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

- (1) NOT REPORTABLE
- (2) NOT OF INTEREST TO OTHER JUDGES
- (3) REVISED

CASE NO: 29586/13

2/2/2018

In the matter between:

NINTERETSE FELIX

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

RAULINGA J,

1. The plaintiff instituted an action claiming for delictual damages against the defendant, that he suffered on the 20 April 2011, at approximately 14H00 when his motor vehicle collided with that of the insured driver, at the intersection of Lynnwood Road and Roper Street, Pretoria. The collision occurred between a motor vehicle ("the Mercedes Benz") bearing registration letters and numbers [...], driven by a certain Mr Brown ("the

insured driver") and a motorcycle bearing registration letters and numbers [...] driven by the plaintiff.

2. The plaintiff contends that he suffered damages as a direct result of the negligent driving of the insured driver. It is the case of the defendant that the collision was caused by the sole negligent driving of the plaintiff who failed to keep a proper lookout.
3. At the beginning of the trial the parties agreed to separate the issues in terms of Rule 33(4) of the Uniform Rules of this Court. As a consequence only the issue of liability was proceeded with and determination of quantum was postponed sine die.
4. It is common cause that on the day of the accident the road was dry, the weather was clear and that there were no external obstructions on the road. It is also common cause that the insured driver and the plaintiff were involved in the collision wherein they were travelling in the same lane, ("the inner lane") and direction. Both of them were travelling towards the western direction on the Lynnwood Road.
5. The following issues are in dispute:
 - 5.1 Whether the insured driver was the main cause of the accident by his sudden stop, if any, in the middle of the road without any warning to the plaintiff alternatively;
 - 5.2 Whether failure by the plaintiff not to adhere to the prescribed following distance was the main cause of the accident.
6. The only witness who testified in this case is the plaintiff himself. The plaintiff testified that he holds an international driving licence which he obtained in Burundi in 2009 and allows him to drive in all countries.
7. At the time of the accident the plaintiff was working in Hatfield and was familiar with the road as he used to travel on the said road regularly.
8. On the day of the accident the plaintiff was driving behind the insured driver's vehicle at a speed of approximately 60 kilometres per hour. When

he was about 4.5 metres away from the insured driver's vehicle, he noticed that it was slowing down because the insured driver had applied brakes. In his mind, he thought that the insured driver was just reducing speed and he would then proceed with his driving. In light of this, the plaintiff then reduced the speed he was traveling at.

9. When he was about 2.5 metres away from the insured driver's vehicle, he realised that it had stopped in the middle of the road without any prior warning to alert other road users. The plaintiff tried to avoid the accident by swerving to the right and consequently his left shoulder hit the right rear end of the insured driver's vehicle. As a result he fell down and became unconscious.
10. He also testified that he could not swerve to the left of the road ("outer lane") in that there were other vehicles travelling on the outer lane towards the same direction and further that there were trees and vehicles parked outside the road. He took all the necessary steps to avoid the accident but, due to the negligent driving of the insured driver who suddenly stopped in the middle of the road, the accident could not be avoided.
11. In cross examination, the plaintiff, when questioned about the speed limit required on the road in question, he failed to give a proper account and testified that he does not know the required speed limit applicable at that particular spot. From the point of impact, the plaintiff said that he could not remember further events that took place after the collision, save to mention that he was unconscious and was taken to Hospital.
12. The plaintiff persisted during cross examination that he was not driving at a high speed, he stood by the point he made in evidence in chief that he was driving at plus minus 60 km/h.
13. Again, the plaintiff testified in cross examination that in his country of origin, Burundi, the rules of driving prescribed a right hand driving as opposed to South Africa, the rules of which prescribe left hand driving. There was no any further driving tests he undertook in South Africa to accredit him to drive, save that his international licence allowed him to operate even in South Africa subject to him acclimatising to driving.

14. The plaintiff conceded he did not maintain the required safe following distance, and as a driver he has such a duty to maintain such a distance. This concession was made only after the court had put questions to him relating to his failure observing the safe following distance rule.
15. The defendant did not call any witness and consequently it tendered no version supported by any evidence. The effect of the defendant's failure to open its case is that the evidence of the plaintiff in relation to how the accident happened remains unchallenged and the only evidence before the Court.
16. It is trite law that the onus is on the plaintiff to prove on a balance of probabilities that the insured driver was negligent and that the negligence was the cause of the collision from which he sustained the bodily injuries.
17. There is no onus on the defendant to prove anything. The defendant however, has an evidentiary burden to rebut the prima facie case presented or made out by the plaintiff in this case.
18. This legal position is confirmed by the provisions of section 17(1) of the Road Accident Fund 67 of 1996 as amended by Act 19 of 2006. Section 17(1) also stipulates and sets out the circumstances under which the Road Accident Fund would be liable to compensate a claimant for bodily injuries sustained in or arising out of motor vehicle collisions.
19. It is clear from the evidence given by the plaintiff that he was the driver of a motorcycle involved in a collision wherein he sustained bodily injuries arising out of the collision. On his own version, the plaintiff was not maintaining the required safe following distance and that he only applied brakes when he was only 2.5 metres from the insured driver's vehicle resulting in the collision with the said vehicle with its rear end.
20. The test for negligence is that of a reasonable man, namely that would a reasonable man have foreseen the occurrence of the harm or damage? If so, would he have taken steps to prevent the occurrence of such harm. In the context of motor vehicle driving, it is generally expected of a driver to throughout exercise the care of a reasonable driver. He must be able to foresee possible damage or damages that may result if he or she were to

deviate from such expected conduct. The driver is also expected to take reasonable steps to prevent such damage or harm from occurring. As soon as the driver deviates from the expected standard or degree of care of a reasonable man or driver, he will be negligent. See *Kruger v Coetzee* 1966 (2) SA 528 (A).

