IN THE HIGH COURT OF SWAZILAND

JUDGMENT

REPORTABLE
Case No. 1697/09

In the matter between

THEOPHILUS MDUDUZI HLOPHE **Plaintiff**

and

PAT VENTER **Defendant**

Neutral citation: *Theophilus Mduduzi Hlophe v Pat Venter* (1697/09) [2013] SZHC 106 (05 June 2013)

Coram: Mamba J

Heard: **22,23 and 24 April, 2013**

Delivered: **05 June, 2013**

[1] Civil law – law of contract – insurance – doctrine of subrogation. That the insured has been fully indemnified by his insurance affords no defence to a defendant or wrongdoer who has caused damage to the insured.

[2] Civil law – delict – negligence causing collision of motor vehicles – test objective and same as under the Criminal law.

[3] Civil law – evidence – who is an expert witness, qualification thereto – an expert is one who has knowledge, training, skill, competence or experience in a particular field.

[4] Evidence – reliability and cogency thereof – expert must state facts upon which his opinion is based and the court is not always enjoined to accept his evidence.

[1] The plaintiff, Mr Theophilus Mduduzi Hlophe, was in 2006, the owner of a BMW motor vehicle registered SD740MS. This motor vehicle was on 05th August 2006 involved in a collision with a Toyota Dyna mini truck registered SD 369 KN, which was owned by the defendant, Mr Patrick (Pat) Venter. This collision occurred on the MR3 public road past the Engen Petrol Filling Station near the Magevini flats.

[2] Both vehicles were traveling on the Highway towards Manzini and were driven by their respective owners. The collision occurred around 815pm on the day in question, which was a Saturday.

[3] According to the plaintiff, the collision was entirely or solely caused by the negligence of the defendant who was negligent in one or more of the following respects: he failed to:

(a) keep a proper look out;

(b) exercise proper and adequate control over his vehicle;

(c) avoid the accident when by the exercise of due care and caution he could and should have done so;

(d) swerve back to his lane on time or at all to avoid the accident;

(e) observe the rule of the road requiring him to allow the plaintiff who was on the fast lane (right lane) to pass before he, the defendant could move to that lane; and the defendant

(f) moved to the fast lane suddenly and without warning and

(g) drove onto the path of the motor vehicle driven by the plaintiff, notwithstanding that the plaintiff had a right of way.

[4] Plaintiff alleges further that as a result of the collision his motor vehicle was extensively damaged and he suffered damages in the sum of E160, 079.25 being the reasonable, fair and necessary costs of repairs to the said car to restore it to its pre-accident condition.

[5] It is common ground that the plaintiff's car was insured by Swaziland Royal Insurance Corporation. It is common ground further that the insurer paid the sum of E134 071.32 in respect of the said repairs or damages and the balance, being the excess of E26, 007.93 was paid to the repairers, Fortune's Panel Beaters (Pty) Ltd (hereinafter referred to as Fortunes) by the plaintiff himself.

[6] Defendant denies that he was negligent in any manner whatsoever. He avers that infact it was the plaintiff who was the sole cause of the collision; he being negligent in one or more or all of the following respects: he

(a) drove his motor vehicle recklessly or at an excessively high speed;

(b) drove at excessive speed under the prevailing circumstances;

(c) failed to apply his brakes timeously or at all;

(d) did not keep a proper lookout for other road users in particular defendant's motor vehicle; and

(e) attempted to overtake defendant's motor vehicle when it was unsafe to do so.

[7] Defendant avers further that because the damages to the plaintiff's car were borne by the insurer, "the defendant is not liable to plaintiff for the amount claimed in the sum of E160, 079.25 or any amount at all." (see paragraph 4.3 of Defendant's plea at page 10 of the Book of Pleadings).

[8] In answer to the last averment above by the defendant, the plaintiff stated in his replication that in terms of his insurance policy and the doctrine or principle of subrogation, he was obliged to sue for the full damages suffered and he was in law, obliged to pay over to his insurer whatever his insurer had paid in respect of the damages. This, the plaintiff repeated in his evidence in court. In his heads of argument, Counsel for the defendant persisted in this defence and stated that:

> 'In order to sustain a claim under subrogation, the plaintiff must obtain the consent of the [insurer] provided that the insurer tenders proper indemnity as to costs… In the absence of subrogation as aforesaid, the plaintiff cannot be permitted to institute proceedings against the defendant.…[The] plaintiff has no locus standi in judicio to institute the present proceedings against the defendant on the basis that the plaintiff has been compensated by its Insurer and therefore has no further business in the matter.'

