



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

Case NO: 3433/22

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED: YES / NO

15 April 2024

DATE

SIGNATURE

In the matter between:

SPAREPRO (PTY) LTD

Plaintiff

and

CHRISTIAN PAUL JOHN MALILA

First Defendant

KAGH MOTORS (PTY) LTD

Second Defendant

AHMANY BIBI ISHMAEL PATEL

Third Defendant

ORDER

1. The first defendant was the sole cause of the collision
2. The first defendant is to make payment in the amount of R1 199 637.65 (one million one hundred and ninety-nine thousand six hundred and thirty-seven rand and sixty-five cents).
3. Interest on the aforesaid amount at the rate of 7.25% per annum from the date of service of summons to date of final payment.

4. The first defendant is to pay the costs.
5. Costs of the postponement application is to be paid by the first defendant on a party and party scale.

JUDGMENT

MOLELEKI AJ

Introduction

[1] This is an action for damages arising from a multi-vehicle accident. The accident occurred on Sunday morning, 13 June 2021 along Corlette Drive, Illovo in Sandton. The following four vehicles were involved: a Ferrari 488 Spider (the Ferrari), a white BMW M4 (the white BMW), an Audi Q3 (the Audi) as well as a red BMW (the red BMW). The Ferrari was driven by the plaintiff's nominated driver; the white BMW belonged to the third defendant and was driven by the second defendant; the Audi belonged to and was driven by the first defendant; whereas the red BMW was driven by Mr Parishill Pillay.

[2] The four vehicles were behind each other shortly after the collision. The Ferrari was stationary when it was struck from behind, at a red traffic light. The white BMW was stationary behind the Ferrari when it was struck from the back by the Audi, and in turn, the white BMW collided with the back of the Ferrari.

[3] It is alleged by the plaintiff that the collision was caused entirely by the negligence of the first defendant. The version of the plaintiff is disputed in totality by the first defendant who alleges that the accident was caused by the red BMW when it collided into the rear of the Audi.

[4] The plaintiff proceeds with its claim against the first defendant in the amount of R1 199 637.65.

Issues

[5] The issue of quantum was agreed at the amount claimed. The court is, therefore, called upon to determine the issue of liability as well as the scale of costs.

[6] The material issues which the court needs to resolve concern:

1. Negligence, more specifically, whether the collision was caused by the first defendant's Audi impacting into the rear of the white MBW or whether it was caused by the red BMW colliding into the rear of the Audi, which in turn struck the rear of the white BMW; and
2. Whether the plaintiff is entitled to a punitive cost order in a postponement application that was withdrawn on 12 October 2023, four days before trial, wherein the first defendant had tendered costs on a party and party scale.

[7] The experts prepared a joint minute. The only points to which the experts could not agree are the following:

1. The orientation and angle between the Audi and the red BMW at impact; and
2. The sequence of the collisions.

[8] Mr Pillay was the only factual witness who testified on behalf of the plaintiff. His testimony was that he was travelling in the right lane behind the white BMW. The Audi changed lanes from the left to the right and cut off in front of his vehicle. The Audi first collided with the white BMW. The white BMW collided with the Ferrari. His red BMW in turn immediately thereafter struck the rear of the Audi.

[9] According to the plaintiff's expert, the Audi executed an unsafe lane change manoeuvre from the left to the right lane, abruptly intersecting the path of the red BMW. At the time of the impact, the Audi was in a partially diagonal direction. The damage to the Audi was in the mid-front and left front.

[10] In respect of the sequence of the collision, the plaintiff's expert was of the opinion that the impact was initiated by the Audi when it impacted the rear of the white BMW, whilst the Audi was at a 2 o'clock angle. This, instigated an anti-clockwise rotation of the right side of the Audi, aligning it with the red BMW which was approaching from behind. His conclusion was therefore that, a collision first occurred between the front of the Audi and the rear of the white BMW. The white BMW in turn

impacted the rear of the Ferrari, which was stationary. The second impact occurred when the red BMW impacted the rear of the Audi.

