REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION PRETORIA

CASE NUMBER: 373/2017

1) REPORTABLE: NO
2) OF INTEREST TO OTHER JUDGES: NO
3) REVISED.

SIGNATURE

30/08/2019
DATE

In the matter between:

TUMO THEBE Plaintiff

And

ROAD ACCIDENT FUND Defendant

JUDGMENT

ERASMUS AJ

INTRODUCTION

1. The parties agreed that, at this stage, the Court should consider only the issue of liability and that the issue of quantum be separated and be considered later. A separation of issues is therefore granted in terms of Rule 33 (4) of the Uniform Rules of Court.

2. On 5 February 2015 at approximately 02h00, and at Tlkgameng / Ganyesa Road in incident occurred. The Plaintiff sustained bodily injuries as a result of the incident and the question that is before me is whether the bodily injuries are caused by or arising from the driving of a motor vehicle by any person at any place within the Republic of South Africa.

FACTS COMMON CAUSE BETWEEN THE PARTIES

3. The following facts are common cause between the parties:

3.1 The *locus standi* of the plaintiff, and that he complied with all the procedural requirements for the lodgement of the claim;

3.2 That an incident occurred on 8 February 2015 at approximately 02h00;

3.3 The incident occurred at Tlakgameng / Ganyesa Road;

3.4 That the incident involved a bakkie with numbers unknown and the driver unknow;

3.5 That this Court has the necessary jurisdiction to hear the matter.

4. There is also no dispute whether the bakkie falls within the description of motor vehicle. [i]

THE EVIDENCE

5. It was only the plaintiff who testified. The Defendant closed it's case without calling any witnesses.

6. The plaintiff was spending the day of 7 February 2015 with a friend of him. The plaintiff and his friend spend the day watching soccer. They were having cold drinks. The house of the plaintiff and that of his friend is approximately 10 kilometres apart.

7. At abut 00h30 he decided that it is time for him to go back home as it is late. He still had to walk home.

8. His friend accompanied him and approximately half-way his friend turned around and the plaintiff then walked on his own.

9. The plaintiff saw a vehicle approaching and he decided to hike as he still had some distance to travel. The plaintiff then showed the sign that he is hiking.

10. Initially the bakkie (an Isuzu bakkie without a canopy) drove past him, but then stopped and reversed and the driver of the bakkie started to talk to the plaintiff. The plaintiff said to the driver of the bakkie that he needs a lift and he indicated how far he still had to travel. The driver of the bakkie asked the plaintiff whether he has any money in order to pay for the lift, and the plaintiff indicated that he has no money to pay for a lift.

11. Despite the fact that the plaintiff indicated that he has no money to pay for the transport (lift) the driver indicated to him that he can get onto the bakkie, in other words the goods apartment.

12. The plaintiff found three male persons in the goods department. He indicated that they were already seated on the back of the bakkie when he had the conversation with the driver about the money for the transport.

13. The plaintiff took seat in the middle of the back of the bakkie, more or less over the area where the back wheels of the vehicle are.

14. After a few minutes of departure from the spot where the plaintiff got onto the bakkie, the three men asked him for money in order to pay for the transport. The plaintiff repeated to them what he said to the driver of the bakkie, in that he does not have money to pay for the transport. The three men then said to him if he does not have money they will take his jersey and his shoes as payment.

15. The three men then started to pull on the plaintiff. They pulled him from side to side. The plaintiff then realised that he need to protect himself, and that is exactly what he did. In the beginning of the wrestling he was seated, but he realised that he will have to stand up in order to protect himself, which he did. This wrestling between the plaintiff and the three men who was with him at the back of the bakkie lasted for approximately 4 minutes.

16. The three men used force and the plaintiff tried to protect himself. The plaintiff tried to block the attack from the three men on the back of the bakkie.

17. During the wrestling between the plaintiff and the three men at the back of the bakkie, the driver of the bakkie simply drove and did nothing to assist the plaintiff. The driver of the bakkie did not participate, and he also did not stop the bakkie in order to find out what was going on between the plaintiff and the three men.

18. They three men then pushed him and he fell. He fell on the tar road.

19. After he fell on the road, he hit his head and he became dizzy. The plaintiff initially did not feel it, but he was bleeding. He only became aware of the fact that he was bleeding after a friend indicated to him that he is bleeding.

