

SOUTH AFRICA / JUDGMENT

Botha v Road Accident Fund (5393/09) [2013] ZAFSHC 2 (31 January 2013)

[2013] ZAFSHC 2**COURT**

Free State High Court, Bloemfontein

BEFORE

M.H. Rampai

CASE / FILE NUMBER

5393/09

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FREE STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC OF SOUTH AFRICA

Case No. : 5393/09

In the matter between:-

DANIEL JOHANNES CORNELIUS BOTHAPlaintiff

and

ROAD ACCIDENT FUNDDefendant

HEARD ON: 7 DECEMBER 2012

JUDGMENT

BY: RAMPAL, J

DELIVERED ON: 31 JANUARY 2013

- [1] The matter came to court by way of action proceedings. The plaintiff delictually sued the defendant for the recovery of damages arising from certain bodily injuries he sustained in a road accident. His motor vehicle collided with two other motor vehicles statutorily insured by the defendant. The action was defended

- [2] By agreement between the parties, I ordered the separation of the issues in terms of rule 33(4) of the Uniform Rules of Court. Accordingly I was called upon to adjudicate the issues of liability only. Those issues were set out in paragraphs 3, 5, 6 and 7 of the summons and identically corresponding paragraphs of the plea. Needless to say that the issues of quantum were shelved for later adjudication.
- [3] I was also requested to decide the issue of costs in connection with the determination of the question of liability. Moreover, I was further requested to decide the issue of costs pertaining to the interlocutory application for the separation of the two classes of issues. The application was served and filed by the plaintiff on 7 November 2012 prior to the mutual agreement to have the issues separated.
- [4] The version of the plaintiff was narrated by two witnesses, namely Mr D J C Botha, the plaintiff himself and Mr R H van den Berg, the plaintiff's witness. The plaintiff testified that he and his witness were in an area of Kelleysview shortly before the accident happened. They were there to view some railway houses. Some of those houses were expected to go up for sale soon. The two gentlemen were interested in purchasing residential properties in the area. They were on their way back to the city when they became involved in a road accident.
- [5] He testified further that he properly negotiated the last but one bend as he was approaching the level crossing. He was nearing the ultimate bend which would have required him to turn left in order to cross the railway track. He was traversing the short distance between the two curves when the collision occurred. He lost consciousness as a result of the impact. He was rushed to the hospital where he was admitted. He received medical treatment and nursing care as an inpatient. On account of the bodily injuries he sustained, he was hospitalised for a fairly long period of time.
- [6] His version was corroborated by his witness as to what exactly brought the collision about. The plaintiff's terse testimony did not really help. Seemingly he suffered loss of memory. What he could recall, was that he was the driver of the Bantam; that Mr Van den Berg was his passenger and that he was travelling on the correct lane or side of the road at the time of the collision.
- [7] The plaintiff's passenger, Mr Van den Berg, also testified. His testimony was useful in determining what had happened. He testified to the effect that as they were approaching the last curve on the road, the two insured vehicles loomed up in front of them. According to the witness, the insured vehicles were occupying the entire road. They were virtually travelling alongside each other - the one on its correct side of the road, but the other on the incorrect side of the road. In other words, the latter was travelling on the plaintiff's correct traffic lane.
- [8] The witness testified that he was frightened by the imminent danger posed by the insured driver, whoever he was, travelling on the plaintiff's path of travel. He immediately shouted alarm to the plaintiff, nonetheless the collision occurred firstly, because of the respective speed at which the two vehicles were approaching each other and secondly, because the plaintiff had nowhere else to swerve in an attempt to avoid the collision. He testified to the

effect that slamming the brakes would not have helped as the two insured motor vehicles were too close to the plaintiff's vehicle when they appeared around the bend.

