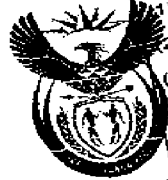


11/6/2009
NOT REPORTABLE



HAAL DEUR WAT NIE VAN TOEPASSING IS NIE
(1) RAPPORTEERBAAR: ~~JA/NEE~~
(2) VAN BELANG VIR ANDER RECHTERS: ~~JA/NEE~~
(3) HERSIEN.
11 June 2009
DATUM
HARPOREKENDIG

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NO: 36786/2006

In the matter between:

Plaintiff

JACQUELINE MADELINE GROVE

And

First Defendant

ROAD ACCIDENT FUND

LENNARD KOOPMAN

Second Defendant

JUDGMENT

LEDWABA, J

- [1] Plaintiff instituted an action to claim damages against the first defendant for an amount of R 2 260 000 and in the alternative an amount of R 25 000. Should the court find that plaintiff's claim is limited, the plaintiff claims an amount of R 2 235 000 against the second defendant.
- [2] The second defendant was not legally represented at the trial. Notwithstanding that the court explained to him that he

has a constitutional right to be legally represented, that if he does not have money he may approach the Legal Aid Board and that it was desirable that he should be legally represented, he elected to represent himself.

[3] When the trial commenced and as it was agreed between the parties, the court made the following order:

"1. *It is ordered in terms of rule 33(4) that the issue of liability be decided first and separate from the remainder of the issue;*

2. *The issue of liability which stands to be adjudicated between the parties relates to the dispute*

2.1 *between the plaintiff, on the one hand, and the first and second defendants on the other as delineated in paragraphs 5 and 6 of the particulars of claim read with paragraph 5 and 6 of the respective pleas of the first and second defendants; and*

2.2 *between the first defendant, on the one hand, and the second defendant (who has been joined by the defendant as a third party) as delineated in paragraphs 1 and 2 of the third party notice and paragraphs 2, 4, 5 and 6 of the second defendant's plea to the said notice;*

3. *The remainder of the issues as set out in paragraphs 7 to 12 of the particulars of claim are to stand over for adjudication at a later stage."*

- [4] For ease reference the first defendant would hereinafter be also referred to as the RAF, depending on the context, and the second defendant's would be referred to as Mr. Koopman.
- [5] The collision which gave rise to this action occurred on 4th November 2005 at or near the corner of Duncan and Duxbury streets, Hatfield, Pretoria in the district of Gauteng at about 2H00.
- [6] The plaintiff was a passenger in an Audi A4 with registration number NPJ 703 GP (hereinafter referred to as the Audi) which was driven by Mr. Koopman. The other vehicle which was at the scene when the accident occurred was the insured vehicle, a Jetta with registration number NGW 269 GP (hereinafter referred to as the Jetta) which was driven by Mr. Chris Potgieter, (Mr Potgieter), the insured driver. The Audi and the Jetta were both driving from south to north in Duncan street. According to the evidence there were no other mobile vehicles at the scene when the accident occurred.
- [7] During the trial proceedings, the plaintiff was always in court and she did not testify. Two witnesses testified to support her case, viz Mr. Hendrik Smit, (Mr. Smit) and Mr. Francois Van

der Merwe (Mr. Van der Merwe) and thereafter her case was closed. The court was informed that the reason why the plaintiff would not testify is because she sustained serious head injuries and could not remember and/or contribute in any way as to how the accident occurred.

