REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: 10344/2022

(1)	REPORTABLE: ~~YES~~/NO
(2)	OF INTEREST TO THE JUDGES: ~~YES~~/NO
(3)	REVISED.

DATE: 2/4/2024 SIGNATURE: [redacted]

In the matter between:

MOKOKOANA THABO PAUL **PLAINTIFF**

And

ROAD ACCIDENT FUND **DEFENDANT**

JUDGEMENT

KGANYAGO J

[1] On 9th August 2021 the plaintiff was involved in a motor vehicle collision along the R521 road in Kalkbank when he collided with the insured motor vehicle. At the time the collision plaintiff was the driver of his own vehicle. The plaintiff has sustained some injuries as a result of the accident. He lodged a third party claim with the defendant. The matter was not finalised within the prescribed time period, and the plaintiff instituted an action against the defendant claiming damages arsing out of the accident of the 9th August 2021.

[2] According to the plaintiff's particulars of claim, the accident was caused by the sole negligence of the vehicle driven by the insured driver when he lost control of his vehicle and collided with the plaintiff's vehicle. The defendant did not enter any appearance to defend, and the plaintiff proceeded to set down the matter for a default judgment.

[3] At the default judgment trial the plaintiff testified under oath. He testified that on 9th August 2021 he was driving from his home in Bochum to Mabokelele village in Moletji using the R521 road. As he was driving towards the direction of Polokwane, he joined a convoy four cars and his vehicle was the fifth in the convoy. Behind him there was a truck which was the sixth vehicle. As they were in that convoy, two Polo vehicles came from behind the truck and started overtaking that convoy of vehicles at a high speed. Those Polo vehicles were travelling as if they were racing with each other. The plaintiff decided to apply brakes abruptly, and when he did that he saw that the truck behind him was going to collide with him from behind. In avoiding to collide with the truck from behind, the plaintiff swerved to right passing the lane of oncoming cars into the gravel side and stopped his vehicle. The plaintiff stated that he could not swerve to the left side as there was a ditch.

[4] When the plaintiff was on the gravel side, two vehicles came from the opposite direction (from the direction of Polokwane). The first vehicle passed, and the second was that of the insured driver and it was travelling at a high speed. The driver of the insured vehicle drove off the tarmac road into the gravel side of the road towards the plaintiff. When the plaintiff saw the insured vehicle coming towards him, the plaintiff tried to swerve his vehicle back into the tarmac road in the lane of oncoming cars, but the insured driver also drove back to the tarmac and a collision occurred.

[5] Under questions by the court, the plaintiff was referred to accident report that shows that what looks like a ditch on the accident sketch has been described as a culvert and it appears on both side of the road, and it is far from the point of impact and also ahead of the point of impact. The plaintiff changed his version and stated that on the left side the road was uneven, and that the uneven part of the road does not appear on the sketch. The plaintiff was also referred to the brief description of the accident on the accident report where the insured driver had stated that the plaintiff was the one who was overtaking the convoy of vehicles when the accident occurred. The plaintiff stated that the police never interviewed him as he had lost his consciousness. The plaintiff could not tell what were the exceptional circumstances that made him to swerve to the right instead of the left side of the road, taking into consideration that the surface on the left was merely uneven, and therefore less risky than facing oncoming cars.

[6] It is trite that RAF is obliged to compensate for bodily injury caused by or arising from the driving of a motor vehicle. The casual link that is required is essentially the same as the casual 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 the available facts and relevant probabilities. The important question is how one should determine a casual nexus, namely, whether one fact follows from another. (See *Grove v The Road Accident Fund*[1]).

[7] According to the plaintiff's version, he was driving in convoy of vehicles wherein there were four vehicles in front of him, and the sixth vehicle was a truck which was travelling behind him. Suddenly, two polo vehicles started overtaking them and he applied brakes abruptly. As he was applying brakes he saw that the truck behind was going to knock him from behind and he swerved to the extreme right into the gravel. He could not swerve to the extreme left as there was a ditch.