[9] I point out from the outset that I cannot agree with the defendant's arguments on the issue pertaining to the doctrine of subrogation (as a principle of insurance law. I do observe that a similar argument or defence was raised and rejected in some South African cases including SMITH v AK BANJO [2011] 2 ALL SA 577 KZP (12 November 2010) and cases therein cited. The submission is, in my view, erroneous and exhibits a total lack of understanding or appreciation of the doctrine subrogation.

[10] Joubert (ed) **The Law of South Africa** (12) at paragraph 373 the authors state that ‘subrogation as a doctrine of insurance law embraces a set of rules providing for the reimbursement of an insurer which has indemnified its insured under a contract of indemnity insurance. The gist of the doctrine is the Insurer’s personal right of recourse against its insured, in terms of which it is entitled to reimburse itself out of the proceeds of any claims that the insured may have against third parties in respect of the loss.’ And in **General Principles of Insurance Law** by *MFB Reinecke et al* at paragraph 373, the learned authors state that: ‘complementary to the insurer’s right of recourse, is the insurer’s right to take charge of the proceedings against third parties who are liable for the loss to the insured. The proceedings are conducted in the name of the insured and the insurer merely acts as dominus litis. …It is firmly established that subrogation does not effect a transfer of the insured’s rights of recourse against third parties in favour of the insurer, by operation of law or otherwise. Unless a cession occurs, the insured therefore remains the holder of his rights against the third party. … Subrogation is simply a process of settling-up between the insurer and the insured after the insured’s claims against third parties

have turned out to be successful. It is concerned solely with the mutual rights and liabilities of the parties to the contract of insurance and confers no rights and imposes no liabilities on third parties'. (I have omitted all footnotes).

[11] From the above brief analysis of the doctrine of subrogation, it is plain that subrogation is a positive right in favour of the insurer to recover from the insured that which the insurer has paid in indemnifying the insured against any loss suffered by the latter as a result of damages or loss caused by third parties; provided of course that the insured has successfully claimed against them. Or, the insurer may prosecute these claims in the name of the insured. It is not a defence that operates in favour of a third party. A third party may of course raise the defence that he has been released by the insured but this is far from a defence of subrogation. Subrogation in its positive form is a contractual right of recourse in favour of or that enures to the insurer per the insurance contract and the third party or wrongdoer is no party to that contract. Again *MFB Reinecke et al* (ibid) at paragraph 389 state that:

> 'After payment has been received from a third party, a process of settlement between the insurer and the insured must take place. Hence,

> where the proceeds of the insured's rights against third parties are in the hands of the insurer, the insurer is contractual bound to pay to the insured the amount it received from the third party less the amount it paid to the insured. Conversely, where the proceeds of the insured's rights are in the hands of the insured, the insured is contractual bound to reimburse the insurer for the amount paid out to him by the insurer. However, in both instances the insured's rights to a full indemnity must be respected…
>
> The insurer itself has no independent claim that it can pursue against the third party. It simply enforces the claim of the insured for its own benefit. This explains why unless a cession has been effected, proceedings must be brought in the name of the insured and why procedurally the insured is regarded as the real plaintiff. The insurer is merely dominus litis.'

[12] In ACKERMAN v LOUBSER R, 1918 OPD 31 at 32-35 where an argument similar to the one herein was raised, Ward J. stated as follows:

> 'The position taken up by Mr Botha, who appeared for the appellant was this, that the respondent having already been compensated for the damage done to his car by the insurers having paid the bill for putting it in order, no action for damages against the wrongdoer exists as the respondent has already been fully compensated for the wrong done to him. The plaintiff (now respondent) admits the car was, at the time it was damaged insured against accident in the insurance company above referred to, and that the company paid to A Ross and Co Ltd the bill for repairing the damage caused by the defendant's dog to the car. …
>
> Mr Fischer for the respondents admits that if the insurance company had paid the account for repairing the car for the purpose of releasing the

appellant from his liability for the wrong done by him that would be a good answer to the respondent's claim, even if payment was made without the knowledge of consent of the appellant, so long as it was made in his name. And I think that the correctness of that position cannot be doubted.

The evidence however is clear that when the insurance company paid for the damaged car, they did so to discharge their own liability under their contract with the respondent and not with any intention of releasing the appellant. The matter was res inter alios acta and can in no way affect the liability for the wrong done by the appellant to the respondent.

Mr Botha's argument that because the insurance company has already compensated the respondent the judgment appealed against awarding him damages in effect compensated him twice for the same damage, seems to me fallacious. For the payment already made by the insurance company was only made to the respondent (the assured) on the understanding that he would fulfill his obligation …and use his right of action for the benefit of the company. The company, if the respondent has refused to comply with the request to allow his name to be used, could have sued him for damages arising from his refusal to fulfill his contract.

