REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 30944/08

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

11th May 2012
DATE

SIGNATURE

In the matter between:

**ANTONIE ANGELO** Plaintiff

and

**SLATTER JONATHAN WILLIAM** Defendant

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**J U D G M E N T**

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**SALDULKER, J:**

INTRODUCTION

[1] The lending of a motor vehicle is not as simple as it appears to be. It is fraught with pitfalls, both for the lender and the borrower, as the parties in this matter discovered. The plaintiff instituted an action against the defendant in respect of damages suffered by him, arising out of a collision which occurred

on 23 May 2008. A BMW motor vehicle, at all material times owned by the plaintiff, with registration letters and numbers TYP 304GP, then driven by the defendant, Mr Slatter, was involved in a collision with another vehicle, a VW Golf with registration letters and numbers TKS 597 GP, then driven by Mr P S Chauke, in the area of the Rooihuiskraal off-ramp, on the N1 Ben Schoeman highway. At the time of the collision, both vehicles were travelling in a northerly direction.

[2] At the outset the parties agreed that the merits and quantum be separated in terms of Rule 33(4). The matter proceeded on the merits.

[3] Although there were three alternative claims to the main claim, the plaintiff pursued two claims at the trial, the main claim and one alternative claim, the latter a delictual claim for damages, arising out of the collision which it was alleged, was occasioned as a result of the negligence of the defendant.

[4] According to the plaintiff the main claim is based on a loan for use, *commodatum*[1], in that an oral agreement was entered into between the parties on or about 12 May 2008, at the plaintiff's premises, in terms of which the plaintiff would lend the BMW to the defendant, and the defendant would

[1] See 1.General discussion on Commodatum *in LAWSA* Vol 15 Part 2,para 279-293;Commodatum is a transaction whereby something is, without any gain, lent for certain use, on condition that the same thing shall after the use be returned. The borrower must return the thing lent to him in the same state in which it was, and is liable for damage or injury caused to the property by his neglect.
2.*Historical Foundations of South African Private Law, Butterworths* 1998 at pg 256,para14.2.3 defines commodatum as a gratuitous loan for use by which the borrower bound himself to return the identical thing to the lender.

return the BMW to the plaintiff by 15h30 on 23 May 2008 in the same condition he received it from the plaintiff, fair wear and tear excepted. In this regard the plaintiff contends that the defendant took delivery of the BMW on 12 May 2008, at which time the value of the vehicle was R162, 500.00. The BMW, whilst being driven by the defendant, was involved in a collision and damaged beyond economical repair. As the defendant failed to return the BMW to the plaintiff in the same condition he received it, the plaintiff has suffered damages in the amount of R156,500.00, *viz* the value of the motor vehicle less its salvage value. In the alternative (alternative claim 1) the plaintiff *inter alia* pleaded that the collision was caused as a result of defendant's negligent driving.

[5] The defendant raised special pleas in respect of both the main claim and the relevant alternative claim. According to the defendant, both the main and the alternative claim do not disclose a proper cause of action.

[6] It has been pleaded by the defendant that he drove the BMW with the knowledge and consent of the plaintiff and that the plaintiff bore the risk in respect of the BMW, and had indemnified the defendant against any liability in respect thereof. The defendant has also admitted that he collided into the rear of Mr Chauke's vehicle. However the defendant has specifically pleaded that he did not return the BMW because of the collision.

[7] The plaintiff amended his particulars of claim a number of times. In his supplementary heads of argument, the plaintiff sought to amend his pleadings

further. He applied to amend paragraph 14 of the particulars of claim in so far as it might be necessary to do so, by deleting the word 'solely' therein. The plaintiff contended that it was clear from the evidence that the defendant's negligence was the 'cause' (not the sole cause) of the collision. A further amendment was sought in regard to paragraph 4.2 of the particulars of claim: According to the plaintiff's pleadings, the parties agreed on 12 May 2008 that the motor vehicle would be returned by no later than 15h30 on 23 May 2008. It had become clear from the plaintiff's evidence, that he gave the defendant an estimate of two weeks (explained by the plaintiff as ten working days, which equates to Friday, 23 May 2008, within which time the Jetta would be repaired, i.e. when the duration of the loan of the BMW would come to an end, but that, subsequently on 22 May 2008, the plaintiff and defendant agreed, during a telephone conversation, that the defendant would return the BMW the following day, 23 May 2008, before close of business. (The defendant has contended that the evidence of the plaintiff was that the defendant agreed to return the BMW the following morning). Thus, insofar as it may be necessary, the plaintiff sought an amendment to paragraph 4.2 of the particulars of claim to include: *'Alternatively, Plaintiff pleads that this term was agreed upon expressly on about 22 May 2008, verbally during a telephone conversation between the parties personally, whilst Plaintiff was at his premises."*

