REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 2012/22193

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

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DATE SIGNATURE

In the matter between:

MKHONZA, ALBERT Plaintiff

And

ROAD ACCIDENT FUND Defendant

JUDGMENT

CHOHAN AJ:

INTRODUCTION

1. On 5 July 2010 at approximately 22h10 and on the N3 between Durban and Johannesburg the plaintiff, whilst driving a Polo Classic with registration number [….], was struck by an object which he later identified as a large tyre.[1]

2. The plaintiff claims that as a result of this collision, he sustained certain injuries and in consequence has now sued the Road Accident Fund ("the RAF") for damages arsing out of that collision. The plaintiff alleges in his particulars of claim that:

    2.1. the object which struck his car was a tyre from a vehicle whose particulars are unknown to him;

    2.2. the sole cause of the collision was the negligent driving of the driver of the unknown vehicle who *inter alia* failed to secure the load on his vehicle properly and diligently and/or failed to maintain his vehicle in a proper and roadworthy condition;

3. The RAF has denied that an accident occurred and has moreover denied that such accident was as a result of the negligence of the unknown driver.[2] It contends in the alternative that the plaintiff was also negligent by failing to keep a proper and adequate look out and by failing to avoid the accident, when by the exercise of reasonable care and skill he could and should have done so.[3]

4. At the commencement of the trial, the parties sought a separation of merits from quantum and I accordingly ruled that the allegations contained in

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1 Later identified by the plaintiff as a large tyre, approximately 1m in height.
2 Pleadings: p 15, para 4-5
3 Pleadings: p 16, para 5.2

paragraphs 1 to 6 of the plaintiff's particulars of claim[4], read in conjunction with paragraphs 1 to 5 of the RAF's plea, be separated and be determined at the outset and prior to the remaining issues.

THE EVIDENCE

5. The plaintiff was the only witness who gave evidence.

6. He testified that he was travelling with his wife and son from Durban on his way to Johannesburg on the N3 motorway. He claimed that the motorway (which was a dual carriage way separated by a barrier line) was busy and that there were a number of trucks adjacent to his vehicle on the left hand side. He was travelling on the right lane and the nearest vehicle in front of his was approximately 30m.

7. He noticed that in the opposite lane, there were a number of lights and therefore assumed that there were a number of vehicles travelling in the opposite direction as well. He was unable of course to make out the type of vehicle as his concentration was focussed in front of him.

8. He testified that as he was driving, an object suddenly appeared approximately 5m in front of him. It was black in colour and it was huge. It was rolling towards him and came from the right hand side in the direction of the opposite lane. Everything happened in a split second. He was unable to swerve to the left because of the presence of the truck that was travelling adjacent to him and he was unable to swerve to the right because of oncoming traffic. He tried to brake but was unable to avoid colliding with the object.

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[4] These are the allegations relating to the occurrence of the accident and the negligence of the driver of the unidentified vehicle

9. The plaintiff was unable to state what occurred immediately after the collision as he was apparently unconscious and thereafter in a state of shock. When he regained consciousness some few hours later, there were a number of policemen and freeway patrollers on the scene who advised him that he had hit a tyre, which he then saw lying a few metres in front of his vehicle and which the freeway patrollers suggested was common parlance on that motorway.

10. The defendant led no witnesses. Counsel for the defendant sought to discredit the plaintiff and his version of how the accident by referring to a number of documents in which a recordal of how the accident took place was set out:

    10.1. the first was a police accident report form which was completed at approximately 24h10 on 6 July 2010.[5] According to that report, the plaintiff had an accident when he collided with a tyre that was lying on the road;[6]

    10.2. the second was a report prepared by Dr GH Schwartz, an orthopaedic surgeon, in which the accident is described as having occurred when another vehicle *"from the front came onto [the plaintiff's] lane and [the plaintiff's] vehicle collided with another vehicle"*;[7]

    10.3. the third was a report prepared by Thusanong Consulting, industrial psychologists, in which it was suggested that the

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5 Merits bundle: p 7

6 Coincidentally, this version of how the accident occurred was never put to the plaintiff during cross-examination.

7 Exhibit C: p 2

accident occurred when a big tyre came off a big truck coming from the opposite direction and colliding with the plaintiff and *"two other cars"*.[8]

11. Although reference was made to these reports, the discrepancies between what was contained therein and what the plaintiff testified were not canvassed with the plaintiff. In addition, the authors of these reports were not called to explain their recordals and I am accordingly left with an undesirable situation where although the plaintiff's version appears prima facie to be inconsistent with versions contained in other documents (not necessarily contemporaneous documents) he was not cross examined on these versions. In any event, he struck me as a reliable and credible witness and his explanation of being hit by a tyre is in part borne out by the police report. I therefore am inclined to accept his evidence.

