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REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

CASE NO: 2010/11130

13/5/2019

In the matter between:

STEPHANUS LUKAS KLOPPER

Plaintiff

and

LAMBERTUS NICOLAAS DE BEER N.O. in his

Capacity as Executor in the Estate of the Late

CORNELIUS WILLEM DE BEER

Defendant

JUDGMENT

MOKOSE J

Introduction

- [1] This is a claim by the plaintiff, was aged fourteen (14) at the time of the accident, for the balance of damage ,over and above the limited liability of The Road Accident Fund under Act 56 of 1996 ("the Act") prior to its amendment which came into effect on 1 August 2018.
- [2] The defendant is the executor in the estate of the Late Cornelius Willem De Beer ("the deceased"), the driver of the motor vehicle in which the

plaintiff was being conveyed as a passenger at the time of the accident which occurred on 10 August 2007 on the Koedoeskop Road .

- [3] The liability of The Road Accident Fund was limited to the sum of twenty-five thousand rand (R25 000,00). The deceased died in the accident which was a single vehicle accident.
- [4] At the commencement of the matter an application was made by the parties for a separation in terms of Section 33(4) of the Act which order was granted. Accordingly, the issue of quantum was postponed *sine die* and the matter proceeded on the merits, being the liability of the defendant for the damages suffered by the plaintiff as a result of the motor vehicle accident. The plaintiff bears the onus of establishing on a balance of probabilities the negligence of the insured driver being the primary cause of the collision.
- [5] It is common cause that the plaintiff only need prove the proverbial 1 % negligence on the part of the insured driver in order to be awarded 100% damages that he or she is entitled to recover from the defendant.
- [6] The common cause facts are the following:
 - (i) a motor vehicle accident occurred on 10 August 2007 along the Koedoeskop Road involving a motor vehicle with registration number [...] driven by the deceased;
 - (ii) the plaintiff, who was fourteen (14) years old at the time **was a** passenger in the said vehicle at the time of the accident;
 - (iii) the deceased died as a direct result of the injuries sustained in the accident; and
 - (iv) . the plaintiff suffered physical injuries in the said accident.

Evidence

- [7] The plaintiff testified in his own case and confirmed that the deceased was the driver of the vehicle in which he was a passenger. He testified that he knew the deceased very well as his father was employed by the deceased's father. The deceased invited the plaintiff to ride with him and

his step-mother, Adri de Beer to the shops to purchase supplies. He agreed and jumped into the vehicle, a Jeep which had no doors and only had seats for the driver and the passenger. At the back was a loose seat which had been converted into a speaker. Furthermore, the Jeep had been fitted with a Lexus engine. The plaintiff also testified that the vehicle had no seat belts fitted.

- [8] When they left the farm they drove along the R511 in the direction of Koedoeskop from the Thabazimbi direction. They had driven approximately 500 metres when the deceased drove off the tarred road and stopped to attend to a problem the vehicle was experiencing. He testified further that the deceased did not indicate what the problem could be but merely looked into the bonnet of the Jeep. He testified further that the deceased took out a spanner from the vehicle and appeared to be tinkering with the vehicle in the bonnet. He confirmed that he could not see what was being done as he had remained seated in the vehicle. After a few minutes, he returned to the vehicle and announced that they would proceed. They drove for approximately 2 kilometres when the accident occurred.
- [9] The plaintiff testified that there was a slight ditch in the road that they drove over then the vehicle careered first to the right then to the left of the road. When they hit the ditch, the deceased said to them that they should be careful as there was a problem. The plaintiff hit his head and lost consciousness. He testified that he was told that the vehicle had overturned but did not see that it had indeed overturned as he had lost consciousness.
- [10] The plaintiff testified that he only regained consciousness on the arrival of the ambulance that transported him to hospital. He was, however, confused and was informed by his father that he had been involved in a motor vehicle accident. He never saw the Jeep after the accident because he was kept away from it as he was emotional about the accident. He did not know what had caused the vehicle to leave the road.
- [11] In cross-examination the plaintiff conceded that the accident had occurred

approximately twelve (12) years ago when he was fourteen years old but affirmed that the evidence he had given was something that he had lived with all his life.

[12] The plaintiff was questioned further by counsel for the defendant about whether he had discussed the details of the accident with anyone but denied having spoken to anyone and in particular Nico, the deceased's nephew. He thought that his father may have spoken to Nico about the accident.

[13] The plaintiffs case was closed without any other witnesses being called.

[14] The first witness for the defendant was Lambertus Nicolaas De Beer, the deceased's cousin. He testified that he knew the plaintiff well for the reason that the plaintiff's father worked for the family on the farm. He testified further that the vehicle belonged to and was driven by the deceased.