20. After he fell, the plaintiff got up and he went to the nearby house of a friend. On arrival it was indicated that he was bleeding. This friend asked him what happened and he indicated to them that people tried to rob him.

21. The driver of the bakkie never came back.

22. The friends took him to the clinic. The plaintiff was at the clinic for a few hours where the ambulance picked him up and took him to the Klerksdorp Hospital. The Plaintiff cannot recall how long he was in the hospital but he thinks it was a period of two weeks. After he was discharged from the hospital in Klerksdorp, he was transferred to the hospital in Ganyesa.

23. After the plaintiff was discharged from the hospital in Ganyesa, he went to the South African Police in order to file a complaint against the people who hurt him, being the three men at the back of the bakkie. He laid a charge for attempted robbery. He emphasized the fact that he wanted the South African Police to find the people who hurt him, being the three men on the back of the bakkie.

24. During cross examination it was put to the plaintiff how is it possible that he was the only person who fell of the bakkie. The plaintiff responded by saying that he was pushed and that he then lost control and that he then fell off the bakkie.

25. The contents of the statutory affidavit were also explored and various questions regarding the contents of this affidavit was put to the plaintiff during cross examination. The plaintiff stated that he went to the South African Police to lay charges against those people who hurt him. This was made in reference to the three males who were at the back of the bakkie with him. He stated that he was *"looking for the people who really hurt me"*. It was put to the plaintiff that in this affidavit nothing was stated about the driving of the bakkie. The plaintiff insisted that it is in the affidavit, but he did not manage

to find the reference to the driving of the bakkie in the affidavit. The plaintiff indicated that he did tell the Police officer about the speed the bakkie was travelling and that it was going sideways over the road. The plaintiff insisted that he did mention it to the Police Officer but see that it is not in the affidavit. He also did mention that the affidavit was never read back to him before he signed it.

ONUS OF PROOF

26. The onus of proof is in the plaintiff to prove his version that the plaintiff was a passenger on the bakkie in the back of the goods compartment with no canopy fitted when he was thrown and/or pushed off the vehicle constituting the incident.

27. At no stage during cross examination was it put to the witness that he was at no stage a passenger on the bakkie, or was it disputed that he was a passenger on the bakkie. The is no evidence before me indicating that the plaintiff was not a passenger on the bakkie. I therefore find that he indeed was a passenger on the bakkie when the incident occurred.

28. I agree with the submission by the Mr Venter on behalf of the plaintiff that in the even that I find that the plaintiff was a passenger on the bakkie then the plaintiff need to proof only 1% negligence on the part of the unknown insured driver to succeed with the whole of its action.

APPLICABLE LEGISLATION

29. It is convenient to set out the relevant provisions of the Act, which are contained in sections 17(1). Only conduct as provided for in section 17 (1) will render the defendant liable. Section 18 (2) of the Act limits the liability in certain circumstances, while section 19 of the Act excludes the liability in certain cases. For the purposes of this judgment it is not necessary that I deal with all three sections.

30. Section 17 (1) reads:

"*The fund or an agent shall –*

(a) …

(b) Subject to any regulation made under section 26, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of neither the owner nor the driver 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 the death of or ay bodily injury to any other person, caused by or

arising from the driving of a motor vehicle by any person at 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 or her employee in the performance of the employee's duties as employee ..."

31. As already indicated herein above, the court has to decide whether the injuries suffered by the plaintiff are injuries caused by or arising from the driving of the motor vehicle driven by the insured driver and were due to a wrongful act of the drivers of the motor vehicle.

REQUIREMENTS IN TERMS OF SECTION 17 OF THE ROAD ACCIDENT FUND ACT

32. Both Mr Mbhalati on behalf of the defendant and Mr Venter on behalf of the plaintiff spend considerable time on the requirements of section 17 of the Act. These arguments were relevant and necessary in light of the question I need to answer. It is necessary that I briefly deal with the requirements as well as the arguments that were presented to me. Both counsel also provided me with heads of argument, for which I am grateful.