Mr Botha admits that if the respondent had ceded his right of action, the insurance company could have recovered and this seems to me to imply that the respondent until he did so cede his right had a valid right of action vested in him which he was entitled to exercise against the appellant….

From this it follows that the amount recovered by the respondent in this case, must, when paid to him be handed over to the insurance company and so it has been held in several English cases. So true is this that in the English law, if the insured refuse to sue the wrongdoer, the court will allow the insurer to sue such a wrongdoer in the name of the insured whether the latter likes it or not. …

This principle of subrogation is not peculiar to the English law nor is it confined to the matter of insurance. …

> Although authority in this matter is scenty in South Africa there is a long and unanimous series of English decisions which establish the right of the insured to recover from the wrongdoer damages of any wrong done to him although he may have been already compensated by the insurers.'

[13] Similarly in TEPER v MCGEE MOTORS (PTY) LTD, 1956 (1) SA 738 (C) at 743-744 wherein the insurance company (Guardian Assurance) had paid for the repairs to the assured's motor vehicle in full and a defence was raised that the assured could not or had no claim against the defendant; rejecting this argument OGILVIE THOMPSON J said:

> 'On the facts as they presently are before the court, it seems to me that the position is a perfectly simple and normal one, namely, that plaintiff's car was damaged; that – on the postulate the court now, at this absolution stage, approaches the matter – defendant was responsible therefor, and the subsequently plaintiff's insurer made a contract with defendant whereunder defendant repaired these damage. Defendant was paid by the insurer in pursuance of that contractual arrangement between the insurer and the defendant, and not – so it prima facie would appear to me – by way of releasing defendant from its obligation, on the authorities … it seems to me to be clear that the events that have happened do not debar the plaintiff from his right to pursue the present action against the defendant.
>
> Defendant's liability, if any, to plaintiff stems from an entirely different cause of action from that which existed between the defendant and the insurance company in relation to the repairs. In my judgment the fact that plaintiff will, or may, have to pay over to his insurer their amount…

should that be awarded to plaintiff, is irrelevant to the present inquiry and does not enure to the benefit of the defendant as a defence in this case. It is true that, prima facie, the plaintiff would then have an advantage in that he would get both a repaired car and the cash notionally representing the amount he would have expended in repairing the car. But that advantage is as between him and the defendant, and over causa extraneous to the legal obligation of the defendant to make good…to plaintiff. … The fact that as between plaintiff and his insurer the [amount] may ultimately go to the insurer is further more irrelevant because of the doctrine of subrogation. … The action continues in the name of the insured; and as McGiilivry on Insurance 4 ed 1953 190, puts it, the effects of the indemnification is to shift the equitable right to receive payment by the wrongdoer from the insured to the insurer without, however, affecting the fact that the action proceeds in the name of the insured.'

Vide also W. E. COOPER *Delictual Liability in Motor Law (Juta 1996)* [at 260 and 265-6] where the author says,

> 'The principle that a plaintiff must mitigate his loss does not enable a wrongdoer to derive any benefit from the fact that the plaintiff has been indemnified by his insurer in terms of a policy of insurance for the damage caused to his vehicle because general any compensation which the plaintiff receives from a collateral source, being res inter alios acta, does not operate to reduce the damages recoverable by him.
>
> And when an insurance company pays for the damage to the plaintiff's vehicle it does so to discharge its own liability under the contract of insurance with the plaintiff, and not with the intention of releasing the defendant. Payment of the plaintiff's damage is therefore res inter alios acta and does not in any way affect the question of the defendant's liability for the wrong done….
>
> Reference to the principle of subrogation raises the question of a plaintiff's right to sue in his own name although he has received

> compensation from the insurance company. It is apparent from the aforegoing passages that in such circumstances a plaintiff is entitled to sue in his own name unless he has ceded or assigned his course of action to the insurance company. Moreover, if the insured, upon receiving an indemnity for his costs refuses to use his name, the insurer can obtain a court order compelling him to do so.' (Footnotes have been omitted by me).

[14] I have not been able to find local cases or authorities on the topic at hand and I have thus relied on both South African and English case law on both the substantive and procedural law on the matter. On matters of locus standi ie. Who has the right to sue, there appears to be differences in different jurisdictions as pointed out by Harms ADP in the case cited in the next paragraph herein. As pointed out some of these differences are due to "legislative activities" and no doubt, ideological characterization or classification of the real origin or formulation of the doctrine. If for instance subrogation is perceived as a form of cession, then the cedent steps aside and the cessionary assumes the right to sue. But where subrogation is viewed as based on the insurance contract (ex contractu), then the matter is between the insurer and insured; the latter having the obligation to pursue the wrongdoer (third party). I can find no justification why the insured

should seek and obtain the consent of the insurer to perform his contractual obligations or even state that the insurer has acquiesced to the proceedings. So, under English law, where the insurer sues, it must do so in the name of the insured. This is of course not the case in the instant case as the plaintiff is the insured himself. Therefore whether it is procedurally proper for the insurer to sue in the name of the insured or its own name is not a matter before me in this case.

