REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 2011/22051

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

29/11/2012
DATE

SIGNATURE

In the matter between:

MATSENJWA, MANDLA Plaintiff

and

ROAD ACCIDENT FUND Defendant

JUDGMENT

MOSHIDI, J:

INTRODUCTION

[1] The plaintiff has instituted action against the defendant for damages arising from injuries sustained by him in a motor accident which occurred on 5

September 2008. Neither the driver nor the motor vehicle that knocked the plaintiff, a pedestrian, were known.

THE SEPARATION OF ISSUES

[2] At the commencement of the trial, and by agreement between the parties, an order was granted in terms of Rule 33(4) of the Uniform Rules of Court, separating the issues of liability from those of quantum of damages. In terms of the separation order, the only issue for determination in this trial is that of liability.

THE EVIDENCE

[3] The evidence was brief and straightforward. The plaintiff was the only witness in the trial. The defendant closed its case without leading any evidence.

[4] The plaintiff, a 55 year old plumber, testified. On 5 September 2008, at about 19h00 on the N1 South Golden Highway, between Eldorado Park and Naturena, Mondeor, he was a passenger in a Peugeot 505 motor vehicle ("*the vehicle*"). The motor vehicle belonged to the plaintiff, but was at the time driven by one Mr Sabelo Mabuso ("*the driver*"). The driver on realising that the motor vehicle ran out of fuel, stopped the vehicle, in order to obtain fuel. The driver climbed out of the motor vehicle and went to buy petrol at a petrol station some distance away.

[5] On the departure of the driver, the plaintiff also climbed out of the motor vehicle. The motor vehicle was parked off the road tarmac on the left-hand side and on the grass. The reason why the plaintiff climbed out of the motor vehicle was to place some triangular signs behind the motor vehicle a few paces away. This was to warn motorists approaching the motor vehicle from behind of the presence of the stationary motor vehicle. This task the plaintiff completed. He also placed a triangular sign in front of the motor vehicle. However, in the process of walking back to the motor vehicle, the plaintiff was knocked down by an unidentified motor vehicle from the back. The plaintiff fell. He lost consciousness which he regained at the Baragwanath Hospital after being conveyed there by an ambulance. The plaintiff sustained injuries to his right elbow and left patella with a crack fracture for which he was treated with an above knee POP for about a month. On 12 September 2008 the plaintiff reported the accident at the Mondeor Police Station.

THE CROSS-EXAMINATION OF PLAINTIFF

[6] The cross-examination of the plaintiff revealed the following. The petrol station to which the driver proceeded was about 500 metres away from the motor vehicle. He had placed one triangular sign behind and another in front of the motor vehicle, about 15 metres away. The driver did not witness the accident as he had quickly disappeared towards the filling station. The triangular signs were placed along the yellow line and the motor vehicle was parked completely off the road on the grass part thereof. The plaintiff was about 7½ metres on his way back to the motor vehicle when he was knocked

down from behind. He did not see any collision between the motor vehicle and the unidentified motor vehicle. He could not memorise the registration letters and number plate of the unidentified motor vehicle. He readily conceded that there were actually two petrol stations some distance away from the accident scene as indicated on the police accident report ("*AR*") form.

SOME LEGAL PRINCIPLES

[7] It is trite law that the *onus* is on the plaintiff to prove, on a balance of probabilities that his injuries were caused as a result of the negligent driving of the unidentified driver of the insured motor vehicle. See in this regard, *inter alia*, *Loras v Road Accident Fund* 2012 (1) SA 610 (GNP).

[8] The plaintiff also has to show and prove that there was indeed contact between the unidentified motor vehicle and himself. Indeed, s 17(1)(b) of the Road Accident Fund 56 of 1996, provides that:

> "*The fund or an agent shall –*
>
> *(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 thereof has been established, be obliged to compensate any person (the 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 any 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."*

Regulation (2)(d), framed under s 26 of the Road Accident Fund Act provides:

> *"(2)(i) In the case of any claim for compensation referred to in section 17(1)(d) of the Act the Fund shall not be liable to compensate any third party unless –*
>
> > *(d) the motor vehicle concerned (including anything on, in or attached to it) came into physical contact with the injured or deceased person concerned or with any other person, vehicle or object which caused or contributed to the bodily injury or death concerned."*

[9] In determining the *causal nexus* between the negligent driving of the driver of the insured vehicle and the injuries sustained by the plaintiff, Van Oosten J, in *Miller v Road Accident Fund* [1999] 4 All SA 560 (W), at 565I, formulated the inquiry as follows:

> *"Two distinct enquiries arise, which were formulated by Corbett CJ in International Shipping Co (Pty) Ltd v Bentley 1990 (1) SA 680 (A) at 700E–I as follows:*
>
> > *"The first is a factual one and relates to the question as to whether defendant's wrongful act was a cause of the plaintiff's loss. This has been referred to as 'factual 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. In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such an hypothesis plaintiff's loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the plaintiff's loss; aliter, if it would not so have ensued. If the wrongful act is shown in this way not to be a causa sine qua non of the loss*

> *suffered. then no legal liability can arise. On the other hand, demonstration that the wrongful act was a causa sine qua non of the loss does not necessarily result in legal liability. 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'.'"*

In *Engelbrecht v Road Accident Fund and Another* 2007 (6) SA 96 (CC), at para [23], Kondile AJ, said:

> *"[23] The applicant's current claim has been created by statute, namely the Road Accident Fund Act. The Act can be employed by anyone who is injured in consequence of the negligent driving of a vehicle in a hit-and-run situation to claim compensation for any loss sustained. The Act is the latest statute in a long line of national legislation beginning with the Insurance Act 29 of 1942. The stated primary concern of the Legislature in enacting these statutes is, and has always been, 'to give the greatest possible protection ... to persons who have suffered loss through a negligent or unlawful act on the part of the driver or owner of a vehicle'."*

APPLYING THE LEGAL PRINCIPLES TO THE FACTS

[10] In the present matter, the credible evidence of the plaintiff was uncontested. The evidence was further corroborated by the police accident report. This report, under the inscription "*Brief description of the accident*", stated:

> *"I was on my way back from putting the triangular sign back after it was been fallen down due to weather condition. The other vehicle came*

from back and bumped me down. I flew off the road and became dizzy."

The plaintiff was the only witness in the trial, as stated above. It was not suggested to him in cross-examination that the accident as described by him did not occur. Neither was it suggested that he was in any manner negligent. He was a pedestrian when the accident occurred After careful scrutiny of his evidence, I could find no well-founded suggestion that the plaintiff was engaged in a fraudulent claim.

[11] The plaintiff's counsel relied on, *inter alia*, *Gray v Protea Versekeringsmaatskappy Bpk* 1990 (3) SA 823 (OPA). In that case the plaintiff sued for damages for injuries sustained when a motor vehicle (insured by the defendant) collided with him from the rear whilst he was out jogging early one morning. The evidence showed that the plaintiff was jogging on the cement portion of the road immediately adjacent to the kerbstones. About 1 metre from the kerbstones there was a continuous yellow line on the tar to indicate where the roadway for vehicular traffic ended. The defendant contended that the plaintiff had been contributorily negligent in jogging on the road with his back to traffic which he could have expected to have been on the road. The Court held, *inter alia*, that the plaintiff had not been guilty of negligence. He had jogged on a portion of the road not intended for vehicular traffic and had been jogging right next to the kerbstones. In my view, the same applied to the instant matter, save that the accident occurred on the highway. However, the plaintiff had taken sufficient precautionary measures by placing triangular signs both in front and back of the motor vehicle in order

to alert other motorists of the presence of the motor vehicle. In addition the motor vehicle had stopped due to the lack of fuel. The accident did not involve the motor vehicle but the plaintiff as pedestrian. The argument of counsel for the defendant that a distinction must be made between a jogger and a pedestrian was, in my view, without merit.

CONCLUSION

[12] I conclude therefore that the plaintiff ought to succeed to recover his full proven damages against the defendant. There was plainly no negligence on his part.

ORDER

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

1. The defendant shall be liable in full for the plaintiff's proven or agreed damages consequent upon the injuries sustained by him during the accident on 5 September 2008.

2. The defendant shall pay the costs of the trial on the merits.

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

D S S MOSHIDI
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

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INSTRUCTED BY	PULE INC
DATE OF HEARING	31 AUGUST 2012
DATE OF JUDGMENT	29 NOVEMBER 2012

SUMMARY

Negligence – what constitutes – claim for damages for injuries sustained in accident in terms of section 17(1)(b) of the Road Accident Fund Act 56 of 1996 – unidentified motor vehicle – pedestrian walking towards stranded motor vehicle when knocked down from the back by unidentified motor vehicle – pedestrian not negligent.