[8] In *Cape Metropolitan Council v Graham*[2] Scott JA said:

> "Turning to the question of negligence, it is now well established that whether in any particular case the precautions taken to guard against foreseeable harm can be regarded as reasonable or not depends on consideration of all the relevant circumstances and involves a value judgment which is to be made by balancing various competing considerations. These would ordinarily be
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> '(a) the degree or extent of the risk created by the actor's conduct; (b) the gravity of the possible consequences if the risk materialises; (c) the utility of the actor's conduct; (d) the burden of eliminating the risk of harm'".

[9] The plaintiff's version is full of loopholes. The plaintiff has failed to explain why he had to apply brakes abruptly when the two polo vehicles were merely

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[1] [2011] ZASCA 55 (31 March 2011) at para 7

[2] 2001 (1) SA 1197 (SCA) at para 7

overtaking even if they were overtaking when it was dangerous for them to do so. It would have made sense if the plaintiff had testified that as the polos were overtaking, there was an oncoming car that forced the two polos to move back into their correct lane in front of him or any of the cars the were driving in front of him, but that is not his version. From the plaintiff's version, it does not seem that as two polos were overtaking, they forced their way in front of any of the cars that were driving ahead of the plaintiff. These polos were not in any way interfering with plaintiff's path of travel, except that they were overtaking when it was dangerous to do so.

[10] The plaintiff has testified that he could not swerve to the extreme left as there was a ditch. When the plaintiff was confronted with the accident report which on the sketch does not show any ditch but a culvert which appears on both side of the road, and was far ahead of the point on impact, the plaintiff changed his version that it was not a ditch, but the road was uneven. When asked where on the sketch plan was the road uneven, he testified that it was before where the drafter of the accident plan had drafted the sketch, and that it does not appear on the sketch. That version makes the plaintiff's version to be more improbable, as if that is the case, the uneven road will be far away from where he started swerving to the right and the point of impact, since the plaintiff had testified that after swerving to the gravel on the right side of the road, he had stopped his vehicle. The point of impact as per his version was not far from where he had stopped his vehicle. When he saw the two cars coming from the direction of Polokwane his car was stationary and far away from the uneven left side of the road.

[11] The plaintiff did not testify that when he swerved to the extreme right, there was an oncoming car. The plaintiff could not explain why he chose to swerve to the extreme right onto the gravel, and not just on the lane of oncoming cars since there was no eminent danger ahead of him. The truck which the plaintiff was avoiding which was coming behind, was not stationary, but moving. A reasonable driver faced with the plaintiff's situation, if it indeed happened as testified by the plaintiff, would have swerved to the right (if the right was his/her only option) into the lane of oncoming cars, slowed down his vehicle to allow the truck to pass, and thereafter moved back to his correct lane. Swerving to the right should have been the plaintiff's last resort, as the uneven side of the road would have been less risky than facing oncoming cars. The court is mindful of the fact that the decision should be made in a split of seconds, but that decision should be what a reasonable driver faced with that situation would have done.

[12] The only reasonable conclusion to be made from the plaintiff's version, is that he is the one who was trying to overtake the convoy of cars, and was faced with an oncoming car. He could not swerve to the left as there was a convoy of cars, and he opted to swerve to the extreme right onto the gravel. The driver of the insured oncoming car also swerved to the extreme left, which as a reasonable driver facing an oncoming car was supposed to do. When the insured driver saw the plaintiff swerving to the gravel side, he tried to swerve back to his correct lane, and that resulted in a head on collision. The insured oncoming car cannot be blamed for the collision, but the collision was as result of the negligent driving of the plaintiff who tried to overtake when it was dangerous to do so. There is no element of contributory negligence on the part of the insured driver of the oncoming car. The plaintiff has failed to prove negligence on the part of

the insured driver of the oncoming car, and therefore liability of the defendant has not been proved or established at all.

[13] In the result the following order is made:

13.1 The plaintiff's claim is dismissed.

13.2 No order as to costs

[redacted]

KGANYAGO J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA, LIMPOPO DIVISION, POLOKWANE

APPEARANCES:

Counsel for the plaintiff	**: Adv RC Molepo**
Instructed by	**: MWIM & Associates INC**
Counsel for the defendant	**: In default**
Date heard	**: 5th March 2024**
Electronically circulated on	**: 2nd April 2024**