[15] Just to conclude this discussion, reference must be made to RAND MUTUAL ASSURANCE COMPANY LIMITED v ROAD ACCIDENT FUND (484/2007) (2008) ZASCA 114 (25 September 2008) where the Supreme Court of Appeal of South Africa revisited the above cases and dealt with the doctrine of subrogation. (This case which I believe is reported is not available in the law reports we have in our library. It was obtained by me through the internet). HARMS ADP stated:

> '…this court, with reference to *Ackerman v Loubser and Teper*, held that 'an insurer under a contract of indemnity insurance who has satisfied the claim of the insured is entitled to be placed in the insured's position in respect of all rights and remedies against other parties which are vested in the insured in relation to the subject matter of the insurance. This is by virtue of the doctrine of subrogation which is part of our common law.'

What this court had in mind in Commercial Union were the three rules of the lex mercatoria (and not only of the English law of insurance): that the wrongdoer is not entitled to benefit from the fact that the person wronged was insured; that the insured may not be enriched at the expense of the insurer by receiving both the insurance indemnity and damages from the wrongdoer; and that the insurer replaces the insured, i.e., the insured is subrogated by the insurer, which entitles the insurer to claim the loss from the wrongdoer.

In English law 'the doctrine of subrogation in insurance rests upon the common intention of the parties and gives effect to the principle of indemnity embodied in the contract.' In our law it would be a case of implied terms (but in t he sense of naturalia of the contract as opposed to tacit terms) of the contract of insurance.

Significantly, in formulating the doctrine of subrogation, this court has not as yet held that the insurer is not entitled to sue in its own name. Different laws deal with this aspect differently. The English common law, as has been said, requires the insurer to sue in the name of the insured. This requirement gives rise to a number of procedural anomalies. American law apparently adopts a different approach: although it is accepted that in strict law the action ought to be brought in the name of the insured, the insurer institutes the litigation in its own name to protect litigants from harassment and to avoid confusion over the identity of the real plaintiff. This appears to be similar to the position in Continental law.

These differences may be due to legislative activities and, especially as far as Continental law is concerned, to the fact that the effect of subrogation may differ from one legal system to another. It may amount to something akin to cession of the claim against the wrongdoer ex lege or it may simply mean that although the claim against the wrongdoer still vests in the insured, the insurer has certain procedural rights against both the insured and the wrongdoer. Locally, there is an academic debate about the correct approach to the substantive aspect but this is not the case to decide

> the matter. For present purposes I shall assume that a transfer ex lege akin to cession does not take place. That does not, however, mean that the procedural rule that the insurer has to sue in the name of the insured is in accordance with the general principles of our law.'

[16] In the present case, the insured (plaintiff) is suing in his own name and this court has not been asked to decide whether or not the insurer has a right to sue in its own name, as the court was in the RAND MUTUAL case (supra). Another significant observation in this case is that the subrogation does not extend to the excess that was actually paid by the plaintiff.

[17] For the above reasons, the defendant's argument that the plaintiff has no right to sue herein simply because he was fully compensated or indemnified by his insurer, is rejected as not being sound in law. I now proceed to examine the case on its merits.

[18] According to the plaintiff, he was on the day in question driving his motor vehicle, a BMW on the highway from the Mbabane direction to Manzini and just past the Engen Petrol Filling Station near the Magevini flats, the defendant who had just joined the highway and was driving on the left lane, suddenly drove his motor vehicle to the

right lane which lane the plaintiff was driving on. That section of the highway is a one way two-lane road. The plaintiff testified that he immediately applied his brakes, but because the defendant's motor vehicle was too close to him he could not avoid colliding with it.

[19] As a result of the collision both motor vehicles were damaged. The plaintiff's vehicle was extensively damaged on its front part whilst the defendant's motor vehicle sustained minor damage on its rear right hand side. The actual point of impact on plaintiff's motor vehicle was on the left front side.

[20] It is common cause that the speed limit in that area was at the material time 100km per hour. The plaintiff said he was driving within the said speed limit.