[8] The defendant avers that the various amendments to the plaintiff's particulars of claim and the plaintiff's attempts to further amend his particulars at this late stage is highly prejudicial to the defendant.

EVIDENCE

[9] The defendant did not testify nor did he call any witnesses on his behalf. The evidence led on behalf of the plaintiff is summarised below.

Plaintiff

[10] The plaintiff, Mr Antonie, a panelbeater by trade, testified that he was the owner of the BMW . The defendant brought his motor vehicle, a Jetta, which had hail damage, to the plaintiff to repair in November 2007. Sometime thereafter, in December 2007, he collected the Jetta from the plaintiff. In February 2008, the defendant took the Jetta back to the plaintiff as he found the paint work done by the plaintiff to be unsatisfactory. On this occasion the plaintiff provided the defendant with a loan car, a Conquest. Approximately a week later the Conquest was returned by the defendant and the Jetta 're-collected'.

[11] During March 2008, the defendant took the Jetta back to the plaintiff for the same reason, and requested that the plaintiff provide him with a 'better' loan car as the Conquest was too small, and did not have air conditioning. The plaintiff then lent the defendant his own personal vehicle, the BMW forming the subject matter of the dispute between the parties.

[12] A few days later the defendant returned the BMW in the same condition he received it, and again collected the Jetta. However, the plaintiff then told him that he was not entirely satisfied with the paint work on the Jetta and informed the defendant that a new paint manufacturer wanted to do a

demonstration, and then suggested that the Jetta be utilised for this purpose. The defendant agreed.

[13] The defendant brought the Jetta back to the plaintiff's premises on the morning of 12 May 2008. The plaintiff testified that they exchanged keys, removed their items from the cars, and the BMW was then lent to the defendant at no charge. There was a common understanding between them that the defendant would be responsible for the BMW, and that the standard agreement, that the defendant would return it in the same good condition fair wear and tear excepted would apply, and that, if there was no 'cover', he, the defendant would be liable. The plaintiff gave the defendant an estimate of when the Jetta would be ready, namely two weeks, ie 10 working days.

[14] On Thursday, 22 May 2008, the plaintiff contacted the defendant on his cellphone, advising him that the Jetta was ready for collection. The plaintiff informed the defendant that he needed the BMW for the weekend. The defendant agreed to collect the Jetta, and return the BMW the following morning, Friday the 23rd May 2008.

[15] However, on the Friday morning, the defendant did not attend at the plaintiff's premises. The plaintiff tried to call the defendant on his cellphone during the afternoon but to no avail. The defendant did not return the BMW to the plaintiff as agreed. That weekend, the plaintiff left for a hunting trip, using his wife's vehicle.

[16] On 24 May 2008, the Saturday morning, the plaintiff was informed by a mutual friend of the parties that a collision had occurred. The plaintiff was told that the defendant had been drinking. After the weekend, on the Monday morning, the BMW was towed to the plaintiff's workshop. The plaintiff was 'shocked' to see the damage to his BMW. The BMW was written off as uneconomical to repair and the plaintiff struggled to get a buyer for the salvage. The defendant refused to give the plaintiff 'any money' for the BMW, and told him that it was his problem and he must 'deal with it'.

[17] The plaintiff stated that the BMW was insured but not insured for use as a courtesy vehicle under his Business Policy. However, he had lent the BMW out of courtesy to the defendant. He conceded that on a previous occasion he had considered lending a black Mercedes vehicle to the defendant which he had purchased as a courtesy vehicle, but changed his mind because the transfer had not yet been finalised and the Mercedes was not insured.

