REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, PRETORIA

CASE NO: 50698/2020

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

06/02/2023

SIGNATURE DATE

In the matter between:

ELIJAH FIKILE MATLALA Plaintiff

and

THE ROAD ACCIDENT FUND Defendant

JUDGMENT

MALUNGANA AJ

Introduction

[1] The plaintiff, a 38 year old male at the time of the trial, sued the defendant, the Road Accident Fund ("RAF"), for damages arising out of the motor vehicle collision in which he was injured on the 30th of July 2016.

[2] At the commencement of the trial, counsel informed the court that the parties were agreed on the separation of merits from quantum in terms of Rule 33. I so ordered. Consequently the matter proceeded on the issue of merits, while the issue of quantum was deferred for later determination.

[3] On 30 July 2016, at approximately 19h00 and along Kgabalatsane Road, near Ga-Rankuwa, the following three motor vehicles were involved in a collision, namely a Mercedes Benz driven by the plaintiff; a Toyota Tazz ('the Tazz') and a VW Polo ('the Polo') driven by the insured drivers named in the particulars of claim.[1]

[4] It is alleged by the plaintiff in his particulars of claim, that the said collision was caused entirely by the negligence by the driver of Tazz ('the first insured vehicle'), alternatively the driver of the Polo)'the second insured vehicle'), who were negligent in one or more of the respects set out in paragraph 5 of the particulars of claim.[2]

[5] It is further alleged that, as a result of the collision the plaintiff sustained the following injuries: a head injury; a bilateral orbital wall fracture; soft tissue to the cervical and lumber spine and injuries to the both wrists.[3] The nature and extent of these injuries are not necessary for purposes of this judgment.

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[1] Mercedes Benz BL 64 XD GP; Toyota Tazz SNM 352 GP and VW Polo DM 86 LW GP. POC para 4.
[2] Case lines H7 to H10, paras 5.1-5.3 of the POC.
[3] Para 6 of the POC. Case lines H10

[6] The version of the plaintiff was disputed in *toto* by the RAF. In the plea the RAF also raised the defence of contributory negligence on the part of the plaintiff in causing the collision.[4]

Issues for determination

[7] The main issue to be determined is whether either of the two drivers of the first and second insured vehicles were negligent, and whether their respective or joint negligence resulted in the collision which caused the plaintiff's injuries.

Test

[8] The *locus classicus* here is the judgment of Corbett J (as he was then) in *Wells and another v Shield Insurance Company Ltd and Another* 1965 (2) SA 865 (C) at 868-870. The relevant portion at 870D-H reads:

> *"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 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 normally be said that the death or injury was 'caused by' the driving; but it might be found to arise out of 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 casual 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 emphasize that, generally speaking , the mere fact that a motor vehicle in question was being driven at the time 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. Thus 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."*

Evidence

[9] The plaintiff took to the witness stand and testified under oath. He testified that on 30 July 2016 at about 19h00, he was driving along Kgabalatsane Road, in Ga-Rankuwa, when his vehicle was involved in a collision with two other motor vehicles. At the time of the collision it was already dark and visibility was not good. There was one lane going in each direction of the road. Whilst so driving he

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[4] Para 3 of the Plea. Case lines H24

observed that there was an oncoming vehicle with its lights switched on encroaching on his lane of travel. He swerved to the right in order to avoid a head on collision, but collided with the other vehicle. When asked why he did not swerve to the left, he replied that he was not sure if the terrain on the left hand side was safe.

[10] Under cross examination he revealed that he was on his way to fetch the lady who was on labour at Zone 4. He also testified that he was driving at the speed of about 60 to 70 km/h.

[11] According to the report of Mr. Grobbler, the Accident Reconstruction Expert, whose report was admitted into evidence, the plaintiff was travelling from the south in the northerly direction. Upon noticing the oncoming vehicle he tried to swerve to the right to avoid the collision but it was too late to avoid the collision. He remembers hitting the Toyota Tazz.[5]

[12] Mr Grobbelaar also obtained the version of the driver of the VW Polo {the second insured vehicle). His version was to the effect that he was travelling on the Ga-Rankuwa Cemetery road towards Zone 20. He drove at a speed of approximately 40km/h. In front of him there was a Toyota Tazz driven by his friend Oagile. A vehicle came from the opposite direction at a high speed veered onto their lane and collided with the Tazz. It then spun towards his car and collided with his vehicle.