[21] It is also common cause that brake-marks caused by the plaintiff's vehicle stretching about 32 paces or almost 24 metres – to the point of impact or collision were observed on the tarmac after the collision. These were on the right hand lane. The plaintiff's motor vehicle also suffered damage on its right front part as it came into contact with the

guard rails in the middle of the highway, separating traffic driving in opposition directions.

[22] It is also common ground further that the point of impact, in relation to the road was in the middle of the right hand lane and at the time of the collision the defendant's motor vehicle was straddling the middle-broken line, ie, defendant's motor vehicle occupied both lanes. Also common ground is the fact that the defendant's motor vehicle stopped about 20-30 metres from the point of impact.

[23] It is the evidence of the plaintiff that he was alone in his motor vehicle and he thought that the defendant was also alone in his motor vehicle at the material time. I hasten to observe though that the defendant said he was with Samuel Mtsetfwa (who gave evidence as DW2). I shall return to this evidence later in this judgment. The plaintiff also testified that after the collision, the defendant came to him (at the scene) and after inspecting his motor vehicle, apologized to him for having caused the collision and also offered to pay the excess-after learning that plaintiff's car was insured. Again, this is denied by the defendant who said that he merely tendered his commiseration to the

plaintiff about what had occurred and did not accept any responsibility for causing the accident and also did not offer to pay anything consequent thereupon.

[24] Although police officers from the Sigodvweni Police Station came to the scene of the accident and found the relevant motor vehicles and their drivers there and recorded statements from the two drivers, no sketch plan was drawn by the Police. Police officer 4766 Mark Dlamini, was one of the police officers who attended to the accident. He explained that he had merely made rough notes of his observations at the scene that evening and had then caused the motor vehicles to be cleared from the highway so as not to cause any further inconvenience to other road users. He said, he had hoped to return to the scene the next day to take proper measurements of the relevant situation but had been unable to do so and thus the absence of a sketch plan or diagram depicting the scene of the accident.

[25] The police charged the defendant for negligently causing the accident. This was of course after examining the scene and taking statements from both drivers. Again I observe here that the said police officer

did not see DW2 at the scene and he said the defendant did not say to him that DW2 had been there as a passenger in his motor vehicle. The said policeman also said that he had seen some liquor in the defendant's motor vehicle and that defendant had a strong smell of liquor as well. PW2 testified that on being tested for alcohol, defendant's breath showed the presence of such alcohol but that the alcohol content in his breath was not within the prohibited range. This was denied by the defendant who said that he did not drink any alcohol and there was no alcohol in his motor vehicle at the time.

[26] The Defendant stated that it is possible that he must have smelt of liquor as he had been working inside and fixing one of the bright beer tanks at the Swaziland Brewery in Matsapha immediately before the collision.

[27] By the 24th April, 2013 when I heard argument on this case, the criminal case against the defendant was still pending before the Magistrate's Court.

[28] After the collision, the plaintiff's motor vehicle was referred to Fortune's for repairs. A quotation was immediately made by them whilst the car was parked at the BMW dealership's premises in Manzini. After approval by the assessors on behalf of the insurance corporation, the motor vehicle was then towed to the panel beaters and a further and more detailed quotation for repairing it was done at the workshop. Again, this was submitted to the assessors who approved of this quotation too. The total amount was as claimed in this action.

[29] When Fortune's called the defendant and informed him that the plaintiff had told them that he would be responsible for paying the excess costs, the defendant disavowed such undertaking and liability. Eventually these costs were paid by the plaintiff.

[30] It is common cause that the plaintiff and the defendant were known to each other; having worked together at Big Bend sometime before the accident. The defendant told the court that it was *inter alia,* because of this knowledge of the plaintiff that he expressed his sorrow to him after seeing the damage to the plaintiff's car after the accident. He emphasized that he never accepted liability for the collision and also

did not make an undertaking to pay for the excess in respect of the repairs thereto.

[31] The evidence is undisputed that the defendant did not take the plaintiff's car to Fortune's and he, when called by them, expressly denied any liability for its repairs. His denial of liability was also conveyed to the police at the scene of the accident. From these pieces of information, I am unable to say that the defendant did accept being the cause of the accident and being liable to pay the excess costs in respect of its repairs. On the contrary, I hold, on a preponderance of probability that he did not apologise to the plaintiff for having caused the collision and also did not agree to pay the said excess. He merely conveyed his sympathies to him for the mishap.