- [8] The RAF in its plea denied that the plaintiff's injuries were caused by or arose out of the driving of the Jetta. Mr. Potgieter gave evidence on behalf of the RAF and the RAF's case was closed. Mr. Koopman, the second defendant, also gave evidence and thereafter closed his case. The RAF, in its plea, further admitted that Mr. Koopman was negligent and made an undertaking in terms of section 17 (4) (a) in respect of plaintiff's special damages subject to a limit of R 25 000.
- [9] Mr. Smit and Mr. Van der Merwe both tow-truck operators who were on duty testified that before the accident occurred they had parked their tow vehicles at the corner of Lynwood and Duncan Streets. Mr. Smit's tow-truck was parked on the southern westerly corner of the intersection on the pavement in Lynwood Street facing the easterly direction. Mr. Van der Merwe's tow-truck was parked on the pavement on the left northern side of the intersection in Duncan Street facing the southern direction. Both testified that their attentions to the Audi and the Jetta was triggered by the high revolutions of engines when the Jetta and the Audi passed at the intersection of Duncan and Lynwood Streets. Further details

of their evidence will be dealt with hereunder when the evidence of other witnesses is evaluated.

[10] The issues to be decided in this matter, revolves on whether:

10.1 the Audi and the Jetta were engaged in on unlawful and wrongful racing commonly known as 'dicing' prior to the accident.

10.2 Mr. Koopman drove the Audi negligently.

10.3 was the accident caused by or arose from the driving or other wrongful or unlawful act of Mr. Koopman.

10.4 The respective degrees of negligence of Mr. Potgieter and Mr. Koopman for purposes of the order sought by the first defendant in terms of the third party notice, i.e. the contribution which the RAF may be entitled to in the event of it being found to be liable to the plaintiff on an unlimited basis.

[11] Mr. Potgieter on behalf of the RAF testified that before the accident happened he, together with his friends, was at a function at Odds Club in Brooklyn. When they left the club they agreed that they were going to Drop Zone, a nightclub at Hatfield. When he left the club he drove alone in the Jetta, joined Duncan street and faced the northern direction. He stopped at the robot controlled intersection of Duncan and Charles street. The robot facing him was red. The Jetta was on the right lane and there was a vehicle on the left lane

parallel to the Jetta which was also stationery. The Audi was behind the said vehicle on the left lane.

- [12] When the robot turned green he pulled the Jetta fast and continued driving at a speed higher than the legally prescribed speed of 60km/h in that area. When he passed other intersections as he was driving in Duncan street, the robots were green in his favour.
- [13] Whilst driving in Duncan Street, on the left lane, immediately after passing the intersection of Duncan and Duxbury he heard the screeching of the tyres of a vehicle behind him. He immediately looked at his right rear view mirror and saw the Audi losing control, spinning and colliding with a wall on the eastern side out of the road. He stopped, reversed and parked the Jetta on the side parking next to the bus stop depicted on photo 41 in exhibit 'B'.
- [14] He alighted from the Jetta and went to the Audi. He was the first person to arrive at the Audi and unexpectedly saw the plaintiff in the passenger's seat and Mr. Koopman had slid to the back seat. Both were unconscious.
- [15] He thereafter saw the tow-trucks and spoke to Mr. Smit who also arrived at the scene and wanted to give some medical aid to the plaintiff and Mr. Koopman in the Audi.
- [16] He then left the scene to fetch his cellphone from his flat which was not very far from the scene of the accident and to

report the accident to his girlfriend and to Mr. Koopman's girlfriend.

- [17] In testifying how he knows Mr. Koopman, he said they were together at the Odds club and they also stayed together at a flat. He denied that he was involved in an organised race or dicing with Mr. Koopman and further that his vehicle came into contact with the Audi immediately prior to the accident. He further denied that he previously diced with Mr. Koopman.
- [18] Mr. Koopman testified that he has no recollection of the events preceding the collision and thereafter. He could not recall if he was engaged in a race with Mr. Potgieter. He further stated that he previously raced (diced) with Mr. Potgieter.
- [19] Liability of the RAF viz-a-viz the plaintiff arises from the provisions of section 17(1) which reads as follows:
- "The Fund...shall-*
- (a) subject to this Act, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of the owner or the driver thereof has been established;*
- (b)... be obliged to compensate any person (the third party) for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself or the death or any bodily injury to any other*

person, caused by or arising from the driving of a motor vehicle by any person at any place within the Republic, if the injury or death is due to the negligence or other wrongful act of the driver of the employee's of the motor vehicle...in the performance of the employee's duties as employee..."

