his review mirror to ascertain whether there is traffic following his vehicle. His duty is a continuous one. The circumstances may require the driver to look repeatedly in his rear view mirror particularly once he or she becomes aware of the presence of the following traffic. A driver is under duty to warn following traffic that he intends to turn to his right.[8] In the

[8] *See* Hartley v Road Accident Fund (44376/2014) [2016] ZAGPPHC 282 (10 March 2016) at para 11; *See* also Midway Recovery and Transport CC v Heigauseb 2021 JDR 1791 (Nm)

circumstances, I find that the insured driver was negligent in failing to look into his rear view or side mirror and as a consequence, failed to keep a proper lookout.

[33] When evaluating the evidence of the Plaintiff, she detailed extensively what had transpired just prior to the collision, whilst conceding that she suffers from short term memory and that she cannot recall the moment of the impact itself. This however is in stark contrast to an affidavit deposed to by the Plaintiff on 3 May 2018 in which she states under oath the following:

> "3. In the vicinity of the Salantra Garage, I noticed a grey Audi that was travelling in front of us. I do not recall what happened after this and only recall waking up in hospital later that day.
>
> 4. My husband later informed me that the driver of this Audi suddenly braked and started turning to its right. The driver failed to slow down or indicate prior to this. I ended up colliding with the side of the vehicle." (My emphasis")

[34] Given this statement, there is then no direct evidence by the Plaintiff, as to the exact moment prior to the collision and I therefore attach little probative weight to her evidence in that regard, i.e. that she saw the insured driver suddenly and without warning swerve right and that he had no indicators on. The evidence of Mr. Craig also does not support this proposition since his evidence was that the damage profile was not consistent with speed; that the insured driver was driving approximately 30-40 km/hr. when he executed the turn and the fact that the insured driver was well into his turn when the collision occurred. I am therefore not persuaded by the Plaintiff's contention that she was of the view that the turn

executed by the insured driver was sudden, as the speed driven does not support this conclusion.

[35] Now turning to the contention by the Defendant that the Plaintiff too was negligent and that such negligence was the sole cause, alternatively contributed to the collision in that she had *inter alia* failed to keep a proper look-out under the circumstances; had failed to avoid a collision where by the exercise of reasonable care she could and should have done so; she failed to avoid taking action timeously, adequately or at all; and she drove her motor cycle across the pass of travel of the insured driver. Since I have already found negligent conduct by the insured driver, the only aspect remaining for me to consider is whether Plaintiff was also negligent and if so, whether such wrongful conduct, whether by act or omission, contributed to the collision and to what degree, if any.

[36] The Defendant argued that even if the insured driver had engaged his indicator, this would not have mattered since the collision occurred whilst the insured driver was well into his turn. They contend that the Plaintiff failed to keep a proper look out in that she rode into him whilst he was executing his turn. It was argued that on Plaintiff's version, she was driving more to the right of the road and had she been riding behind the insured driver, even though not directly behind him, she would have been driving at a safe following distance which would have given her time to stop or move to the left hand side of the road. I am in agreement with this contention. In the first instance, it is common cause that the traffic was slowing down and the Plaintiff was already in the process of overtaking the insured vehicle. I

accept that when the collision occurred, the Audi could not have been speeding, given the evidence of Mr. Craig, as well as the evidence of My Taylor who stated that the traffic had slowed down considerably after that right intersection by the garage. I also accept the evidence of Mr. Taylor that the Plaintiff was driving quickly in that, on his evidence, she had overtaken three vehicles in front of him and was in the process of overtaking the Audi when the collision occurred. This fact is supported by Mr. Craig who opined that it is natural to increase one's speed to accommodate the action of overtaking.

[37] It is also more probable that the insured driver and the Plaintiff were both watching the oncoming traffic to see whether, in the instance of the insured driver's case, that it was safe for him to cross, and in the case of the Plaintiff, whether it was safe to overtake in the oncoming traffic lane. Furthermore, it is apparent from the conduct of the Plaintiff and despite her testimony that '*nothing was chasing her'*, she was in a rush to catch up to her friends who were riding ahead of them. This is corroborated by the evidence of the Plaintiff's husband that they prefer to ride together in a group, together with the common cause evidence that she had overtaken two vehicles and was in the process of overtaking a third when the collision occurred.

[38] The law regarding the duty of a driver is trite, a driver should scan the road ahead continuously for obstructions or potential obstructions. In *Nogude v Mniswa* 1975(3) SA 685 (A) at 688D a "proper look-out" was described as follows:

"More than looking straight ahead it includes awareness of what is happening in ones immediate vicinity. He (the driver) should have a view of the whole road from side to side."

