IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case Number: 734/2021

In the matter between: -

ISAQUE LALMIAH **PLAINTIFF**

and

ROAD ACCIDENT FUND **DEFENDANT**

CORAM: **MBHELE, DJP**

HEARD ON: 23 May 2023

DELIVERED ON: 01 September 2023

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[1] Plaintiff alleges that he sustained bodily injuries arising from a motor vehicle accident caused by an unknown third party. He instituted a claim for damages against the Defendant (RAF). The merits were separated from the quantum. At the beginning of the trial, the RAF abandoned its special plea.

[2] The plaintiff's testimony was essentially as follows. On 19 November 2019, the plaintiff was travelling from Senekal to Welkom in a Toyota Hilux single cab bakkie with registration numbers and letters F[…] 9[…] FS (Plaintiff's vehicle) carrying one passenger. The vehicle was travelling on a tarred road with a single carriage in both directions with cardboard boxes containing stationary loaded on the back of the bakkie. The plaintiff was travelling at a speed of approximately 90- 100 kilometres per hour. About 30 kilometres before Welkom in between, Hennenman and Ventersburg, he noticed a blue Toyota Tazz (insured driver) following him.

[3] The insured driver overtook the plaintiff where after he reduced his speed to approximately 80 – 90 kilometres per hour. The plaintiff followed the insured driver for about 5 – 8 Kilometres on a road consisting of rolling hills. The insured vehicle was driving slowly and the vehicle was making sudden abrupt left and right turns (driving in a zig-zag). Plaintiff indicated his intention to overtake and then proceeded with a manoeuvre to overtake the insured vehicle. While his vehicle was parallel to the insured vehicle, the insured vehicle moved into the right lane without indicating and it slightly bumped with the left fender of his vehicle. He swerved to the right and his vehicle landed outside the tarmac on the gravel, he immediately thereafter swerved to the left, lost control of the vehicle and crossed the left lane where he eventually landed in the veld.

[4] The photos of the plaintiff's vehicle show that it had damages on the bonnet and on the sides. Plaintiff contradicted the affidavit taken down by his Attorney and submitted to the RAF accompanying the RAF1 form when he lodged his claim. In his affidavit, the plaintiff said that he collided with a blue Mazda bakkie with registration numbers and letters **D[…] 5[…] FS** after which he lost control of the vehicle and it rolled.

[5] In cross-examination, he denied ever telling his Attorney that he collided with a vehicle as described in the affidavit. He reiterated that he collided with a blue Toyota Tazz whose registration numbers and letters are unknown. The plaintiff

was confronted with the inconsistencies between the oral evidence tendered in court and the affidavit he signed in support of his claim but he offered no satisfactory explanation. He was evasive in his response and failed to answer many questions.

[6] The RAF closed its case without calling any witnesses. I have to evaluate the evidence on the version proffered by the plaintiff.

[7] In the particulars of claim, the plaintiff alleges 5 grounds for negligence on the part of the insured driver: That he drove too slow under the prevailing circumstances, he failed to keep a proper lookout, he failed to apply brakes of the vehicle he was driving effectively alternatively at all, he failed to drive the vehicle with the necessary skill expected of a reasonable driver in the circumstances, he moved into the lane for oncoming traffic at a time when it was inopportune and unsafe to do so.

[8] The onus rests upon the plaintiff to prove negligence on the part of the defendant on a balance of probabilities. In **Sardi v Standard and General Insurance,**[1] Holmes JA remarked as follows:

> '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 probability, just as the Court would do in any other case concerning negligence. In the final analysis, the Court does not adopt a 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'[2]

[1] 1977 (3) SA 776 (A).
[2] Ibid at 780G-H.

[9] The question to ask is whether the evidence adduced by the plaintiff is credible and sufficient to prove his case See **Van Wyk v Lewis**[3] where the following was said "

> 'The question of *onus* is of capital importance. The general rule is that he who asserts must prove. A plaintiff therefore who relies on negligence must establish it. If at the conclusion of the case the evidence is evenly balanced, he cannot claim a verdict; for he will not have discharged the *onus* resting upon him. '

[10] The plaintiff must show that there was a duty of care that the defendant breached. The plaintiff, as a driver of a motor vehicle on a public road, had certain duties to fulfil to stay safe on the road. He had to appreciate that he shared the road with other road users, he had to recognise the existence of reciprocal duties and was obliged to avoid harm to other road users. He had a duty to keep a proper lookout, to keep left, to travel at a reasonable speed under the prevailing circumstances and to avoid collision by the exercise of reasonable care. He had a duty to act reasonably and to regulate his speed in relation to his range of vision. A breach of these duties justifies a conclusion of negligent conduct on the part of a driver.[4]

[11] A reasonable driver using a public road would be capable of foreseeing situations that may cause harm on the road, such as stationary traffic, fast-moving traffic, pedestrians, animals and obstructions as well as irregularly.[5]

[12] In order to prove negligence in a collision between an overtaking vehicle and the one being overtaken, an overtaking driver must be able to show that the collision was occasioned by the sudden movement to the right of the driver of the vehicle being overtaken and that he/she had given sufficient space between the two vehicles to allow for foreseeable and normal lateral movement of the vehicle being overtaken. A driver who overtakes another vehicle must ensure that it is safe to do so. The overtaking driver must be alert to the possibility that the vehicle being overtaken may turn to its right[6].