33. Plaintiff argued that the Act requires that:

"15.1 There be compensation for the bodily injury, which was:

15.1.1 cause by or arising from the driving of a motor vehicle;

15.1.2 due to the negligence or other wrongful act of the driver." [ii]

34. It is the argument of the plaintiff that he does meet the requirements of section 17 (1) in that there is sufficient evidence before me to find that the injuries sustained was:

34.1 arising from the driving of a motor vehicle; and/or

34.2 due to another wrongful act of the driver.

35. I did not understand the plaintiff's argument that the other grounds / tests should not be considered, but these were the arguments he focused on.

36. On his turn, Mr Mbhalati on behalf of the Road Accident Fund indicated in his heads of argument that the requirements for liability for such a claim are found in section 17 (1) of the Act, and are the following: [iii]

"4.2.1 The claimant must be a person who has suffered damage or prejudice because of injury to himself or herself, or the death or bodily injury of another.

4.2.2 The conduct must be either the driving of a motor vehicle or another wrongful act of the driver, owner or the employee of the owner acting in the course of his employment or any other person. It is submitted

that a wrongful act of any other person is not covered by this section or any other part of the Act.

4.2.3 There must be fault on the part if either of these persons in the form of negligence or intention.

4.2.4 The damage or prejudice suffered must be either bodily injuries to him or herself, or resulting from the death or injury of someone else.

4.2.5 There must be a causal link between the damage or prejudice suffered and the conduct.

4.2.6 The damage or prejudice must occur at any place within the Republic of South Africa."

37. Mr Mbhalati submitted further that all the requirements set out in Section 17 of the Act must be satisfied for a claim to be successful. Failure to prove any of these requirements should result in a dismissal of the claim. He proceeded and stated that the plaintiff did not satisfy the requirements set out in subparagraphs 4.2.2, 4.2.3 and 4.2.5 of his Heads of Argument.

APPLICABLE LAW - CAUSED BY OR ARISING FROM THE DRIVING OF A MOTOR VEHICLE

38. I will now turn to deal with arguments raised by the parties and the relevant judgments and literature with reference to "*caused by or arising from the driving of a motor vehicle*".

39. The first consideration is whether the injuries sustained by the plaintiff was caused by or arising from the driving of a motor vehicle.

40. Mr Venter on behalf of the plaintiff stated in his heads of argument that basis of the liability of the Road Accident Fund is delictual in nature and that the phrase "*caused by or arising from*" must be interpreted against this backdrop. Mr Venter proceeded and argued that the wording "*caused by or arising from*" is the legislator's reference to the common-law requirement that there must be a sufficiently proven causal link between the conduct (driving of a motor vehicle) and the consequences of such conduct.

41. During the evidence presented and the respective arguments by both the parties much emphasis was laid on the interpretation and the understanding of the terminology *"arising from the driving of a motor vehicle"*. From the evidence that was presented it is clear that there is no immediate and direct consequence of the injuries sustained by the plaintiff and the driving of the motor vehicle.

42. Further, in determining a causal link between the negligent driving and the injury of the plaintiff, the plaintiff must establish a *nexus* on a balance of probabilities. There must be a reasonable connection between the harm threatened and the harm done. As already stated, no such direct evidence was placed before me.

43. This brings me to the question of the meaning of *"arising from the driving of a motor vehicle"*. In his argument in the Heads of Argument, Mr Venter indicated that *"arising from"* is the instance where the driving is the indirect cause of the injury or death. Thus, injury or death will arise from the driving of a motor vehicle where according to the standard of common sense the injury or death can be sufficiently connected or be found to be related to the driving.

44. In ***Wells and Another v Shield Insurance Co Ltd and Others*** [iv], to which Mr Venter referred me to in support of the aforementioned argument, Corbett J found at 870 D – H:-