[18] When it was put to him under cross-examination that he had lied to the insurance company in regard to the insurance claim, and concocted a story with the co-operation of the defendant, the plaintiff conceded that he had done so because his insurance broker thought it would work for the purposes of the insurance claim, stating that he had an 'inclination' that the defendant had been drunk, and he had therefore lied to the insurance company with the defendant's approval. The claim was rejected by the insurance company.

[19] The plaintiff denied the indemnity as pleaded to by the defendant. He conceded under cross-examination, that on 12 May 2008, no discussion took place between the defendant and himself, as to who would be liable, he or the defendant, if the BMW was involved in a collision.

Mr Chauke

[20] Mr Chauke, the driver of the VW Golf, testified to the circumstances of the collision. He was travelling in the left lane, the lane for the slow traffic on the Ben Schoeman N1 highway, when he heard a bang at the back of his vehicle. He lost control, and his vehicle overturned, rolling several times after the impact. The BMW which struck his vehicle's right rear end, came to a standstill approximately 200 meters beyond his vehicle and ended up on its roof. He did not know why the BMW struck his vehicle. He saw the defendant after he was assisted from the vehicle, lying next to the BMW. The defendant could not do anything, nor did he speak to the ambulance personnel. Mr Chauke stated that the collision had occurred at about 21h55 on the 23rd May 2008, and not on the 28th as recorded in the Accident Report Form.

Mr Bosman

[21] Mr Bosman, a paramedic in the employ of Netcare 911, testified that on his arrival at the scene of the collision, he saw the BMW lying on its roof and the defendant lying on his back on the road surface next to the BMW. He knelt down next to the defendant, about 30 to 40cm away, and observed that the defendant's eyes were bloodshot and his breath smelt of alcohol, a sweet, fruity smell. He could not say whether the smell was strong or weak.

[22] The defendant identified himself as a reservist member of the South African Police Service, and refused to move or be moved from the road surface until his commanding officer arrived at the scene of the collision. When the commanding officer, whose name Mr Bosman did not know, arrived, he informed Mr Bosman that the defendant was on his way home from a party where he had consumed liquor.

[23] Mr Bosman stated that he no longer had his written notes about the collision, and had no independent recollection of the relevant time and date of the collision, but thought that the date reflected in the statement of 30 May 2008 , was correct. Certain information contained in his statement did not come from his personal knowledge, but was given to him by the insurance investigator, e.g. the details of the registration number of the BMW.

[24] Mr Bosman could not explain why the defendant was difficult, not wanting to get up from the road surface, and took no steps to establish the reason. He was particularly worried about the smell of alcohol but he did not perform any tests on the defendant nor did he attempt to establish the cause of the collision. The defendant spoke incoherently, repeating his sentences as he spoke. Mr Bosman opined that the defendant was intoxicated. The defendant was taken to Netcare Unitas Hospital by ambulance.

Dr Malan

[25] Dr Malan testified with reference to his casualty notes that he was the doctor on duty on the night of 23 May 2008, at the Netcare Unitas Hospital

and examined the defendant when he arrived at 22h50. He recorded that the defendant smelt of alcohol. Accordingly, he requested that blood tests of the defendant be done to test for alcohol (ethanol). The results of the blood tests indicated that the defendant's blood alcohol level was 0,21grams per 100 milliliter. He concluded that the defendant was intoxicated and under the influence of alcohol.

[26] He could not find signs of serious injury. It was difficult to examine the defendant who was obese and he could not be X-rayed. His glasgow coma scale was recorded at 14/15. He referred the defendant to a neurologist, Dr Terblanche, and booked him into high care, with a diagnosis of concussion. Dr Malan conceded that there was a correlation between concussion and alcohol consumption in relation to a patient's responses and that it was difficult to explain what was attributable to concussion and what was attributable to alcohol consumption. Dr Malan stated that he recorded his diagnosis as "*Concussion*" for administrative purposes, because medical aid did not pay when alcohol was involved.

