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

Case No.: **2725/2019**

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

FRANK AUGUST KORB

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

CORAM: VAN RHYN, J

HEARD ON: 23 and 26 AUGUST 2022

DELIVERED ON: 10 OCTOBER 2022

[1] This is an application for absolution from the instance. It was brought by the defendant at the end of the plaintiff's case. The plaintiff opposes the application.

[2] The plaintiff in this action is Mr Frank August Korb, a major retired pharmacist of Riebeeckstad, Welkom, Free State Province. The plaintiff issued summons against the defendant, the Road Accident Fund, for damages as a result of injuries he sustained in a motor vehicle accident that occurred on 26 September 2016 at the intersection of the Virginia/Kroonstad/Welkom roads, Free State Province.

[3] At a pre-trial conference held during February 2022, the parties agreed to separate the merits and the quantum and the court is thus required only to adjudicate the merits of the matter. The quantum is to be determined at a later date.

[4] It is alleged by the plaintiff in his particulars of claim that on the 26th of September 2016 a motor vehicle collision occurred during which a motor vehicle with registration letters and numbers [...] (the "Kia") driven by Belinda Ngubane (the "insured driver") collided with a motorcycle with registration letters and numbers [...] (the "motorcycle") driven by the plaintiff.

[5] In his particulars of claim, the plaintiff alleged that the collision was caused by the sole negligence of the insured driver who was negligent in one or more of the following respects:

5.1 she failed to keep the insured vehicle under any control, alternatively under any proper control;

5.2 she failed to keep any, alternatively any proper lookout;

5.3 she failed to comply with traffic rules and regulations;

5.4 she failed to take into consideration other users of the road;

5.5 she brought the insured vehicle to almost a standstill in the road under circumstances when it was dangerous to do so and thereby creating a dangerous situation for other users of the road;

5.6 she caused an obstruction in the road, thereby creating a dangerous situation for other users of the road;

5.7 she failed to avoid the collision when by the exercising of reasonable care and skill she could and should have done so.

[6] The Defendant admitted that on the particular day and at the intersection referred to by the plaintiff, a motor vehicle collision occurred, but denied the allegations that the insured driver of the Kia was negligent as alleged. Alternatively, that should the court find that the insured driver was negligent, that such negligence was not the cause of the collision and in the further alternative that the plaintiff's was contributory negligent with the result that his claim should be reduced in accordance with the provisions of the Apportionment of Damages Act.¹ The defendant pleads that the plaintiff was negligent in one or more of the following respects:

6.1 he failed to keep a proper lookout;

6.2 he failed to take cognisance of the prevailing traffic and/or prevailing traffic conditions;

6.3 he failed to take cognisance of the rights of other road users and in particular, the rights of the said insured driver;

6.4 he failed to avoid the collision, when by the exercise of reasonable care and consideration, he could and should have done so;

6.5 or on any other grounds which may be proven during the course of the trial.

[7] The plaintiff testified at the trial and the evidence of two further witnesses were presented where after the plaintiff closed his case. The plaintiff testified that on the particular day it was sunny with good visibility. The road surface was in a good condition with clear and visible markings. At around 07h00 on the particular day, and

¹ Act 34 of 1956 for

while on his way to the gymnasium, the plaintiff was traveling on a tarmac road consisting of two lanes in a single direction, the R730 road. The R730 road converges into a single lane after the intersection which allows traffic from Virginia, to cross the R730 to join the road to Kroonstad. The speed limit on the road is 100km/h.

[8] Plaintiff was traveling from his home in Riebeeckstad in a southern direction behind the Kia motor vehicle and was following the insured driver for a distance of between 100 to 200 meters from the Virginia turn off. They were both travelling in the left lane of the dual carriageway. Plaintiff testified that he kept the insured vehicle under observation at all times. He noticed a congestion (“oopenhoping”) of about 5 to 6 vehicles in the left lane ahead of the Kia. The congestion occurred before the intersection which he was approaching. He reduced his speed to about 50 – 60 Km/h because of the congestion in front. The insured driver of the Kia had by then also reduced speed and was travelling at the same speed as the plaintiff.

[9] The plaintiff decided to engage his indicators with the view of moving to the right lane in order to pass the Kia in front of him. He testified that he wanted to move to the right lane due to the fact that the traffic flow in the right lane was moving better. Secondly, the left lane in which he was traveling, in any event, converge with the right lane after the intersection ahead of him. Plaintiff testified that he was about 10-12 meters away from the Kia. He noticed a vehicle to his right in his mirror, approaching from behind. He waited for the vehicle to pass whilst keeping the insured vehicle and the approaching vehicle from behind under constant observation. After the said vehicle passed him in the right lane, the plaintiff started to execute the manoeuvre to move to the right lane in an effort to pass the Kia.

