REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 26209/2018

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED: ~~YES~~/NO

Date: 19/2/2020 Signature: S Schyff

In the matter between:

GM KABINI PLAINTIFF

and

ROAD ACCIDENT FUND DEFENDANT

JUDGMENT

Van der Schyff, J.

[1] On 10 June 2017 the plaintiff was injured in a motor vehicle accident between a motor vehicle driven by himself and an unknown vehicle. The matter came before me for adjudication on the merits only.

[2] In his particulars of claim the plaintiff avers that the accident was caused as a result of the sole negligence of the unknown insured driver, the latter being negligent in one or more of the following respects:

i. He travelled at a high speed under the circumstances;
ii. He omitted to keep a proper lookout;
iii. He omitted to keep his motor vehicle under proper control;
iv. He failed to comply with the statutory traffic rules;
v. He failed to avoid an accident when by exercising reasonable care he should and could have done so;
vi. He failed to adequately apply the controls and other mechanisms of his motor vehicle in such a way that it does not pose a threat to other road users;
vii. He failed to adequately consider the presence, movements and clearly visible movements of other motor vehicles; and
viii. He failed to consider the rights of other road users.

[3] The plaintiff pleaded that the accident occurred when the insured vehicle veered into the lane of the plaintiff and the plaintiff swerved to the left to avoid colliding with the insured vehicle and collided with a barrier on the left side of the road.

[4] The defendant pleaded that it is not in a position to admit or deny the allegations pertaining to the negligence of the insured driver and put the plaintiff to the proof thereof. In the alternative the defendant pleaded that if it was found that the insured driver was negligent, that the collision was caused by the plaintiff who was negligent in one or more of the following aspects:

i. He failed to keep a proper look out;
ii. He failed to avoid the collision by failing to exercise the reasonable care and skill;
iii. He failed to take evasive measures;
iv. He failed to take sufficient cognisance of the presence of the insured driver on the road surface; and
v. He failed to abide by the general rules of the road.

In the further alternative it was pleaded that in the event of it being found that the insured driver was negligent, the said collision was partly caused by the fault of the insured driver and partly by the fault of the plaintiff and that damages must be apportioned in accordance with the Apportionment of Damages Act 34 of 1956 as amended.

[5] The only witness who testified was the plaintiff. His version of the events was that he was driving in a northern direction on the Mapobane Highway and the accident occurred around 18h30. He was driving in the left of two lanes that carry traffic in the same direction. There were no other vehicles directly behind him in the same lane, but there was a vehicle immediately in front of him. His undisputed evidence is that this vehicle was about 5 metres in front of him. There were two kombis in the right lane who approached from behind and passed him. As he checked his rear view and side mirrors, he noticed a white vehicle approaching from behind. When he noticed the vehicle for the first time it was far behind him but when he saw the vehicle again it was next to him. He regarded the vehicle to be driven at an excessive speed. I pause to note that the plaintiff said that all the new vehicles look the same to him, but it, the white vehicle, could have been a BMW.

[6] When the white vehicle was next to his vehicle and behind the taxi that was diagonally in front of him, the vehicle suddenly swerved to the left to move into the space between the plaintiff's car and the car in front of him. The plaintiff thought that the white vehicle would collide with him and instinctively swerved to his left. He passed the yellow line. The next moment he heard a loud noise. He thought he drove into a pot-hole. He saw his vehicle's wheel rolling passed. He saw fiery sparks caused by the friction, and lost control of his car. He collided with a cement barrier that was standing next to the road. The white vehicle did not stop.

[7] The plaintiff testified that if he did not swerve, he would have collided with the white vehicle. He testified that it was not safe to swerve to the right. He also testified that his motor vehicle was properly maintained.

[8] Plaintiff was then cross-examined. Counsel for the defendant attempted to introduce the accident report into evidence, but since the plaintiff did not consent thereto, and he had no witness present through whose evidence a proper basis could be laid for the acceptance of the accident report into evidence, he abandoned that line of cross-examination.

[9] Counsel for the defendant then laid a basis to introduce an affidavit previously attested to by the plaintiff, into evidence. It was admitted as Exhibit B. The content of the affidavit corresponds with the evidence of the plaintiff, save for the fact that it is not stated in the affidavit that the plaintiff thought that the white vehicle was a BMW, and the plaintiff did not explain in the statement that he lost his wheel after he swerved to the left and before he collided with the barrier.

[10] The plaintiff explained that when he made the statement, he was providing a short version of the events, and was not "asked to that point".

[11] Counsel for the defendant proceeded to cross-examine the plaintiff on the basis that it is very peculiar for a motor vehicle's wheel to come off when a pothole is struck. I asked him whether any expert evidence would be presented regarding what could be expected in circumstances when a pothole is struck, and he indicated that he would not lead any evidence. In light thereof I disallowed the question.

