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**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)
JUDGMENT**

**Not Reportable
Case No: 4363/2011**

In the matter between:

LOUISE ERICA HARTMAN

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

Coram: RALARALA, J
Heard on: 2 September 2024
Delivered on: 30 July 2025

Summary: Road Accident Fund-claim for loss of support - Plaintiff, wife of the deceased issued summons against Road Accident Fund following a collision of a motor vehicle driven by the deceased colliding with a tyre which was abandoned on the trafficable surface of the road-whereafter the deceased vehicle left the road and overturned-Circumstantial evidence relied upon.

ORDER

On the balance of probabilities, the Plaintiff established that the collision was caused as a result of a tyre having been left on a roadway by the insured driver/owner. The Defendant is liable for 100% of Plaintiff's damages to be proved.

The Defendant to pay Plaintiff's costs, such costs to include Counsel's costs on Scale B.

JUDGMENT

RALARALA, J

INTRODUCTION

[1] The Plaintiff instituted action for loss of support against the Defendant following an accident which occurred on 28 November 2007 on the N7 highway in the vicinity of Malmesbury, Western Cape. The motor vehicle driven by Helgaard Hartman, the deceased, was involved in an accident, resulting in fatal injuries to him. The Plaintiff is the widow of the deceased.

[2] The parties in this matter reached an agreement to separate the issues in terms of rule 33(4) of the Uniform Rules of Court. At the close of the Plaintiff's case, the Defendant unsuccessfully applied for absolution from the instance and closed its case without adducing any *viva voce* evidence. The court is enjoined to determine whether the deceased, while driving his motor vehicle on the N7 highway in the vicinity of Malmesbury, Western Cape, collided with a tyre which was left abandoned by an insured truck driver/owner on the trafficable surface of the roadway, resulting in the motor vehicle to leave the road and overturned.

Evidence

[3] The Plaintiff was married to the deceased and was financially dependent on him for spousal support. The Plaintiff testified that she was a housewife and was wholly reliant on the financial support of the deceased. The Plaintiff testified that the deceased left their Malmesbury home, *en route* to Cape Town International Airport, early on the morning of the accident. The Plaintiff pleads that an accident occurred on 28 November 2007 on the N7 highway ('the roadway') in the vicinity of Malmesbury, Western Cape, when a motor vehicle driven by the deceased collided

with a tyre, which was left on the trafficable surface on the roadway causing the accident.

[4] The Plaintiff further pleads that the tyre was left on the trafficable surface of the road by the insured driver, whose details remain unknown to the Plaintiff. Alternatively, the owner of the insured vehicle, alternatively his/her employee acting within the course of their employment. The Plaintiff pleads that the deceased died on 28 November 2007 as a result of injuries he sustained in the collision, claiming that the death was as a result of negligence or other wrongful act of the insured driver, alternatively the owner of the insured vehicle or his/her employee in the performance of their duties as envisaged in section 17(1) of the Road Accident Fund Act 56 of 1996.

[5] Mr. Nicholas Fortuin ('Fortuin') testified that he resides at 1[...] W[...] S[...], Abbotsdale, Malmesbury, Western Cape. He confirmed that on the day of the incident, he was residing at 6[...] K[...] S[...], Abbotsdale, Malmesbury, Western Cape. His home was situated adjacent to the road, and it was on the left side of the road as one leaves Malmesbury in the direction towards Cape Town, Western Cape. Fortuin testified that on the morning of the accident at approximately 4:30 he was awakened by a loud sound outside. He thereafter went outside in the direction of the crash scene. He found a tyre ('tread') beside the road, as well as a bakkie that had veered off the roadway. He searched the grass and came across the deceased, laying in close proximity to a fence.

[6] Fortuin hurried back home, calling out to his wife and children to bring a blanket. In the ensuing chaos, he was not able to see whether it was his wife or one of his children who brought the blanket to cover the deceased. Fortuin encountered some of the deceased's family or friends at the scene of the accident the next day. According to him, they were on the lookout for an envelope and collected some of the bakkies' broken mirrors.

[7] Fortuin took the tread home and repurposed it as a flowerpot. During cross examination he was questioned regarding the two affidavits which formed part of the

witness bundle (Exhibit 'A'). The first Affidavit, signed on 26 June 2008, is purportedly commissioned by one Theodore Lesley Koopman ('first affidavit') while the subsequent affidavit was allegedly commissioned on 12 October 2016 ('second affidavit').

