IN THE HIGH COURT OF SOUTH AFRICA

(NORTH AND SOUTH GAUTENG HIGH COURT, PRETORIA DIVISION)

CASE NO: 21801/2006

5 March 2009

In the matter between:

LEBOGANG SINDANE Plaintiff

And

THE ROAD ACCIDENT FUND Defendant

JUDGMENT

LEDWABA, J

[1] The plaintiff instituted a claim against the defendant in terms of the **Road Accident Fund Act 56 of 1996** (hereinafter referred to as "the Act").

[2] The parties agreed that the merits and quantum be separated. I, in terms of the Rules of Court, ordered that the merits and quantum be separated and issued relating to quantum be stayed.

[3] The accident upon which the claim is based happened on 25th January 2005 between 13H00-14H00 at the intersection of Pretorius and Johan Streets, Arcadia, in Pretoria. It is common cause that the motor vehicle with registration PSD 177 GP (vehicle B) which was driven by the plaintiff was involved in an accident with motor vehicle registration number PXM 038 GP (vehicle A) which was driven by Mr. J. Ramalepa (the insured driver).

[4] In paragraph 4 of the plaintiff's particulars of collision it is alleged that:

'The collision was caused solely by the negligence of the insured driver in that:

4.1. He did not keep a proper look out of the road,

4.2. He failed to consider the safety of other road users,

4.3 He failed to apply the brakes of his motor vehicle adequately, timeously or at all, alternatively he drove a motor vehicle of which the braking system was defective, a fact which he could and should have been aware of by the exercise of reasonable care,

4.4 He failed to exercise control over his motor vehicle under the circumstances, *4.5. He drove the motor vehicle at an excessive speed under the circumstances,*

4.6. He failed to avoid an accident while he was in a position to do so with the exercise of reasonable care that a driver would have exercise under the circumstances."

[5] Defendant's plea to the said paragraph reads as follows:

"4.1 Each and every allegation herein contained is denied as if specifically traversed and the plaintiff is put to the proof thereof.

4.2 Alternatively, and in the event of it being held by the above Honourable Court that a collision occurred as alleged by the Plaintiff and that the driver of the insured vehicle was negligent, which is denied, then the defendant pleads that such negligence was not the cause of the collision. The collision was caused by the sole negligence of the Plaintiff, he (sic) being in one or more or all of the:-

4.2.1. he (sic) failed to keep a proper look out;

4.2.2. he (sic) drove at an excessive speed under the circumstances.

4.2.3 he (sic) failed to avoid a collision when, by the exercise of due and reasonable care and skill, he could and should have done so;

4.2.4. he (sic) failed to maintain sufficient, alternatively any control over his motor vehicle;

4.2.5. he (sic) failed to pay due regard to motor vehicles in the area and in particular, to the vehicle which the defendant was driving.

4.3. Further alternatively, and in the event of the above Honourable Court finding that the driver of the insured vehicle acted negligently as alleged, which is denied, and that such negligence contributed to the collision which is also denied, then and in that event, the Defendant avers that the Plaintiff was also negligent and that his (sic) negligence contributed to the cause of the collision, then it is pleaded that apportionment of damages as is foreseen in the Apportionment of Damages Act, should be ordered."

[6] The plaintiff testified and closed her case without calling any witnesses. The defendant's counsel applied for absolution from the instance and the application was dismissed because the court was of the view that there was evidence upon which the court might find in favour of plaintiff.

[7] After both parties closed their cases and during arguments, the defendant's counsel informed the court that defendant intends amending it's plea by adding paragraph 4.4 which reads as follows:

"4.4 <u>Further alternatively</u>, in the event the above Honourable Court finding that the collision did occur either as alleged or at all (which is still denied), and that the collision was solely caused a result of the negligence of the insured driver, then in that event the Defendant pleads that the insured driver was faced with a situation of sudden emergency in that the Plaintiff suddenly turned to the right into Johan Street from the second lane from the right (which lane does not permit her to turn) while the insured driver's vehicle was at close proximity."

[8] The intention to amend the particulars of claim was raised during the argument stage when the court informed defendant's counsel that defendant did not specifically raise 'sudden emergency' as a defence in the plea.

[9] Defendant's counsel's reason for bringing the application late was that, he together with defendant's attorney only managed to consult with the insured driver in the morning on the day of the hearing.

[10] I find it disturbing that the defendant filed a plea not knowing the version of the insured driver. Defendant's attorneys were served with a notice of set-down on the 29th January 2008. The plaintiff's claim-form was lodged with the defendant on the 23rd January 2006 and summons was served on 12th July 2006. The defendant had ample time to investigate and consult with the relevant witnesse(s). The manner in which the defendant failed to secure the insured driver's statement timeously is unacceptable. A proper plea could have been filed and the Plaintiff could have known and prepared it's case properly and timeously.

[11] There was a delay bringing of the application for an amendment. Application was refused. If the defendant had properly pleaded to the plaintiff's claim, the plaintiff could have known the nature of the defendant's defence(s). This, in my view, should have a bearing on the question of costs.

[12] It is common cause that vehicles A and B collided with each other at the intersection, both vehicles were driving in Pretorius Street to the westerly direction prior too the accident. Pretorius Street is a one way street and has four lanes at the intersection where the accident occurred. Johan Street accommodates vehicles moving from south to north and from north to south.

[13] When preparing for trial the plaintiff's version of how the accident occurred differs materially with the evidence of the insured driver regarding the lanes on which each party was driving prior to the collision.

