REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: 1975/2018

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

DATE: 19/11/2024 SIGNATURE: [redacted]

In the matter between:

MATSILELE KULANI LOVERS **PLAINTIFF**

And

ROAD ACCIDENT FUND **DEFENDANT**

JUDGEMENT

KGANYAGO J

[1] On 29th July 2017 the plaintiff was the driver of motor vehicle with registration number JGL 905 NW when he was allegedly involved in a motor vehicle collision with a motor vehicle (insured motor vehicle) whose registration numbers were unknown to the plaintiff. As result of the accident the plaintiff sustained serious bodily injuries. The plaintiff has instituted an action against the defendant claiming damages arising out of that accident. According to the plaintiff's particulars of claim, the plaintiff was driving behind the insured motor vehicle when the insured motor vehicle reduced its speed which forced the plaintiff to apply brakes. In the process of applying brakes, the plaintiff lost control of his motor vehicle which rolled.

[2] The defendant had defended the plaintiff's action. In its plea the defendant had denied that the accident was caused by the negligent driving of the insured driver, but that it was as a result of the sole negligence of the plaintiff. In the alternative the defendant had pleaded contributory negligence. During the pretrial conference the parties have agreed on separation of merits and quantum. At this stage what the court is required to determine is the issue of liability only.

[3] The plaintiff has testified under oath. He testified that on 29th July 2017 he was driving his motor vehicle which is an NP200 from Makhumele village to Malamulele on a tarmac road. He was driving behind the insured motor vehicle. The insured motor vehicle suddenly applied brakes and immediately stopped in the middle of the road. In order to avoid a collision, the plaintiff swerved to the extreme right and lost control of his vehicle which rolled.

[4] When the plaintiff came out of his motor vehicle, he found that the insured motor vehicle which was the sole cause of the accident was no longer there. The

plaintiff had sustained serious injuries as a result of the accident. The bystanders who came to the scene phoned an ambulance, but it did not arrive. One of the bystanders took the plaintiff to the hospital by his car. Before the accident the plaintiff was driving at a speed of 80 km per hour, and that the speed limit in that area was 80 to 100 km per hour. The plaintiff alleges that there was nothing he could have done to avoid the accident as on the left there was a ditch and that is the reason he swerved to the right. At the time of the accident the plaintiff was having two passengers in his car.

[5] The plaintiff was cross-examined and he stated that the accident occurred between 8h00 and 9h00 whilst he was travelling to work in Malamulele. The weather was clear and it was sunny. The plaintiff stated that when he first saw the insured motor vehicle stopping, he was at a distance of about 50 to 60 metres. He stated that it was a two-lane road, and that when the insured motor vehicle stopped there were no oncoming cars. The plaintiff stated that when he saw the insured motor vehicle stopping, he applied brakes and seeing that he was going to knock it from behind, he swerved to the right.

[6] The plaintiff was referred to the discrepancy in his *viva voce* evidence and his section 19(f) affidavit. In his section 19(f) affidavit the plaintiff has stated that the unknown driver had reduced speed in front of him, and he tried to apply brakes but lost control of his vehicle and it rolled. The plaintiff stated that the correct version is his *viva voce* evidence wherein he had stated that the insured driver had stopped his vehicle in the middle of the road which resulted in him swerving to the right, and in the process lost control of his vehicle which rolled. The plaintiff conceded that when he state that the insured vehicle stopped in the middle of the road, he refers to it stopping in its correct lane of travel. The

plaintiff stated that under normal circumstances when he overtakes a vehicle in front of him, he will do so when he was about 10 metres from it. That concluded the evidence of the plaintiff and he closed his case. The defendant in turn closed its case without leading any evidence. Both parties have submitted their closing address on the merits of the case.

[7] It is trite that the defendant (RAF) is obliged to compensate for bodily injury caused by or arising out of the driving of a motor vehicle. The causal 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]).

[8] For the plaintiff to succeed with his claim against the defendant, he must prove negligence on the part of the insured driver. The accident must have been caused by the negligent driving of the insured driver, and the plaintiff has a duty to set out the circumstances which he regards as acts of negligence on the part of the insured driver. It follows that failure to prove any negligence on the part of the insured driver will absolve RAF from being held liable for any damages suffered by the plaintiff arising out of that accident.