12. I should add that in an affidavit deposed to by the plaintiff on 26 January 2012, the plaintiff reaffirmed that at 22h10 and on 5 July 2010 and whilst he was travelling from Durban to Johannesburg along the N3 motorway, a big tyre fell from an oncoming truck and rolled over his path of travel, causing the collision.[9]

13. Of course, and as the plaintiff himself conceded, he did not see a big tyre falling from an oncoming truck. He assumed that that was the case based on the big object that he had seen rolling in his direction, what had been conveyed to him by the freeway patrollers and the tyre that he subsequently saw lying on the road in front of his vehicle after the collision.

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[8] Exhibit E: p 8
[9] Merits bundle: p 3

ANALYSIS

14. Despite the apparent discrepancies, it is quite clear that a collision in fact occurred on 5 July 2010 at approximately 22h00 along the N3 motorway towards Johannesburg between the plaintiff's vehicle and a large tyre.

15. It follows that there are two further enquiries:

15.1. the first is whether the collision was caused, as the plaintiff contends, by a tyre that had fallen off from a truck travelling in the opposite direction;

15.2. the second (which is premised on an affirmative finding in relation to the first inquiry) is whether the collision was caused by the negligence of the driver of the unknown truck that was travelling in the opposite direction.

16. I deal with each of these inquiries more fully below. Both inquires require inferences to be drawn on the available evidence. That is because there is no evidence by the unknown truck driver or by any other eye witness for that matter. In drawing such inferences, I am to balance the probabilities and to select that inference which is the more *"natural, or plausible conclusion from amongst several conceivable ones even though that conclusion be not the only one"*.[10]

17. There is a fine line between an inference based on unacceptable conjecture and an inference premised on acceptable deductive reasoning

[10] See De Maayer v Serebro; Serebro v Road Accident Fund 2005 (5) SA 588 (SCA) at 596, para [18]

based on proven physical facts.[11] For this reason, a greater degree of caution must, in my view be exercised.

18. I note in this regard the *dicta* of Holmes JA in Sardi & others v Standard & General Insurance Co Ltd[12]:

> *"In this Court, in seeking to establish negligence of the driver of the insured vehicle, counsel for the appellant referred to the fact that he swerved across the road. Wherefore counsel relied on the maxim res ipsa loquitur (the thing speaks for itself). He submitted that it was for the respondent to adduce sufficient evidence to overcome the prima facie effect of the evidence that Coxon drove on to the incorrect side of the road. The maxim has no bearing on the incidence of the onus of proof on the pleadings. It is invoked where the only known facts, relating to the negligence, consist of the occurrence itself; see Groenewald v. Conradie: Groenewald en Andere v. Auto Protection Insurance Co. Ltd., 1965 (1) S.A. 184 (A.D.) at p. 187F. The occurrence may be of such a nature as to warrant an inference of negligence. As INNES, C.J., pertinently insisted in Van Wyk v. Lewis, 1924 A.D. 438 at p. 445, lines 8-9, "It is really a question of inference". It is perhaps better to leave the question in the realm of inference than to become enmeshed in the evolved mystique of the maxim. The person, against whom the inference of negligence is so sought to be drawn, may give or adduce evidence seeking to explain that the occurrence was unrelated to any negligence on his part. The Court will test the explanation by considerations such as probability and credibility; see Rankisson & Son v. Springfield Omnibus Services (Pty.) Ltd., 1964 (1) S.A. 609 (N) at p. 616D. At the end of the case, the Court has to decide whether, on all of the evidence and the probabilities and the inferences, the plaintiff has discharged the onus of proof on the pleadings on a preponderance of probability, just as the Court would do in any other case concerning negligence. In this final analysis, the Court does not adopt the piecemeal approach of (a), first drawing the inference of negligence from the occurrence itself, and regarding this as a prima facie case; and then (b), deciding whether this has been rebutted by the defendant's explanation. See R. v. Sacco, 1958 (2) S.A. 349 (N) at p. 352; Grootfontein Dairy v. Nel, 1945 (2) P.H. 015 (A.D.); Arthur v. Bezuidenhout and Mieny, 1962 (2) S.A. 566 (A.D.) at pp. 574-576."*[13]