"The death or bodily injury for which compensation is claimed must be causally related to this negligent or otherwise unlawful act and also the driving of the vehicle. Where the direct cause from the point of culpability is the same act or omission on the part of the driver in the actual driving of the vehicle then it would generally be found that the death or injury was 'caused by' the driving. Where the direct cause is some antecedent or ancillary act, then it could not normally be said that the death or injury was 'caused by' the driving; but it might be found to arise out of the driving. Whether this would

be found would depend upon the particular facts of the case and whether, applying ordinary, common-sense standards, it could be said that the causal connection between the death or injury and the driving was sufficiently real and close to enable the Court to say that the death or injury did arise out of the driving. I do not think that it is either possible or advisable to state the position more precisely than this, save to emphasise that, generally speaking, the mere fact that the motor vehicle in question was being driven at the time of death was caused or the injury inflicted or that it had been driven shortly prior to this would not, of itself, provide sufficient causal connection. This the injury suffered by a passenger aboard a bus as a result of being assaulted by a bus conductor could not be said to arise from the driving of the bus, even though the bus was being driven at the precise moment when the assault was committed. Similarly, in the illustration already given of X who stepped off the bus into a hole in the pavement, it could not be said that the injury arose out of the driving merely because driving (in the ordinary sense) had taken place immediately prior to this.")

(My emphasis)

45. The plaintiff went to great trouble to refer me to various case law where the Court in the past found that a certain set of facts can be said to illustrate circumstances where the Court found that certain actions are as a result of arising from the driving of a motor vehicle. The set of circumstances to which I was referred to included where injury or death arose from the driving of a motor vehicle where a petrol bomb was thrown into the passenger

compartment of a bus, where a horse which was killed in a collision was not removed from the roadway resulting in injuries sustained in a subsequent collision with the dead animal, where a person committed suicide as a result of depression emanating from his injuries and where a collision and injury resulted from skidding on diesel spilt on the roadway by a truck. Some other references were also made, for example where a passenger was pushed from a bus, the conductor having forced the person's hand free from the handrail, the injuries suffered by that person were caused by or arose form the driving of the bus. [v]

46. The plaintiff also referred me to the following instances where the Court found that in certain circumstances the injury or death did not arise as a result of arising from:

46.1.1 Injuries caused by the negligent operation of a separate mechanism attached to a tractor (a hydraulic control lever to lift a tip-back bucket) were not caused by nor did they arise form the driving of the tractor since the loading mechanism functioned separately and independently, even though the tractor supplied the power; [vi]

46.1.2 The unrelated and independent act of a passenger opening the door of a stationary vehicle cannot be related to the driving of the vehicle in question, and accordingly a claim arising in such circumstances could not be brought in terms of section 11 of Act 29 of 1942 (Act 29 of 1942 has been repealed by section 63 of Act 56 of 1972

which has been repealed by section 19 of Act 84 of 1986 which has been repealed by section 27 of Act 56 of 1996. [vii]

47. The plaintiff also relied on the judgment in the matter of ***Khumalo v Multilateral Motor Vehicle Accidents Fund*** [viii] where it was found that, where gunmen, in concert with the driver of a taxi, managed to drive alongside the taxi, and from that position fire shots into the taxi, injuring the driver, there was a casual connection between the driving of the vehicle and the taxi, more particularly so since the driver of the taxi deliberately facilitated the gunmen's objective. The injury to the plaintiff had accordingly arisen out of the driving of the vehicle carrying the gunmen and had been due to the negligence or unlawful act of its driver.

48. In this respect I was also referred to the Judgment by Pretorius J in the matter of ***Laas v Road Accident Fund*** [ix] where the plaintiff, being a Fidelity Security Guard, sustained injuries driving his employer's vehicle while him and a colleague were delivering pension money to Ekangala Post Office. The plaintiff was seated in his vehicle, waiting for his colleague who had taken the money into the post office, when his vehicle was boxed in by a Land Rover and a Honda motorcar. A number of armed men then approached him and shots were fired. The plaintiff responded by pushing the vehicles out of the way with the armoured vehicle and proceeded at a high speed to the Police station. The Honda chased the plaintiff at the same speed and they continued to shoot at the plaintiff. The plaintiff was travelling at 100 – 110 km per hour and in the process of driving away he traversed several speed

bumps on the main road at a high speed causing injuries to his cervical spine. After considering the legal position, the defendant was found to be 100% liable for the proven or agreed damages.

49. In most cases there is no problem in determining in one way or another whether or not the conduct of the wrongdoer has caused harm to the plaintiff.

50. In the unreported judgment of ***Grove v The Road Accident Fund*** x Tshiqi JA at para [7] stated that : -

"The RAF is obliged to compensate for damages arising from 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 available facts and relevant probabilities. The important question is how one should determine a casual nexus, namely one fact follows from the other."