[13] Mr Grobbelaar's opinion on the occurrence of the collision is recorded in paragraphs 10 to 11. Essentially he postulates two possibilities as to the manner in which the collision occurred:

> "a) The Tazz was travelling southbound but in the northbound lane just prior to collision. The Mercedes driver swerved to his right from his correct lane into his incorrect lane (the southbound lane) to avoid a head-on collision with the Tazz, but the Tazz driver swerved to his left back to his correct lane and collision occurred in the southbound lane.
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> For the Polo travelling behind the Tazz, and there being no indication in the statements of the Polo Driver or his passenger

[5] Paras 7.1-7.3 at Case lines D5-D6

that they swerved into this approaching lane prior to collision, it follows from the area of collision at "H" in the police photographs that the Polo was then also probably travelling in this lane behind the Tazz. (It must be indicated here that, though the statements of the Polo driver and his passenger do not indicate directly in which lane they were travelling, they do not Indicate that the Mercedes veered into their lane and collided with the Tazz.

b) The Tazz was travelling in the Southbound lane when the collision with the Mercedes occurred, but for the collision with the Mercedes and Polo occurring in the northbound lane "H", and there being no indication in the statements of the Polo driver or his passenger that they swerved into this approaching lane prior to this collision, it is probable that the Polo was travelling in this lane and therefore, in probability, attempting to overtake the Tazz prior to the collision, with this collision at "H" occurring directly after the collision of the Mercedes with the Tazz. The Mercedes driver therefore swerved to his right in order to avoid a head-on collision with the Polo that was attempting to overtake the Tazz."

[14] According to Grobbelaar the version of the plaintiff, the driver of the Mercedes is consistent with the version in 'b' above, and inconsistent with the versions of the Polo driver and his passenger in relation to the lane in which they were travelling. He concludes that the plaintiff was faced with a vehicle approaching in his lane of travel.[6]

[15] The defendant closed its case without calling any witness.

Submissions

[16] Counsel for the plaintiff submitted that the plaintiff was faced with an oncoming motor vehicle which was on his side of the road. He could not swerve to the left as he was afraid of overturning on the gravel shoulder of the bend of the road. He referred to the report of the accident reconstruction expert(Grobbelaar),and submitted that the plaintiff found himself in an emergency situation. He did what he was supposed to do under the circumstances. As regards the alleged contributory negligence, counsel for the plaintiff submitted that the defendant bears the onus to prove any contributory negligence on the part of the plaintiff, and it had failed to adduce evidence to this effect.

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[6] Para 10.3 Case lines D10

[17] Counsel for the defendant submitted that the plaintiff failed to act like a reasonable man. He could have swerved to the left, as this would have avoided an accident between him and the Tazz. He urged the court to find that the plaintiff was 30% responsible for the occurrence of the collision in terms of the Damages Act.

Assessment

[18] As in criminal cases the onus can only be discharged by adducing credible evidence to support the case of each party.[7]

[19] In the current case the plaintiff had to adduce evidence on the balance of probabilities that his injuries were caused as a result of the negligent driving of either or both of the insured drivers of the Toyota Tazz or the VW Polo. See *Miller v Road Accident Fund* [1999] 4 All SA 560 (W), at p 565(i).

[20] Turning to the evidence. The plaintiff's evidence is to the effect that upon noticing the vehicle (the Tazz) in front of him he swerved to the right hand side of the road. The plaintiff further testified that he could not swerve to the left on the gravel shoulder of the road as he was afraid of overturning. I must point that the plaintiff made a good impression to the court, his version was to a large extent consistent with the findings of the accident's reconstruction expert. I also find it undisputed that he was faced with an emergency situation.

[21] As regards the contributory negligence alleged by the defendant, I find no basis for any negligence to be imputed to the plaintiff. The defendant did not bother to adduce any evidence of this claim. A trier of fact must consider the totality of all the facts and then decide whether the plaintiff exercised the standard of conduct which the law requires. The standard of care so required is that which a reasonable man would exercise in the circumstances. It cannot be said in the present case that the plaintiff foresaw that the insured motor vehicles will encroach onto his lane of travel. [8]

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[7] *National Employers General Insurance v Jagers* 1984 (4) SA 437 (E) 44D-441A.
[8] *Santam Versekeringsmaatskappy Bpk v Swart* 1987 (4) SA 816 at 819B

Conclusion

[22] I am therefore satisfied that the plaintiff's version as to how the collision occurred is far more probable. As set out in Mr. Grobbelaar's report, the plaintiff was faced with an emergency situation. He did not know which side to turn in order to avoid the collision. Moreover, it is improbable that the accident could have happened in the manner that the driver of the Polo and his passenger described. In the result I hold that the plaintiff succeeded in discharging the onus of proving that the insured driver(s) were negligent.

[23] Accordingly, the following order is made:

1. The Defendant is liable for the plaintiff's proven damages arising from the injuries sustained in the collision on 30 July 2016;

2. The determination of the plaintiff's quantum is postponed *sine die*.

3. The Defendant will pay the agreed or taxed party and party High Costs of the action including costs of counsel.

PH MALUNGANA
Acting Judge of the High Court

APPEARANCES:

For the Plaintiff	: Adv F Grober SC
Instructed by	: Adams & Adams Attorneys
For the Defendant	: Ms Elaine Van Zyl
Instructed by	: State Attorney