REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 44331/2013

DELETE WHICHEVER ONE IS NOT APPLICABLE:

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~

(3) REVISED ✓

5·3·2015 _____

DATE SIGNATURE

In the matter between:

MASENG OTSILE PLAINTIFF

And

ROAD ACCIDENT FUND DEFENDANT

JUDGMENT

VAN NIEKERK J:

Introduction

[1] The plaintiff claims damages from the defendant in terms of the Road Accident Fund Act, 56 of 1996, in consequence of injuries sustained by him in a motor vehicle accident that occurred on 4 September 2010.

[2] After a substantive application filed by the defendant four days before trial and heard at roll call, the issues of liability and quantum were separated in terms of Rule 33 (4). The only issue to be determined for present purposes therefore is that of negligence.

[3] In his particulars of claim, the plaintiff avers that while travelling on Swartkoppies Road in southern Johannesburg at about 6:15 am, he was obliged to react to a sudden emergency situation created when a pedestrian, who had been walking along the grassed island between the north and southbound lanes, suddenly and without warning stepped into the northbound lane, across the plaintiff's line of travel. The plaintiff swerved to his left to avoid the pedestrian and in consequence, he collided with the rear end of the insured vehicle, being a 20 ton yellow Hyundai Caterpillar excavator, registration number XXH 984 GP. The insured vehicle was stationary, parked in what is commonly referred to as an emergency lane.

[4] The plaintiff contends that the sole cause of the collision was the negligence of the driver, being the last person to drive the insured vehicle and park it overnight in the emergency lane; alternatively, the owner of the insured vehicle; further alternatively, their joint negligence, in one of the following respects:

i) that the emergency lane was used as a parking space for the insured vehicle thereby preventing other road users, and particularly the plaintiff, from using the emergency lane in an emergency situation, such as that which presented itself to the plaintiff;

ii) that the vehicle had been parked in the emergency lane when it was not permitted to be so parked;

iii) that the insured vehicle had been left unattended for an extended period of time, thus endangering other road users;

iv) a failure to park the vehicle in the open veld alongside of the road thus not posing a danger to road users;

v) failure to cordon off the area in which the insured vehicle was parked and to place warning signs to alert other road users as to the presence of the insured vehicle or to take any other steps to warn road users that the insured vehicle was stationary and unattended, and thus constituted a danger to road users;

vi) parking the insured vehicle in an area where pedestrians cross the road thereby causing the potential hazard;

vii) leaving the insured vehicle unattended for an extended period of time thereby creating a hazard in an area where pedestrians are known to cross the road.

[5] It is common cause that as a consequence of the collision the plaintiff suffered serious bodily injuries, and that he was taken by ambulance to the Union Hospital in Alberton, where he remained until his discharge some months later.

[6] In its amended plea, the defendant admits that the plaintiff was the driver of a black Range Rover travelling along Swartkoppies Road from east to west, and that the plaintiff collided with the rear of the insured vehicle which was stationary, inside the yellow emergency lane. The defendant avers that the collision was caused solely as a result of the negligence of the plaintiff who was negligent in one or more of the following respects:

i) that he failed to keep a proper lookout;

ii) he failed to exercise any or any proper control over the vehicle that he was driving;

iii) he travelled at an excessive speed having regard to the prevailing circumstances;

iv) he failed to have due regard to the rights of other road users, including those of the insured driver;

v) he failed to utilise the brakes of the vehicle timelessly, adequately or at all;

vi) he failed to give any adequate warning of his intention to the insured driver; and

vii) he failed to avoid the collision when by the exercise of reasonable care, he could and should have done so.

[7] In the further alternative, the defendant pleads that in the event that the court finds that the driver of the insured vehicle was negligent, that negligence did not cause or contribute to the collision, which was caused solely by the negligence of the plaintiff in one or the respect referred to above. In the further alternative, and in the event of the court finding that insured driver was negligent and that such negligence caused or contributed to the collision, the defendant avers that the collision was caused partly by the negligence of the driver of the insured vehicle and party by the negligence of the plaintiff.

Material facts

[8] It is not disputed that on the morning of 4 September 2010, at about 6:15 am, the plaintiff was travelling in his Range Rover, registration number 724 TSL GP, on Swartkoppies Road, Kibler Park, in a northerly direction. (The pleadings refer to the direction of travel as east to west. During the trial, reference was consistently made to the direction of travel as south to north. Nothing turns on this.) Swartkoppies Road is a double-carriage way, with two lanes in each direction of travel. The lanes are separated by a grass island. In the northbound direction, the width of the road is some fourteen paces, including the emergency lane. Beyond the emergency lane is an expanse of open veld. Prior to the collision, the contracting company and owners of the insured vehicle, Group Five Construction, were engaged in the installation of a pipeline. The insured vehicle was parked in the emergency lane. It had been parked there since lunchtime on 2 September 2010, some 40 hours prior to the accident. The evidence of Mr. Naude, employed by Group Five as a safety officer, is that the

vehicle had broken down on account of a fault in the hydraulic system, and that spares were awaited from an overseas supplier.