[11] The first defendant's evidence was that he had already changed into the right lane at the previous intersection. The white BMW suddenly stopped at about half a car's length away from his Audi. Shortly thereafter, his Audi was rear-ended by the red BMW, which caused it to impact the white BMW. According to the first defendant, the red BMW was the sole cause of the collision in that, it rear-ended his Audi whilst it was stationary. This, therefore, caused the whole collision chain.

[12] Mr Greg Dlamini echoes the same sentiments as his friend, the first defendant. He testified that the Audi changed into the right lane at the previous intersection. The Audi suddenly stopped behind the white BMW. Shortly thereafter there was an impact when the red BMW rear-ended the Audi. The Audi impacted the white BMW which in turn impacted the Ferrari.

[13] Ms Wilna Badenhorst, the defendant's expert was of the opinion that the first impact was the front of the red BMW colliding into the rear of the Audi. Whereafter, it was a typical chain collision towards the front.

Onus

[14] It is trite that the plaintiff bears the onus. The onus can only be discharged by adducing credible evidence. The plaintiff had to adduce evidence on a balance of probabilities that the collision was caused as a result of the negligent driving of the Audi. In this regard, the court in *Stacey v Kent*, per Kroon J said the following—

"The enquiry at the conclusion of the case remains whether the plaintiff has, on a balance of probabilities, discharged the onus of establishing that the collision was caused by negligence attributable to the defendant. In that enquiry the explanation tendered by the defendant will be tested by considerations such as probability and credibility"¹

[15] There is, however, "no onus on the defendant to establish the correctness of his explanation" as to the circumstances which led to the occurrence of the event.²

¹ *Stacey v Kent* 1995 (3) SA 344 (ECD) at 352H-I.

² *Id* at 352H.

[16] There are two mutually destructive versions. The version of the plaintiff is that the accident was caused by the first defendant who suddenly changed lanes from left to right and rear-ended the white BMW at an angle. The driver of the plaintiff's Ferrari cannot be said to have seen how the collision occurred. This is most probably the reason he was not called as a witness. The version of the first defendant on the other hand is that the cause of the collision is the red BMW which struck the rear of the Audi, therefore, causing a chain collision towards the front.

[17] The approach to adopt when faced with two mutually destructive versions of the parties was set out in *Stellenbosch Farmers' Winery Group Ltd and Another v Martell Et Cie and Others*³ as follows:

"The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities."⁴

[18] Mr Pillay testified that he reported the accident at Bramley police station and a sketch plan was drawn up. There was divergence in the statement made by Mr Pillay to the plaintiff's expert when the latter was gathering information for purposes of investigations. That notwithstanding, Mr Pillay was a good witness. He was honest to admit that he had given conflicting versions to the plaintiff's expert. His explanation for it was that, on both occasions when he was contacted by the plaintiff's expert, he was out with friends and could not hear properly.

[19] This concession was not favourable to the plaintiff's case, but Mr Pillay remained honest about it. Clearly, he gave his evidence in an objective manner. Of significance is that he remained consistent in his version. This is supported by the accident report (Exhibit K) and sketch plan. He also gave a description of how the accident occurred. This report was made shortly after the accident. The said version was repeated in his testimony.

³ 2003 (1) SA 11 (SCA).

⁴ *Id* at para 5.

[20] Mr Pillay narrated his story in a logical, chronological and simple manner. His evidence was direct, probable, credible, and reliable as to how the accident occurred. He was a good witness who was honest to admit he first saw the Audi when it cut off in front of his red BMW.

[21] Plaintiff's expert postulates only one possibility as to the way the accident occurred. He testified that his opinion was consistent with the statements made by the drivers. He confirms that the left front side of the Audi collided with the mid-section of the white BMW. The white BMW was struck by the Audi whilst the Audi was at an angle. The Audi rotated slightly to the right. The damage on the white BMW is a sharp indentation towards the middle of the bumper which leads to the conclusion that the impact was at an angle. The deployment of the airbags of the white BMW confirms that the white BMW impacted the rear of the Ferrari with its front or mid-section. According to the plaintiff's expert, there was no visible damage to the right side of the Audi, which is an indication that the impact by the Audi on the white BMW was not frontal. To support this conclusion, he stated that, had the impact of the Audi on the white BMW been frontal, the airbags of the Audi would have also deployed.