- [9] The witness could not remember which of the two insured motor vehicles, the Hyundai or the Seat was travelling on the plaintiff's correct lane when they first appeared around a sharp curve. However, he was adamant that one of them was travelling on its incorrect side of the road as the plaintiff was approaching the same curve from the opposite direction but on his correct side of the road. However, he was certain that the collision took place on the correct traffic lane of the plaintiff. According to the witness the collision took place on the Kloofeind Road at Kelleysview on Friday 2 February 2008.
- [10] The version of the defendant was narrated by two witnesses, namely Mr J E Wagenaar and Mr F du Preez. The former testified that he and the latter had an appointment on that particular day to meet at a pub somewhere at Kelleysview. He was already at the pub when he received a cellular call from Mr Du Preez who told him he was lost. He could not find his way to the pub. He then suggested to the lost gentleman to stop alongside the road and undertook to fetch him from there. He then drove back towards Bloemfontein on the Kloofeind Road. He found him alongside the road approximately 50 metres on the eastern side of the railway level crossing.
- [11] He passed his friend, made a U-turn slightly behind him and then stopped right next to his stationary vehicle. The friend's stationary vehicle was off the road. He brought his mobile car to a standstill on the roadway. They had a brief chat. He then advised his friend to follow him. He stopped at a level crossing. He ascertained that it was safe to cross and proceeded across. His friend did likewise. There was a distance of the length of approximately two cars between them. Both of them drove on their correct traffic lane one behind the other and not parallel to each other. He did not see any approaching vehicle in good time. He just heard a loud bang as the two vehicles collided. He was on his correct side of the road at the time. The accident occurred between 16:45 and 17:15 according to the witness. He was the author of exhibit "a", which demonstrated the post-accident final positions of the three vehicles involved.
- [12] The testimony of the first insured driver, Mr Wagenaar, was materially corroborated by that of the second insured driver, Mr Du Preez. He testified that the vehicle driven by the plaintiff first collided with that driven by Mr Wagenaar with its right front wheel after which it spun. In that spinning process it collided with the vehicle he was driving. After the collision he observed that the plaintiff's vehicle was largely in its correct traffic lane, but slightly protruding into the lane for the incoming vehicles. The final position of rest of his motor vehicle was on its correct traffic lane next to the plaintiff's vehicle. However, the final position of Mr. Wagenaar's vehicle was off the road on the left hand side, in other words, on the southern side of the road (vide exhibit "a").

- [13] Both of the defendant's witnesses testified to the effect that the collision took place in their correct traffic lane. According to Mr Wagenaar the point of collision was approximately half a metre inside his correct traffic lane from the middle line.
- [14] I deem it necessary to give a summary of the undisputed facts. The plaintiff was involved in a vehicle collision which took place in Bloemfontein on Friday, 2 February 2008. The scene of the accident was on the Kloofeind Road at Kelleysview. The road was macadamised. It consisted of one traffic lane in each direction. There was no physical esplanade, but the road was divided by means of a painted white middle line. Kelleysview is not an urban neighbourhood, but rather one of the peri-urban areas on the outskirts of the city. The accident happened at or about 17:00.
- [15] The plaintiff was the driver of a Ford Bantam with registration number BWR359FS. It was a white light delivery van. With him in the vehicle was Mr Van den Berg, who occupied a front passenger seat. The van was travelling in an easterly direction towards a railway level crossing. The scene of the accident was a few metres west of the level crossing. There the traffic flow was regulated by means of warning traffic signs, one on each side of the crossing.
- [16] Shortly before the collision, there were two other motor vehicles travelling on the same road but in the opposite direction in relation to the plaintiff's direction. The one was a dark Hyundai sedan with distinctive registration number DDC117FS there and then driven by Mr F du Preez. I shall refer to the Hyundai as the second insured vehicle and its driver as the second insured driver.
- [17] The other vehicle was a Seat Altea sedan with distinctive registration number DFS551FS there and then driven by Mr M Wagenaar. I shall refer to the Seat as the first insured vehicle and its driver as the first insured driver.
- [18] Seconds from disaster, the two insured vehicles travelled in a westerly direction. They too were approaching the same railway track, but from the opposite direction. The first insured vehicle reached the level crossing first. There the first insured driver stopped. He did so in order to obey a warning traffic sign. Having ascertained that it was safe to cross the railway track, he proceeded and drove across.
- [19] The second insured vehicle was following the first. Its driver was not familiar with the road. Therefore the first insured driver had to lead the second insured driver to the pub they were visiting. When he reached the level crossing, he too precisely acted in the same manner as the first insured driver.
- [20] From the level crossing westwards the narrow road, with no emergency zone or gravel shoulders, meandered. The winding road sharply curved to the right and then sharply to the left. The plaintiff negotiated a sharp curve to the right and proceeded to a sharp curve to the left. Similarly the first and the second insured drivers were negotiating an equally sharp curve to the right. Somewhere between the two sharp and close curves the Bantam collided first with the Seat and then the Hyundai.

