**IN THE HIGH COURT OF SOUTH AFRICA, NORTHERN CAPE DIVISION, KIMBERLEY.**

Not reportable

Case no: 1016/2017

In the matter between:

SYBRAND ABRAHAM DE BEER PLAINTIFF

And

ROAD ACCIDENT FUND DEFENDANT

Heard: 19 February 2019

Delivered: 25 March 2019

Coram: Phatshoane ADJP

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**JUDGMENT**

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PHATSHOANE ADJP

[1] Mr Sybrand Abraham De Beer, the plaintiff, instituted action against the Road Accident Fund, the defendant ("the RAF"), for damages arising out of a collision that occurred on 09 December 2013 between his vehicle, an Isuzu bakkie, and a Toyota Landcruiser, the insured vehicle, which was driven by Mr JH Maritz.

[2] The parties agreed that the merits be disposed of first and the question of *quantum* stand over for later determination. Having granted the application in terms of Rule 33(4) of the Uniform Rules the matter proceeded on the issue of liability only.

[3] On the late afternoon of 09 December 2013 the plaintiff was driving back to his

farm near Grobblershoop, Northern Cape Province, in his Isuzu bakkie towing a four-wheeler trailer. He was alone in the cab whereas his employee, Mr Zachariah Witbooi, was on the back of the bakkie, an apartheid relic which ironically spared Mr Witbooi any physical injury. The bakkie carried 600 kg (12 bags) of salt. A 1000 kg of fodder was loaded on the trailer. The plaintiff possesses a code 10 driver's license that authorises him to drive the vehicle described. He knows the road very well as he regularly uses (about twice per week) for the past 40 years.

[4] Approximately 11km of the road from Groblershoop to his farm is tarred while 60km thereof has a gravel surface. It is straight except that at approximately 12 kilometers from Grobblershop it curves at the bottom of a small hill. It has a succession of steep ascents and descents (undulating) with small sand dunes in between. The condition of the dirt road is worse just before reaching the top of the last sand dune which necessitates careful driving. Due to the weight of the load on the bakkie and its trailer, the steep inclines, and the bad condition of the road, the plaintiff could not exceed speed of 30km/h.

[5] When the plaintiff exited the last sand dune, he noticed the insured vehicle approaching from the opposite direction of the gravel road. This vehicle swerved across the road on its incorrect side, that is, in the direction of the plaintiff's bakkie. To avoid a collision, the plaintiff swerved his bakkie to the left shoulder of the road. The bakkie stopped due to its weight and the heavy sand on the road shoulder. As the insured vehicle continued in its threatening course the left part of the bakkie was outside the roadway. The insured vehicle crashed into the right front wheel of the bakkie.

[6] The impact of the collision forced the engine of the bakkie into the cabin of the vehicle. As a result of this, the plaintiff's legs were trapped inside the wreckage. He was freed three hours later by paramedics and ferried to the Mediclinic in Upington to receive medical attention. He spent four months in a hospital recuperating. He sustained serious injuries, *inter alia*, injury to the achilles tendon on the right ankle; soft tissue injury on the right ankle; patellectomy of the left knee and other fractures and lacerations to his lower extremities.

[7] The plaintiff testified that prior to the accident, on numerous occasion, he drove on the side of the road, on which the insured driver was driving, and had never experienced any problems. Therefore there could never have been any reason for the insured driver to move over to his left side of the road where the accident occurred.

[8] What arises for determination is whether the Plaintiff established that the collision occurred as a result of the causal negligence on the part of the insured driver. It should also be considered whether there was, in this case, any negligence attributable to the plaintiff, that is, contributory negligence.

[9] Mr Botha, for the plaintiff, argued that there was nothing more that the plaintiff could have done to avoid the accident. He contended that, had the insured driver kept to his side of the road and not moved over to the plaintiff's side, the accident would not have happened.

[10] Mr Jancowitz, for the RAF, contended that there was contributory causal negligence on the part of the plaintiff because he should have driven "totally to the [left] side of the road". He apportioned 20% of the accident due to the negligence of the plaintiff and attributed 80% the driver of the insured vehicle. The difficulty with this submission is that the RAF did not tender any evidence. It also failed to plead any contributory negligence. In my view, the plaintiff was unable to move further to his left due to the load the bakkie carried and the condition of the road. In any event, the bakkie had already left the road surface before the accident happened and was stationary. The fact that the accident was on a gravel road which ordinarily had no road marks cannot avail the insured driver or the RAF.

