REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION: PORT ELIZABETH)

CASE NUMBER 2886/2009

In the matter between:

ERNEST BERNARDUS MARAIS Plaintiff

And

ROAD ACCIDENT FUND Defendant

JUDGMENT

TOKOTA AJ

[1] On 24 January 2005 in the afternoon at about 13h30 a collision occurred, at the intersection of Durban Road and Drostdy Street, Uitenhage, between the vehicle registration number BGT, 261 EC driven by Mr Mpambani, (the insured driver) and vehicle registration number CVR 230 EC driven by the plaintiff.

[2] As a result of the collision the plaintiff is alleged to have suffered damages in the amount of R715 850.00 it being alleged that the sole cause of the collision was as a result of the negligent driving of the insured driver.

[3] In terms of section 17 of the Road Accident Fund Act 56 of 1996 the defendant is, subject to the provisions of the Act, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of the owner or the driver thereof has been established, obliged to compensate any person (the third party) for any loss or damage which the third party may have suffered as a result of any bodily injury to himself or herself, caused by or arising from the driving of a motor vehicle by any person at any place within the Republic, if the injury is due to the negligence or other wrongful act of the driver or of the owner of the motor vehicle.

[4] Pursuant to the aforesaid collision the plaintiff is now suing the defendant for compensation of the above damages. The defendant is resisting liability. On 25 January 2011 this Court made an order separating the issues relating to the merits (liability) of the plaintiff's claim from the issues relating to quantum in terms of Rule 33(4) of the

Uniform Rules of Court. It must now determine the merits of the claim only.

[5] The plaintiff called one Anton Ebersohn, a detective Warrant Officer who claimed that he witnessed the accident. Ebersohn testified that on the day in question he was on duty driving a police vehicle from Kamesh detective Branch on his way to Magistrate's Court. At the robot controlled intersection of Durban Road and Higher Drostdy Street he stopped because the robots were red for him. He was going to take a right turn into Durban Road. Whilst his vehicle was stationery he observed a BMW car driven by the plaintiff also stationery at the opposite direction from the Lower Drostdy Road waiting for the robots to turn green.

[6] When the robots turned green for him he proceeded slowly and waited for the BMW car to proceed straight as he was turning. Whilst still waiting to negotiate his right turn he heard a bang of the collision. Although his evidence was that he moved about a metre from the white lane I find that he must have gone past the BMW when he heard a bang. The bang was coming from the collision of the insured driver colliding with the plaintiff's BMW. The insured driver was driving a Fox from the direction of Durban Road heading for VW Paint Mix where he was going

to work. After the collision had occurred he assisted in controlling the traffic until the Uitenhage police arrived and took over. Since the traffic lights were green for him he assumed that they were also green for the plaintiff to proceed.

[7] The plaintiff gave evidence. He testified that on the day in question he was on his way home for lunch. He stopped at the robot controlled intersection of Lower Drostdy Street and Durban Road. It was between 13h00 and 14h00. The robots were red for him. When the robots turned green he proceeded straight towards Higher Drostdy Street. Whilst he was about three quarters of the Durban Road on the second lane thereof he heard a bang on the left side of his BMW. It was the insured driver who drove into his car damaging the left side of the fender, passenger door and the wheel which was pushed inwardly by the impact to the extent that the car could not be driven thereafter. He maintained that the robots were green for him and that they were red for the insured driver.

[8] It is perhaps opportune at this stage to mention that at the commencement of the proceedings an application for the amendment of the plaintiff's particulars of claim was sought and granted. The amendment was to the effect that the insured driver proceeded against

the red robots. The application was not opposed on behalf of the defendant.

[9] The defendant called Mr Christian Mpambani, the insured driver, as its witness. His evidence was that on the day in question he was on his way to work at VW Paint mix. He was travelling on the Durban Road. On his way he had given a lift to one Sizwe Jordan. He dropped him before the robots near the Magistrate's Court. It is now common cause that the distance between those robots and the Lower Drostdy Street intersection is 75 metres.

[10] He proceeded to the intersection of Drostdy and Durban Road. He did not notice any vehicles on the intersection. The robots were green for him. Whilst at the intersection the plaintiff came straight to his vehicle and collided with it. His vehicle was damaged in front, the engine side. It spun and faced the direction where it came from.

[11] The defendant then called Mr Jordan. Mr Jordan testified that on the day in question he had an appointment with his lawyer. The insured driver gave him a lift from KwaNobuhle Township. He was dropped at the robots next to the Magistrate's office. He observed the insured driver when he drove through the green robots. He testified that the robots at

the Durban Road and Lower Drostdy intersection were green in favour of the insured driver and were red for the plaintiff. He witnessed the collision. He did not go to the scene of accident after the collision because he was rushing for his appointment. The insured driver later, and after he was discharged from hospital, came to him and asked him as to whether he witnessed the accident and he (Jordan) informed that he did and would testify about what he observed on the day in question.