- [20] The plaintiff's claim for damages from the RAF is also based on the negligence or unlawful act of the insured driver (Mr. Potgieter). The plaintiff needs to prove that what we normally refer to as one percent (1%) negligence on the part of Mr. Potgieter to succeed with the unlimited claim against the RAF.
- [21] Mr. Koopman is sued as an alternative defendant. His potential liability only arises if it is found that the plaintiff has no unlimited claim against the first defendant, the RAF. The issue of an apportionment or determination of the respective degrees of negligence between Mr. Potgieter and Mr. Koopman therefore does not arise in so far as it concerns the plaintiff's claim. It is only relevant for purposes of the dispute between the RAF and Mr. Koopman.
- [22] The RAF issued a third party notice against Mr. Koopman on a conditional basis, i.e. that a contribution is sought from Mr. Koopman in the event of the court finding that the RAF is liable to pay damages to the plaintiff on an unlimited basis (the RAF having conceded its liability vis-à-vis the plaintiff on a limited claim based on the negligence of Mr. Koopman).

The RAF has also tendered payment of such limited claim in the amount of R25 000, 00 by means of an undertaking to be furnished in terms of **section 17(4)(a) of the Act** in such instance.

- [23] In **General Accident Insurance Co South Africa Ltd v Xhego & Others 1992 (1) SA 580 (A)** at 586B-E, with regard to the word 'arising out of', Collier AJA said the following:
- "In the earlier legislation, the Motor Vehicle Insurance act 29 of 1942 and the compulsory Motor Vehicle Insurance Act 56 of 1972, the corresponding sections were almost identically worded, and the meaning of the words 'caused by or arising out of the driving of a motor vehicle' has been considered by the courts on a number of occasions. In his discussion of the meaning of these words in Wells & Another v Shield Insurance Co Ltd & Others 1965 (2) SA 865 (C) Corbett J at 869B-C stated that the words 'caused by' referred to the direct cause of injury whereas the words 'arising out of' referred to the case where the injury, though not directly caused by the driving, is nevertheless casually connected with the driving and the driving is a sine quo non thereof. Corbett J, however, pointed out at 869F-H that an uncontrolled application of the sine quo non concept could bring about consequences never contemplated or intended by the legislature. Some limitation must therefore be placed on the application of this concept. The court should be guided by a consideration of the object and scope of the Act, and by notions of commonsense (870A-B). The following concluding remarks of Corbett J on this problem at 870D-F*

should in my view also be applied in the present case: "Where the direct cause is some antecedent or ancillary act, then it could not normally be said that the death or injury was 'caused by' the driving; but it might be found to arise out of the driving. Whether this would be found would depend upon the particular facts of the case and whether, applying ordinary, common-sense standards, it could be said that the casual connection between the death or injury and the driving was sufficiently real and close to enable the Court to say that the death or injury did arise out of the driving. ..."

- [24] Advocate W. P. de Waal SC, for the plaintiff submitted that Mr. Potgieter's conduct is tantamount to dicing and that second defendant engaged in dicing with the second defendnat wherein the plaintiff was a passenger. Mr. de Waal referred the court to **Santam Insurance Co. Ltd v Voster 1973 (4) SA 764 AD at 773E (Voster)** wherein the court said dicing was a hazardous, and indeed unlawful activity.

- [25] On the facts in the **Voster's** case, there is no doubt that the conduct of Conradie and Van der Schyff was hazardous and should be regarded as unlawful.

- [26] Mr. Smit in his evidence further said when he saw the two vehicles, the Jetta was slightly in front of the Audi. Mr. Van der Merwe said that after the two vehicles crossed Lynwood road the Jetta was travelling in the left lane of Duncan street ahead of the Audi and the Audi was in the right lane. In

considering and evaluating the evidence of Mr. Smit, Mr. Van der Merwe, and Mr. Potgieter the picture created is that at Charles street at the red robot the Jetta was in the right lane and, at a certain stage, it swerved to the left lane. There is no evidence that the Audi at any stage overtook the Jetta. It should also be kept in mind that when the Audi lost control the Jetta was in the left lane. Mr. Van der Merwe said that it was in the vicinity of Duncan and Duxbury he saw the brake lights of the Jetta. There is no evidence that the driver of the Jetta disturbed the driver of the Audi.