21. The foreseeability test in the determination of negligence was enunciated by the Appellate Division in this case, *Kruger v Coetzee (supra)*. The court held: "For the purpose of liability culpa arises if-

- (a) *A deligens paternfamilias* in the position of the defendant;
- (i) would foresee a reasonable possibility of his conduct injuring another in his person or property ... and
- (ii) would take reasonable steps to guard against such occurrence; and
- (b) The defendant failed to take such steps."

22. In *Arthur v Bezuidenhout & Miery* 1962 (2) SA 566 (A) this principle was formulated as follows:

"There is in my opinion, only one enquiry, namely: has the plaintiff having regard to all the evidence in the case, discharged the onus of proving on a balance of probabilities the negligence he has averred against the defendant?"

23. The legal issue in this matter revolves around a rear-end-collision, which the rules prescribe that the driver following the other vehicle (plaintiff) is presumed negligent until the contrary is proven. However, this must be premised on the general duties owed by a driver to:

- (a) Keep a proper look out;
- (b) Travel at a reasonable speed;
- (c) Keep left; and

(d) Maintain his speed properly .

24. The general approach to adopt when dealing with rear-end-collision is set out by HB Kloppers in *The Law of Collision in South Africa* (7th ED) page 78 as follows:

"A driver who collides with the rear of a vehicle in front of him is prima facie negligent unless he or she can give an explanation indicating that he or she was not negligent."

25. The driver who collides with another from the rear can escape *prima facie* liability for negligence by providing an explanation that shows that the collision occurred because of the negligence of the driver of the other vehicle or due to other intervening circumstances.
26. In the instant case, the plaintiff wants to escape liability based on sudden emergency, when he submitted that for the insured driver to have applied the brakes and reduced the speed created an untenable situation for the plaintiff to avoid collision. The plaintiff avers that it is strengthened by the fact that the defendant did not tender any evidence to rebut his version.
27. I agree with the submissions of the plaintiff that in certain circumstances, his explanation may off-set his failure to keep the required following distance, which is the reason he presented in his own evidence.
28. I have already intimated in this judgment above that the plaintiff bears the onus to prove on a balance of probabilities that the insured driver was negligent and that the negligence was the cause of the collision from which he sustained the bodily injuries. There is no onus on the defendant to prove anything. Even in the instance where the defendant has not tendered evidence to rebut the evidentiary burden of the *prima facie* case presented by the plaintiff in this case, the plaintiff may not succeed with his claim depending on the nature and weight of the evidence so tendered.
29. Moreover, even in the absence of the defendant's evidence it can clearly

be inferred from the evidence of the plaintiff that he was the sole cause of the accident through his negligence in that he failed to keep a proper lookout.

30. I agree with the defendant in his submissions that it is the duty of every driver, in this case the plaintiff, to keep proper lookout at all material times, i.e. a continuous scanning of the road ahead, from side to side for obstruction or potential obstruction. See *Jenneker v Marine and Trade* 1978 (2) SA 145 (SE) at 149H.
31. The issue of sudden emergency raised by the plaintiff is rejected on the basis that the plaintiff failed to keep a proper lookout, did not travel at a reasonable speed in the circumstances of this case, and did not maintain the required following distance and was consequently negligent.
32. It is the version of the plaintiff that the road was busy with traffic flowing from both directions. This is borne out by the fact that when he was about 2.5 metres from the insured driver's vehicle he could not veer off to the side of the oncoming traffic because there were vehicles on the two opposite lanes. Nor could he swerve to the left lane because there were vehicles on that lane.
33. Moreover, when he was about 4.5 metres from the insured driver's vehicle he was traveling at a speed of 60km when he reduced speed. He only realised that the vehicle in front of him had suddenly stopped when he was only 2.5 metres from it. He then had no choice but to swerve to the right thereby colliding with the insured driver's vehicle on its rear end. This simply means that the plaintiff drove his motorcycle negligently and is the sole cause of the accident.
34. In the circumstances I make the following order:
 - 34.1 The plaintiff's claim for damages against the defendant is dismissed with costs.

TJ RAULINGA

JUDGE OF THE GAUTENG DIVISION, PRETORIA

Heard on:

For the Plaintiff :

Adv U.B Makuya

Instructed by:

Mphokane Attorneys

For the Defendant :

Adv M.M Thipe

Instructed by:

Moche Attorneys

Date of Judgment:

02 February 2018