[12] It is trite law that in a claim of this nature the plaintiff bears the onus of proof of negligence on the part of the insured driver on a balance of probabilities. "*At the end of the case the court has to decide whether, on all of the evidence and the probabilities and the inferences, the plaintiff has discharged the onus of proof on the pleadings on a preponderance of probabilities, just as the court would do in any other case concerning negligence. In this final analysis, the court does not adopt the piecemeal approach of (a) first drawing the inference of negligence from the occurrence itself, and regarding this as a prima facie case; and then (b) deciding whether this has been rebutted by the defendant's explanation."*[1]

[1] See Sardi and Others v Standard and General Insurance Co Ltd 1977 (3) SA 776 (A) at 780D - E and G - H. See also Arthur v Bezuidenhout and Mieny 1962 (2) SA 566 (A) at 574B

[13] Having referred to the above *dictum* I must now evaluate the evidence of all the witnesses bearing in mind that the plaintiff bears the onus as stated above. It has been submitted, both orally and in written heads of argument, on behalf of the plaintiff that he and his witness were satisfactory and reliable. Conversely, it was contended, the evidence of the insured driver was poor and fraught with improbabilities. It was further submitted that the evidence of Mr Jordan was poor and unreliable. Furthermore, so the argument ran, he was not an independent witness.

[14] Counsel for defendant submitted that the plaintiff and his witness were not good witnesses. The plaintiff was further criticised for the late amendment of the particulars of claim. I must say that I was also not happy with late amendment but in any event I find that the witnesses merely assumed that since the robots were green on their sides they must have been red for the insured driver. It was further submitted on behalf of the defendant that the insured driver and his witness were satisfactory witnesses and that their evidence should be preferred to that of the plaintiff and his witness.

[15] In my view, and bearing in mind that human intellect is fallible, especially regard being had to the passage of time since the occurrence

of the accident, I find that the plaintiff and his witness gave satisfactory evidence. In the eloquent words of Cory J in **R v Askov (1991) 49 CRR 1 (Supreme Court of Canada) at 20:**

"(t)here can be no doubt that memories fade with time. Witnesses are likely to be more reliable testifying to events in the immediate past as opposed to events that transpired many months or even years before the trial. Not only is there an erosion of the witnesses' memory with the passage of time but there is bound to be an erosion of the witnesses themselves. Witnesses are people; they are moved out of the country by their employers; or for reasons related to family or work they move from the east coast to the west coast; they become sick and unable to testify in court; they are involved in debilitating accidents; they die and their testimony is forever lost. Witnesses, too, are concerned that their evidence be taken as quickly as possible. Testifying is often thought to be an ordeal. It is something that weighs in the minds of witnesses and is a source of worry and frustration for them until they have given their testimony."

The plaintiff, quite honestly, conceded that he did not look at the side where the insured driver came from. He only heard a bang when he collided with his vehicle. If he was not honest and wanted to be taken as a careful driver he could have simply said that he looked both from left and right but could not see any vehicle.

[16] The insured driver's evidence was mainly directed at emphasising that the robots were green for him and red for the plaintiff. His evidence was that he was driving at a speed of 80km per hour. His conduct is typical of a driver rushing to catch the robots whilst still on amber. I however make no finding in this regard. His evidence that it was the plaintiff who came to him and collided with his vehicle is not borne out by the impact. It is not in dispute that the plaintiff's vehicle was damaged from left front side having collided with the front part of the insured driver's vehicle. It can hardly be said that in those circumstances plaintiff's vehicle went to the insured driver's vehicle.

[17] When it comes to the evidence of Jordan, I observed him when he was giving evidence. I gained the impression that he had undertaken to come to court and confirm that the robots were green in favour of the insured driver and were against the plaintiff. His story that he watched the insured driver until the impact at the intersection because he was concerned with his safety is not consistent with his conduct after the accident. I am even doubtful if he indeed witnessed the accident. If he witnessed the accident and was concerned about the safety of the insured driver, as he claimed, one wonders why he would not be curious to investigate the condition of the insured driver immediately after the

collision. When he was asked as to on what basis did he say that the robots on the side of the plaintiff were red he produced his driver's licence and said he was also a driver.

[18] In all the circumstances I am satisfied that evidence of the plaintiff and his witness should be preferred to that of the insured driver and his witness. Mr Ebersohn's evidence was short and straightforward. He did not contradict himself or the plaintiff. I am satisfied with his explanation as to why he did not make a statement immediately after the collision. He was calm and collected in the witness box. I find that he gave his evidence to the best of his recollection of the events. On the contrary I find that the insured driver entered the intersection against the red robots and that Jordan was an unreliable witness and therefore their evidence, to the extent that it conflicts with that of the plaintiff and his witness, must rejected.

