IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES/NO	
(2) OF INTEREST TO OTHERS JUDGES: YES/NO	
(3) REVISED	
.....	.....
SIGNATURE	**DATE**

Appeal Case Number: A81/2022

Court *a quo* Case Number: 23538/12

In the matter between: -

LOUW, VERONICA OBO HERSELF,

LOUW, QUINTALENE SHOMEEZ AND

LOUW, KEALYN BRAYDON Appellant

and

ROAD ACCIDENT FUND Respondent

JUDGMENT

COETZEE AJ

INTRODUCTION:

[1] This is an appeal against the order and judgment by the court *a quo* as per Makhubele AJ, wherein the Appellant's claim for loss of support, in both her personal and representative capacity, was dismissed. The appeal to this court is not opposed by the Respondent.

[2] The parties have previously agreed to separate merits and quantum, and to proceed with the issue of liability first. The Appellant called two witnesses in the court *a quo* being Seargeant Wanele Booi and Wilma Badenhorst, a reconstruction expert. The Respondent called one witness, one Alton Phumzile Mniki ('the first insured driver').

BACKGROUND:

[3] On 12th of August 2010 at Zipunzana and Bypass near Duncan Village, East London in the Eastern Cape, one Albert David Louw ('the deceased) who was the driver of a motor vehicle with registration number NMJ 929 GP (Volkswagen Caravelle), collided with another motor vehicle with registration number DXX 476 EC (Toyota Avanza), driven by the first insured driver and a third motor vehicle with registration number NMJ 929 GP (Toyota Hiace Minibus), driven by one K. Tshaka ('the second insured driver').

[4] The deceased died on the scene of the accident as a result of the injuries sustained in the collision. The Appellant has instituted an action against the Defendant claiming for loss of support in her personal capacity and also

representative capacity as the mother of one Quintalene Shomeez Louw and Kealyn Braydon Louw.

[5] The Respondent had defended the Appellant's action and pleaded that the deceased was solely negligent in causing the collision. In the alternative, the Respondent pleaded that the deceased was contributory negligent.

[6] For the Appellant to succeed with her claim for loss of support, she only needs to prove 1% negligence on the part of the first or second insured driver. The standard used to assess negligence is evaluated against the benchmark of a reasonable person. In *Cape Metropolitan Council v Graham*[1] Scott JA said:

> "*Turning to the question of negligence, it is now well established that whether in any particular case the precautions taken to guard against foreseeable harm can be regarded as reasonable or not depends on a consideration of all the relevant circumstances and involves a value judgment which is to be made by balancing various competing considerations. These would ordinarily be*
>
> > *'(a) the degree or extent of the risk created by the actor's conduct.*
> >
> > *(b) the gravity of the possible consequences if the risk of the harm materialises.*
> >
> > *(c) the utility of the actor's conduct; and*
> >
> > *(d) the burden of eliminating the risk of harm'.*

[1] 2001 (1) SA 1197 (SCA) at par. 7.

If a reasonable person in the position of the defendant would have done no more than was actually done, there is of course, no negligence".

EVIDENCE:

[7] The following was common cause between the parties:

[7.1] The collision occurred on the 12th of August 2010 at approximately 23:10.

[7.2] The nature of the collision was a head-on impact.

[7.3] The road is a two-lane carriageway with a straight trajectory, with two lanes for traffic in each direction.

[7.4] The speed limit is 70 kilometres per hour.

[7.5] The visibility was unobstructed, with clear weather conditions and no rain.

[7.6] The road's width measures a combined 6.9 meters.

[7.7] The point of impact occurred near the middle of the road, but within the lane designated for the first insured driver.

[8] The evidence of the Appellant's witnesses:

[8.1] The evidence of Seargeant Booi was that on the 12th of August 2010 he arrived at the collision scene around 23:40. He consulted with the first insured driver who explained that he was driving from town towards Mtangani when he observed another vehicle crossing the middle lane from the opposite direction. The first insured driver attempted to slow down, but the collision occurred about 0.5 meters from the middle line in his lane of travel. The second insured driver also provided his account to Sergeant Booi. He was driving in the slow lane when he witnessed the two vehicles colliding. The vehicle of the first insured driver shifted to his lane and struck his car. He was travelling "*a little bit backwards from the Avanza*". Seargeant Booi drafted a rough sketch and later created a plan and key to the plan. The sketch plan verified several aspects of the collision site, such as the straight road with four lanes, the divergent travel directions of the first insured driver and the deceased, the involvement of a third vehicle ('the second insured driver'), the point of impact near the centre line, the position of the respective vehicles after the collision and the width of the entire road.