[22] The defendant's expert on the other hand, relied on the very statements the plaintiff's expert had obtained from the drivers. Her opinion was that the vehicles were positioned more or less straight behind each other when the various impacts occurred. She stated that, when comparing the extent of the damage to the front of the red BMW with the minimal damage to the front of the Audi, together with the fact that the airbags of the Audi did not deploy, it is highly probable that the red BMW collided first with the Audi, resulting in the Audi being pushed to the rear of the white BMW.

[23] The first defendant's expert never consulted with the first defendant despite her being his expert. Neither did she consider the accident reports. She therefore failed in her duty to investigate the accident by failing to take all the relevant information into account. I am not satisfied that her opinion is capable of withstanding logical analysis. She placed more emphasis on the extent of the damage to the red BMW as compared to the front of the Audi. However, she did not deal with the indentation which the plaintiff's expert observed on the white BMW. This, according to the plaintiff's expert, was an indication that the Audi impacted the white BMW at an angle. That also explains the reason the airbags of the Audi did not deploy.

[24] It is the quality of the reasoning of the plaintiff's expert witness which I consider places her evidence on a significantly lower plane than that of the plaintiff's expert. She was of no assistance to this court.

[25] The evidence of the plaintiff's expert on the other hand was logically reasoned and supported by objective evidence. The plaintiff's expert substantiated the submissions and opinion he proffered. He gave reasons for his opinion which was independent. When he compiled his report, he obtained statements from the drivers, photographs, accident reports as well as sketch plans. Due to his wealth of experience and his specialist knowledge and skill, he could, on account of such attributes assist the court in deciding the issue of how the accident occurred.

[26] The first defendant's testimony is that his Audi was rear-ended by the red BMW as the first collision. His witness, Mr Dlamini conceded to the version of the plaintiff when it was put to him by the plaintiff's counsel. Mr Dlamini's evidence was, therefore, not only in conflict with the evidence of the first defendant but was irreconcilable with the version put forward by the first defendant. This, in my view, is a material contradiction. It cannot be downplayed as an insignificant discrepancy. When the plaintiff's version was put to Mr Dlamini, counsel for the plaintiff spent a considerable amount of time to make sure there was no misunderstanding.

[27] Mr Dlamini conceded that the collision most probably occurred in the manner suggested by the plaintiff's counsel. He even went further to qualify his response by stating that, the Audi was damaged mainly on its left front side, which was an indication that the impact by the Audi on the white BMW was at an angle. This is in line with the evidence of the plaintiff's expert. In his own evidence, Mr Dlamini stated that, the people who had gathered after the accident, including the drivers of the vehicles that were involved in the accident pointed to the first defendant as the sole cause of the collision. This clearly supports the description given by Mr Pillay as to how the collision occurred.

[28] Mr Dlamini was the only passenger and the first defendant, the driver. I am cognisant of the fact that, for obvious reasons, a passenger would not necessarily concentrate intently on how the vehicle is travelling, as the driver would. Mr Dlamini had himself stated that he was taking a video of the convoy of vehicles that were

participating in the breakfast run that was taking place on that day. He was therefore not looking in front. That notwithstanding, he conceded to the plaintiff's version. He went further to state that the first defendant stopped the Audi in an uncomfortable manner shortly before the accident. It appears to me that the first defendant was somehow trying to make his case appear stronger than it really was. Mr Dlamini was more impressive as a witness than the first defendant was.

[29] In *Martindale v Wolfaardt*⁵, it was stated that—

“a driver is entitled to regulate the manner of his driving on the assumption that another driver will not suddenly, without warning and recklessly, expose himself and others to danger.”

[30] In *Van Der Berg v Road Accident Fund*⁶, citing *Kloppers*⁷, it was stated 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”⁸

[31] And further that—

“[t]he driver who collides with another from the rear end can escape prima facie liability for negligence by providing an explanation that shows that the collision occurred because of the negligence of the other vehicle or due to other intervening circumstances. The example of the exception to the general rule of rear end collision is said to be where for an example, as stated by Kl[o]pper, the driver in front suddenly swerves immediately and applies the breaks.”⁹
(footnote omitted.)