- [21] The type of collision may be described as a double partial head-on collision. The area of the double impact was between 20 metres at least and 40 metres at most from the railway track. The area of such an impact was closer to the bend nearest to the railway level crossing than the bend farthest from there. I suppose I have said enough about undisputed facts. Now I turn to the dispute.
- [22] In his particulars of claim (vide paragraph 5) the plaintiff averred that the first insured driver was negligent in that:
- “5.4 He moved into the lane of travel of the Plaintiff’s vehicle and collided with the Plaintiff’s vehicle on its correct side of the road;*
- 5.5 He moved into the incorrect lane of travel for approaching vehicles at a time when it was inopportune and dangerous to do so;”
- [23] In his particulars of claim (vide paragraph 6) the plaintiff averred that the second insured driver was also negligent. He attributed the same grounds of negligence to the second insured driver as he did the first insured driver.
- [24] In its written plea (vide paragraph 5) the defendant denied such allegations and pleaded that the collision was caused by the plaintiff’s exclusive negligence. Accordingly the defendant pleaded that the collision was primarily occasioned by the exclusive negligent driving of the plaintiff and denied that the insured driver was negligent as alleged or in any other manner whatsoever. However, no specific grounds of negligence were outlined here.
- [25] In the first alternative, the defendant raised the defence of contributory negligence on the part of the plaintiff. Among others, the defendant alleged that the plaintiff failed to keep a proper lookout (vide paragraph 5.2.1); he failed to adhere to the rules of the road (vide paragraph 5.2.2) and he failed to pay due regard to the rights of other road users, in particular, the first insured driver (vide paragraph 5.2.3). In the second alternative, the defendant raised the customary defence of confession and avoidance, in other words, non-causative negligence.
- [26] In paragraph 6 of the plea the defendant raised the same defences of contributory negligence on the part of the plaintiff and totally harmless negligence on the part of its insured drivers in connection with the second insured driver, Mr Du Preez.
- [27] It was apparent from the testimonial versions that the dispute revolved around the issue of negligence. Put differently, the question to be decided was whether the plaintiff succeeded on a balance of probabilities to prove that one or both of the insured drivers was negligent in the driving of the insured vehicle. To that end the plaintiff had to carry the onus.

[28] At the same time I was called upon to decide whether or not the defendant had succeeded on a balance of probabilities to prove that the plaintiff was also negligently driving his motor vehicle and whether such contributory negligence causatively brought about the collision. To that end the onus of proof rested on the defendant.

[29] On the one hand, Mr Pohl, counsel for the plaintiff submitted that the issue had to be affirmatively decided in favour of the plaintiff. On the other hand, Ms Le Roux, counsel for the defendant submitted that the answer to the crucial question had to be in the negative.

[30] The defendant's witnesses maintained that, before and after the commencement of the trial, they informed the defendant's legal representatives that the collision had taken place in their correct lane. The testimonies of the witnesses were contrary to the defendant's plea. In paragraph 5 and in paragraph 6 thereof the defendant spelled out the grounds of the plaintiff's negligence, on which it relied. It was significant to note that nowhere in its plea the defendant pleaded that the collision took place in the plaintiff's incorrect lane. I shall return to analyse the evidence. Let me digress for a moment.

[31] I deem it necessary to refer to some applicable legal principles. The locus classicus in respect of negligence is still the case of KRUGER v COETZEE 1966 (2) SA 428 (A) at 430 E – F where Holmes JA said the following:

“For the purposes of liability culpa arises if -

- (a) a diligens paterfamilias in the position of the defendant -
- (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
- (ii) would take reasonable steps to guard against such occurrence; and
- (b) the defendant failed to take such steps.”