[32] In his evidence, the defendant essentially or substantially agreed on how the accident occurred. He, however, denied that he was the cause thereof or that he was negligent in anyway. The defendant stated that after joining the highway, he drove on the left lane which is popularly known as the slow-lane and was following a minibus. He then looked back (on the highway) and saw the plaintiff's car some distance away

and then decided to overtake the minibus. He swerved to the lane on his right and just then his motor vehicle was hit from behind and violently propelled forward. He was pushed or flung over the steering wheel and in the process knocked his head against the front windscreen of his motor vehicle momentarily losing control of his motor vehicle. When he regained controlled of it he successfully avoided colliding with the minibus (Kombi) he had tried to overtake. He said because of the force of the impact on his motor vehicle, he was able to stop about 50 metres from the point of impact.

[33] The defendant stated that DW2 Samuel Mtsetfwa, was a passenger in the cabin of his motor – seated next to or alongside him. After bringing his motor vehicle to a stop and ascertaining that his passenger was alright, he went back to the plaintiff and they both had the conversation I have already dealt with above before calling the police.

[34] The defendant testified that after examining the scene and talking to both drivers, the police ordered him to sit in the police car and there they told him he was the cause of the accident. He told the court that

the police demanded a bribe of E500.00 from him or payment of a fine of E60.00 and that he goes for a breathalyser test at the Matsapha Police Station. He refused to comply with any of these demands.

[35] As stated above, the defendant denied that there was liquor in his motor vehicle or that he had taken liquor. He said he did not drink liquor at all. He was supported in this respect by DW2. He conceded though that he may have been smelling of liquor as he had been working on the bright beer tanks at the Swaziland Breweries. He said the argon gas he was using in doing the welding had been finished and he was driving to his home at eLwandle to get another gas bottle. The defendant, contrary to what DW2 said, told the court that he had not returned to the Brewery that evening following the accident. I think it is also noteworthy that DW2 informed the court that the front windscreen of defendant's motor vehicle was damaged during the collision. The defendant and PW2 only mentioned the damage on the right rear side of the motor vehicle.

[36] The two differences or inconsistencies in the evidence of DW2 and the defendant; ie the breaking of the windscreen and whether the pair

returned to the Breweries that evening cast a serious doubt on the veracity of the former. This doubt becomes more serious and significant when regard is had to the fact that he was not seen by the police or the plaintiff at the scene of the accident. Under cross examination DW2 resorted to saying he could not remember most things. His evidence is, at best and in fairness to him, not convincing.

[37] The sum total of the evidence by the defendant is that the sole cause of the collision was the negligence of the plaintiff who was traveling too fast in the circumstances. He said when he decided to overtake the kombi infront of him and change lanes, the plaintiff's motor vehicle was a fair distance away but it suddenly knocked his vehicle from behind before he could even complete his move to overtake. He said plaintiff's motor vehicle came from the blue and to his surprise collided with his. He stated that the length of the tyre or skid-marks made by the plaintiff's motor vehicle; and the force with which his motor vehicle was hit and the damage sustained by the plaintiff's car proved this.

[38] I now examine whether or not the facts as stated above do establish the negligence of the defendant in any of the alleged particulars of negligence.

[39] Negligence is the failure to foresee and exercise the necessary care and skill which the reasonable man, in this case, driver would have exercised in the circumstances. Foreseeability is paramount in the equation. Therefore, if the reasonable man (driver) would have foreseen it as a reasonable possibility that his driving or conduct would cause injury to another and result in him suffering patrimonial loss and would thus have taken steps to prevent or avoid it occurring but failed to do so, he is negligent. It is the failure to foresee that which a reasonable person in the position of the defendant would have foreseen and taken steps to guard against. The standard employed in such an inquiry is an objective one. (Vide BUTTERS v CAPE MUNICIPALITY, 1993 (3) SA521 (C), NGUBANE v SATS, 1991 (1) SA 756 (A) and DEYSEL v CASTEN 1992 (3) SA 290 (E)).

[40] In *Herschel v Mrupe*, 1954 (3) SA 464 (A) at 490, the court stated that the reasonable man '…is not … a timorous faint heart always in

trepidation lest he or others suffer some injury; on the contrary, he ventures into the world, engages in affairs and takes reasonable chances. He takes reasonable precautions to protect his person and property and expects others to do likewise' and is not given to 'anxious conjecture and morbid speculation.' And in *Roberts and others v Ramsbottons [1980] 3 All ER 7 at 13* Neill J quoting Lord Denning MR in *Nettleship v Weston [971] 3 All ER 581 at 586* said:

> 'The standard of care by which a driver's actions are to be judged in an action based on negligence is an objective standard. Every driver, including a learner-driver –
> "must drive in as good a manner as a driver of skill, experience and care, who is sound in mind and limb, who makes no errors of judgment, has good eyesight and hearing, and is free from infirmity.'
> It is the same standard as that which is applied in criminal law in relation to offences of dangerous driving and driving without due care and attention. The standard eliminates the personal equation and is independent of the idiosycrancies of the particular person whose conduct is in question.
> …The liability of a driver in tort is not, however, a strict liability. Nor is the offence of dangerous driving an absolute offence. In *R v Gosney [1971] 3 All ER 220 at 224* Megaw LJ said in relation to a charge of dangerous driving:
> "It is not an absolute offence. In order to justify a conviction there must be, not only a situation which, viewed objectively, was dangerous, but there must also have been some fault on the part of the driver, causing that situation. "Fault" certainly does not necessarily involve deliberate misconduct or recklessness or intention to drive in a manner inconsistent

> with proper standards of driving. Nor does fault necessarily involve moral blame. Thus there is fault if an inexperienced or a naturally poor driver, while straining every nerve to do the right thing, falls below the standard of a competent and careful driver. Fault indicates a failure, a falling below the care or skill of a competent and experienced driver, in relation to the manner of the driving and to the relevant circumstances of the case. A fault in that sense, even though it might be slight, even though it be a momentary lapse, even though normally no danger would have arisen from it, is sufficient.'

[41] As pointed out in *Herschel (supra)* foreseeability itself has three elements, namely;

(a) whether a reasonable person in the position of the driver would have foreseen the possibility of harm to others – (the exact nature of the harm need not be foreseen though);

(b) whether the reasonable driver in the relevant circumstances would have guarded against such harm and

(c) whether the driver (defendant) did take the required precautions to prevent the occurrence of such harm. That is the law that I have to apply to determine the liability or otherwise of the defendant herein.

[42] In the present case, the plaintiff was travelling on the right lane when the defendant suddenly decided to overtake the kombi by trying to

switch to the right lane. The defendant was unable to complete his move. The collision took place before his motor vehicle could be wholly within the right (fast) lane. When the defendant started moving or changing lanes, the plaintiff was already on the right lane and very close-by. That the plaintiff's motor vehicle just came from the blue and hit the defendant's from the back is another way of saying that the defendant did not see it or he did not pay proper or due care and attention before making his move to overtake the Kombi. It is plain to me that if the defendant had looked behind him before attempting to overtake, he would have seen that the motor vehicle was too close and driving on the fast lane and he would not have changed lanes. I cannot accept the evidence by the defendant that the plaintiff's motor vehicle was way behind him when he started to overtake the Kombi. He (defendant) simply did not look behind him to ascertain if it was at that time safe for him to overtake. He should have done so though, as a reasonable driver would have done in those circumstances. The defendant created a dangerous situation by turning to the right without satisfying himself that it was opportune to do so. A reasonable driver in this position would have realized this and taken the necessary precaution to prevent the collision.

[43] WE Cooper (ibid) at 164-165 states that:

> '…before overtaking, a driver should look back or in his rear view mirror to ascertain whether there is traffic following him. If there is traffic reasonably close behind which may be contemplating the same manoeuvre as he is, he must give a timeous and adequate signal of his intention to overtake. …There is no general rule that an overtaking driver is under a duty to warn the driver ahead that he is about to be overtaken. On a main road an overtaking driver is generally entitled to assume that slower traffic being overtaken will continue on its course on the left of the road.'

Lastly, emphasizing the duty that was placed on the defendant at the time-it being on a highway-, in *S v Oliver, 1969 (4) SA 78 (N) at 82* Miller J. said:

> '…where vehicles are proceeding almost as in a procession, only a few feet or yards separating each vehicle from the one behind it, a driver who wishes to turn to his right down a street intersecting the one along which he is travelling may well be entitled, in regard to the vehicles coming on slowly behind him, to do no more than give a clear and timeous signal of his intention to do so. If he assumes that his signal will be seen by the driver of the vehicle behind him who will accommodate his progress to the turn of the vehicle ahead and not run into it as it turns, such assumption may well, in the vast majority of cases, be held to be a legitimate one. But not so, I think, in the case of a driver who is travelling along a national road on which it is common experience to be overtaken at high speed by other vehicles. Such a driver would, I think, if he were reasonably diligent, before or at the time of giving a signal of his intention to turn right, make a special point of ascertaining, with the aid of his rear view mirror, or otherwise, whether there were any vehicles coming on behind him. And, a fortiori, he would also keep a keen look-out ahead for

> vehicles approaching from the opposite direction and into whose line of travel the proposed right-turn would necessarily take him. If the road ahead were entirely free of danger but a vehicle were to be seen by him approaching from behind at not great distance but at speed, he would in my opinion be taking an unjustifiable risk if, without paying any further attention to the movement of that vehicle, he were simply to execute his right-hand turn on the blithe assumption that the driver thereof had seen and understood his signal and would heed it.'