[32] In the present case, an explanation has been given on behalf of the plaintiff that the Audi suddenly changed lanes from the left to the right and encroached onto the back of the BMW, which was then propelled forward and collided with the Ferrari.

⁵ 1940 AD 235 at 244.

⁶ [2013] ZAGPJHC 94.

⁷ *Kloppers The Law of Collision in South Africa* 7 ed (LexisNexis Butterworths, 2003) at 78.

⁸ *Id* at para 14.

⁹ *Id* at para 15.

[33] The first defendant and his witness, Mr Dlamini, attempted to create an impression that the white BMW applied the brakes suddenly. There was a discrepancy in the version of the first defendant and Mr Dlamini on this aspect. The first defendant stated that the Audi was half a car's length from the BMW. Mr Dlamini on the other hand stated that it was about 40 centimetres away. However, it is not in dispute that the plaintiff's Ferrari was stationary.

[34] In his own evidence, the first defendant testified that he changed lanes long before the accident. His version was that shortly before the accident the Audi was travelling behind the white BMW. He noticed the brake lights of the vehicles that were travelling ahead. He also applied the brakes and stopped behind the white BMW. From this version, the BMW had clearly come to a complete halt.

[35] Even if the version of the first defendant were to be accepted, which is not, that the Audi was travelling behind the white BMW, the Audi would be *prima facie* negligent. A motor vehicle in a stream of traffic must anticipate the possibility of a vehicle travelling ahead stopping suddenly. A following driver is under a duty to regulate his speed and distance from the vehicle ahead to avoid a collision should the vehicle ahead stop suddenly. Therefore, should a collision result, the inference is that the following vehicle was either travelling too closely to the vehicle ahead or too fast or that he was not keeping a proper lookout.

[36] The first defendant is the person upon whom an obligation rested to offer an explanation to neutralise the application of the *res ipsa loquitur* (facts speak for themselves) rule against him. It is the first defendant who initiated the chain of collision. Therefore, the presumption of negligence did not operate against the red BMW. That notwithstanding, no satisfactory explanation was provided by the first defendant to negate the presumption of negligence.

[37] Liability generally depends on the wrongfulness of the act or omission relied on by the plaintiff. Wrongfulness in the instant case is inferred from the fact that the first defendant initiated the chain of collision.

[38] In the law of delict causation involves two distinct enquiries: the first is a factual one and it relates to the question as to whether the defendant's wrongful act was a cause of the plaintiff's loss. This is commonly referred to as factual causation. The

enquiry as to factual causation is generally conducted by applying what is commonly called the 'but-for' test. In the application of this test, a hypothetical enquiry is to be used: what probably would have happened but for the wrongful conduct. If the plaintiff's loss would in any event have ensued, the wrongful conduct was not a cause of the plaintiff's loss. If the wrongful act is shown not to be the cause of the loss suffered, then no legal liability can arise. However, demonstration that the wrongful act was the cause of the loss, does not necessarily result in legal liability.

[39] This leads to the second enquiry to be had, which is whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to follow. That is, whether the loss is not too remote. This is referred to as legal causation.

[40] As stated, the first defendant is the cause of the loss suffered by the plaintiff. Had the first defendant not executed an unsafe lane change manoeuvre, abruptly encroaching into the back of the white BMW, the chain of collision would not have occurred.

[41] I am satisfied that the version of the plaintiff is more probable than that of the first defendant. The probabilities point to the fact that the collision occurred when the first defendant changed lanes from the left to the right. The Audi collided with the rear of the white BMW at an angle. This propelled the white BMW forward thus, causing it to collide with the Ferrari. At this point, the traffic had slowed down to a point where the Ferrari and the white BMW became stationary. The Ferrari stopped in accordance with the flow of traffic. It was not a sudden stop.

[42] As stated, proof that a motor vehicle in a stream of traffic collided with the vehicle ahead is *prima facie* proof of negligence.¹⁰

[43] The collision occurred in the morning. It was daylight. The facts establish negligence against the first defendant. There is no satisfactory explanation from the first defendant.