[19] The plaintiff testified that he moved slowly into the intersection. He did not see the insured driver until he heard a bang of the collision. The question that must be resolved is whether his conduct amounted to neglect of duty by a reasonable driver in his position. It was submitted on his behalf and relying on the decisions **Nogude v Union and South-West Africa Ins Co Ltd 1975 (3) SA 685 (A) and Van Vollenhoven v**

McAlpine 1976 (3) SA 579 (N) that the plaintiff had no duty to be on the look out for vehicles that could possibly enter the intersection from left or right unlawfully against the red robots. Plaintiff conceded that if he had exercised a proper look out he would probable have avoided the collision.

[20] In the case of **Nogude v Union and South-West Africa Ins Co Ltd t**he Learned Judge of Appeal said the following at p.688A-C

“A proper look-out entails a continuous scanning of the road ahead, from side to side, for obstructions or potential obstructions (sometimes called "a general look-out": cf. Rondalia Assurance Corporation of SA Ltd. v Page and Others, 1975 (1) SA 708 (AD) at pp. 718H - 719B). It means -

"more than looking straight ahead - it includes an awareness of what is happening in one's immediate vicinity. He (the driver) should have a view of the whole road from side to side and in the case of a road passing through a built-up area, of the pavements on the side of the road as well".(Neuhaus, N.O. v Bastion Insurance Co. Ltd., 1968 (1) SA 398 (AD) at pp. 405H - 406A).

Driving with "virtually blinkers on" (Rondalia Assurance Corporation of SA Ltd. v Gonya, 1973 (2) SA 550 (AD) at p. 554B) would be inconsistent with the standard of the reasonable driver in the circumstances of this case.”

[21] Notwithstanding the above remarks it seems to me that the weight of authorities favour the view that a driver who enters a robot controlled intersection where the robots are green in his favour is not expected to be on the look out for drivers who may enter the intersection unlawfully when the robots are against them from either left or right.[2] A reasonable driver will expect that other drivers will obey the traffic rules and will not enter an intersection against red robots.

[22] In this case I have found that the insured driver entered the intersection whilst the robots were red for him. On the authority of **Brummer** *supra*, if the driver is aware of the presence of a vehicle which is clearly being driven in a negligent manner he should not ignore it. Plaintiff was not aware of the presence of the insured driver until he heard the bang. At the time of the collision he was on the verge of completing crossing the intersection. It would be an exercise of an armchair critic to expect him to have done anything at that stage.

[2] See: Van Vollenhoven v McAlpine 1976 (3) SA 579 (N) at 581A-B; Izaaks v Schneider 1991 (3) SA 675 (NM) at pp.678D-J-679A Netherlands Ins Co of SA Ltd v Brummer 1978 (4) SA 824 (A) at 833A-F where the Learned Judge of Appeal said “Soos in bogenoemde gewysdes verduidelik moet 'n bestuurder wat 'n kruising binnegaan terwyl die verkeerslig vir hom groen is, uitkyk vir verkeer wat reeds in die kruising is, bv verkeer wat die kruising binnegegaan het voor die verkeersligte verander het. Hy mag natuurlik ook nie 'n voertuig ignoreer waarvan hy bewus is en wat duidelik op 'n nalatige wyse bestuur word. Maar dit word nie van hom verwag om uit te kyk vir verkeer wat moontlik onwettiglik die kruising teen 'n rooi verkeerslig van links of regs kan binnegaan nie.”

[23] In the all the circumstances I am of the opinion that the plaintiff has discharged the onus resting on him and that the defendant is liable to compensate him.

[24] Counsel for plaintiff has made suggestion of the order to be made in the event of the plaintiff being successful. Counsel for defendant did not have a problem with the suggested order in the event I find in favour of the plaintiff. In the result I make the following order.

1. It is declared that the defendant is liable to pay such damages to the plaintiff as may be proved arising out of the collision on 24 January 2005.
2. The defendant is ordered to pay the plaintiff's taxed costs or such costs as may be agreed between the parties pertaining to the merits, such costs to include costs of one inspection in loco.
3. The defendants is to pay interest on the plaintiff's costs calculated at the rate of 15,5% p.a. from thirty days after taxation or agreement to date of payment.
4. The issue pertaining to the quantum of the plaintiff's claim is postponed *sine die.*

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B R TOKOTA

ACTING JUDGE OF THE HIGH COURT

Date Heard: 22 and 23 March 2011

Date Delivered: 29 March 2011

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