[14] The plaintiff said she was driving alone on the extreme right lane in Pretorius Street which accommodates vehicles driving straight and vehicles turning to the right. The road was not busy and she was on her way to Arcadia Street to see a doctor. When she approached Johan Street she reduced the speed of vehicle B about 30-40 kilometres per hour. When she was about five (5) to seven (7) metres away from Johan Street she switched on her right indicator. On the question of why did she turn to the right, it is not clear because Arcadia Street is on the southern side of Pretorius Street and runs parallel to Pretorius Street.

[15] She said when she started executing the turn to the right she heard an impact on her vehicle, lost control of vehicle B and it stopped when it collided with a wall of a flat on her right side after the intersection.

[16] She further said she did not see the insured vehicle prior to the accident. She cannot recall if she looked at her rear mirror before executing the turn. Vehicle B was damaged on the right front, right middle back and the front as noted in the Accident Report form (AR). She sustained a broken femur.

[17] As a result of the damages on vehicle B she assumed that the insured vehicle was from behind. During cross examination she was confronted with the contents of paragraph three, exhibit 'C, and 'affidavit' wherein she states that:

"The accident occurred when I was travelling from east to west along Pretorius street and as I was about to turn right into Johan street, having been indicating my intention to turn right, the vehicle which was following me from behind hit my vehicle on the right side directly on the drivers door."

[18] Her explanation to the contents of paragraph 3 of exhibit 'C was that she did not see the insured driver colliding with her vehicle, she just assumed the insured driver collided with her right hand side because of the damages on the right side of the vehicle.

[19] I provisionally accept the contents of exhibit 'C despite the objection by plaintiff's counsel that it is prejudicial to the plaintiff and that the document only given to them just before the trial commenced. The court noted some problems regarding exhibit 'C, for example, plaintiff said she did not sign it before the commissioner of oaths despite the fact that it had a page showing that it was duly signed and commissioned on 28th June 2008. The plaintiff said she signed it on the 27th June 2006.

[20] The said document was discovered in an unsigned discovery affidavit which was served on plaintiff's attorneys on 12th August 2005 and plaintiff's attorneys did not object to the validity of the said 'discovery affidavit'.

[21] At the pre-trial the parties agreed that the documents in the bundle are what they purport to be without the parties admitting the contents thereof, for that, exhibit 'C is finally accepted and it forms part of the record.

[22] The insured driver's version is that he was in the extreme right lane driving at a speed of about 55 kilometres per hour. He saw plaintiff's vehicle for the first time at a distance of further argued that it plaintiff was travelling at 35 kilometres per hour and the insured driver drove at 55 kilometres per hour the damage would not be extreme.

[25] The plaintiff's version was that she was on the extreme left lane and she assumed that the insured vehicle was behind her and it collided with her vehicle.

about twenty-one (21) metres ahead on the second lane from the right. When he was about five metres away from the intersection and was about to pass plaintiff's vehicle, the plaintiff's vehicle front part was already in the intersection, she suddenly and unexpectedly executed a turn to the right. He did not have time to apply breaks nor swerve to avoid the accident. Vehicle A collided with the right middle side of the plaintiff's vehicle, he lost control and the next thing he heard was when his vehicle collided with the wall on the right side after the intersection.

[23] He denied that plaintiff's vehicle right indicator was on and that the plaintiff was driving on the extreme right lane.

[24] Plaintiff's counsel argued that the plaintiff's version that she was travelling at thirty to forty kilometres per hour was not disputed. Having record to the damages in the AR, especially to the damage on the rear right side of plaintiff's vehicle the court should infer that the insured driver was driving too fast and he was driving behind the plaintiff on the extreme right lane. He further failed to keep a proper look-out and his negligence caused vehicle A to collide with vehicle B. He further argued that if plaintiff was travelling at 35 kilometres per hour and the insured driver drove at 55 kilometres per hour the damage would not be extreme.

[25] The plaintiff's version was that she was on the extreme left lane and she assumed that the insured vehicle was behind her and it collided with her vehicle.

[26] The insured driver's version was that he was on the extreme right lane and was in a situation of sudden emergency. He further said the accident was caused by the plaintiff's negligence in that she turned into the path of the insured vehicle when she was not suppose to do that. In my view, the defence raised in paragraph 4.2.5 of the plea embraces the insured driver's version.

[27] I carefully considered the contents of the AR and the evidence before me. It is of importance to mention some of the damage noted in the AR in respect of vehicle A are disputed by the insured driver. The plaintiff disputes the positions of the vehicle set out in the AR after the accident. The point of impact has not been marked in the AR. The contents of the AR cannot assist the court in the adjudication of the case.

[28] If the evidence in respect of the damages was clear, that could have assisted the court in determining which version is more probable. The plaintiff clearly states that she did not see all the damages on vehicle B. The plaintiff thinks vehicle A was behind her and it was travelling at an excessive speed. It is not very clear as to what caused the damages on the right mid centre of vehicle B. The damages on the right mid centre of vehicle B may suit the insured driver's version.

[29] The version of the plaintiff and the defendant are mutually destructive and the onus rests on the plaintiff to prove on the balance of probabilities that the plaintiff's version is true and that of the defendant's is false. In evaluating the evidence, plaintiff had not discharged the onus.

[30] **I therefore, make the following order:**

(i) I grant absolution from the instance.

(ii) Each party to pay its own costs.

A. P. LEDWABA
JUDGE OF THE HIGH COURT

Date of hearing: 23 February 2009
Counsel for Applicants': Advocate B. L. Roode
Instructed by: Van Rensburg Koen & Baloyi Attorneys
Counsel for Respondent: Advocate D. P. Mogagabe
Instructed by: Maponya Incorporated