[15] Lambertus Nicolaas De Beer testified further that he did not witness the accident but was called to the scene of the accident after his uncle (the deceased's father) had notified his father of the accident. He found the vehicle lying on its side and the deceased was still in the vehicle. After they had removed him from the vehicle, he saw the steering arm next to the road and in a ditch. He merely looked at it. He testified further that when they removed the Jeep from the scene of the accident, they had to turn the wheel manually as there was no steering wheel to do so.

[16] Lambertus Nicolaas De Beer testified that he knew the Jeep well and had assisted the deceased when he had worked on it in the past. He testified that it had never experienced any problems.

[17] In cross-examination Lambertus Nicolaas De Beer conceded that although he had worked on the Jeep he was not a qualified mechanic nor was the deceased a qualified mechanic. He also had no knowledge if the deceased had worked on the vehicle in his absence.

[18] The defendant's second witness was Lambertus Nicolaas De Beer, the deceased's brother who also admitted that he was not present at the time of the accident. He testified that he had discussed the accident several times with the plaintiff who he knew very well. He confirmed that the

plaintiff was shocked and emotional about the accident at the time.

[19] In cross-examination, he testified that the deceased would ask his nephew to assist him in repairing the vehicle. He had no knowledge of who was qualified to work on the vehicle but also confirmed that the Jeep would be sent to a workshop for repairs from time to time. He confirmed that the engine was replaced and a Lexus engine inserted.

[20] According to the plaintiff the accident occurred as a result of the deceased's own negligence which caused the insured vehicle to lose control. The defendant denied liability and pleads that the plaintiff travelled as a passenger voluntarily and with the permission of his father and natural guardian. At a pre-trial conference held on 19 March 2019 and in response to a question by the plaintiff on how the incident occurred, the defendant stated:

"Mechanical failure to steering mechanism of vehicle"

The law

[21] The party who bears the onus of proof can only discharge it if he has adduced enough credible evidence to support the case of the party on whom the onus rests. In the matter of **National Employer's General Insurance v Jagers**¹ the court considered the matter and said-

"In deciding whether the 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 his version as being probably true."

[22] Evidence of a witness which is not contradicted does not necessarily have to be accepted by a court. Whether or not the evidence is **accepted will depend** upon its quality. Evidence which **is vague**, contradictory, highly

¹ 1984 (4) SA 437 (E) at 440 D - G

improbable or just plain irrational will not pass muster.²

- [23] The test to be applied in order to weigh the defendant's conduct is enunciated in the matter of **Kruger v Coetzee**³ in which the following **was stated**:

"Each case in which it is said that a motorist is negligent must be decided on its own facts. Negligence can only be attributed by examining the facts of each case. Moreover, one does not draw inferences of negligence on a piecemeal approach. One must consider the totality of the facts and then decide whether the driver has exercised the standard of conduct which the law requires. The standard of care so required is that which a reasonable man would exercise in the circumstances. In all the cases the question is whether the driver should reasonably in all circumstances have foreseen the possibility of a collision."

- [24] W.E. Cooper in the book Delictual liability in Motor Law at page 101 said the following about a vehicle driving on the wrong side of the road:

(b) *Vehicle driving onto the incorrect side*

When a motor vehicle drove onto the incorrect side of the road and collided with an approaching vehicle it has been held res ipsa loquitur because the only reasonable inference was that the defendant's driving onto the incorrect side of the road at an inopportune moment was due to his failure to exercise proper care. Proof that a vehicle was on its incorrect side of the road at the time of the collision (it is held) is prima facie proof of the driver's negligence."

- [25] In argument, counsel for the plaintiff **avers** that the circumstances of the accident are *res ipsa loquitur* and that the plaintiff has proved an occurrence giving rise to an inference of negligence on the part of the defendant. Accordingly, the defendant must produce evidence to the

² Essential Judicial Reasoning by BR Southwood **page 3**

³ 1996 (2) **SA 428 (A)** at 430 E - G

contrary or take a risk that judgment will be granted against him .⁴

[26] The maxim *res ipsa loquitur* gives rise to an inference of negligence. A court is not compelled to draw an inference. The enquiry at the end of the matter is where the balance of probabilities lies. This is determined on the totality of the evidence heard. Although the onus of proving negligence rests with the plaintiff, the establishment of a *prima facie* inference of negligence on the part of the insured driver places the evidential burden on the defendant to adduce and tender rebuttal evidence which negates the *prima facie* negligence.⁵

[27] If the plaintiff proves the occurrence giving rise to the inference of negligence against the defendant, in effect the insured driver is obliged to adduce probative evidence in rebuttal of the inference of negligence.