[32] In NYANDENI v NATAL MOTOR INDUSTRIES LTD 1974 (2) SA 274 (D) at 279 A – B Fannin J had this to say about the purpose of pleading:

“The plea directed the attention of the plaintiff to that issue and that issue alone. The purpose of pleading is to clarify the issues between the parties and a pleader cannot be allowed to direct the attention of the other party to one issue and then, at the trial, attempt to canvass another.”

[33] The importance of the rule of cross-examination was stated in the decision of PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS v SOUTH AFRICAN RUGBY FOOTBALL UNION AND OTHERS 2000

(1) SA 1 (CC) at page 36 paragraph 61 the court unanimously remarked:

“The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination

showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness-box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct. This rule was enunciated by the House of Lords in Browne v Dunn and has been adopted and consistently followed by our courts."

[34] In the same decision on page 37 paragraph 63 the court went on to say:

"The precise nature of the imputation should be made clear to the witness so that it can be met and destroyed, particularly where the imputation relies upon inferences to be drawn from other evidence in the proceedings. It should be made clear not only that the evidence is to be challenged but also how it is to be challenged. This is so because the witness must be given an opportunity to deny the challenge, to call corroborative

evidence, to qualify the evidence given by the witness or others and to explain contradictions on which reliance is to be placed."

[35] In *TENGWA v METRORAIL* 2002 (1) SA 739 (C) at 745 F – G Msimang AJ, as he then was, said:

"However, not only did plaintiff's notice of amendment come to light late in the proceedings, but the amendment seeks to introduce omissions relating to a completely new incident. While in the original particulars of claim the plaintiff had pleaded the attack by the robbers and defendant's failure to protect him from them and had hitherto conducted his case on the basis of the said allegations, he now wishes to introduce the incident as narrated by Ms Mazimba with its accompanying omissions which bear no relevance to the original incident."

[36] I now proceed to examine the evidence in the matter. The important aspect of the enquiry in this matter was precisely where in relation to the line of demarcation line in the middle of the road the first collision occurred. On the one hand, the evidence tendered by and on behalf of the plaintiff indicated that the point of impact was on the plaintiff's correct traffic lane. On the other hand, the evidence tendered on behalf of the defendant indicated that the vehicles collided on the insured drivers' correct side of the road.

[37] The evidence of the defendant's witnesses concerning this extremely important aspect of the matter was not in line with the grounds of negligence pleaded by the defendant. That sharp contradiction had to be seen against the backdrop of the plaintiff's specific averment that the first insured vehicle and his vehicle collided in his correct traffic lane. The averment was made in paragraph 5.4 and 5.5 of the particulars of claim. The plaintiff, particularly his witness tendered evidence which established that averment.

[38] The defendant's evidence was at variance with its plea (vide paragraphs 5 and 6). The evidence sought to introduce a completely new aspect relating to the real issue in dispute. The defendant

omitted to plead such a vital aspect as a ground of negligence attributable to the plaintiff. Accordingly the defendant was precluded by the rules of fair engagement from belatedly testifying, at the stage of trial, about that which was not pleaded – which

was that the plaintiff deviated, crossed the line and, on the wrong side of the road, collided with the two insured vehicles –

TENGWA v METRORAIL *supra*. The plaintiff prepared, conducted and presented his case on the legitimate assumption that his averments about the proximate and

probable area of impact were undisputed. In my view he was entitled to do so.

[39] In deciding whether a party succeeded in proving any negligence, it is of vital importance to have regard to the pleadings. In this matter it was not the defendant's case on the pleadings that the collision took place in the correct traffic lane of the insured drivers. Such evidence surfaced for the first time when the first insured driver testified. By then the plaintiff's case had already been closed. In that sense the defendant's evidence was belated. Besides that, there was a definite discord between the defendant's plea and the evidence tendered in support thereof. In that sense the evidence was startling.