Prof Vermaak

[27] Prof Vermaak, a pathologist, testified as an expert witness for the plaintiff. He testified that on 23 May 2008, a blood sample was collected from the defendant, and Prof Vermaak's laboratory, Vermaak & Vennote Pathologists, was requested to test it for blood ethanol/alcohol. At 23h10 the blood sample was received in the laboratory, which is on the hospital's premises. The results were produced at 23h54. The defendant's blood

alcohol level was 0,213 grams per 100 milliliter, which was 400% higher than the legal limit.

[28] Prof Vermaak testified that the identity of the defendant was verified and the blood sample was drawn from the defendant at the Netcare Unitas Casualty Unit by a nursing sister, according to the standard operating procedure, at 22h30. The sealed sample, marked with the defendant's name, was opened at the laboratory whereafter the blood tests were administered. No other blood samples were tested by the laboratory on the night in question. The defendant was invoiced by the laboratory for the services rendered, which account had been paid.

[29] Prof Vermaak conceded under cross-examination that he was not present when the blood sample was drawn, sealed, and taken to the laboratory and tested. He testified that because of the applicable standard operating procedures applied by the laboratory, the blood test results were an accurate reflection of the defendant's blood alcohol level on the night of the collision. He could not explain the discrepancy between the time Dr Malan examined the defendant, which was at 22h50 and the time the blood was drawn from the defendant recorded as 22h30.

[30] He stated that a person with a blood alcohol level of 0,213 grams per 100 milliliter could suffer severe motor impairment, impaired sensation, loss of understanding and loss of consciousness.

[31] Prof Vermaak stated that it took time for alcohol to be absorbed into the bloodstream, which absorption then peaked, before the process of excretion began. The rate of absorption was also dependent on the pathology of a person and more particularly, on the amount of food consumed by that person and still in his system, at the time of the commencement of the absorption process.

[32] The plaintiff then closed his case. The defendant closed his case without calling any witnesses.

THE PLAINTIFF'S CONTENTIONS

[33] The plaintiff contends that his main claim is based on a loan for use, *commodatum,* on the basis that an oral agreement was entered into between the parties in terms of which the plaintiff would lend the BMW to the defendant, and that the defendant would return the vehicle to the plaintiff in the same condition as he received it from the plaintiff, fair wear and tear excepted. It is common cause that the defendant took delivery of the vehicle, after which it was involved in a collision, and that the defendant failed to return the vehicle to the plaintiff in the same condition as he received it , as the vehicle was damaged beyond economical repair due to the collision. The plaintiff lent the BMW at no cost to the defendant and with no express agreement as to who would bear the risk on the BMW, in the event of a collision. The plaintiff claims that he has suffered damages. In the alternative, he claims damages arising out of the negligent driving of the BMW by the defendant.

[34] The plaintiff further contends that the general principle is that a borrower is liable for damage. The plaintiff submits that the facts *in casu* fall within the ambit of *Saridakis t/a Auto Nest v Lamont*[2]. In that case the appellant instituted a claim against the respondent for payment of the damage sustained by her motor vehicle whilst it was in the respondent's possession. Two causes of action were pleaded: The main claim was based on the allegation that the appellant had gratuitously lent and delivered her motor vehicle to the respondent and, in the alternative, the appellant based her claim in delict on an allegation that the motor vehicle had been damaged through the respondent's negligence.

[35] The court a quo held that the contract between the parties amounted to *commodatum*, but that the parties had agreed that the motor vehicle was to be at the risk of the appellant, so that if it was damaged as a result of the respondent's negligence, the appellant would have no claim against the respondent, and accordingly dismissed the appellant's claim.

[36] On appeal it was held that the magistrate "*was correct in holding that the contract between the parties was one of commodatum, that is loan for use, because in terms of the contract, the vehicle was lent by appellant to the respondent for him to use it in a particular manner and then to return it to appellant (see Hutchison and Others v Wille's Principles of South African Law*

[2] 1993 (2) SA 164(C )

*8th ed at 579 and the authorities there cited) and the lending was gratuitous in that appellant was not to receive any consideration therefore* [3]....