[10] Plaintiff then became aware of the fact that the insured driver suddenly and unexpectedly, without any warning, applied the brakes of the Kia. According to the plaintiff, the insured driver braked so harshly that it appeared as if the Kia come to a standstill. The insured driver did not observe any obstruction in front of the Kia. He did not see a pedestrian, animal or another vehicle which might have contributed to the sudden and unexpected decision by the insured driver to apply the brakes of the Kia.

[11] In an attempt to avoid a collision with the Kia, the plaintiff applied the brakes of the motorcycle but was unable to stop the motorcycle in time and collided with the rear right side of the Kia. In his opinion he could not exercise any evasive action because of the sudden and unexpected action by the insured driver to apply the brakes of the Kia.

[12] During cross examination the plaintiff testified that at some stage there might have been two vehicles in front of the Kia, but he was not able to give an exact estimation of their distance in front of the Kia. Upon questioning on a safe following distance, the plaintiff indicated that it would be 2-3 seconds distance between two vehicles. When converted to meters, this would amount to approximately 30 meters. He testified that he believes that he was traveling approximately 15 -20 meters away from the Kia prior to the collision.

[13] Mr J J van den Berg testified for the plaintiff. He and the plaintiff has known each other for many years. In his estimation he arrived at the scene of the collision shortly after the accident had occurred and immediately started to take photographs with his cell phone. The photographs were included in the plaintiff's merit bundle which was submitted as Exhibit "A." He noticed "fresh" brake marks on the road surface which he attributed to the Kia. He did not notice where the Kia stopped immediately after the accident. The Kia was moved from the tarmac and was parked to the left. He, also identified skid marks on the tarmac which he identified as that of the motorcycle.

[14] The plaintiff presented the testimony of Mr D Strydom of J P Strydom Accident Consultants CC based at Roodepoort. Mr Strydom holds the following degrees: BA, LLB and LLM. He completed two online certificate courses, an At-Scene Traffic Crash/Traffic Homicide Investigation Certificate and an Advanced Traffic Crash Investigation Certificate obtained from the Institute of Police Technology and Management (IPTM) at the University of North Florida in the United States of America.

[15] Mr Strydom was provided with the following documents and information which were included in his report:

- 15.1 Accident Report by Constable Ngozo;
- 15.2 Sketch Plan and Key to Sketch Plan by Constable Lesupi;
- 15.3 Sketch Plan and key to Sketch Plan by Mr J C Steyn;
- 15.4 Sketch Plan and key to Sketch Plan by Mr J de Wit;
- 15.5 Google Earth Images of the scene of the collision;
- 15.6 Visit to the scene of the collision, taking of measurements and photographs;
- 15.7 Photographs taken by Mr JJ van den Berg;
- 15.8 Various statement and affidavits;
- 15.9 Dimension specifics/data of the two collision vehicles sourced from the internet;
- 15.10 Contents of the SAP docket;
- 15.11 Summons, particulars of claim and annexures thereto.

[16] From the aforesaid information and the consultation with the plaintiff, Mr Strydom opined that the collision occurred close to the intersection where vehicles approach the R730 from the left- hand side (from Virginia side). The intersection is controlled by way of a stop to the left, for vehicles approaching from the Virginia side. Plaintiff tried to pass the Kia to the right side of the said vehicle when the driver of the Kia suddenly braked upon which the plaintiff's motorcycle collided into the Kia. The Kia skidded to a final rest into the intersection while the motorcycle skid on its side to a final rest in the right –hand lane. The plaintiff landed in the intersection in the left- hand lane.

[17] According to Mr Strydom it appears probable that the motorcycle fell over onto its right hand side upon impact. The right rear tyre of the Kia became deflated during impact as a result of the forces and consequential energy exerted upon the two vehicles occasioned by the Kia during braking and the forward motion of the motorcycle. The most probable place/point of impact occurred close to the white arrow painted on the road surface in the left hand lane as can be seen on photo 1 and 2 on page 21 and page 22 of Exhibit "A". The cause of the collision can be attributed to the insured driver, breaking suddenly and resulting in the available space/distance between the Kia and the motorcycle being diminished so quickly that it was impossible for the plaintiff to fully execute his passing manoeuvre to the right side of the Kia.

[18] On behalf of the defendant, Mrs Bornman contends that there is no evidence that the insured driver was negligent in causing or contributing to the collision taking place. With reference to the skid marks on the photographs on page 33 of Exhibit "A," Mr Strydom indicated that the skid marks in the larger oval belongs to the Kia and the marks in the smaller oval is that of the motorcycle. The tyre skid-marks shown by the inserted white oval circle on photograph 10 on page 65 of Exhibit "A" indicate that the Kia continued to brake after the collision occurred and that it proceeded into the intersection. Mrs Bornman argued that it can be deduced that the tyre marks had been deposited after the collision and not prior to the collision and thus in conflict with the evidence presented by the plaintiff. On the plaintiff's own evidence, he failed to keep a safe following distance of at least 2-3 seconds and taking cognisance of his observation that he noticed a traffic congestion ahead, he should have allowed an increased following distance under the prevailing circumstances.