[40] At no stage was the plaintiff's attention drawn, by way of the defendant's plea, to any allegation that the plaintiff's

vehicle deviated from its correct path of travel, veered to the right, moved across the demarcation line onto its incorrect path of travel and there collided with the first insured motor vehicle. The defendant's omission to do so defeated the purpose of pleading as set out in NYANDENI's case *supra*.

[41] In this matter the defendant tried to do, by means of evidence inconsistent with its plea, precisely that which should not be done according to the decision of NYANDENI's case *supra*. In its plea the defendant evaded to deal with an issue pertinently raised by the plaintiff and only at a very late stage of the trial attempted to introduce it in order to deal with that real issue. When the defendant's witnesses testified I was taken aback to hear for the very first time that the collision took place in their correct traffic lane and not in the plaintiff's correct traffic lane, as averred by the plaintiff long before the trial.

[42] At times an issue not pertinently pleaded may be so fully canvassed that it becomes part and parcel of the evidential material that a court hearing the matter may have to deal with as if it had been properly pleaded. However, in the instant matter, it cannot be argued that the issue, namely the allegation that the collision took place on the plaintiff's incorrect traffic lane, was fully canvassed. This is so because for an issue to be fully canvassed, such contrary version had to be put to an opposite witness, who must then be invited to comment and afforded an opportunity of doing so. It was never done in this particular matter. About that there was no dispute – the PRESIDENT's case, *supra*, paragraph 63. Since it was neither expressly pleaded nor fully canvassed, the omitted aspect cannot be redeemed.

- [43] Both of the defendant's witnesses maintained that they had informed the defendant's legal representatives right from the onset that the collision took place in their correct traffic lane and not in the plaintiff's correct traffic lane, as the plaintiff alleged. The difficulty I had with their testimonies was that the defendant's version to that effect was neither put to the plaintiff nor his witness. What was even more telling against the defendant was the fact that the contrary evidence of the plaintiff and his witness to the effect that the collision occurred on his correct traffic lane, was not disputed during cross-examination by the defendant's counsel. The nett result of the omission by the defendant's counsel was that the issue was not fully canvassed. Vide the PRESIDENT's case supra.
- [44] Since no contrary imputation was made to suggest that the plaintiff and his witness were not speaking the truth on that particular point, they were deprived of an opportunity of giving an explanation in order to defend their testimonies and their characters. In such circumstances the rule of cross-examination required that the unchallenged testimony of the plaintiff and his witness be accepted as correct. In the PRESIDENT's case supra the court unanimously accepted that the rule of cross-examination imposed certain obligations on a cross-examiner and that it was an essential rule designed to ensure fair play and fair dealing with witnesses. With that I could not agree more.
- [45] This was not the case where a vital imputation was not clearly made to the witness. Here we have the case where a vital imputation sought to be relied upon was not at all made not to one but to two witnesses. Both of them left the witness box unaware that a crucial aspect of their evidence would be later challenged. Clearly they were given no opportunity to deny or to deal with the challenge. As far as they were concerned there was no challenge to their evidence and because there was no challenge, they expected the court to accept their evidence as true and correct.
- [46] To find otherwise in these circumstances would constitute an unfair play and an unfair dealing with them. They were denied the opportunity to respond to the belated allegations made by the defendant's insured drivers. In the light of all these circumstances I cannot find, as I was urged to find, that the vehicles collided on the plaintiff's wrong side of the road.
- [47] The importance of properly pleaded case was also demonstrated in the decision of TENGWA's case supra. The plaintiff has conducted his case on the basis of the essential averments he made in the particulars of his claim. He, through his witness, tenaciously asserted those undisputed averments in his testimony. To dismiss his claim at this stage on the strength of the evidence of the defendant, which did not tally with the defendant's plea, would constitute a serious violation of the cross-examination rule – the PRESIDENT's case, supra.
- [48] In the premises counsel for the plaintiff submitted that the evidence as to the probable area of impact being on the defendant's insured driver's correct traffic lane appeared to be an afterthought by the two insured drivers. Counsel went on to say if that was not the case, one

would imagine that the legal representative of the defendant would have asked for an amendment of the plea prior to the commencement of the trial. However, that was not done. The omission to do so, coupled with the fact that the plaintiff's evidence, as substantially corroborated by his witness, was unchallenged during cross-examination indicated that the evidence of the two insured drivers was untrue.