[8] Fortuin explained that following the accident, he was contacted by an investigating officer from the South African Police Service ('SAPS') with whom he shared his account of the events that took place that morning. The essence of the cross examination was in relation to his reference to a rim of a tyre in his first affidavit. It was further his evidence that the investigating officer wrote down what Fortuin recounted in the statement. Thereafter the investigating officer asked him to sign the affidavit without having read it, or it being read back to him.

[9] Fortuin clarified that he encountered only a tread and not a rim of a tyre. Fortuin further explained that had it been brought to his attention that the investigating officer had introduced the word 'rim', he would have noticed the error and brought it to the investigator's attention. According to Fortuin he was taken to the police station and after he relayed the statement he was not requested to swear to the content thereof.

[10] Regarding the second affidavit, he testified that a representative of the Defendant approached him at home to request his account of the events surrounding the accident. In this instance, he provided his statement, which was recorded by the individual present, who then asked him to sign it. In addition, Fortuin stated that the Commissioner of Oaths, SJ Diedericks was not present when he signed the affidavit. The second affidavit was executed in the presence of Vukile Shandu.

[11] In the second affidavit, reference was made to a 'light delivery vehicle', and para 14 stated that he never referred to a 'light delivery vehicle' but maintained that it was a Bakkie. An additional affidavit surfaced and in this third affidavit, Fortuin indicated that he had been home and collected a blanket to cover the injured person. This statement was at variance with what he had testified in that regard. Earlier his evidence was that he called out to his wife and children to bring a blanket. He

explained that he went home to collect a blanket, called out to his family, to bring it, but he couldn't remember who had brought him the blanket.

[12] Regarding whether he knew where the tread came from, he testified that Michelle Fortuin, his wife at the time, had informed him of a tyre burst that occurred prior to the morning of the accident.

[13] Michelle Fortuin testified that she was residing with her husband Fortuin in Abbotsdale, Malmesbury at the time of the accident. She confirmed that on the morning of the accident, they heard a loud bang, which prompted them to run outside. A Bakkie was discovered next to the body of the deceased, which was positioned on the left-hand side. It was further her evidence that a day before the accident she heard a loud bang, it was a tyre burst. She further testified that this happened at approximately 11h00 in the morning when she was about to leave for Malmesbury. She noticed a truck parked on the side of the road in the direction of Malmesbury. She travelled by taxi to town and still observed the truck stationary on the side of the roadway with people busy working on the tyre. A tyre was lying on the side of the road which was the lane in the direction towards Cape Town.

[14] Upon her return a few hours later, the truck was no longer on the road. However, on the morning of the accident, she observed that the tyre had moved and was now lying on the other side of the road. Further, she stated that she had indeed informed Fortuin about the tyre burst, but she was unable to recall when she had done so.

[15] During cross-examination, she clarified that she had *en route* to Malmesbury alerted the taxi driver to the position of the tyre on the road and the potential hazards it presented to other motorists. Michelle Fortuin also testified that the morning of the accident she noticed the tyre close to the Bakkie and realised that it was the same tyre that had been on the roadway the previous day after the tyre burst. She explained that it was the same size as the tyre she observed the previous day, and that it was large resembling that of a truck. In addition, she testified that following the incident, Fortuin took the same tyre to their home and she used it to plant parsley therein.

[16] It was her evidence that it was a tyre without any rim corroborating Fortuin's evidence in this regard. She expressed the view that the tyre was the cause of the accident that morning.

[17] The Defendant having merely denied all allegations in the particulars of claim in its plea, applied for an absolution from the instance at the end of the Plaintiff's case, which was opposed by the Plaintiff. Both Mr. Benade, for the Plaintiff and Mr. Hindley, for the Defendant, filed comprehensive heads of argument and addressed the court on the merits and demerits of the application. The evidence presented by the Plaintiff has been detailed above. The court, in exercising its discretion and after considering the facts of this case, was not persuaded that the application should be granted.

Legal Principles and Analysis

[18] The Plaintiff's claim against the Defendant is asserted to fall under section 17(1) of the Road Accident Fund Act 56 of 1996, as the death of the deceased was allegedly caused by the negligence or other wrongful act of the insured driver. The relevant provisions of section 17(1) are as follows:

“The fund or an agent shall:

(a) . . .

(b) Subject to in regulation made under section 26, in the case of a claim for compensation under this section arising from the driving of a motor vehicle with identity off neither their own nor the driver thereof has been established; be obliged to compensate any person (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 death of /or any bodily injury to any other person, caused by or arising from the driving of a motor vehicle by any person it any place within the Republic, if the injury or death is due to the negligence or other wrongful act of the driver or of the owner of the motor vehicle or of his employee in the performance of the employee's duties as employee...”