51. Tshiqi JA in para [11] and [12], and with reference to ***International Shopping Co (Pty) Ltd v Bentley*** *1990 (1) SA 680 (A) at 700 E* stated that : -

"[11] Whether the wrongdoer should be liable for the consequences of his wrongful conduct entails an enquiry into whether the link between the act or omission and the harm is sufficiently close or direct for legal liability to ensue, or whether the harm is, as it is said 'too remote'. This

enquiry is concerned with a juridical problem in which considerations of legal policy may play a part.

[12] Courts have in the past grappled with choosing a criterion to be applied to determine legal causation. In S v Mokgethi & others, [xi] *Van Heerden JA held that there is no single and general criterion for legal causation which is applicable in all instances. He suggested a flexible approach where the court has the freedom in each case to apply a theory which serves reasonableness and justice, in light of the circumstances, taking into account considerations of policy.* [xii] *The basic question is whether there is a close enough relationship between the wrongdoer's conduct and its consequence for such consequence to be imputed to the wrongdoer in view of policy considerations based on reasonable, fairness and justice."*

52. In ***Kemp v Santam Insurance*** [xiii] at 331 A-C Diemont J held:

"*As was pointed out by CORBETT, J., in Wells and Another v Shield Insurance Co. Ltd. and Others,* ***1965 (2) SA 865*** *(C) at p. 867, the section lays down two prerequisites of liability upon the part of a registered insurance company for damages suffered by a third party as a result of bodily injury. These are (i) that the injury was caused by or arose out of the driving of the insured motor vehicle and (ii) that the injury was due to the negligence or other unlawful act of the driver of the insured vehicle, or the owner or his servant. There are thus two separate enquiries, a fact which is sometimes*

lost sight of because in most cases the injury is caused by the negligent driving of the insured vehicle" . Diemont J went further at 332C and stated that "*The casual relationship between the injury and the driving is a close one".*

53. In ***Miller v Road Accident Fund*** [xiv] van Oosten J, formulated the inquiry determining the *casual nexus* between the negligent driving of the driver of the insured vehicle and the injuries sustained by the plaintiff as follows:

"Two distinct enquiries arise, which were formulated by Corbett CJ in ***International Shopping Co (Pty) Ltd v Bentley*** *1990 (1) SA 680 (A) at 700 E – I as follows:*

"The first is a factual one and relates to the question as to whether defendant's causation'. The enquiry as to factual causation is generally conducted by applying the so-called 'but-for' test, which is designed to determine whether a postulated cause can be identified as a causa sine qua non of the loss in question…The second enquiry then arises viz whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether, as it is said, the loss is too remote. This is basically a juridical problem in the solution of which considerations of policy may play a part. This is sometimes called 'legal causation.

54. As indicated herein above, the plaintiff placed some reliance on the judgment by Broom DJO in ***Khumalo v Multilateral Motor Vehicle Accidents Fund.*** [xv] In considering this judgment, Broome DJP found at p 388 G -1:

"Reverting to the present case, the Cressida had to be driven behind and alongside the taxi to enable the gunmen to fire into it and at its occupants. The chase and the shooting took place over a substantial distance and lasted an appreciable time. On any reckoning there was a causal connection between the driving of the Cressida and the injury to the taxi driver. Furthermore, the driver was acting in concert with and deliberately facilitating the gunmen's objective. I am satisfied that the injury to the taxi driver and the subsequent injuries to the plaintiff arose out of the driving of the Cressida and were due to the negligence or unlawful act of its driver."

55. In essence, the Court found that the casual relationship between the driving of the Honda enabling the occupants to shoot at the vehicle of the plaintiff and the injuries sustained by the plaintiff was so real and close that it was caused by unlawful act as contemplated by the provisions of section 17(1).

APPLICABLE LAW – OTHER WRONGFUL ACT

56. In ***General Accident Insurance v Xhego*** [xvi] the distinction between negligent driving and an "*other unlawful act*" connected or concerning a motor

vehicle was recognised by the Appellate Division where, despite being warned, the owner of the bus negligently directed the bus to follow a certain route which resulted in a petrol bomb being thrown at the bus and the plaintiff was injured. The Appellate Division held that this injury arose from the driving of a bus.