*....In the absence of some contractual term providing otherwise, a borrower under a contract of commodatum had to exhibit the greatest degree of care, diligentia summa, in looking after the property lent to him ... and was thus liable not only for dolus but for all three degrees of negligence, culpa lata, culpa levis and culpa levissima...I cannot agree with the magistrate that they did agree otherwise by including an owner's risk provision in their contract. Apart from the fact that no such term was pleaded and its existence as part of the contract was not directly addressed in the evidence, I do not think that the term found by the magistrate can be implied on the facts of this case.....*[4]

*There was no express term on the point and, as has been seen, such a term was not one of the naturalia of the contract. Thus there could only have been an owner's risk provision in the contract if such a term would be implied on the facts, i.e. if it was a tacit term."*[5] There was nothing in the dealings of the parties to suggest that any term other than that implied by law in a case of this kind was to be implied. The appeal was accordingly upheld.

THE DEFENDANT'S CONTENTIONS

[37] According to the defendant, the plaintiff has failed to discharge the *onus* in respect of both the main claim and his alternative claim and that same fall to be dismissed with costs, including all reserved costs orders. The defendant contends that in respect of the main claim, insufficient averments have been pleaded to establish a causal connection between the damages claimed and

[3] *Saridakis*, p171,B-C
[4] *Saridakis*,p171,E-G
[5] *Saridakis*,p172,A-C

the alleged breach. Further, that in respect of the alternative claim, similarly insufficient averments have been pleaded to establish a causal connection between the damages claimed and the negligent driving, and the special pleas must therefore be upheld. The defendant contends that the plaintiff failed to establish what the defendant's blood alcohol content was at the time of the collision, or that the defendant was driving under the influence of alcohol and, most importantly, failed to prove that the collision was caused as a result of the negligent driving of the defendant.

[38] The defendant furthermore contends that Prof Vermaak's evidence falls to be excluded as it was mostly hearsay, especially since he did not take the blood sample from the defendant, nor did he analyse it. He merely interpreted the results of the blood alcohol tests and concluded that they were obviously correct. The blood test results were not an accurate reflection of the defendant's blood alcohol level at the time of the collision, which was the critical time. There was a contradiction concerning the time it was drawn and the time Dr Malan examined the defendant. Most importantly, as the element of concussion was present, the defendant's behaviour could be attributed as much to concussion, as to being under the influence of alcohol.

ASSESSMENT

[39] Having considered the facts in this case, in my view the facts fall within the ambit of the *Saridakis case.* The contract between the parties was clearly one of *commodatum* loan for use. It is common cause that the plaintiff lent the BMW to the defendant gratuitously for use for a fixed or determinable

period. The BMW had to be returned to the owner, the plaintiff herein, by the defendant in the same condition that he received it. The lending was gratuitous in that the plaintiff did not receive any consideration for the use of the vehicle by the defendant during the period the defendant had it in his possession. It is common cause that the BMW was not returned to the plaintiff by the defendant in as good a condition as when it was lent, reasonable wear and tear excepted. It is common cause that it was damaged in a collision and rendered uneconomical to repair.

[40] There was no express discussion or agreement between the plaintiff and the defendant as to who would be liable for possible damage to the BMW. It was therefore not an express term of the oral agreement nor was it tacitly agreed between the parties that the plaintiff would be so liable. The defendant, who is the borrower, must therefore bear the risk. Accordingly, in the absence of an express or tacit term agreed upon by the parties, it was an implied term that the borrower, in this case the defendant, would be liable for any damage to the BMW.

[41] It is the defendant's case that he was indemnified. However, no evidence was tendered by the defendant that he asked the plaintiff whether the vehicle loaned to him was insured, or that he only wanted the loan of the vehicle on condition that he would be indemnified if he drove it negligently and damaged it. The only evidence before the court in respect of the indemnity pleaded by the defendant, is the evidence of the plaintiff, who denied the existence of an indemnity and testified that there was no agreement as to who should be

liable in the event of the BMW being involved in a collision. Accordingly, there was no agreement, express or implied as to who would be liable between the parties.

[42] In respect of a claim based on *commodatum* the *onus* is on the borrower, in this case the defendant to establish facts to prove that he is not liable in respect of any particular loss or damage in respect of the thing lent.[6] The defendant did not testify nor did he call any witnesses. The defendant was available to testify as to how the collision occurred, but chose not to do so, and this justifies a negative inference to be drawn against him. If a witness was available to confirm a party's allegations and was not called to give evidence, the inference is overwhelming that his evidence would have been unfavourable to the party not calling him.