Essentially the court has to decide whether the death of the deceased was caused by or arose from the driving of the insured vehicle and whether due to the negligence or other wrongful act of the driver or of the owner of the insured vehicle or of his or her employee. The Plaintiff's case relies significantly on circumstantial evidence. In essence the court is requested to draw inferences from circumstantial evidence. *R v Blom* 1939(AD) 188 at 202 to 203, is the locus classicus of the two cardinal rules in respect of circumstantial evidence where Watermeyer JA held as follows:

- “1. The inference sought to be drawn must be consistent with all proved facts. If it is not, nor then the inference cannot be drawn.
2. The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.”

[19] The test applicable in civil matters is as expounded in *Cooper and Another NNO v Merchant Trade Finance Limited* 2000(3) SA 1009 (SCA) at 1027-1028, where the court observed thus:

“...The Court, in drawing inferences from the proved facts, acts on a preponderance of probability. The inference of an intention to prefer is one which is, on a balance of probabilities, the most probable, although not necessarily the only inference to be drawn. In a criminal case, one of the ‘two cardinal rules of logic’ referred to by Watermeyer JA in *R v Blom* is that the proved facts should be such that they exclude every reasonable inference from them save the one to be drawn. If they do not exclude other reasonable inferences then there must be a doubt whether the inference sought to be drawn is correct. This rule is not applicable in a civil case. If the facts permit of more than one inference, the Court must select the most ‘plausible’ or probable inference. If this favours the litigant on whom the onus rests he is entitled to judgement. If, on the other hand, an inference in favour of both parties is equally possible, the litigant will not have discharged the onus of proof.”

[20] Once the Plaintiff proves facts giving rise to the inference of negligence on the part of the truck driver, the Defendant has to produce evidence to the contrary. The court will have regard to reasonable possibilities. Inferences cannot be made without objective facts that serve as the basis for establishing the other facts in question. Mr.

Hindley, for the Defendant, submits that no credible evidence was led that the deceased had collided with the alleged tyre, nor is there clarity regarding the tyre's location or whether it was actually on the road surface.

[21] Michelle Fortuin's evidence suggests that a day prior to the accident, a truck had a tyre burst, resulting in a damaged tyre being left on the roadway heading towards Cape Town, not far from the railing or barrier. According to her statement, *'the tyre was in the live southbound lane'*. Her evidence further revealed that the accident was the result of the negligence by the truck driver who had left the damaged tyre on the roadway earlier. This aspect of her evidence is corroborated by Fortuin's account. Mr. Hindley's argument in this regard is meritless, in my view.

[22] Further, there is evidence indicating that the accident occurred in the early hours of the morning around 4h30, which is at dawn. Visibility would have posed a challenge for a motorist approaching from a far distance, who would not be expecting hazardous object on a highway. There is no evidence that there was any warning signs placed from a distance to alert motorists of the hazard ahead. Expectedly, and reasonably so, the truck driver or employees of the truck owner were to remove the damaged tyre from the roadway after the tyre burst. The truck driver /owner ought to have reasonably foreseen that the abandoned tyre in the roadway would create a hazard for other road users and cause injury or death. Appropriate steps ought to have been taken by the truck driver/owner to reduce the risk of such harm, the accident could have been avoided had appropriate steps been taken. Importantly the Defendant failed to produce any evidence to the contrary.

[23] Fortuin in his second Affidavit, states that *'it does happen in the area where the accident occurred that people pick up the tyres and put them on the road.'* However, that evidence should be viewed in the light of Michell Fortuin's statement indicating that the tyre was left on the same lane the deceased vehicle travelled, after the truck's tyre burst. Crucially, it must be borne in mind that there is certainly no evidence that indeed someone took the tyre and actually placed it on the road. Accepting the above statement as an established fact would be tantamount to elevating speculation to the same level of an established fact. It is important to remind ourselves that inference is distinguishable from speculation and conjecture,

crucially, the court ought to be mindful thereof. In *MacLeod v Rens* 1997 (3) SA 1039 at 1048 at para D – E, the court cautioned as follows:

“Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer other facts which it is sought to establish. In some cases other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are not positive, proved facts from which the inference can be made the metaphor of inference fails and what is left is mere speculation or conjecture.”