[39] The duty of an overtaking driver was discussed in Cooper: Delictual Liability in Motor Law at p165[9] as follows:

"An overtaking driver must keep a vehicle about to be overtaken under observation and he should not overtake when the vehicle ahead is turning, or the driver has indicated his intention to turn, to the right."

[40] The duty of a following motorist was discussed in *Hobson and Another v National Employers General Insurance Co Ltd* 1982(1) SA 205 (E) on p208 C-D as follows:

"The crucial enquiry, however, is whether the reasonable man in the plaintiff's position would have considered it reasonably possible that the driver of any vehicle following Collier would overtake in the circumstances and manner in which Yoyo did so. Fundamental to the answer is the fact that the law does not, generally speaking, oblige one to anticipate possible recklessness on the part of one's fellow motorists."

[41] If one considers the evidence of Mr Taylor that the traffic ahead of them had been slowing down, almost like a concertina effect, had the Plaintiff slowed down in light of the slowing traffic, then this collision would not have occurred if I were to accept, which I do, Mr Taylor's evidence that one could not see in front of the much larger Jeep in front of him. It is not surprising that the motorcycle did not anticipate

[9] Revised Edition, 1996

the right turning Audi, since she probably did not see him whilst she was in the process of overtaking the Jeep.

[42] The degree of the impact is also instructive. The insured driver was well into his turn when the collision occurred. This is an indication that the insured driver did not see the Plaintiff on his right side and neither did the Plaintiff, since this was not an instance that the insured driver had just commenced turning when the collision occurred. I agree that with both parties' actions at that precise moment, the collision was inevitable.

[43] The action of overtaking is not contentious, but it must be done in a manner when it is safe to do so, and when the painted markings of the road allow. For instance, one cannot overtake on a solid line. In this instance, the evidence of `Mr. Taylor was that the 'cat eyes' were installed in the road some two to three years prior to the collision, indicating, according to Mr Taylor, that one could not overtake there. Thus, had the Plaintiff observed these markings and not overtaken the insured driver at that point, again, the accident could have been avoided.

[44] To sum, this is an indication that firstly, the Plaintiff was not keeping a proper look out at the insured vehicle because had she done, she would have observed the insured driver executing the turning manoeuvre or starting to execute the right hand turn, and secondly the evidence of Mr Craig that it was not a high speed turn. Had the Plaintiff kept a proper look out, she could have avoided the collision if she had

done so. Given the aforementioned facts, I am of the view that the Plaintiff was equally negligent for failing to keep a proper lookout and riding and overtaking in a place so not designated and when inopportune to do so.

[45] The second issue relates to the contention by the Defendant that Plaintiff overtook on a painted island which is unlawful, relying on the Leaner Manuel for driver's license and motor cycle licenses which provides that a painted island should not be driven on unless directed by a traffic officer, a police officer or a state of emergency.[10]

[46] It is not disputed that this is where the Plaintiff rode and to the right of the insured driver when the collision occurred. Had the Plaintiff, on her version, been on a leisurely ride, then there was no reason why she could not have ridden directly behind the insured driver in a manner that made her visible to him. Furthermore, had she done this, and had the insured driver executed his right hand turn in the manner that he did, the collision would have been avoided as she would have merely proceeded on her way. According to the South African K53 driver's manual, one may only drive in the area of a painted island if instructed to do so by a police officer, in an emergency, or to avoid a potentially dangerous situation. This was not the evidence *in casu*, as Mr Taylor stated in his evidence and also in an affidavit as recorded in Mr Craig's report, he noted two motorcyclists were travelling on the painted island and ended up on the wrong side of the road. Furthermore, the suggestion by Mr Craig, that it was a sudden emergency is unconvincing since it was

[10] at page 48

not disputed by any of the witnesses that they had a sudden emergency and their own evidence was that they prefer to ride in the middle of the roadway and the evidence of Mr Craig was that riding in the middle gave riders a better view and a wider berth.

Conclusion

[47] The onus of proving negligence on a balance of probabilities rests with the Plaintiff. It is clear that the insured driver failed to keep a proper lookout by not observing the Plaintiff in his rear view mirror. If he did, continuously so, then he would have seen the Plaintiff approaching to his right side. I also find that the Plaintiff contributed to the collision in that she was negligent in that she too failed to keep a proper look out; had failed to overtake when it was safe to do so[11]; and should have overtaken when it was safe and also allowed a wide berth to so overtake.