[9] The plaintiff was the only eyewitness who was able to depose to the circumstances in which the collision took place. There is no reason to reject or call his evidence into question, and his version of events must be accepted. He testified that he was proceeding on Swartkoppies Road, after having spent the night at a friend in Rust en Vrede. He was traveling in the right hand lane at no more than 80 kilometres per hour, the applicable speed limit. The plaintiff noticed a vehicle to his rear and light traffic moving in the opposite direction, but otherwise the road was clear. From a distance of approximately 100 metres, he saw a pedestrian on the grass island separating the north and south bound lanes, walking in the same direction that he was travelling. He also noticed the insured vehicle in the emergency lane, about the same distance away as the pedestrian. At that stage, he thought that the insured vehicle was moving. When he was within 7.5 - 8 metres of the pedestrian, a man dressed in casual trousers, the pedestrian turned and stepped onto the verge of the road, so as to cross the road in the face of oncoming traffic.

[10] The plaintiff testified that when he saw the pedestrian step into the road, he took evasive action by swerving to the left and accelerating. His intention was to avoid the pedestrian by crossing the adjoining left-hand lane and driving into the open veld on the far side of the emergency lane. Having successfully avoided the pedestrian and travelling at 45 degrees relative to the road, he saw the insured vehicle in front of him. The plaintiff could not say how far the insured vehicle was in front of him at the time he swerved, but he was aware of its presence, having first observed the vehicle from some 100 metres away. Having swerved and accelerated to avoid the pedestrian, the plaintiff says that when he raised his eyes he 'saw the Caterpillar right in front of me'. The plaintiff testified that he 'thought the Caterpillar was busy' and that he would pass behind it. He took further evasive action by swerving to the right, but could not avoid a rear end collision with the insured vehicle. When asked under cross examination why he had not simply proceeded in the left hand lane after swerving to avoid the pedestrian, the plaintiff answered that 'the Caterpillar was way too close.' The plaintiff was later told that his vehicle had caught alight and that he had been rescued by a passing motorist and taken to the Union

Hospital by ambulance. He recalled having spoken to a police officer concerning the collision, but was not fully in possession of his faculties at the time. He was placed in a medically induced coma for some weeks and discharged from hospital in November 2010.

[11] A member of the Johannesburg Metro Police, Mr. Mamatlepa, testified that he attended at the scene of the accident, arriving there at the time that the plaintiff was being taken to hospital. He was unable to take a statement from the plaintiff that morning, and returned to the hospital the next day. The plaintiff was unable to tell him what happened. Mamatlepa testified that he made measurements at the accident scene – the road was fourteen paces wide from the grass island to the opposite edge, including the emergency lane. On his arrival at the scene, there had been no-one in charge of the insured vehicle except for a security guard who stated that he was guarding the vehicle. He did not observe any lights on the insured vehicle, and saw no reflective triangles in the vicinity of the collision.

[12] The only evidence proffered by the defendant was that of Naude. As I have indicated, Naude was not a witness to the accident, nor was he called as an expert witness. On the morning of the accident, Naude took a series of photographs, a number of which were referred to during the course of his evidence. These photographs depict the plaintiff's vehicle as having collided with the rear of the insured vehicle, the burnt-out wreck of the plaintiff's car and indications of debris consequent on the collision. In particular, Naude referred to a headlamp and part of a plastic fender which were found in the road, in front of the insured vehicle. He testified that these items were parts of the plaintiff's car.

[13] For reasons that are not apparent, Naude did not introduce the report that he had prepared into evidence. He had arrived on the scene approximately an hour after the collision and at that stage, the fire resulting from the collision had already been extinguished by the fire brigade. At that stage, the plaintiff had been taken to hospital. Naude stated that he visited the plaintiff in hospital on 4 September 2010 when the plaintiff was unable to speak to him and again later on 6 September 2010 when the plaintiff told him that he recalled that 'something jumped in front of him' and that he had swerved and collided with the insured vehicle. At that stage, the plaintiff could not recall exactly what it was that it caused him to swerve. Naude testified that

the insured vehicle had been parked in the emergency lane since the afternoon of 2 September. His investigations revealed that the vehicle had a leaking hydraulic pipe and that it was difficult to move the vehicle without damage to the hydraulic system. Naude could not recall seeing any warning lights on the insured vehicle but confirmed that at the time when he arrived on the scene, there were no reflective triangles to be seen. Naude confirmed that ordinarily, he would expect that a warning reflective triangle would be placed in the emergency lane 50 metres away from the insured vehicle and that the yellow revolving light affixed to the cabin of the vehicle would be activated.