[24] In the third affidavit, he deposed to, Fortuin corroborates Michell Fortuin’s version regarding the tyre burst, he however, explains that as a result of the lengthy time lapse, he was unable to recall when Michell Fortuin told him about the tyre burst. Similarly, Michelle Fortuin, although she could with certainty say that she told Fortuin, she could not with certainty say when she informed Fortuin about the tyre burst. In my view, it is entirely reasonable and understandable that after 16 years has lapsed it is not implausible that memory would fail them.

[25] Ostensibly, abandoning of a tyre on the trafficable surface of the roadway following a tyre burst is directly related to driving for the purposes of section 17(1) of the Road Accident Fund Act 56 of 1996. [The Law of Third Party Compensation, Third Edition, HP Kloppe, para 5.2.2.2].

[26] Mr. Hindley further made issue of the first and second affidavits, which were evidently not executed in accordance with the rules set out in the Justices of the Peace and of the Oath Act 16 of 1963. Mr. Hindley highlights that Fortuin’s written statements were contradictory to his testimony and that Fortuin displayed selective memory, thus rendering his evidence unreliable. The contradictions that Mr. Hindley addressed were all satisfactorily clarified by Fortuin. It must be borne in mind that in any event, without adducing any evidence on the particular aspects of the affidavits that were disavowed during cross examination, the Defendant cannot successfully rely on them. In my view, Mr. Hindley’s argument in this regard cannot be sustained.

[27] Significantly, Fortuin and Michell Fortuin were independent witnesses and neither of them have anything to gain from the outcome of this matter. All the witnesses made a good impression on this court. They were credible witnesses, and their evidence was consistent with the pleadings. They were unwavering during a robust cross examination by Mr. Hindley. The court is satisfied that the truth was told.

[28] In my view, the Plaintiff has successfully demonstrated to this court that the inference sought to be drawn is the apparent and acceptable inference. The insured driver/ the owner was negligent by abandoning the damaged tyre on the roadway after the tyre burst and in failing to place adequate warning signs to alert other road users on the lane en route Cape Town. The insured driver/the owner should have foreseen that their negligent acts would cause injury /death to other road users resulting in damages. In *Grove v Road Accident Fund* (74/2010) [2010] ZASCA 55(31 March 2011) Tshiqi JA stated as follows:

“7. The RAF is obliged to compensate for damages arising from bodily injury caused by or arising from’ the driving of a motor vehicle. The causal link that is required is essentially the same as the causal 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 available facts and relevant probabilities. The important question is how one should determine a causal nexus, namely whether one fact follows from another.”

[29] Mr. Benade in his opening address, aptly referred to an unreported matter where the plaintiff similarly instituted action for loss of support due to a death arising out of a collision which occurred as a result of a motor cyclist colliding with the tyre abandoned on the roadway. *A.D.C & Others v Road Accident Fund* (2018/027323) [2023] ZAGPHC 350 (18 April 2023) where Van der Merwe AJ remarked as follows:

“[13] The plaintiffs are innocent third parties claiming loss of support. It is trite that no question of apportionment or of fault or damages can be attributed to them. They only need to prove on a balance of probability the proverbial 1% negligence on the

part of the insured driver/owner is guilty of some negligence which was causally connected to the collision.”

Similarly, in *Kemp v Santam Insurance Co Ltd and Another* 1975 (2) SA 329(C) at 330F, the court dealt with a matter where the plaintiff was a passenger in a vehicle that collided with a heavy-duty wheel and tyre that had fallen from a motor vehicle shortly before the collision. The court held that the plaintiff had to prove that the collision was caused by the wheel while the vehicle was in motion, and that but for the negligence of the driver or owner of the vehicle, the wheel would not have fallen into the road.

[30] I am satisfied that the Plaintiff has established on the balance of probabilities that the death of the deceased arose out of the driving of an insured vehicle and caused by the negligence of the insured truck driver/ the owner as contemplated in section 17(1) of the Road Accident Fund Act 56 of 1996.

Order

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

- (a) I am satisfied that the Plaintiff has established on the balance of probabilities that the collision was caused as a result of a tyre left abandoned on the roadway by the insured driver/owner.
- (b) The Defendant is held liable for 100% of the Plaintiff's damages to be proved.
- (c) The Defendant shall pay Plaintiff's costs, such costs to include costs of counsel on Scale B.

RALARALA J
JUDGE OF THE HIGH COURT, WESTERN CAPE DIVISION

Appearances

For Plaintiff: E Benade
Instructed by: DSC Attorneys

For Defendant: C Hindley
Instructed by: State Attorney