57. In ***Road Accident Fund v Russell*** [xvii] Chetty AJA found at paragraph 26:

"[26] As far as foreseeability is concerned it is not necessary for the wrongdoer to have foreseen the details of any, possibly subtle, connection between the injuries caused to the deceased and his subsequent suicide. Finally, in applying the flexible approach which this Court enjoins one to employ in determining the question of legal causation, it would be eminently reasonable, fair and just to hold that the evidence established the requirements for the existence of such causation. Consequently the appellant is liable to compensate the respondent for such damage as she may prove."

58. In considering the principles, HB Klopper, The Law of Third Party Compensation, second edition in paragraph 5.2.4.1 set out:

"*This means that the unlawful conduct referred to in section 17 (1) must be interpreted restrictively in order that the conduct concerns a motor vehicle and/or the driving thereof in accordance with the nature of the preceding conduct specified by the legislator and the object of the Act, being the compensation of victims for damage from the negligent and unlawful driving of a motor vehicle."*

59. An "*other unlawful act*" will consequently become relevant when a third party is injured or his or her breadwinner is killed by conduct closely related to a vehicle and driving but there where the damage suffered by the third party did not arise from any negligent driving of motor vehicle.

60. HB Klopper further set outs at p 59:

"In the latter instance, the legislator never intended that the liability of the statutorily created fund should be extended to include all claims, including those which only remotely involve a motor vehicle,"

61. Regarding the question whether the defendant should be held liable due to negligence or other wrongful act of the driver, mr Venter argued that certain statutory provisions indicate the standards of acceptable behaviour of a driver of motor vehicle. He stated that a contravention of these provisions may under certain circumstances indicate negligence on the part of the driver.

62. I was referred to section 61 of the National Road Traffic Act, 93 of 1996, stating that the duty of a driver in the event of an accident, when such vehicle is involved in or contributes to any accident, or in which a person is killed or injured, provides that the vehicle shall immediately stop and report the accident.

63. I was also referred to : -

63.1 Regulation 250 (2) of the Regulations of the Road Traffic Act making provision that no person shall convey any other person in the goods compartment of a motor vehicle for reward: provided that the provisions of the sub-regulation shall apply not in respect of a motor vehicle which complies with the provisions of the NLTA;

63.2 Regulation 251 (1) of the Regulations of the Road Traffic Act making provision that no person shall operate, on a public road, a minibus or bus unless the sides of the passenger comportment are enclosed to the height of at least 600mm from the floor with material which is durable and weatherproof.

CONCLUSION

64. According to Diemont J in ***Kemp v Santam Insurance*** [xviii], with whom I agree, the primary conduct required is the negligent driving of a motor vehicle by the insured driver. I need to answer the question whether the fashion in which the insured driver drove caused the Plaintiff's injuries.

65. The plaintiff's evidence was that he fell from the bakkie as a result of the wrestling between himself and the three other men on the bakkie. He stated this more than once. Even in his mind, the actions by the three men caused him to be injured. He testified that he went to the Police to lay a charge against the three men who injured him.

66. Regarding the question whether the J88 serves as sufficient proof to indicate that the injuries sustained by the plaintiff is indeed as a result of a motor vehicle accident, I should take cognisance of the fact that the evidence by the plaintiff differs materially from what was stated in the J88. In light of these discrepancies, one then would expect that the doctor who completed the J88 will come and testify why he or she come to the conclusion that the injuries are as a result of a motor vehicle accident.

67. Therefore, the pertinent question whether the negligent driving by the unidentified insured driver, can in itself without any other factor be held to have caused the indicent, must therefore be answer in the negative. There is simply not enough evidence before me regarding the fashion in which the vehicle was driven.

68. The second question I need to concern myself is whether there is sufficient evidence before me to come to the conclusion that the is another wrongful act of the driver.

69. On the argument of the wrongful act, the plaintiff relied on 3 grounds, namely:

69.1 The driver is in contravention of the Road Traffic Act in driving away for an accident scene;

69.2 Seeking to convey individuals on a bakkie in contravention of the Road Traffic Regulations;

69.3 In being a co-accomplice to a robbery.

70. The only evidence before me regarding the accident and the actions by the driver was that he did not stop. No evidence was placed before me that he saw that the wrestling at the back of the bakkie. I cannot speculate as to whether he saw it and ignored it. There are also no grounds set out as to why he should have seen the wrestling at the back of the bakkie. No evidence was led as to lighting in the area, was it full moon, what colour clothing the people where which would have made them visible, etc. There is also no evidence before me that the plaintiff tried to get the attention of the driver and that the driver simply ignored him. I therefore cannot agree with this argument by the plaintiff.