[14] The evidence of Naude and Mamatlepa is such that it is more probable than not that on the morning of the collision, the insured vehicle was stationary in the emergency lane without there being any warning reflective triangles in place, nor any warning lights affixed to or in the vicinity of the insured vehicle.

Analysis

[15] An emergency lane, while it does not enjoy any particular definition or recognition in terms of the Road Traffic Act 29 of 1989, is 'resorted to by motorists in situations of emergency.' (see *Road Accident Fund v Odendaal* 2004 (1) SA 585 (WLD)). A motorist does not necessarily act unlawfully by stopping in an emergency lane; it is not generally used as a thoroughfare but generally speaking a motorist that is stationary in the emergency lane ought reasonably to foresee that the vehicle may constitute a danger or obstruction to other possible users of the emergency lane. Guarding against that harm would require reasonable steps to be taken to ensure that other motorists were alerted to the hazard represented by the stationary vehicle, for example, by the use of reflective triangles and hazard lights (*Road Accident Fund v Odendaal* (supra) at paragraph 15.

[16] The owners and/or the driver of the insured vehicle ought to have foreseen the reasonable possibility that leaving the insured vehicle in the emergency lane for a protracted period would pose a risk of harm, and ought to have taken reasonable steps, including steps to move the vehicle out of the emergency lane and into the adjoining veld, so as to avoid that risk. The presence of the insured vehicle in the emergency lane when in a state of mechanical breakdown would by each sheer size

and weight present a potential danger to road users such as the plaintiff. There is no evidence of any steps taken by the owners of the insured vehicle to remove the vehicle from the emergency lane, indeed, the attitude appears to be one of indifference. In these circumstances, in my view, the owners were negligent in leaving the insured vehicle in the emergency lane for what by the time of the collision was already a protracted period and what was clear to be an even more extended period pending the delivery of spares from overseas.

[17] The situation that pertained on the morning of the accident is exacerbated by the failure by the owners and/or the driver of the insured vehicle to take reasonable precautions to warn oncoming motorists of the fact of that the vehicle was parked in the emergency lane. It was incumbent on them at least to take reasonable steps to warn oncoming motorists, who like the plaintiff may have occasion to use the emergency lane for purposes of emergency, of the danger presented by the stationary vehicle. This would include the placing of warning triangles at an appropriate distance from the stationary vehicle, the installation of hazard lights and even positioning a person with warning flags ahead of the vehicle. The owners/driver of the insured vehicle did none of this, indeed, there were no steps taken to warn oncoming motorists of the danger ahead. In this regard, I must necessarily have regard to the extraordinary length of time that the insured vehicle remained in the emergency lane and the fact that it blocked the entire lane. Naude could furnish no reasonable explanation as to why the insured vehicle had not been moved or why no attempt had been made to move the vehicle out of the emergency lane. He did say that the insured vehicle was heavy and that it would have required some effort to move it, but he did not suggest that this was impossible. Naude was also unable to explain the absence of reflective triangles, which were clearly part of standard procedure in the case of a breakdown.

[18] Had reasonable steps been taken to warn motorists of the stationary vehicle, the plaintiff's attention may well have been drawn to the fact of the breakdown of the insured vehicle, and thus alerted him to the potential danger that it represented. The plaintiff's evidence, as I have indicated, was that when he first observed the insured vehicle from 100 metres away, he thought it was in motion. Warning reflective triangles placed at a reasonable distance before the obstruction to the emergency

lane represented by the parked insured vehicle and warning lights, either on the vehicle itself or placed some distance before it, would have altered oncoming motorists (and the plaintiff) of the potential danger represented by the parked vehicle.

[19] I am satisfied that the driver and/or owners of the insured vehicle were negligent in failing to take timeous and adequate steps to remove the hazard represented by leaving the insured vehicle parked in the emergency lane and that the harm of a collision was reasonably foreseeable. Motorists are entitled to expect that the emergency lane will be kept clear for their intended purpose, i.e. use by emergency vehicles or in other circumstances of emergency.

[20] That leaves the question of negligence on the part of the plaintiff. It is apparent from the evidence that the entire sequence of events took place within seconds, in circumstances that were potentially life threatening for both the pedestrian and the plaintiff. Mr. Adams, who appeared for the defendant, submitted during argument that the plaintiff's version was unsatisfactory and in particular, his evidence concerning the conduct of the pedestrian. It was highly improbable that a pedestrian, walking on a grass island between two lanes of traffic, would without warning suddenly change direction and step into oncoming traffic. Mr. Adams went so far as to suggest that the plaintiff, having collided with the rear of the insured vehicle, may well have been driving in the emergency lane. There is no evidence to support this proposition, which in any event, was never put to the plaintiff during cross-examination. I did not understand Mr. Adams seriously to contest during cross-examination that the plaintiff saw the pedestrian and the insured vehicle from a distance of about 100 metres, and that he took evasive action to avoid hitting the pedestrian. There is no evidence to gainsay the plaintiff's version that the pedestrian stepped into his path and that he took evasive action to avoid him, by swerving left.