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[11] See Road Accident Fund v Mgweba [2005] 1 All SA 646 (SCA) at 651, para [16]; AA Onderlinge Assuransie Bpk v De Beer 1982 (2) SA 603 (AD) at 620F-G

[12] 1977 (3) SA 776 (AD) at 780C-H

[13] This *dicta* has not had universal approval and has to some extent been criticized by academics such as Cooper in his authoritative book, Delictual Liability in Motor Law, 1996 at page 106

19. I now turn to address the first inquiry:

19.1. the plaintiff, it will be recalled, was unable to say whether the tyre that he ultimately saw after the collision had come from a truck travelling in the opposite direction. He assumed that it did and it was counsel for the plaintiff's contention that that was the most probable explanation for what occurred;

19.2. it is unlikely that the tyre was rolled over by someone standing on the verge of the motorway. It was a meter in height and would have been too heavy for someone to roll it with such speed that it would have crossed 2 lanes and thereafter collide with the plaintiff's vehicle;

19.3. similarly, it is unlikely that the tyre was lying on the freeway waiting for the plaintiff to collide into it. That is because there was another care in front of the plaintiff and there was no evidence that that vehicle swerved to avoid the obstruction;

19.4. I am accordingly satisfied that on probability the most plausible inference to be drawn from the plaintiff's evidence is that the tyre that ultimately struck his vehicle came from an oncoming vehicle. In this regard I am of the view that in all probability, the tyre was part of a consignment being transported along the freeway and fell off the vehicle. It is unlikely that the tyre came off a moving truck as I would assume that if it did, the truck driver would notice a missing tyre alternatively, it would have had some negative impact on the truck itself. Here again, there was no evidence of an accident on the opposite lane or of a

truck stopping because a tyre came loose and rolled across the freeway.

20. That leads me to the second inquiry. In this regard:

20.1. it was similarly suggested by counsel for the plaintiff that even though there was no direct evidence of negligence, I am to infer that there was negligence on the part of the driver of the unknown vehicle because, absent such negligence, a tyre would not have fallen off and would not have rolled onto the path of the plaintiff. Reliance was placed, in part on the *res ipsa loquitur* principle;[14]

20.2. there is no evidence as to how the unknown vehicle was being driven. There is equally no evidence of what steps may have been taken by the driver of that unknown vehicle to secure the load on his vehicle or to maintain his vehicle in a proper and roadworthy condition;

20.3. there are a number of possibilities. One such possibility (bordering along impermissible conjecture and speculation) is that the unknown vehicle could have hit a pothole, which could have loosened the load with the result that the tyre which had been secured came loose and fell off. Of course another possibility is that the load was not properly secured and the tyre fell off as a result;

20.4. a rolling truck tyre on a freeway is by its very nature not

[14] The term *res ipsa loquitur* means *"the thing speaks for itself"*.

something that drivers ordinarily experience. The question is whether it is one which does not ordinarily happen without negligence for if that is so, then the application of the res ipsa loquitur principle is apposite;[15]

20.5. absent any other explanation(and none was suggested by the defendant) it would seem to me that the more plausible inference to draw from the plaintiff's evidence is that the tyre came loose as a result of a failure on the part of the driver of the unknown vehicle to have properly secured his load. That, it would seem to me, is the most natural and obvious conclusion to draw.

CONCLUSION

21. In the result, I find for the plaintiff in respect of the separated issues.

22. I accordingly make the following order:

22.1. the RAF is liable to the plaintiff for whatever injuries and/or damages the plaintiff may in due course prove;

22.2. the RAF is to pay the plaintiff's costs of the trial on the separated issues.

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M A CHOHAN
ACTING JUDGE OF THE
HIGH COURT

[15] See The South African Law of Evidence, 2nd Edition by D Zeffert and Paizes at p 218

HEARD: 9 OCTOBER 2013

DELIVERED: 11 OCTOBER 2013

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(jmt.4.6.13)