71. It was also indicated that he never turned around and came back. In coming to this finding, I will have to speculate. The only evidence led was that the plaintiff got up and that he went to the house of a friend who lives nearby the place of the incident. There is absolutely no evidence before me as to who long he remained at the scene. If he got up and walked to the friend's house immediately then he cannot say for sure that the driver did not turn around. How far was he from the point where the driver had to drop him off before he fell of the bakkie. There is simply not sufficient evidence before me to come to this conclusion.

72. The question then arose why the driver did not report the incident. No evidence was led by either the plaintiff or a police officer who was on duty on the night in question to say for certain that this was not written in the occurrence book. What we know is that the plaintiff only reported the attempted robbery a couple of weeks later. I cannot therefore come to the conclusion that a police officer would have known if this incident was report on the night on question.

73. I therefore cannot agree with the argument of the plaintiff.

74. In as far as it relates to the question of the compliance with the regulations of the Road Traffic Act, I again cannot agree with the argument by the plaintiff. In respect of Regulation 250 (2) the evidence is clear. The driver did ask for money, but the plaintiff had none. If the plaintiff indeed did make payment then I could, and would have, come to the conclusion that the driver was in contravention with this regulation. But on the evidence before me I cannot come to this conclusion.

75. In respect of Regulation 251 (1) there is no evidence before me to state that the vehicle was a minibus or a bus. The evidence is clear that it was a bakkie.

76. In as far as it relates to the argument that the driver was a co-accomplice to a robbery, I have to reject the argument. There was absolutely no evidence led that the people at the back of the bakkie is known to the driver, that there was any communication between the driver of the bakkie and the three men

in terms of which the robbery was contemplated. And it this point I need to add and state that if there was indeed communication between the driver and the men at the back of the bakkie contemplating the robbery it would have been unwise of the plaintiff to still get onto the bakkie. I will again have to speculate and try and get into the minds of the men at the back of the bakkie and the driver.

77. There is simply not sufficient evidence before me to substantiate the possible claim against the defendant.

ORDER

78. As a result, I make the following order:

78.1 Absolution from the instance is granted;

78.2 Each party is liable for his or its own costs.

N Erasmus

Acting Judge

Appearances:

On behalf of the Plaintiff : Adv P A Venter

Instructed by Van Zyl Le Roux Inc

On behalf of the Defendant : Adv S Mbhalati

Instructed by Maluleke Msimang & Associates

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[i] See Plaintiff's Heads of Argument, Undated
[ii] See Plaintiff's Heads of Argument, Undated
[iii] See Defendant's Heads of Argument, dated 19 July 2019
[iv] 1965 (2) SA 865 (C)
[v] ***Pillay v Santam Insurance Co Ltd*** 1978 (3) SA 43 (D)
[vi] ***Petersen v Santam Versekeringsmaatskappy*** 1961 (1) SA 205 (C); ***Nkhala b Mutual & Federale Versekeringsmaatskappy Beperk*** 1985 (1) SA 824 (O)
[vii] ***Pretoria City Council v Auto Protection Insurance Co Ltd*** 1963 (3) SA 136 (T)
[viii] 1997 (4) SA 385 (N) 388 G - I
[ix] 2012 (1) SA 610 (GNP)
[x] 974/10) [2011] ZASCA 55 (31 March 2011)
[xi] 1990 (1) SA 32 (A) 40 - 41
[xii] J Neethling, J M Potgieter and P J Visser *Law of Delict* 5ed (2005) page 174
[xiii] 1975(2) SA 329 W
[xiv] [1999] 4 All SA 560 (W)
[xv] 1997 (4) SA 384 (NPD)
[xvi] [1991] ZASCA 189; 1992 (1) SA 580 (A)
[xvii] [2000] ZASCA 155; 2001 (2) SA 34 SCA
[xviii] Supra