[21] What is less clear is the plaintiff's actions in relation to the insured vehicle. Although the court ought to be cautious not to draw inferences of negligence on a piecemeal approach, the plaintiff failed satisfactorily to explain his conduct in relation to the insured vehicle. He was clearly aware of its presence, having observed it from a distance of approximately 100 metres. When he swerved to avoid the pedestrian,

the plaintiff must have been aware of the proximity of the insured vehicle, in the emergency lane.

[22] The plaintiff stated that it was only when he was approximately 7 or 8 metres from the pedestrian that he (the pedestrian) gave any indication that he intended to cross the road and the decided in those circumstances that the only way to avoid a collision was to swerve to the left and accelerate. In my view, in those circumstances, the plaintiff found himself in a sudden emergency which was not of his own doing. The question still remains as to what the reasonable and careful driver in the plaintiff's position would have done when confronted with the insured vehicle parked in the emergency lane. The plaintiff had intended when he first swerved to miss the pedestrian to cross the left-hand lane at a 45 degree angle to the road and drive into the adjoining veld. When he saw the insured vehicle in front of him, he changed his mind and swerved to the right, thus colliding with the rear of the insured vehicle. The plaintiff could not explain why he had changed his mind or why he had not kept to the left, thus passing behind the insured vehicle, or why he did not use the left hand lane, which on his own version was clear of any traffic, to avoid a collision with the insured vehicle. While the plaintiff actions in swerving to the left and accelerating to avoid the pedestrian and thereafter again swerving to the right to avoid the insured vehicle constitutes a manoeuvre as opposed to a series of single acts in a sequence of events, the fact of the matter remains that the plaintiff was aware of the insured vehicle in the emergency lane and had been so aware from a distance of as far as a 100 metres.

[23] What the plaintiff was unable to explain is why he failed to use the left hand lane, which in his version was clear of traffic, to avoid a collision with the insured vehicle. When he took evasive action, the plaintiff had a portion of the right hand lane and the whole of the left hand lane available to him to avoid a collision with the insured vehicle. On the plaintiff's own version, he failed to keep a proper look out and ought to have seen the insured vehicle sooner than he did. The plaintiff had seen the pedestrian and the insured vehicle from the same distance, on opposite sides of the road. There was nothing to obstruct the plaintiff's view of the insured vehicle. While his decision to take evasive action to avoid hitting the pedestrian who stepped into his pathway is beyond reproach, the same cannot be said for his failure

to use the adjacent lane to avoid a collision with the insured vehicle, to keep a proper look out and to avoid the collision.

[24] In my view, as far as the apportionment of blame is concerned, the owner/driver of the insured vehicle must shoulder most of the blame. They caused the obstruction in the first place, and while they cannot be blamed for the breakdown, they took no steps to attempt to remove the insured vehicle from the emergency lane. Instead, as I have observed, they were content to leave the vehicle in the emergency lane for days on end. In these circumstances, they had a responsibility to take reasonable steps to warn oncoming motorists of the hazard represented by the stationary vehicle; they took no steps at all. By comparison, the plaintiff was placed in a situation of danger and he failed to react timeously. He ought to have been in a position to avoid the collision with the insured vehicle by keeping a proper lookout and by reacting timeously to the danger that confronted him. A fair apportionment of fault seems to me to be 60 per cent against the defendant and 40 per cent against the plaintiff.

[25] In relation to costs, on 16 February 2015, at roll call, the court granted an order separating the merits and quantum, after an application seeking that relief was filed by the defendant a matter of days prior to the date on which the trial had been set down. The issue of costs was reserved for the trial court. The defendant can offer no explanation for its failure to file the Rule 33 (4) application outside of the time limit prescribed by the Rule. In these circumstances, the defendant ought to be liable for the costs incurred in relation to the opposed application.

I make the following order:

1. The defendant is ordered to pay the plaintiff 60 per cent of such damages as the plaintiff may prove.

2. The defendant is ordered to pay the costs of these proceedings, including the costs of the opposed application in terms of Rule 33 (4) heard on 16 February 2015.

A VAN NIEKERK

ACTING JUDGE OF THE GAUTENG LOCAL DIVISION

JOHANNESBURG

Attorneys for the plaintiff: Mafate Inc Attorneys
Counsel for the plaintiff: Adv F Docrat

Attorneys for the first defendant: Lindsay Keller
Counsel for the first defendant: Mr L Adams

Date of Hearing: 16 – 18 February 2015
Date of Judgment: 6 March 2015