[48] In *Mvimbi v Road Accident Fund*[12], the court considered the circumstances of a collision where a vehicle had turned to the right, and had not kept a proper lookout in the process of doing so. The vehicle in this case had substantially commenced a right-hand turn and negligence was apportioned as being thirty percent (30%) to the insured driver and seventy percent (70%) to the plaintiff. It was held that the plaintiff

[11] Regulation 298 of the National Road Traffic Regulations, 2000

298. Passing of vehicle

"(1) Subject to the provisions of sub-regulation (2) and (4) and regulation 296, the driver of a vehicle intending to pass any other vehicle proceeding in the same direction on a public road shall pass to the right thereof at a safe distance and shall not again drive on the left side of the roadway until safely clear of the vehicle so passed: Provided that, in the circumstances as aforesaid, passing on the left of such vehicle shall be permissible if the person driving the passing vehicle can do so with safety to himself or herself and other traffic or property which is or may be on such road …"

[12] [2010] ZAWCHC 113 (26 March 2010)

had ample time to view the turning manoeuvre and had ample opportunity to react timeously.

[49] The Plaintiff relied on the matter of *Van Der Schyff v Road Accident Fund*[13], which was claimed to be substantially on point to the matter in *casu*. In *Van Der Schyff*, the plaintiff sustained injuries as a result of a motor collision which took place between a bakkie driven by the insured driver and his motorcycle. The plaintiff testified that the insured driver was driving very slowly and he had therefore decided to overtake it. He turned on his indicator to the right, checked for oncoming traffic in the opposite lane, checked for traffic behind him and then proceeded to overtake. As the Plaintiff's motorcycle was overtaking the bakkie, the driver of the bakkie (the insured driver) suddenly turned right without signalling. The Court held that the insured driver had failed both to signal his intention to turn right and to determine properly whether it was an opportune time to turn. The defendant did not call any witnesses, but nevertheless tried to argue that the plaintiff ought not to have overtaken at the place where he did, and that it was unlawful of him to do so in terms of the Road Traffic Act. The Court noted that the defendant's counsel had neither placed any evidence before the Court showing that it was unlawful for the plaintiff to overtake there, nor could he refer the Court to the provisions of the Road Traffic Act that would render it unlawful to do so. The Court concluded that although the defendant had alleged contributory negligence on the part of the plaintiff, it had failed to place any evidence before the Court to establish such contributory negligence, either through calling its own witnesses, or impugning the plaintiff's version to the contrary under cross-examination. The Court in *Van Der Schyff*

[13] (9952/16) [2017] ZAGPPHC 966 (20 October 2017)

accepted the plaintiff's version that the driver of the bakkie (the insured driver) had failed both to signal his intention to turn and to determine properly whether it was an opportune time to turn. The Court further found that there was no basis on which the Court could find any contributory negligence on the part of the plaintiff and the Court accordingly held that the defendant was 100% liable for any damages arising from the injuries which the plaintiff had sustained in the collision.

[50] Whilst the facts may be similar, in my view this case is distinguishable since, in *casu*, the Defendant called a witness disputing the veracity of Plaintiff's version. In any event, it is my respectful view that the approach adopted in *Van der Schyff* was incorrect. I say this for the following reasons: In the first instance in *casu*, the Defendant called an independent eye witness to testify about the collision and about the conduct of the Plaintiff whilst in *Van der Schyff*, the defendant did not call any witnesses. The court found that the version as advanced by the plaintiff (that the insured driver had failed both to signal his intention to turn and to determine properly whether it was opportune to do so; while the plaintiff had properly both signalled and kept a proper lookout), was '*contested neither by the defendant calling witnesses to the contrary; nor by counsel for the defendant on cross-examination.'* In light thereof, he concluded that there was nothing before him on the basis on which he could find any contributory negligence. In my view, it seems as though the basis for this finding lay in an exchange between counsel following an objection by counsel for plaintiff. It is necessary to quote the full paragraph.