[11] The plaintiff bears the *onus* to prove on a balance of probabilities that the driver of the insured vehicle drove negligently and that his driving caused or contributed to the collision.[1] The following dictum in *Milton v Vacuum Oil Company of SA Ltd*[2] is apposite:

[1] *Bezuidenhout and Miebny* 1962 (2) SA 566 (A) at 574B and 576G
[2] 1932 AD 197 at 205

> '(W)here there are two streams of traffic in a road in opposite directions, a person in a vehicle proceeding in one direction is entitled to assume that those who are travelling in the opposite direction will continue in their course and that they will not suddenly and inopportunely turn across the line of traffic. A person travelling in one direction can assume that one travelling in the opposite direction will continue his course, but he may only assume that until he is shown a clear intention to the contrary. When a clear and undoubted warning is given, then there is no longer any room for the assumption that the other person will continue in his former course.'

[12] The cross-examination of the plaintiff did not elicit any discrepancies or contradictions. He was a credible witness whose account had no blemishes. The undisputed facts are that the insured driver did not keep to the right side of the gravel road as he was required to. He moved his vehicle to the incorrect left side of the road. He was therefore negligent and his negligence was causally linked to the accident.

[13] I have, therefore, come to the conclusion that the plaintiff established on a balance of probabilities that he is entitled to compensation due to the injuries he has suffered as a consequence of the collision that occurred on 09 December 2013. It follows that the defendant is liable to compensate him 100% of such damages that he will be able to proof.

[14] Mr Botha urged that costs of suit be awarded on an attorney and client scale. He contended that the RAF failed to take any steps to properly prepare for the trial. There had been no indication, he contended, that the insured driver was not available to testify and therefore the inescapable inference is that, had he been called, he would not have been able to contradict the plaintiff’s version. He further argued that, under these circumstances, the RAF should not have persisted in proceeding with the trial on the merits but should have conceded liability.

[15] The following remarks in *Madzunye and Another v Road Accident Fund* 2007 (1) SA 165 (SCA) are instructive:

> ‘[18] I find it almost impossible to believe that the respondent would ever have been

in doubt that the Court a quo's findings regarding the bakkie's involvement in the collision were wrong. By persisting with its opposition of the appeal on the basis of a judgment in which the Court a quo had so palpably misconstrued the issues, the respondent, which relies on the public purse for its existence and does not, therefore, have unlimited financial resources, conducted itself in a manner which cannot be reconciled with the requirements set out in the Klisiewicz [unreported judgment: *Road Accident Fund v Roman Klisiewicz* (SCA case No 192/2001, 29 May 2002)]case. This is particularly so having regard to the fact that the intention of the Act, in terms of which the respondent functions, is to give the greatest possible protection to victims of negligent driving of motor vehicles. The fact that there may have been merit in opposing the appeal in respect of the taxi cannot detract from its ill-considered decision. In the circumstances, a costs order on the attorney and client scale against the respondent is, in my view, justified.'

[16] In *Road Accident Fund v Roman Klisiewicz*[3], the Court pronounced that the RAF existed to administer, in the interests of road accident victims, the funds it collects from the public taxes; that it had the obligation to effect that administration with integrity and efficiency which entailed the thorough investigation of claims and, where litigation is responsibly contestable, the adoption of reasonable and timeous steps in advancing its defence. It held that: *"These are not exacting requirements. They must be observed."* It can hardly be said that the RAF discharge its obligations efficiently. The trial on the merits was absolutely unnecessary and dilatory. Resultantly, it should bear costs on a punitive scale.

<u>Order</u>

1. Judgment is granted in favour of Mr Sybrand Abraham De Beer, the plaintiff, against the Road Accident Fund, the defendant, on the merits;

2. The defendant is ordered to pay 100% of such damages that the plaintiff suffered flowing from the accident which occurred on 09 December 2013 as the plaintiff will be able to proof;

[3] Unreported SCA- Case No 192/2001, handed down on 29 May 2002.

3. The defendant is ordered to pay the plaintiff’s costs of the trial on the merits on an attorney and client scale;

4. The hearing on the question of quantum is postponed sine die.

MV Phatshoane
Acting Deputy Judge President

APPEARANCES:

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| FOR THE PLAINTIFF: | Adv C.H. Botha<br>Instructed by Elliott, Maris, Wilmans & and Hay |
| FOR THE DEFENDANT: | Adv D.C. Jankowitz<br>Instructed by Towell & Groenewaldt Attorneys |