[44] I entirely endorse the above remarks. The facts in this case are distinguishable from those in *BLOCH v SAR & H, 1939 NPD 106* because in the instant case, in overtaking the minibus the defendant went onto the plaintiff's driving lane – virtually blocking him, whereas in Bloch's case both drivers simultaneously attempted to overtake the bus. See also *Mabaso v Marine and Trade Ins, 1963 (3) SA 439 (D) at 440.*

[45] For the foregoing reasons, I hold that the plaintiff has established, on a preponderance of probabilities that the sole cause of the collision herein was the negligence of the defendant who failed to keep a proper look-out in the circumstances. He attempted to overtake the Kombi whilst it was inopportune for him to do so. He swerved onto the path of the plaintiff who was close by behind him.

[46] I now turn to deal with the issue of the quantum of damages. This aspect of the case hinges on the acceptability, reliability or cogency of the evidence of Paul Fortune (hereinafter referred to as PW3).

[47] The only objection raised by the defendant regarding the evidence of PW3 was that he had no formal educational training to qualify him as an expert on vehicle panel beating and spray painting, or making quotations in that regard. It is trite that the court has a duty, after viewing all the evidence of the witness introduced as an expert to make the declaration whether the witness in question is an expert or not. See *Menday v Protea Assurance Co. Ltd 1976 vol. 1 SA 565 at 569.* But even when the court has declared a witness an expert, it is not bound to accept his opinion. It is ever so essential that the expert must lay out the facts upon which his opinion or conclusion is based. Otherwise mere conclusions without the underlying facts count for nothing. It is not inconveivable that the court may, in an appropriate case prefer and accept the evidence of an ordinary witness over that of an expert on a particular issue. See *Stacy v Kent, 1995 (3) SA 344.*

[48] The defendant did not point out to court any defects or shortcomings regarding the individual items appearing on the relevant quotations. Neither did the defendant object to any of the repairs or charges thereon as being unnecessary, unreasonable or fair. PW3 said all the repairs and charges listed in the said quotations were necessary, reasonable and fair to restore the vehicle to its pre-accident condition.

[49] As already stated, PW3 has no formal education on the subject at hand. He learnt his trade in the business, so he said, and has 32 years experience in it. He is the Managing Director of Fortune's which he said was started by his father before he was born. He said his business, under his stewardship has been accorded an A grading by the local insurance industry. Such grading means that the business may undertake work of any value – unlimited. He stated further that he has been responsible for doing quotations at Fortune's for the past 32 years and his business has a very good relationship with the local insurance companies – no doubt because of its ability and professionalism. It is not insignificant I think, that the quotations he made were approved by the relevant motor vehicle assessors. These

assessors had seen the damaged vehicle and were satisfied that the itemized repairs in the quotation were necessary, fair and reasonable; otherwise I cannot see how they would have approved it. To think otherwise would be stretching one's imagination too far, I think. Pw3 explained that the first quotation was made at the dealer's premises before the vehicle was stripped. The second quotation had to be made after the vehicle had been stripped at Fortune's.

[50] Just for the avoidance of doubt, in mentioning that the quotations were approved by the motor vehicle assessors, this court is in no way suggesting that that fact of acceptance or approval, is certification that Pw3 is an expert. There is, however, no doubt that the said approval points to his competency in the task he was performing; which in turn is a factor to be considered in determining the issue whether he is an expert or not. I must also observe here that there is very little opinion, if any, expressed in these quotations. PW3's report and his evidence in court comprises in the main what was damaged and had to be replaced and the value of these spares or parts. These spares, I would want to believe are sourced and priced by the dealers. (I accept of

course that what had to be removed and replaced on the vehicle finally came down to the opinion and judgment of PW3).

[51] From the above evidence of PW3, I am satisfied that he is an expert on the subject under consideration herein. He has the necessary experience and knowledge spanning over 30 years in the business and his evidence has the required probative value and this court may rely on it. His evidence and the quotations he compiled, is admissible as evidence in these proceedings.

[52] For the foregoing reasons, I hold that the plaintiff has, on a balance of probabilities, established that he suffered the damages claimed in his summons herein. I hereby make the following order:

The defendant is ordered to pay to the plaintiff

(a) the sum of E160,079.25 (as damages)

(b) interest on the said sum of E160,079.25 at the rate of 9% per annum with effect from 05th July, 2013 to date of final payment and

(c) costs of suit.

MAMBA J

For the Plaintiff	**:**	**Mr S. Dlamini**
For the Defendant	**:**	**Mr J. Rodrigues**