[19] On the other hand Mrs Bornman contends that the evidence presented by Mr Van den Berg has no probative value on the basis that he did not witness the collision and therefore did not witness neither the motorcycle nor the Kia making the tyre and/or skid marks on the road surface to which she referred during her argument. Regarding the testimony of Mr Strydom it is submitted on behalf of the defendant that Mr Strydom's evidence was presented as that of an expert witness but due to his lack of experience in the actual reconstruction of accidents and on the

basis that he lacks the necessary qualifications, his evidence should be rejected. Due to Mr Strydom's failure to draw objective conclusions, of being biased and appearing to be the proverbial "hired gun" his evidence should be rejected *in toto*. Mrs Bornman therefore contends that there is no evidence of negligence on the part of the insured driver, which a court, applying its mind to such evidence, could or might find for the plaintiff and that the application for absolution from the instance should be granted.

[20] In opposing the application for absolution, Mr. Thompson, counsel on behalf of the plaintiff contends that the crux of the plaintiff's case is that the insured driver, suddenly and unexpectedly, and without warning whatsoever, stopped or reduced her speed on a public road causing an obstruction and dangerous situation for the plaintiff who was following the insured driver. The insured driver's aforesaid negligence led to the rear-end collision. It is submitted that the plaintiff made out a *prima facie* case that the insured driver's negligent conduct caused the plaintiff to collide with the rear-end of the Kia. The plaintiff contends that the application for absolution from the instance should be dismissed with costs.

[21] It is trite that a driver who collides with the rear end of a vehicle in front of him or her is *prima facie* negligent unless he or she can give an explanation indicating that he or she was not negligent. Regulation 300 of the Regulations promulgated in terms of the National Road Traffic Act of 1996 provides that the driver of a vehicle on a public road who intends to stop such vehicle or suddenly reduce speed thereof, or to turn such vehicle to the left or the right or move to the left of the right on the road, shall give a conspicuous signal, in the manner prescribed in regulations 324 to 328, of his or her intention, to warn any such person of his or her intention.

[22] In addition to the above, regulation 304(i) provides that except in order to avoid an accident or in compliance with a road traffic sign or a direction given by a traffic officer or cause beyond the control of the driver, no person shall stop a vehicle on the roadway of a public road in any other place where the stopping of a vehicle would or would be likely to constitute a danger or an obstruction to other traffic.

[23] The evidence presented by the plaintiff is the only direct evidence regarding how the accident occurred. Mrs Bornman, during cross-examination of the plaintiff and the other witnesses who testified in the plaintiff's case, did not put any version in contradiction to the plaintiff's version to any of the witnesses. It was not put to the plaintiff that the insured driver of the Kia did not apply the brakes as he described during his testimony or that the collision did not occur in accordance with his testimony. The plaintiff therefore did not have the opportunity to respond to any other version or to explain any contradictions relating to his evidence in relation to the version of the insured driver, whatever that may be.

[24] The test for absolution at the end of the plaintiff's case was formulated in **Claude Neon Lights (SA) Ltd v Daniel**² in these terms:

“(W)hen absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by the plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff.”

[25] In determining whether the driver of the insured vehicle was negligent, the court must consider all the evidence on record and make a determination accordingly. I agree with the submissions made by Mr Thompson that the evidence presented during the trial is that the plaintiff and the insured driver was travelling from north to south on the R 730, a dual carriage way at a speed of approximately 50 – 60 Km/hour. The insured driver was travelling in front of the plaintiff. At a stage when the plaintiff indicated that he was intending and in the process of passing the Kia, the insured driver suddenly braked upon which the plaintiff collided into the right rear-end of the Kia. The court should not at this stage evaluate the evidence³.

[26] I am of the view that the plaintiff succeeded in making out a prima facie case and that the evidence presented in the plaintiff's case holds the possibility of a finding for the plaintiff.

² 1976 (4) SA 403 (A) at 409G-H.

³ Atlantic Continental Assurance Co of SA v Vermaak 1973 (2) SA 525 (E) at 527.

ORDER:

[27] The application for absolution from the instance is dismissed with costs.

VAN RHYN, J

On behalf of the Plaintiff:

Instructed by:

MR. D THOMPSON

McINTYRE & VAN DER POST

ATTORNEYS

BLOEMFONTEIN

On behalf of the Defendant:

Instructed by:

MRS C BORNMAN

OFFICE OF THE STATE ATTORNEY

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