> "[17] Mr Maluleka for the Defendant in his cross examination pursued with enthusiasm only one line of questioning. He asked the witness whether there were any road markings on the road indicating that it was lawful for him to overtake where he did. The witness responded that there were, apart from the markings of the intersection, no markings on the road where he overtook and

particularly no line (whether broken or solid) between his and the oncoming lane. Mr Maluleka then put it to the witness that he had overtaken at a place where 'in terms of the Road Traffic Act') it was unlawful for him to do so. The witness denied this, but Mr Fourie then objected that, given that the Defendant was not going to lead any evidence, Mr Maluleka could only put this proposition to the witness if he either had evidence before court that it was unlawful to overtake there, or he could refer the court to the provisions of the 'Road Traffic Act' that would render it unlawful to do so. In response Mr Maluleka indicated that he would abandon this line of questioning."("own emphasis")

[51] It is seemingly on this basis that the court found '*that there was nothing before me'*. This approach in my view is incorrect since it would suggest that a court should disregard the laws and regulations applicable at the time of the incident. It is clear that counsel for the defendant placed in issue the lawfulness of the plaintiff having overtaken at the place that she had by putting to the witness that it was unlawful for him to have done so 'in terms of the Traffic Act". When asked by opposing counsel to refer to the exact provision which rendered it unlawful, counsel seemingly capitulated and abandoned that line of questioning.

[52] It is not unusual in litigation for parties to elect for example, not to file opposing papers, or, such in that instance, not to call witnesses because they are of the view that the matter can swiftly be argued purely on the applicant/plaintiff's papers if *prima facie* they are of the view that no case has been made out. This is an occurrence that happens daily in our courts. Thus the mere fact that counsel could not, on his feet, quote the pertinent provision upon which he relied, whilst challenging the witness, did not absolve the court from taking cognizance of the applicable legislation and regulations which was applicable to the matter at hand. Put differently, a presiding officer is obliged to consider the relevant legislation as a

matter of course in the evaluation of a matter, and the failure of any party to refer to, or rely upon, such legislation or law as the case may be, does not vindicate the other side purely on that basis. A court or any tribunal for that matter is not obliged to ignore it simply because of the (in that case), unpreparedness of counsel.

[53] In the full bench decision of *Fischer v RAF*[14] , the facts are remarkably similar, but for the fact that it was found in that matter that the insured driver had engaged her indicators. In that matter, the appellant was involved in a collision whilst riding his motorcycle, a Kawasaki ZX10, on the N2 highway, near Plettenberg Bay. He collided, from behind, with a red Citi Golf. It was found that the appellant did not have a direct recollection of the collision and reliance was placed on the evidence of his brother-in-law, who testified that they had been travelling in a staggered formation and that he was approximately twenty metres behind the Appellant prior to the collision occurring. He indicated that he was travelling on the left-hand side of the lane, close to the yellow line when they approached the insured vehicle from behind. His evidence was that the insured driver came over from the left-hand side of the lane, close to the middle line and suddenly braked heavily in front of the appellant. He indicated that the insured's vehicle was at a slight angle prior to the collision. In his view, when the insured driver commenced turning, there was nothing the appellant could do other than collide with the insured vehicle as he was right behind it.

[14] Case No. A36/2020 WCHC [26 August 2021]

[54] As in this matter, there Mr Craig was also the reconstructive expert testifying for the insured driver. Regarding the question as to the appellant's alleged overtaking attempt, Mr Craig testified that if the Appellant's motorcycle was accelerating at the point when the insured vehicle commenced turning to the right, this meant that in such an event, the appellant did not leave enough space between him and the insured motor vehicle, which would be evident by the Appellant striking the middle of the rear of the insured vehicle. In that case, the court found that the the insured driver had engaged her indicators. The court confirmed the court *a quo's* apportionment of 20/80 in favour of the insured driver. The evidence given by Mr Craig in *Fischer* is also apposite in *casu*, where substantially the same averments were levelled against the insured driver. However, in this matter, whilst we can accept that the indicator of the insured driver was not engaged, I am of the view that, given the totality of the evidence, the Plaintiff was also negligent in riding without keeping a proper lookout and overtaking in a manner that was unsafe, and in place in the roadway where she was prohibited from doing so. I am also of the view that such negligence was also a causal link to the collision.

[55] In the circumstances, having considered all of the evidence and taking into account the probabilities of the circumstances of the matter, I make the following order:

Order

1. The Defendant is liable to pay to the Plaintiff fifty percent (50%) of such damages as the Plaintiff is able to prove arising from the injuries she sustained in the collision.

2. The issue of costs shall stand over at the determination of *quantum* or as agreed between the parties.

KUSEVITSKY, DS

JUDGE OF THE HIGH COURT

APPEARNCE FOR PLAINTIFF	**: ADV. WAYNE COUGLAN**
ATTORNEY APPEARING FOR PLAINTIFF	**: CHRIS SMITH**
	: DSC ATTORNEYS
APPEARANCE FOR DEFENDANT	**: STATE ATTORNEY**
	: CLAIREESE THOMAS