[28] It is notable that mechanical failure was not pleaded by the defendant. No expert **witnesses** were called by the defendant to confirm a mechanical failure. No service records were produced in evidence of the condition of the vehicle as also a possible reason for the vehicle leaving the road and overturning. I am of the view that the principle of *res ipsa loquitur* finds application as no evidence has been adduced in rebuttal of negligence on the part of the deceased.

[29] The defence of *volenti non fit injuria* which was pleaded by the defendant, requires it to be established that the plaintiff had knowledge of the risk, appreciated it and consented to such risk. The onus of proof lies with the defendant. I am of the considered view that the defendant has failed to discharge such onus. The plaintiff was fourteen years old at the time of the accident and it was not proved that he had the knowledge of the risk, appreciated it and consented to it. Furthermore, no evidence has been adduced that the plaintiffs natural guardian had knowledge of the risk, appreciated it and also consented to it. As such, the defence fails.

[30] Accordingly, the following order is granted:

The draft order attached hereto and marked “X” is incorporated herein and

⁴ Ntsala v Mutual & Federal Ins Co. Ltd 1996 (2) SA 184 (T) at 190

⁵ **Mmekwa** v RAF (33275/ 2009) dated 13 June 2012

made an order of court.

MOKOSE J

**Judge of the High Court
of South Africa Gauteng
Division, Pretoria**

For the Plaintiff:

Adv L Visser

instructed by

Salome Le Roux Attorneys

For the Defendant:

Adv J Moller

instructed by

OJ Botha Attorneys

Date of Hearing: 24 April 2019

Date of Judgement: 13 May 2019

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

**AT PRETORIA ON THIS THE 24TH OF APRIL 2019
BEFORE HER LADYSHIP MADAM JUSTICE MOKOSE**

CASE NUMBER: 11130/10

IN THE MATTER BETWEEN:

STEFANUS LUKAS KLOPPER

PLAINTIFF

AND

**LAMBERTUS NICOLAAS DE BEER n.o IN HIS
CAPACITY As· EXECUTOR IN THE ESTATE
OF THE LATE CORNELIUS WILLEM DE BEER**

DEFENDANT

DRAFT ORDER

THE COURT MAKES THE FOLLOWING ORDER:

1. The defendant is ordered to pay 100% (one hundred percent) of the plaintiff's proven or agreed damages arising from injuries suffered by him as passenger in the accident that occurred on 10 August 2007 and on which plaintiff's claim is based.
2. The only remaining issue for determination in this court being the solely quantification of the claim is hereby separated in terms of Rule 33(4) from the issues of merits and liability which have become resolved in plaintiff's favour and postponed sine die.
3. The defendant is ordered to pay the plaintiff's taxed or agreed

attorney and client costs of suit on the High Court scale incurred in respect of the issues which have become resolved as stipulated above in paragraphs 1 and 2, which costs will include, but not necessarily be limited to the fees of plaintiffs counsel to be taxed on the senior-junior scale, and also the following :

- 3.1. The costs of the interpreter for the plaintiff for trial;
- 3.2. The reasonable taxable travelling and subsistence costs of the plaintiff, who is declared a necessary witness, for trial on 24 April 2019; .
- 3.3. The costs incurred in counsel having heads of argument prepared.

- 4. All payments of the plaintiff's legal costs are to be made by paying the taxed or agreed costs to the credit of the Trust account of Salome Le Roux Attorneys, the detail of which is as follows:

SALOMe LEROUX ATTORNEYS

BANK:	THE STANDARD BANK OF SOUTH AFRICA
BRANCH:	PRETORIA, CHURCH SQUARE
BRANCH CODE:	01-00-45-00
ACCOUNT NUMBER:	[....]
ACCOUNT HOLDER:	SALOMe LEROUX TRUSTACCOUNT
TYPE OF ACCOUNT:	TRUST CHEQUE ACCOUNT
REF:	N0673

- 5. In the event of the parties not being able to agree on the amount of the legal costs payable by the defendant, the plaintiff shall:

- serve a notice of taxation on the defendant's attorneys in the action; and
 - allow the defendant 14 court days to make payment of the costs so taxed.

If the defendant falls in mora to pay the plaintiff's taxed or agreed to

legal costs the defendant will pay. interest on any such outstanding costs to be calculated on the outstanding amount at the statutorily prescribed mora rate of interest applicable from time to time to be calculated from date of mora to date of final payment.

BY ORDER OF THE COURT

THE REGISTRAR

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REF:N0673

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