¹⁰ *Kruger v Van der Merwe* 1966 (2) SA 266 (A).

[44] The first defendant's evidence that the Audi was struck by the red BMW first, thus propelling it to impact the white BMW, failed to impress me. It is therefore rejected.

[45] I accept that the Audi moved from the left lane, across the middle line of the road, and encroached on to the back of the white BMW, thus colliding with the back of the white BMW at an angle. This propelled the white BMW forward thus, causing it to collide with the Ferrari.

[46] The plaintiff is therefore entitled to recover 100% of its proven or agreed damages.

Costs

[47] The court was called upon to determine whether the plaintiff is entitled to a punitive cost order in a postponement application that was withdrawn days before the day on which the matter was set down for trial. On 2 October 2023, the first defendant brought an application for a postponement. Notice of intention to oppose the application for a postponement was served on 6 October 2023. On 9 October 2023 the plaintiff filed its answering affidavit. The matter had been set down for trial on 16 October 2023. On 12 October 2023 the first defendant withdrew its application and tendered wasted costs. The plaintiff's submission is that the first defendant's conduct was reckless, intentional, and *mala fide*, with no regard to the plaintiff, the court rules, process, and procedure. Further that no substantial reasons for seeking a postponement were provided.

[48] The first defendant submitted that the conduct was not reckless, *mala fide* nor was it an intentional disregard of the rules. Further that it was not irresponsible, negligent, frivolous and vexatious litigation.

[49] The guiding principle is that—

“costs are awarded to a successful party in order to indemnify him for the expense to which he has been put through having been unjustly compelled either to initiate or to defend litigation, as the case may be. Owing to the

unnecessary operation of taxation, such an award is seldom a complete indemnity; but that does not affect the principle on which it is based."¹¹

[50] It is also an accepted principle that the issue of costs is at the discretion of the court. In respect of the main action, there is no reason to deviate from the general principle that costs follow cause.

[51] In the exercise of my discretion, I am not inclined to make a punitive cost order in respect of the application for a postponement as requested by the plaintiff. The first defendant has tendered wasted costs and that should suffice.

[52] It was submitted further on behalf of the first defendant in the heads of argument that, despite the limited issues and the simplicity thereof, the plaintiff submitted heads of argument of 82 pages long, consisting of numerous extracts from the record and authorities which ought to have been as concise as possible to reduce further time required by the court.

[53] I am not satisfied that it is necessary to punish the plaintiff.

[54] In the result, I make the following order:

Order

1. The first defendant was the sole cause of the collision
2. The first defendant is to make payment in the amount of R1 199 637.65 (one million one hundred and ninety-nine thousand six hundred and thirty-seven rand and sixty-five cents).
3. Interest on the aforesaid amount at the rate of 7.25% per annum from the date of service of summons to date of final payment.
4. The first defendant is to pay the costs.
5. Costs of the postponement application is to be paid by the first defendant on a party and party scale.

¹¹ *Texas Co (SA) Ltd v Cape Municipality* 1926 AD 467 at 488. See also, in this regard, *Agriculture Research Council v SA Stud Book and Animal Improvement Association and Others*; *In re: Anton Piller and Interdict Proceedings* [2016] JOL 34325 (FB) at para 1-2; *Thusi v Minister of Home Affairs and 71 Other Cases* (2011) (2) SA 561 (KZP) 605-611; and *Cilliers AC 'Law of Costs'* Butterworths pages 1-4.

[Redacted]

M Moleleki

M MOLELEKI

Acting Judge of The High Court
Gauteng Division, Johannesburg

Appearances:

For the Plaintiff: Engelbrecht Attorneys Inc

Counsel: Advocate M Bronkhorst

For the First Defendant: Van Breda & Herbst Inc

Counsel: Advocate Jansen Van Vuuren Jansen Van Vuuren instructed by Van
Breda & Herbst Inc

For the Third Defendant: Ismail & Dahya Attorneys

Date of Hearing: 23–27 Oct 23
 5 & 6 Dec 2023

Date of Judgment: 15 April 2024