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[3] 1924 AD 438 at 444

[4] Klopper's Law of Collisions in South Africa 8th edition page 38

[5] Klopper's Law of Collisions pages 64,72 and 73

[6] Klopper's Law of Collisions pages 66, 72, 73

[13] The test for negligence is well established. In **Kruger v Coetzee**[7] it was held that negligence arises if a reasonable person in the position of the defendant 'would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss' and 'would take reasonable steps to guard against such occurrence' but the defendant failed to take those steps.

[14] In **Cape Town Municipality v Paine** (1923, A.D at p. 216) the following was said: -

> "It has repeatedly been laid down in this Court that accountability for unintentional injury depends upon culpa, the failure to observe that degree of care which a reasonable man would have observed. I use the term reasonable to denote the *diligens paterfamilias* of Roman law, the average prudent person. Every man has a right not to be injured in his person or property by the negligence of another, and that involves a duty on each to exercise due and reasonable care. The question whether, in any given situation, a reasonable man would have foreseen the likelihood of harm and governed his conduct accordingly, is one to be decided in each case upon a consideration of all the circumstances. Once it is clear that the danger would have been foreseen and guarded against by the *diligens paterfamilias*, the duty to take care is established, and it only remains to ascertain whether it has been discharged."

[15] The evidence before me shows that for about 8 kilometres when the plaintiff was following the insured vehicle, the latter had been making abrupt movements to the left and right. The movement of the insured vehicle to the right was not sudden, it had been observed by the plaintiff for about 8 kilometres and for that distance, plaintiff experienced no harm. Having observed the insured driver for such a distance it would have been apparent to the plaintiff that overtaking the insured vehicle would put his life in harm's way.

[16] As stated above, the overtaking driver must, when overtaking, assume that the vehicle being overtaken will keep to the left lane and continue on its course until the manoeuvre is complete. There was no basis for the plaintiff to assume that the insured vehicle would keep to the left lane as it is normally the case. It was clear for the 8 kilometres that the 2 vehicles travelled together that overtaking the insured driver would be tantamount to walking into a lion’s den.

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[7] Kruger v Coetzee 1966 (2) SA 428 (A) at 430E – F.

[17] Although the insured driver drove recklessly the plaintiff had a reciprocal duty to keep other road users safe, including his passenger. Plaintiff foresaw the possibility of his vehicle colliding with the insured driver but he nevertheless overtook the insured vehicle. The plaintiff's conduct was irreconcilable with that of a reasonable driver in a similar situation.

[18] In **Santam Insurance CO LTD v Vorster**[8] the court said the following when it dealt with voluntary assumption of risk

> 'Whether or not the plaintiff consented to the risk of injury through the negligent driving of van der Schyff and/or Conradie during the race is admittedly a question of fact. Cf. *Letang v Ottawa Electric Railway Co.*, 1926 A.C. 725 (P.C.) at p. 731, where it was said that:
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> > 'If the defendants desire to succeed on the ground that the maxim *volenti non fit injuria* is applicable, they must obtain a finding of fact that the plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it.'

[19] The facts before me evince that the plaintiff engaged in an activity and that he was aware of the risks inherent in such activity as a driver. The plaintiff voluntarily accepted the risk through his conduct. He cannot complain that he sustained injuries flowing from such activity and seeks compensation for such injuries. The negligent driving of the insured driver caused no harm until the plaintiff decided to overtake at an inopportune moment.

[20] I am unable to find that the collision as described by the plaintiff was directly caused by the sole negligence of the insured driver. The plaintiff chose to encounter a well-known risk when he decided to overtake the insured driver in the circumstances. The collision could have been avoided had the plaintiff exercised the necessary caution expected of a reasonable driver in his position. The plaintiff's claim cannot succeed.

[21] I make the following order:

1. The plaintiff's claim is dismissed with costs.

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[8] Santam Insurance CO LTD v Vorster 1973 (4) SA 764 (A)

N.M. MBHELE, DJP

Appearances:

For the Plaintiff: Adv. Coetzer
Instructed by: Honey Attorneys
Bloemfontein

For the Respondents: Ms. Gouws
Instructed by: State Attorney
Bloemfontein