**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA**
**GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: **4559/2016**

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

31.1.18

**Date:** **WHG VAN DER LINDE**

**In the matter between:**

Bainton, Wayne Michael **Plaintiff**

and

The Road Accident Fund **Defendant**

---

Judgment

---

Van der Linde, J:

Introduction

[1] The plaintiff sues the defendant as being statutorily liable for the agreed damages he suffered when he was involved in a collision on 12 February 2015 on the N17 highway. He was travelling in a Corsa LDV, in the middle of three lanes, in an easterly direction, when the

vehicle some two and a half car lengths ahead of him suddenly swerved out to the right. What then confronted the plaintiff, in the middle lane in which he had been travelling, was a stationary Combi, also facing east. The plaintiff collided with the rear-end of the Combi.

[2] The only issue in the trial was the question of causative negligence, and the only witness was the plaintiff himself. Three exhibits were received as exhibits A, B and C: respectively the police accident report including a sketch plan of the scene; the plaintiff's attorney's sketch plan of the scene; and an affidavit prepared by his attorney to which the plaintiff himself had deposed concerning the merits of the collision.

[3] The status of these exhibits was the usual formal one, being that the documents are what they purported to be, but they were not admitted for truth of content, and they were received subject to admissibility. As it happened, exhibit A was not admitted on the basis of it being hearsay evidence. Although exhibit C constituted self-corroboration and was for that reason *prima facie* inadmissible, it became admissible when the plaintiff was cross-examined on its contents. The plaintiff proved the truth of the contents of exhibit B, and so its admission into evidence is uncontentious.

[4] As already indicated, the plaintiff testified that he was travelling on a clear day at around 13h25 in the middle lane in an easterly direction at about 80 kph two and a half car lengths behind the vehicle in front of him, when it suddenly swerved out to the right. The stationary Combi confronted him, but it all happened too quickly for him to take any evasive action; in any event, he could not have swerved to the right, because there were then vehicles in that lane.

[5] In cross-examination by Ms Mohomane for the defendant, the plaintiff was asked why he did not swerve to the left, but he frankly and fairly said that - apart from the fact that it all

happened too quickly – he could not say why. The defendant closed its case without calling any witnesses.

Discussion

[6] There are really two points in issue in the case. The first is whether the driver of the Combi was negligent and if so, whether the plaintiff too was negligent. I discuss these issues in turn, relying on the following judgments referred to by Ms Benson for the plaintiff: Intercape Ferreira Mainliner (Pty) Limited v Pro-Haul Transport Africa CC and Another (44350/2012) [2016] ZAGPJHC 134 (3 June 2016), Von Wielligh v Protea Versekeringsmaatskappy Bpk, 1985 (4) SA 293 (C), and Pienaar v Road Accident Fund (14962/2016) [2016] ZAGPPHC 1121 (6 December 2016).

[7] It must be accepted, and this was not contested by the defendant, that the driver of a vehicle does not act reasonably when he allows his vehicle to be stationary on a public highway without alerting other road users to the danger of the stationary object right in the their way of travel.[1] I appreciate that in Intercape the light was poor, not broad daylight as here.

[8] But in a sense the principle remains unaffected: the driver of the Combi must have realised that even those vehicles that were approaching from behind the immediately approaching vehicles ought to have been warned of the obstruction, precisely so that they could take avoiding action well in advance of the obstruction in the middle lane of the highway.[2] The conclusion must therefore follow that he driver of the Combi was causally negligent in relation to the collision.

[9] Was the plaintiff negligent? The law requires that that a driver in the position of the plaintiff should keep such a distance as would enable him to stop, or to swerve, but at all events to

[1] Von Wielligh at 298 D to F; Pienaar at [27]; and compare Intercape at [19], [20], [56], [60], [62].
[2] Von Wielligh and Pienaar op cit.

avoid, colliding with the vehicle in front of him if it were suddenly to stop.[3] The evidence of the plaintiff was that he was following at about two and a half car lengths behind the vehicle in front of him. The parties accepted that this was about seven metres.

[10]Travelling at about 80 kph meant that he was travelling at about 22,2 m per second. Even if reaction time is taken to be as short as 0,5 seconds, then it is understandable that the plaintiff could not avoid the collision. There was simply no space to swerve out to the left, not enough time and space to brake in time.

[11]The conclusion cannot be avoided that on the evidence as presented the plaintiff was following too hot on the heels of the vehicle in front of him, and that he did not leave sufficient berth to deal with a sudden emergency. To that extent, he was causatively negligent in relation to the collision.

[12]I have considered whether the defendant's concession that the plaintiff's following distance was sufficient precludes this conclusion. I do not believe that it does, because an incorrect concession of law by counsel does not bind her client.

[13]Both parties' responsible drivers were accordingly negligent. The question of an appropriate apportionment arises. It seems to me incontestable that the presence of the Combi on the road was the cause of it all. The plaintiff could have avoided the collision, but his remissness falls into a very different, and lower, category than that of the driver of the Combi.

[14]Apportionment is a difficult endeavour, because it is subjective and requires that a percentage must be placed on what is essentially a value judgment of the respective degrees of remissness of two individuals in circumstances where the court itself was not present. Doing the best I can, I believe that 20/80 in favour of the plaintiff is fair.

[15]In the result I enter judgment against the defendant in favour of the plaintiff as follows:

---

[3] Intercape at [19] to [29].

(a) Payment of R724,934.95;

(b) Costs of suit.

WHG van der Linde
Judge, High Court
Johannesburg

For the plaintiff: Adv. Benson
Instructed by: Wolmarans Inc.
1st Floor, 264 Oak Avenue
Ferndale
Randburg
Tel: 011 781 6050
Ref: Mr J Murray/B369

For the defendant: Adv. Mohomane
Instructed by: Moloto Stofile Inc.
4th Floor, Marble Towers
208-212 Jeppe street
Johannesburg
Tel: 011 333 2453/2545
Ref: R01876/HC/THM/an

Date of trial: 31 January, 2018.
Date of judgment: 31 January, 2018.