[43] In *Galante v Dickinson*, Schreiner JA stated that an inference is to be drawn if a party himself fails to give evidence: "*In the case of the party himself who is available, as was the defendant here, it seems to me that the inference is, at least, obvious and strong that the party and his legal advisers are satisfied that, although he was obviously able to give very material evidence as to the cause of the accident, he could not benefit and might well, because of the facts known to himself, damage his case by giving evidence and subjecting himself to cross-examination*".[7]

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[6] *LAWSA*.2nd Edition, Vol 15, Part 2, p179, para 293; See also *Enslin v Meyer* 1925 OPD 125
[7] *Galante v Dickinson* 1950(2) SA 460(A) at 465,

[44] In respect of the alternative claim based on negligence the plaintiff bore the *onus*. Mr Chauke testified on behalf of the plaintiff to the circumstances of the collision occurred. His vehicle was hit from behind by the motor vehicle driven by the defendant. He further stated that the BMW came to a standstill on its roof, approximately 200 metres beyond his vehicle. It is significant that no version was put to Mr Chauke as to why the defendant was not negligent.

[45] The driver of a vehicle that collides with the rear of a vehicle in front of him is *prima facie* negligent unless he can give an explanation indicating that he was not negligent. It must follow that, in the absence of any evidence to the contrary, such negligence was the cause of the collision[8]. The defendant's failure to testify justifies the only reasonable inference that whilst driving the BMW, the defendant collided into the rear of Mr Chauke's vehicle, and was thus negligent.[9] In my view, it was not incumbent on the plaintiff to prove that the defendant was the sole cause of the collision. As a result of the collision the BMW was damaged beyond economical repair, and the plaintiff, as owner of the BMW, suffered damages. It is clear from the evidence that the defendant's negligence was the cause of the collision.

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[8] *Fig Brothers (Pty) Ltd v SA Railways and Harbours and another* 1975(2)SA 207(C )at 211 H; *Union and South West Africa Insurance Co Ltd v Bezuidenhout* 1982(3)SA 957(A) at 966A-B;*Nkuta v Santam Assurance Company* 1975(4)SA at 854B

[9] *Sampson v Pim* 1918 AD, 657, at 662;*Kruger v Van der Merwe* 1966 (2) SA 266 (A)

[46] The fact that a driver of a motor vehicle was under the influence of intoxicating liquor whilst driving, does not *per se* constitute negligence.[10] A finding that the defendant was under the influence of intoxicating liquor at the time of the collision, is in any event, not necessary to enable the plaintiff to succeed with his alternative claim. The mere fact that it is common cause that the motor vehicle was driven by the defendant at the time it collided with the rear end of the motor vehicle driven by Mr Chauke, is sufficient to establish the defendant's negligence, which required an explanation from the defendant, which did not come. *And as Schreiner JA in Galante, aptly stated "But it seems fair at all events to say that in an accident case where the defendant was himself the driver of the vehicle the driving of which the plaintiff alleges was negligent and caused the accident, the court is entitled, in the absence of evidence from the defendant, to select out of two alternative explanations of the cause of the accident which are more or less equally open on the evidence, that one which favours the plaintiff as opposed to the defendant.*[11]"

[47] The plaintiff and his witnesses testified in a clear and credible manner. They withstood the rigours of cross-examination. There is no reason to doubt their veracity. In fact the plaintiff conceded that he had concocted a story with the defendant for the insurance claim. He made no attempt to 'cover up' the issue of the insurance claim. He was truthful to the court that he had in fact lied to his insurers.

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[10] *S v Mtsweni* 1963(3) SA 398 (T) ; *R v Higgins* 1953(2) SA 23 (SR) at 25A;*R v Shalovsky* 1935 SR 109 T 113;*The Law of Collisions,7th Edition by HB Klopper (2003)*, at p 19 at para 3.2 fin 24;

[11] *Galante*,p465

[48] In my view, having regard to all of the aforegoing, the defendant's special plea against the main claim of *commodatum* cannot succeed. The plaintiff pleaded that the BMW of which he is the owner, and which he lent to the defendant sustained damages in the collision, rendering it uneconomical to repair. Sufficient averments have been pleaded by the plaintiff to establish a causal connection between the damages claimed and the failure by the defendant to return the BMW gratuitously loaned to him as agreed, in the same condition as which he received it from the plaintiff, fair wear and tear excepted.