- [49] The aforesaid submission was persuasive. But there was more to it than just that. It may well be that the witnesses did inform the defendant's legal representatives about how the accident occurred and precisely where the area of impact was, as they maintained they did. Where nobody cared to take proper note of accurate accounts given by witnesses and to accurately draw up a plea accordingly, the character of an otherwise impressive witness may be impaired or adversely affected. Such failures by legal representatives are not uncommon in my experience. Quite often they may lead to poor presentation of cases of litigants. However, it would constitute an appealable misdirection if one were to have a litigant case dismissed on such grounds of perceived lack of expertise.
- [50] If it is accepted, and I think it should, that the plaintiff did not deviate from his correct path of travel as he was nearing the last sharp bend, then it follows as a matter of logic that one of the insured drivers did. The evidence suggests that Mr Wagenaar was the transgressor. By driving on the incorrect side of the sharply curving road, where his field of vision was significantly restricted – he should have foreseen the reasonable possibility of his careless conduct injuring another road-user. By driving as he did, he failed to carefully take reasonable steps to guard against such foreseeable harmful occurrence. A diligent pater familias or mater familias would have acted differently in those prevailing circumstances. He could have avoided the collision by keeping to his correct side of the road until he had a clear view of the traffic situation ahead of him. In the circumstances I am inclined to reject the version of the insured drivers. In reaching this conclusion I have borne in mind the test for negligence as enunciated in the decision of *KRUGER v COETZEE* supra.
- [51] I am of the view that the plaintiff has shown on a balance of probabilities that the collision was occasioned by the sole negligence of the first insured driver in the negligent driving of the first insured vehicle. That, in my view, was the primary cause of the collision. This is so because there is no other credible and reliable version to contradict his version, as corroborated by his witness, that he was driving on his correct traffic lane and that one of the insured motor vehicles travelling on its incorrect lane, emerged out of the blue and collided with his motor vehicle.
- [52] The defendant pleaded contributory negligence on the part of the plaintiff. The onus to aver and to prove contributory negligence

rested on the defendant. Perhaps the only grounds of contributory negligence that may possibly be attributed to the plaintiff was his failure to keep a proper lookout. In this regard the pertinent legal position as outlined in *GUARDIAN NATIONAL INSURANCE CO LTD v SAAL* 1993 (2) SA 161 (C) by Cooper J applies. The headnote captures the gist of the decision quite well as follows:

“Held, that in order to recover damages against the appellant the onus had been on the respondent to prove on a balance of probabilities that M had driven negligently and that his negligent driving had caused or contributed to the collision.”

Held, further, that the finding by the trial Court that M had not been keeping a proper lookout at the time of the collision was not sufficient to render the appellant liable, since respondent had to prove that M's failure to keep a proper lookout was causally connected with the collision, the critical question being whether M ought reasonably to have become aware thereafter, at a stage when effective avoiding action could still be taken, that the pick-up truck was not going to stop.

Held, further, that the respondent had to prove that, had M reacted when the reasonable man would have reacted, the collision would probably not have occurred.

Held, further, that on M's version of the collision, and because respondent suffered from amnesia, the precise speed at which the vehicle was travelling when it entered the intersection and at what stage he intended doing so could not be established, and unless these facts could be established on a balance of probabilities, the Court could not find that, if M had reacted as a reasonable man would have, the collision would not have occurred.”

[53] It was common course that the collision occurred in the vicinity of a curve near the level crossing. On both sides of the winding road there was relatively high vegetation. The railway track, the curves and the plants cumulatively impaired and diminished a driver's range of vision in the vicinity of the scene. Consequently the plaintiff did not instantly appreciate the impending danger. This is so because his driver alerted him to the danger posed by the oncoming vehicle. The warning given by the passenger justified the conclusion that the plaintiff was not keeping a proper lookout at the time. However, on the persuasive authority of the decision in SAAL's case *supra* that finding alone was not sufficient to render the plaintiff liable on the basis of contributory negligence. The plaintiff was seriously injured in the collision as a result of which he suffered from retrospective amnesia and could not give a full and helpful account of how the collision occurred.