[8.2] Ms. Badenhorst testified that the collision occurred on a relatively straight section, with a slight uphill for the Avanza (the first insured's vehicle) and a slight downhill for the Caravelle (the deceased's vehicle). She opined that the Caravelle left its lane and entered the oncoming lane of the Avanza, suggesting it was not a sudden movement. According to her, the standard reaction time is 1.6 seconds, encompassing the time to perceive, identify a hazard, and decide on a course of action. She further expressed the view that the first insured driver could have steered his vehicle approximately 3 meters to the left instead of braking, thus avoiding the collision. During cross-examination, Ms. Badenhorst was presented

with the first insured driver's account that he slowed down and came to a halt, implying there was nothing he could do to avoid the collision. Ms. Badenhorst indicated that this scenario of slowing down or stopping implies that the driver had time to react. In re-examination she testified that it would have taken the first insured driver 2.8 seconds to brake to almost a standstill, which excluded any reaction time. This implies that he would have had enough time to take evasive action to avoid the collision, instead of bringing his vehicle to a stop. She further indicated that if the first insured driver reduced his speed as he alleged, he would have been pushed back. She opined that this scenario, appears unlikely, given that both vehicles came to rest in close proximity to the collision area. This suggest that the vehicles were likely travelling at similar speeds, allowing their respective momentums to neutralize each other.

[9] The evidence of the Respondent's witness:

[9.1] The first insured driver testified that he was driving an Avanza in the fast lane and the lanes were separated by three solid white lines. This seems to be incorrect given the photographs contained in the report of Ms. Badenhorst. This indicates that the lanes in each direction are separated by broken white lines, while the two lanes in each direction are divided by a triple barrier line. The first insured driver initially stated that the Caravelle, also in the fast lane, approached from the opposite direction and crashed into him while he was already stationary. The second version was that the Caravelle crossed over the barrier line onto his lane of travel and then the Caravelle rolled. In this momentum of swirling, the Caravelle crashed into the bonnet of his vehicle, and it fell over onto the left-hand side. The Caravelle,

according to the second version, only hit him after it had first rolled. In the third version, he asserted that the Caravelle was not approaching him. Instead, he claimed that the Caravelle was on the side of the road and abruptly made a sharp turn towards him.

[9.2] The insured driver was unable to pinpoint when he first noticed the Caravelle's lights, he was unable to provide an estimate of the speed at which the vehicles he had overtaken in the left lane were travelling, he could not express certainty about distances, or determine the presence of vehicles immediately behind him or in the left lane. Additionally, he did not hoot or swerve to the left prior to the collision.

EVALUATION OF EVIDENCE:

[10] Typically, the party carrying the burden of proof can successfully discharge it by presenting credible evidence, especially in cases involving conflicting accounts. The evaluation of witnesses and consideration of overall probabilities often play a decisive role in such situations.

[11] In *National Employer's General Insurance v Jagers* [1984] 4 All SA 622 (E) 624 – 625; 1984 (4) SA 437 (E) 440 D-G the following was stated:

'It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rests on the plaintiff as in the present case, and where there are two

mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept this version as being probably true. If, however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true, and that the defendant's version is false.'

[12] When considering the testimony of Sergeant Booi, it does not contribute significantly to the matter. He only arrived on after the collision. He could however verify the physical aspects of the collision site as per his sketch plan, the most important aspects being that deceased and the first insured driver were approaching each other from opposite directions, that the point of impact was near the centre line, and the position of the respective vehicles after the collision. The remainder of his testimony consisted mainly of hearsay evidence.

[13] The court *a quo* heavily criticized Ms. Badenhorst for not interviewing the first insured driver and for treating the Caravelle and Avanza's weight ratios as equal when determining their speed. Her testimony was entirely dismissed for these reasons. It remains uncertain whether interviewing the first insured driver would have led Ms. Badenhorst to come to a different opinion, especially given the various versions he provided regarding the collision (outlined above). Notably, her assumption of equal weight ratios favoured the first insured driver. The Caravelle was in fact significantly heavier than the Avanza. In reality, if both vehicles had been

traveling at the same speed, the Avanza would have been pushed back much farther than it was. Therefore, the logical conclusion is that either the Caravelle was moving much slower, or the Avanza was traveling much faster for them to have come to rest in the immediate vicinity of the collision area, as confirmed in the sketch plan compiled by Sergeant Booi. Ms. Badenhorst made necessary admissions and concessions in relevant instances. In my view there was no justification for rejecting the entirely of her evidence.