[49] The terms as pleaded to by the plaintiff clearly meant that the defendant would have to exercise reasonable care over the BMW, and that the defendant would be liable for damages to it whilst in his possession. The breach lies in the defendant's failure to return the BMW by virtue of the collision, the failure to return as well as the collision being common cause.

[50] It must therefore follow that the plaintiff suffered contractual damages as a result of such damage. In these circumstances, the defendant's first special plea must be dismissed, with costs.

[51] The defendant's special plea against the alternative claim based on the *Lex Aquilia*, has no merit and cannot succeed. The plaintiff established that the collision was caused by the negligent driving of the defendant. The defendant's second special plea is also dismissed, with costs. It is not necessary to deal with the remaining special pleas as they have fallen away

by virtue of the fact that the plaintiff did not persist with the remaining alternative claims. Accordingly, the plaintiff's main claim and the alternative claim both succeed.

[52] The defendant has criticised the plaintiff for making several amendments to his particulars of claim. In my view, all of the amendments were necessary for a proper ventilation of the disputes between the parties[12] and were consistent with the evidence presented in court. The new amendments are allowed, as they were necessary to determine the real issues between the parties. More importantly, it was to ensure that the defendant did not, by relying on technicalities, avoid his obligation to compensate the plaintiff.

CONCLUSION

[53] Accordingly, I find that the plaintiff has proved the main claim, based on *commodatum,* as well as the alternative claim based on the *Lex Aquilia.*

[54] The plaintiff is entitled to judgment in his favour on the issue of the merits with costs, in accordance with the terms of the draft order provided to the court by the plaintiff and annexed hereto marked "X", which includes the following terms :

1. The defendant's first and second special pleas are dismissed, with costs.

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[12] *Robinson v Randfontein Estates G.M. Co. Ltd* 1925 AD 173 at 198;*Shill v Milner* 1937 (AD) 101 at 105;*Trans-Drakensberg Bank Ltd* v *Combined Engineering (Pty) Ltd and another* 1967(3)SA 632(D) at p637-641

2. Judgment is granted against the defendant, in favour of the plaintiff, for all damages (to be proven) in respect of the plaintiff's main claim, alternatively the plaintiff's first alternative claim, together with costs.

3. The cost order included in 2 above is to include all costs previously reserved.

4. The issue of the Plaintiff's quantum is postponed *sine die*.

[55] I make the following order: 'The draft order marked "X" annexed hereto is made an order of court.'

**H SALDULKER**
**JUDGE OF THE SOUTH GAUTENG**
**HIGH COURT, JOHANNESBURG**

ATTORNEY FOR PLAINTIFF: HUTCHEON ATTORNEYS

ATTORNEY FOR DEFENDANT: HIRSCHOWITZ FLIONIS ATTORNEYS

COUNSEL FOR THE PLAINTIFF: ADV LOUW

COUNSEL FOR THE DEFENDANT: ADV NOWITZ

DATE OF TRIAL : 8 November 2012

DATE OF JUDGMENT: 11 May 2012

**IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG**
**(REPUBLIC OF SOUTH AFRICA)**

11/5/2012

Case No: **30944/2008**

South - Gauteng, Johannesburg
Before Her Ladyship Ms Justice Saldulkar

In the matter between:

**ANTONIE, ANGELO** Plaintiff

and

**SLATTER, JONATHAN WILLIAM** Defendant

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**DRAFT ORDER**

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The following order is made:

1. The defendant's first and second special pleas are dismissed, with costs.

2. Judgment is granted against the defendant, in favour of the plaintiff, for all damages (to be proven) in respect of the plaintiff's main claim, alternatively the plaintiff's first alternative claim, together with costs.

3. The cost order included in 2. above is to also include all costs previously reserved.

4. The issue of the plaintiff's *quantum* is postponed *sine die*.

BY ORDER:

_____
REGISTRAR