[54] To partially repudiate the plaintiff's claim, the defendant had to prove that the plaintiff's failure to keep a proper lookout was causally connected with the collision. The practical question being whether the plaintiff received a passenger's warning at a stage when effective avoiding action could still be taken. Whether he ought reasonably to have become aware at that critical moment to have speedily taken an evasive action, must be borne out by evidence. The defendant had to prove that in those given circumstances had the plaintiff reacted when a reasonable man would have reacted, the collision would probably not have occurred. In my view the defendant failed to prove that the plaintiff's failure to keep a proper lookout causally contributed to the collision.

[55] It was undisputed that when the danger posed by the head-on collision became imminent, there was nothing the plaintiff could do to avoid it. The rejection of the defendant's evidence meant that it had to be accepted that the insured motor vehicles were travelling parallel to each other on the road. Seemingly neither the slamming of the breaks nor the swerving of

the vehicle would have brought about any different outcome. In certain circumstances an attempt to take an evasive action by veering off the trafficable surface of the road, not knowing what to expect beyond its parameters, may bring about worse consequences than taking no evasive action at all. In my view the defence of contributory negligence attributed to the plaintiff by the defendant, was not established.

- [56] Therefore the fact that the plaintiff took no evasive action cannot be held against him in order to apportion the blame. In my view the negligence of the plaintiff in failing to keep a proper lookout, was tantamount to negligence in the air. It was shown that there was no causative connection between the plaintiff's failure and the harmful event. The same could not be said about the defendant. I would, therefore, dismiss the defendant's second alternative defence as well. The negligence of the defendant's first insured driver had everything to do with the injury the plaintiff sustained.
- [57] Having made a determination on the merits that leaves the matter of costs still to be adjudicated. Mr Pohl, for the plaintiff, urged that in the event of my coming to a decision favourable to the plaintiff, I should make an order in favour of the plaintiff now with regards to the costs incurred in determining the issue of liability. Ms Le Roux did not urge me to reserve costs for the decision of the court still to be tasked with the responsibility of finalising the matter.
- [58] In my judgment, it is time to bring the curtain down on this part of the proceedings instead of having such a decision left in abeyance. In coming to this conclusion, I found comfort in the views expressing in *GROOTBOOM v GRAAFF-REINET MUNICIPALITY* 2001
- (3) SA 373 (ECD) at 381 G – 382 C by Ponnar AJ, as he then was, and the authorities there cited.
- [59] Finally, there remains one more issue of costs relating to the formal application for the separation of issues in terms of rule 33(4) of the Uniform Rules. The stance of the defendant relating to trials is well known. The defendant has adopted an inflexible attitude that when a matter is enrolled, and it is invariably done by the plaintiffs, the defendant will conduct its case on the basis that the matter has been enrolled for a full-blown trial, to adjudicate issues pertaining to both the merits and the quantum. As a result of such a stance, a majority of attorneys who act on behalf of victims of road accidents, such as the plaintiff in this matter, often bring applications in terms of rule 33(4) beforehand or on the date of the trial to have the issues separated.
- [60] In this matter the application was filed shortly before the date of hearing for hearing before the commencement of the main trial on 4 December 2012. The application was not opposed by the defendant. It was accordingly granted by mutual consent. In such circumstances there can be no persuasive argument as to why the costs relative to such a separation application should not be borne and paid by the defendant.
- [61] In the premises I make the following order:

61.1. The defendant is liable for 100% of the plaintiff's proven or agreed damages.

61.2. The defendant is liable for the plaintiff's costs in respect of the merits.

61.3. The defendant is also liable for the plaintiff's costs relative to the application for the separation of issues in terms of rule 33(4) which was served by the plaintiff on the defendant on 7 November 2012.

M.H. RAMPAL, J

On behalf of plaintiff: Adv L Le R Pohl

Instructed by:

Honey Attorneys

BLOEMFONTEIN

On behalf of respondent: Adv L Le Roux

Moroka Attorneys

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