[14] In *Motor Vehicle Assurance Fund v Kenny* 1984 (4) 432 EC the following was stated:

"Direct and credible evidence of what happened in a collision must generally carry greater weight than the opinion of an expert, however experienced he may be, seeking to reconstruct the event from his experience and scientific training. Strange things often happen in a collision and, where two vehicles approaching each other from opposite directions collide, it is practically impossible for anyone involved in the collision to give a minute and detailed description of the combined speed of the vehicles at the moment of impact, the angle of the contact or of the subsequent lateral or forward movements of the vehicles. An expert's view of what might probably have occurred in a collision must give way to assertions of the direct and credible evidence of an eyewitness. It is only where such direct evidence is so improbable that its very credibility is impugned, that an expert's opinion as to what may and may not have occurred can persuade the Court to his view."

[15] The evidence provided by the first insured driver, indicates a lack of precision in his recollection. His evidence as a whole does not bear the imprint of truth. Consequently, in my view, it should have been disregarded. In the absence of direct and credible eyewitness evidence, the testimony of Ms. Badenhorst should be given due consideration, together with the common cause facts and the probabilities.

[16] It must be noted that, considering the unreliable and substandard quality of the first insured driver's testimony, the Respondent chose not to call the second insured driver. The latter could have played a pivotal role in providing the court with information concerning the speed of travel and the distances between the respective vehicles.

[17] In the matter of *Catamessa v Reinforcing Steel Company Ltd* 1940 AD 1 the following was stated:

"*In an action for damages arising out of a collision between a van and a motor lorry proceeding in opposite directions, it appeared that both vehicles were travelling near the centre of the road, the van slightly over the centre on its incorrect side. The course which the vehicles were taking was such as would lead to a collision, unless the driver of one of the vehicles took steps to avoid it by moving to his left, but neither driver became aware of the danger and each of them continued on this course."*

"Held, allowing an appeal, that assuming the driver of the van had been negligent, the driver of the lorry had also been negligent in that had he kept a proper lookout he could have avoided the collision; that the collision was therefore due to the joint negligence of the two drivers and that consequently plaintiff was entitled to damages."

[18] In my view, the mere fact that the first insured driver was driving close to the centre line, if indeed he did so, does not automatically constitute negligence. Drivers are entitled to utilize the entirely of their lane. Negligence on the part of such a driver only arises if, given the prevailing conditions, a reasonable driver would have chosen to drive farther away from the centre line. For example, this might be the case in

heavy rain, impairing the vision of other drivers (*CF A A Onderlinge Assuransie Beperk v De Beer* 1982 (2) SA 603 (A)); or when it is evident that another vehicle will encroach while negotiating a curve (*Jadezweni v Santam Insurance Co Ltd and Another* 1980 (4) SA 310 (C). Depending on the circumstances, merely allowing space from the centre line might not be sufficient; even failure to completely get out of the road may still amount to negligent driving. This maybe the case where for example one maintains one's course despite an oncoming vehicle clearly traveling in the wrong lane. In the present case, based on the evidence of Ms. Badenhorst, it is suggested that the first insured driver had adequate time to manoeuvre away from the centre line and avoid the collision. The road was straight, visibility was clear, and the weather conditions were favourable.

[19] After considering the above, the trial court's credibility finding of Ms. Badenhorst amounts to a misdirection. This is because her evidence aligns with the common cause facts and is further supported by the evidence of Seargeant Booi. In the circumstances, the court finds that the Appellant had discharged the onus of proving 1 % negligence on the part of the first insured driver. In the result the following order is made:

ORDER:

1. The appeal is upheld.
2. The order of the court *a quo* is set aside and substituted with the following order:

2.1 The Respondent is ordered to pay 100 % of the Appellant's proven or agreed damages.

2.2 The determination of the Appellant's quantum is postponed *sine die*.

2.3 The Respondent is ordered to pay the costs of the appeal.

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COETZEE, AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT,
PRETORIA

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TOLMAY, J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT,
PRETORIA

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be the 13th day of December 2023 .

Counsel for Appellant:	Adv. D. Combrink
Instructed by:	A.F. Van Wyk Attorneys
Counsel for the Respondent:	No appearance
Date heard:	2 October 2023

Date of judgment: 5 December 2023