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IN THE HIGH COURT OF SOUTH AFRICA
NORTH GAUTENG DIVISION; PRETORIA

CASE NUMBER: 47692/14

DATE: 5/4/2017

IN THE MATTER BETWEEN

M. E. M.

PLAINTIFF

AND

ROAD ACCIDENT FUND

DEFENDANT

Date of Hearing: 04th April 2017 Date

Judgment: 05th April 2017

JUDGMENT

INTRODUCTION

[1] The plaintiff, a widow, sues the Road Accident Fund ("*the defendant*") for the loss of support suffered by her and her two minor children as a result of the death of her husband A. J. M. ("*the deceased*") who died as a result of injuries he sustained in a motor vehicle collision on 25th February 2012 at or along R 568 Road, Nkangala District, Gauteng Province

[2]. The Plaintiff alleges that the accident was caused solely by the negligence or negligent driving of another motor vehicle by an unknown insured driver, these allegations were denied by the Defendant.

[3] In the particulars of claim at paragraphs 4 to 6 the plaintiff alleged as follows:

"4. On or about the 25th February 2012 at about 19h00 along R568 Road, Nkangala district, Gauteng Province an accident occurred between a motor vehicle bearing registration letters and numbers [X...] (hereinafter called "Audi") driven by MANDLA MSIZA (hereinafter called insured driver") and a motor vehicle bearing registration numbers [C...] (hereinafter called "Corolla) driven by A. J. M..

"5. A. J. M. (hereinafter called "the deceased") who was a driver of the Corolla was injured when the aforesaid motor vehicles was involved in an accident and died as a result of his injuries. Copies of the death certificate and the post-mortem report is annexed hereto marked "A"

"6. The aforesaid collision was caused by the negligence of the insured driver who was negligent in one or more of the following respects:-

6.1 He failed to keep proper lookout;

6.2 He drove Audi at an excessively high speed in the circumstances.

6.3 He overtook at barrier line.

6.4 He failed to keep Audi under proper and adequate control.

6.5 He failed to apply brakes timeously, or at all.

6.6 He drove without due regard to other road users, in particular the Deceased.

6.8 He failed to avoid a collision when by the exercise of due and reasonable care he could and should have done so.

[4] The contents of paragraph 4 of the particulars of claim were also denied by the Defendant in its plea.

4. AD PARAGRAPHS 4 & 5 THEREOF

The Defendant denies each and every allegation contained herein as if specifically traversed and puts Plaintiff to the proof thereof

THE ISSUES FOR DETERMINATION

[5] The parties agreed at the pre-trial conference that the matter should be heard on the issue of negligence only. On application at the start of the trial, an application to separate the issue of merits and quantum and also to separate the issue of negligence from liability was made and I granted leave as such.

EVIDENCE OF THE PLAINTIFF

[6] The Plaintiff Mrs. E. M. M., was the only witness called on behalf of the Plaintiff herself and in representative of the minor children.

[7] Her evidence is that she and her two children were the passengers in the motor vehicle driven by the "deceased" her husband A. J. M. on the road from Zithobeni to Nkangala.

[8] As they were driving a motor vehicle approaching from the opposite direction left its correct lane of travel and collided with their motor vehicle.

[9] She states that the sole cause of the accident was the driver of the oncoming vehicle or the motor vehicle that came from the opposite side as it left its correct lane of travel and further that there was nothing the deceased could have done to avoid the accident.

[10] In her evidence in chief, she was not led about the description of the motor vehicle or the identity of the motor vehicle driver or the registration letters and numbers of the motor vehicle that their motor vehicle collided with.

[11] Under cross - examination she stated that she does not know the motor vehicle motor vehicle which she collided with neither does she know the identity of the driver of the said motor vehicle. The Court asked her if she knew the colour or description or type of the motor vehicle they collided with she stated that she does not know.

[12] Counsel for the Defendant referred her to paragraph 4 of her particulars of claim and also to paragraphs 6.2 and 6.4 and in particular with reference to the motor vehicle "Audi" that it was her averment that it was the motor vehicle that their motor vehicle collided with but she was adamant that she does not know the motor vehicle that their motor vehicle

collided with and she could not say if it was an “Audi”.

[13] The Plaintiff was not re-examined and there-after Counsel for Plaintiff closed the case for the Plaintiff.

APPLICATION FOR ABSOLUTION FROM INSTANCE

[14] Immediately after the close of the Plaintiff's case, the Defendant brought an application for absolution from instance.

[15] The basis for the application for absolution from instance was that the evidence already presented by the Plaintiff does not create a causal nexus between the negligence or accident and the identified motor vehicle or its driver alleged to be the sole cause of accident in Paragraph 4 and 6 of the particulars of claim as a result causal negligence on the part of the insured driver had not been established.

[16] Persons who intend instituting claims for compensation against the Road Accident Fund under the RAF Act 56 of 1996 must inform the Fund of the exact nature of the claim they intend to advance. In particular, claimants must inform the Fund of whether or not the identity of the owner or driver of the insured vehicle is known or not by correctly categorising the claim as either one submitted under s 17(1)(a) (identity of owner/ driver established) or under s 17(1)(b) (identity of owner/ driver not established). This requirement is a non-negotiable and essential component of a valid claim, and the provision of incorrect information in this regard would be fatal to the claim. It follows that an unambiguous identification of a claim as one that arose as a result of the driving of an identified vehicle cannot be substituted by giving a contradictory evidence stating that it arose from the driving of an unidentified vehicle. Similarly, the Plaintiff has duty to prove material facts contained in his/her particulars of claim which would be necessary for the Plaintiff to prove, if traversed, in order to support his right to judgment of the court.