[12] It was put to the plaintiff that there was no other car involved in the accident that was driven negligently and that he was involved in the accident alone. The plaintiff answered that if it was not for the white car nothing would have happened. It was then put to the plaintiff that the accident occurred simply because his wheel came off, and the plaintiff reiterated that the accident was caused due to the fact that his car's wheel came off.

[13] The only aspect dealt with in reply was to the effect that the content of the affidavit and the plaintiff's evidence in chief is not contradictory but that the affidavit was merely not that extensive.

[14] The plaintiff closed his case, where after the defendant closed his case.

[15] Counsel for the plaintiff argued that the plaintiff has made out its case. He argued that the plaintiff was a good, honest witness whose evidence was consistent. Counsel for the plaintiff surmised that the only issue that was put in dispute by the defendant's counsel was the fact that the plaintiff did not previously mention that his vehicle's wheel came off and the that this caused the accident. As a result, he argued that the following facts are undisputed:

i. The plaintiff was driving in the left lane;
ii. He was following a vehicle in the same lane and the distance between the two vehicles was approximately 5m;
iii. There were two kombis diagonally in front of him;
iv. A white car approached fast from behind and swerved in front of him;
v. The plaintiff swerved to the left in order to avoid an accident, heard a loud banging sound and his car's wheel got off;
vi. He lost control of his vehicle and collided with a barrier.

[16] I drew his attention to the statement put to the plaintiff that there was no other car or driver that was negligent, and that the plaintiff was in the accident alone and asked if this is not indicative of the fact that the defendant disputes the existence of the white car and its concomitant actions. Counsel argued that facts must be directly and clearly disputed and that it cannot merely be regarded to be disputed based on assumptions drawn by the Court.

[17] Counsel for the plaintiff argued that the accident was solely attributable to the conduct of the insured driver, and that no negligence is attributable to the plaintiff. He could not foresee that the white car would unexpectedly swerve to enter his lane, neither could he execute any other preventative actions.

[18] Counsel for the defendant argued that whether evidence is contested or not a court must look at the evidence in its entirety. The Court was requested to take cognisance of the fact that that the plaintiff did not make any contact with any vehicle, that his

evidence that his vehicle's wheel came off was raised for the first time in Court. He concluded by stating that the version of the plaintiff alone leaves much to be desired and argued that if the Court finds that the insured driver was negligent a 50-50 apportionment must be made.

[19] I pause to note that it was never put to the plaintiff during cross-examination that he was negligent in any way. He was not cross-examined on the speed that he was driving in the circumstances, nor on the way that his vehicle was maintained, the condition of the road surface or any other possible events that could have caused the tyre breaking loose.

[20] The plaintiff was a good witness whose evidence was consistent. There is no reason not to accept his evidence. I thus accept his version that a white vehicle driving at an excessive speed approached him from behind and suddenly swerved in front of him. In order to avoid a collision, he swerved to the left. He suddenly heard a loud noise and thought that he hit a pothole, as a result whereof a wheel broke loose. He lost control of the vehicle and collided with a barrier.

[21] It is trite that a plaintiff only has to prove 1% negligence on the part of an insured driver for a claim to be established. It is then for the defendant to prove contributory negligence on the side of the plaintiff.

[22] Based on the plaintiff's version that is accepted, the unidentified insured driver was at least 1% negligent when he (or she) suddenly and unexpectedly swerved to the left in an effort to enter the space between the plaintiff and the vehicle travelling in front of him. This action was the catalyst for the accident since it was a *sine quo non* for the plaintiff's preventative actions which resulted in his vehicle losing a tyre and the subsequent collision with the barrier.

[23] The question whether the insured driver should have foreseen that the plaintiff could drive into a pothole when he had to take evasive action, must be answered in the affirmative. Rampai J stated in *P obo P v Road Accident Fund* (5820/2015) [2017] ZAFSHC 70 (11 May 2017): "Travelling on a country road, a reasonable driver,

aware of the hazard posed by potholes, foresees a reasonable possibility of another driver encountering an animal, cyclist, pedestrian **or a pothole anywhere at any time**." (My emphasis).

[24] No basis was laid for the Court to find that the plaintiff was contributory negligent in any way.

[25] There is no reason to find that the general rule that costs follow suite should not apply. I was specifically requested to address the use of an interpreter in the cost order.

ORDER:

As a result, the following order is made:

1. The defendant is 100% liable for the plaintiff's proven or agreed upon damages;
2. The defendant is to pay the costs of this trial, which costs include the costs of the interpreter who assisted in the proceedings.

E van der Schyff
Judge of the High Court, Gauteng Division, Pretoria

Counsel for the plaintiff:	Adv W J Dreyer
Instructed by:	VZLR INC.
Counsel for the defendant:	Adv T J Ramotsekisa
Instructed by:	MORARE THOBEJANE INC.
Date of the hearing:	18 February 2020
Delivered:	19 February 2020