- [27] Much as Potgieter admitted that from the intersection of Charles and Duxbury he drove at a speed higher than the normal allowed. He denied that he drove at the speed estimated by Mr. Smit.
- [28] Mr. Smit and Mr. Van der Merwe said they noticed two vehicles following each other at a fast pace, the Jetta being in front and the Audi behind. Mr. Koopman said he once dined with Mr. Potgieter meaning that they were engaged in racing. However, Mr. Potgieter denies same. In my view, there is insufficient enough evidence to support that Mr. Potgieter was engaged in an unlawful and hazardous illegal racing with Mr. Koopman.
- [29] Other than the fact that Mr. Potgieter drove fast in front of Mr. Koopman there is no other evidence untoward about his driving. The driving fast of Mr. Potgieter, is in my view, not causally connected to the collision of the Audi. Concerning

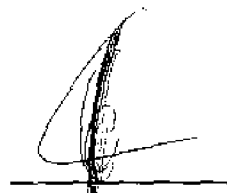
Mr. Koopman, it should be accepted that on the evidence he drove at an excessive speed and lost control of his vehicle resulting that his vehicle should collide with a wall. Such conduct, in my view, constitutes negligence. The RAF correctly in my view, conceded that Mr. Koopman was negligent.

- [30] Mr. Potgieter was cross-examined in detail regarding what happened after the collision and the speed he was driving. In evaluating his evidence carefully, I cannot find, especially regarding how he was driving, that he is not a credible witness. Even though Mr. Smit and Mr. Van der Merwe can be regarded as independently honest and credible witnesses their evidence cannot be sufficient to draw a reasonable inference from it that the parties were involved in an unlawful racing from which the plaintiff's injuries arose.
- [31] Koopman did not have a recollection of the events immediately preceding the collision until then. In particular, he cannot state that he was engaged in a race with Potgieter on the day of the accident.
- [32] There is no evidence, in my view, to suggest that Koopman and Potgieter agreed to race or that Potgieter enticed or influenced Koopman to race with him.
- [33] To suggest that the collision arose out of the driving of Potgieter of his vehicle at a higher than prescribed speed would be preposterous. Contravention of statutory law on

speed does not on the facts of this case give rise to liability in terms of the Act. On the evidence presented I cannot find that the driving of Mr. Potgieter caused or contributed to Mr. Koopman losing control of his vehicle. The accident was caused by the exclusive negligence of Mr. Koopman (the second defendant).

[34] **I therefore make the following order:**

- (i) The plaintiff's claim against the first defendant (RAF) based on the negligence and/or arising out of the wrongful driving by the insured driver (Mr. Potgieter) is dismissed.**
- (ii) The first defendant (RAF) is ordered to pay plaintiff's special damages (section 17(4) (a) undertaking) subject to a limit of R25 000.**
- (iii) The second defendant (Mr. Koopman) is liable to pay 100% of the plaintiff's proven or agreed damages, less special damages to be paid by the first defendant (RAF).**
- (iv) The first defendant (RAF) is jointly and severally with the second defendant liable to pay the plaintiff's costs up to the time when a tender for special damages was made and the second defendant (Mr. Koopman) is solely liable for the remaining costs.**

A handwritten signature in black ink, appearing to be 'A. P. LEDWABA', written over a horizontal line.

A. P. LEDWABA

JUDGE OF THE HIGH COURT

Date of hearing: 03 March 2009

Counsel for Plaintiff: Advocate W. P. De Waal (SC)

Instructed by: Adams & Adams

Counsel for First Defendant: Advocate M. M. Lingenfelder

Instructed by: DYASON Incorporated

Counsel for Second Defendant: In Person