[17] I first have to, have regard to the law in regards to factors to be considered by the Court when granting or not granting absolution. The test is clear: the Plaintiff must make

out a prima facie case in the sense that there is evidence relating to all the elements of a claim on the strength of which the court can find in favour of the plaintiff.

[18] Harms JA conveniently set out the definitive approach to an absolution application in *Gordon Loyd Page & Associates v Riviera and Another* **2001 (1) SA 88** (SCA) as follows:

"The test for absolution to be applied by a trial court at the end of a Plaintiffs case was formulated in *Claude Neon Lights (SA) Ltd v Daniel* **1976 (4) SA 403** (A) at 409G - in these terms:

*'(W) hen absolution from the instance is sought at the close of Plaintiffs case, the test to be applied is not whether the evidence led by 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. (Gascoyne v Paul and Hunter **1917 TPD 170** at 173; Ruta Flour Mills (Pty) Ltd v Adelson (2) **1958 (4) SA 307** (T).)'*

[19] The courts have pronounced that it implies that a Plaintiff has to make out a *prima facie* case - in the sense that there is evidence relating to all the elements of the claim - to survive absolution because without such evidence no court could find for the Plaintiff.

See: *Marine & Trade Insurance Co Ltd v Van der Schyff* **1972 (1) SA 26** (A) at 37G - 38A

De Klerk v ABSA Bank LTD and Others **2003 (4) SA 315** (SCA).

CAUSAL NEXUS

[20] For a delictual liability to arise there must be a causal nexus between the defendant's negligent conduct and the plaintiff's damages. In order to succeed in its claim for damages, the plaintiff must establish both the factual causation and legal causation. The question in relation to the former is whether the defendant's negligent act or omission caused or materially contributed to the harm giving rise to the claim. If it did, the second question is

whether the negligent act or omission is linked to the harm sufficiently closely or directly for legal liability to ensue, or whether the harm is too remote.

See: *Gibson v Berkowitz and Another* **1996 (4) SA 1029** (W) at 1039 F-G)
Minister of Police v Skosana **1977 (1) SA 31** (A) at 34 E - F;
International Shipping Co (Pty) Ltd v Bentley **1990 (1) SA 680** (A) at 700 E.

[21] The principle is encapsulated very well in the authority of Grovev Road Accident Fund (74/10) (2011) ZASC 55 by TSHIQI JA when he said:

The RAF is obliged to compensate for damages arising from bodily injury 'caused by or arising from' the driving of a motor vehicle. The causal link that is required is essentially the same as the causal link that is required for Aquilian liability. There can be no question of liability if it is not proved that the wrongdoer caused the damage of the person suffering the harm. Whether an act can be identified as a cause, depends on a conclusion drawn from available facts and relevant probabilities. The important question is how one should determine a causal nexus, namely whether one fact follows from another.

[22] The Counsel for the Plaintiff, in his argument kept on referring to the Accident report and a police statement (both documents alleged have the particulars of the motor vehicle that was involved in an accident with the one driven by the deceased) which the Plaintiff has not tendered as evidence or exhibit in her examination in chief and further argues that at the end of the trial, he was going to bring an application to have the accident report and the statement made by the police officer who attended the scene to be admitted as evidence but he does not give a plausible reason why such application was not made or why the police officer who attended the scene or who prepared the accident report (of which one of them was in court as informed by Counsel for Plaintiff) was not called by the Plaintiff to proof the identity of the other motor vehicle and its driver. Counsel for Plaintiff

only states that it was an oversight.

[23] Due diligence and/ or proper preparation would have demanded that an evidence be given to prove the description of the motor vehicle involved and its ownership, more so, the allegation of the description of the insured motor vehicle and driver and also the grounds of negligence as contained in paragraphs 4 and 6 of the particulars of claim were denied in the Defendant's plea. Plaintiff's counsel was unable to provide any reason as to why this was not done or even considered.

[24] I am convinced that the Plaintiff has failed to establish a causal nexus between the negligence and the driver of the motor vehicle as alleged in Paragraph 4 and 6 of the particulars of claim, and consequently the evidence led by Plaintiff does not establish what would finally be required to be established, upon which a Court, applying its mind reasonably to such evidence, could or might find in favour for the Plaintiff.

[25] Accordingly an application for absolution from instance must succeed.

I therefore make the following order

1. Application for absolution is granted; and
2. The Plaintiff is order to pay the Defendant's costs

EPHRIAM SEIMAAJ

ACTING JUDGE OF THE HIGH COURT OF SOUTH

AFRICA NORTH GAUTENG HIGH COURT

FOR THE PLAINTIFF: MR MATSEMELA

INSTRUCTING ATTORNEY: MPHELA ATTORNEYS

FOR THE DEFENDANT: MR. STRYDOM

INSTRUCTING ATTORNEYS: FOURIE FISMER ATTORNEYS