[9] The standard used to determine whether a person is negligent is that of a reasonable person. In *Cape Metropolitan Council v Graham*[2] Scott JA said:

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

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

"Turning to the question of negligence, it is 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 a 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

'(a)the degree or extent of the risk created by the actor's conduct; (b) the gravity of the possible consequences if the risk of the harm materialises; (c) the utility of the actor's conduct; and (d) the burden of eliminating the risk of harm'.

If a reasonable person in the position of the defendant would have done no more than was actually done, there is of course, no negligence".

[10] According to the plaintiff's *viva voce* evidence which he regards as the correct version of how the accident occurred, he first saw the insured vehicle at a distance of 50 to 60 metres when the insured vehicle allegedly stopped in its lane of travel. At that stage the plaintiff was travelling at a speed of 80 km per hour and the permitted maximum speed within that area was 80 to 100 km per hour as testified by the plaintiff. The plaintiff was therefore travelling within the permitted speed limit.

[11] The weather condition was clear and it was sunny. The road surface was also clear and there was nothing to obstruct the plaintiff. The plaintiff has further testified that normally when he overtakes a vehicle in front of him, he will do so when he was about 10 metres from that vehicle and he will be able to overtake that vehicle without encountering any problems. The plaintiff has conceded that when he saw the insured vehicle allegedly stopping there were no oncoming cars. The plaintiff even went on to testify that if there was any oncoming car, he would have collided with it when he swerved to the right. The plaintiff was unable to explain why at the distance of 50 to 60 metres he did not simply

overtake the insured vehicle since there was no eminent danger of an oncoming car.

[12] The question is whether the plaintiff has acted reasonably by swerving to right instead of applying brakes at that distance taking into consideration the speed at which he was travelling, or overtake the insured vehicle. In *Road Accident Fund v Grobler*[3] Hanckle AJA said:

"[11] The question is whether the respondent acted reasonably in the circumstances. In South African Railways v Symington 1935 AD Wessels CJ stated (at 45)

'Where men have to make up their minds how to act in a second or in a fraction of a second, one may think this cause better whilst the other may prefer that. It is undoubtedly the duty of every person to avoid an accident, but if he acts reasonably, even if by a justifiable error of judgment he does not choose the very best course to avoid the accident as the events afterwards show, then he is not on that account to be held liable'.

[12] When a person is confronted with a sudden emergency not out of his own doing, it is, in my view, wrong to examine meticulously the options taken by him to avoid the accident, in the light of after-acquired knowledge, and to hold that because he took the wrong option, he was negligent. The test is whether the conduct of the respondent fell short of what a reasonable person would have done in the circumstances".

[13] The plaintiff did not plead sudden emergency. The version of the plaintiff does not suggest that there was any sudden emergency. At the distance at which the plaintiff was when he first saw the insured vehicle allegedly stopping, the speed at which the plaintiff was travelling, and also that there were no oncoming vehicles, in my view, a reasonable driver who finds himself/herself in the position of the plaintiff, would have overtaken the insured vehicle without any risk of colliding with the oncoming vehicles as there was none. There is no

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[3] 2007 (6) SA 230 (SCA) at para 11 and 12

evidence presented that at the spot where the insured motor vehicle had allegedly stopped, it was dangerous to overtake. The other option which a reasonable driver would have taken even though it was not necessary, would have been to apply brakes and at that distance and speed, his/her vehicle would have come to a standstill without any risk of bumping or colliding the insured vehicle from behind.

[14] The plaintiff has testified that he tried to apply brakes but lost control of his vehicle. The plaintiff was unable to explain what caused him to loose control of his vehicle as the insured motor vehicle was still far away from him, and also taking into consideration the speed at him he was travelling, and there were no oncoming cars, unless he was travelling at an excessive speed and not 80 km as testified by him.

[15] It would have been a different story if the plaintiff's version was that the insured vehicle suddenly stopped whilst he was driving behind him at close range, and he had to make a decision in a split of seconds due the sudden emergency he was finding himself in. In my view, the option which the plaintiff took fell short of what a reasonable driver finding himself/herself in that situation would have done. The plaintiff has failed to prove negligence on the part of the insured driver. The plaintiff was 100% to blame for the accident.

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

16.1 The plaintiff's claim is dismissed with costs

[redacted]

KGANYAGO J

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

APPEARANCES:

Counsel for the appellant	**: Adv LT Nkonyane**
Instructed by	**: Mashamba Incorporated**
Counsel for the respondent	**: MC Mafiri**
Instructed by	**: State Attorney Polokwane**
Date heard	**: 12th November 2024**
Electronically circulated on	**: 19th November 2024**