IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

30821/11

CASE NO:~~25205/2013~~

(1) REPORTABLE: ~~YES~~ / (NO)

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / (NO)

(3) REVISED.

2014.04.03
DATE

SIGNATURE

3/4/2014

ABC FITMENT CENTRE (PTY) LTD Plaintiff

and

JOSEPH MATSHEGO First Defendant

JACOB RAMODIBE NYATHI Second Defendant

J U D G M E N T

MAKGOKA, J:

[1] The plaintiff instituted action against both the first and second defendants for damages arising out of a motor vehicle collision which occurred on 13 June 2009. The collision was between the plaintiff's vehicle and a Volkswagen Beetle (the Beetle). The plaintiff alleges that the collision was as a result of the first defendant's vehicle colliding with the Beetle from behind, which caused the Beetle to veer onto the path of the plaintiff's vehicle. The first defendant's vehicle was driven by the second defendant, who was an employee of the first

defendant. The plaintiff alleges that the second defendant was driving the first defendant's vehicle during the course and scope of his employment with the first defendant.

[2] Only the first defendant defended the matter and filed a plea. Summons could not be served on the second defendant – the sheriff returned non-service in respect of the second defendant. As a result, only the first defendant is before court. From the pleadings and admissions made in the minutes of three pre- trial conferences held between the parties, the following issues are common cause:

(a) that the first defendant's vehicle was one of the three vehicles involved in the accident

(b) that the second defendant was an employee of the first defendant at the time of the collision;

(c) that the second defendant was driving the first defendant's vehicle with the permission of the first defendant's vehicle;

[3] Accordingly, there are only three issues in dispute and for determination. First, whether the second defendant was negligent, and if so, whether such negligence caused the plaintiff damage. Second, whether the second defendant was acting within the course and scope of his employment with the first defendant. Lastly, the amount of the plaintiff's damage.

[4] Only two witnesses testified during the trial – both in the plaintiff's case. The first defendant closed his case without testifying or calling any witnesses, after his application for absolution from the instance at the close of the plaintiff's case was refused. Mr Michael Stratford, who was the driver of the plaintiff's vehicle, testified that he was driving in the northerly direction along Station Avenue in Brits. He was approaching an intersection, where the Beetle and the first defendant's vehicles were part of a stationary convoy of vehicles, preparing to turn right in to Flow Avenue. In the circumstances, Mr Stratford had the right of way as he was proceeding on a straight line.

[5] According to him, suddenly, and without any warning, the Beetle moved out of the convoy and came onto his path of travel. He tried to swerve left, but was unsuccessful in the split seconds available to do so. He collided with the Beetle, almost head-on. After the accident, he observed that the Beetle had a damage mark on the back bumper. He also observed the Hyundai on the verge of the road, facing south. On inspection of the Hyundai, he observed collision damage on the front lower bumper. From those observations, he made a deduction that the Hyundai had collided with the Beetle from behind, which caused the Beetle to shoot out of the convoy and onto his path.

[6] He had not met driver of the Beetle before the collision, nor had he seen the vehicle before the collision. He also did not know what made the Beetle to shoot out. He spoke to several people at the scene, including the driver of the

Beetle and the second defendant. The latter admitted to him that he was the driver of the Hyundai and that he had bumped into the Beetle from behind.

[7] Mr Schalk Strydom testified as an expert witness on behalf of the plaintiff. He is a qualified assessor of damages to motor vehicles, with 18 years' experience. As such, he bears knowledge of the costs involved in repairing such damages, be they labour or parts costs, as well as the market values of all motor vehicles before and after the damage. The upshot of his evidence is that in his expert opinion, the plaintiff's vehicle was uneconomic to repair. Upon his assessment of the vehicle and after pruning the quotation by the panel beaters, and after factoring in the retail and salvage values of the vehicle, and towing costs, he concluded that the plaintiff's damage amounts to R167 315.40.

[8] It is on the evidence before me that I have to determine the three issues in dispute, referred to in para [3] above. I consider them, in turn. With regard to the issue of negligence, there is no direct evidence that the Hyundai caused the beetle to shoot out of the convoy. Therefore, conscious of this fact, Mr Theron, attorney for the plaintiff, invited me draw certain inferences from the surrounding circumstances to conclude that the Hyundai collided with the Beetle from behind, which conduct jolted the Beetle to shoot out of the convoy and collide with the plaintiff's vehicle.

[9] On the other hand, Ms *Van Zyl*, counsel for the first defendant, contended that the proven facts do not lend themselves to that inference. In the course of

her argument, counsel sought support in the two 'cardinal principles of logic' enunciated in *R v Blom* 1939 AD 188 at 202 – 3, and invited me to apply them, in particular the second one, namely that 'the proved facts should be such that they exclude every reasonable inference from them, save the one sought to be drawn'. In *Govan v Skidmore* 1952 (1) SA 732 (N), Selke J, faced with a similar proposition, concluded that the principle is not applicable in civil cases. The learned Judge said:

> '*Rex v Blom* ... was a criminal case, and in my opinion, it is a fallacy to suppose that the second principle in *Blom*'s case represents the minimum degree of proof required in a civil case, for, in finding facts or making inferences in a civil case, it seems to me that one may, as Wigmore conveys in his work on Evidence (3rd ed., para.32), by balancing probabilities select a conclusion which seems to be more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion may be not the only reasonable one... I do not regard myself as bound, in the present case, to apply the second of the principles set out in *Blom*'s case in the way in which I should be bound to apply it were the case a criminal one.'

[10] Subsequent to *Govan v Skidmore* (above) the second principle in Blom has been modified for civil cases as follows: the inference to be preferred must be the most plausible and appropriate one to be drawn from all the proved facts. See *Ocean Accident and Guarantee Corporation Ltd v Kock* 1963 (4) SA 147 (A) at 159C-D; *AA v De Beer* 1982 (2) SA 603 (A) at 614G - 615A; *Parents' Committee of Namibia and Others v Nujoma and Others* 1990 (1) SA 873 (SWA) at 887 C–D; *Santam v Potgieter* 1997 (3) SA 415 (O) at 423A–D; *Mcleod v Rens* 1997 (3) 1039 (E) at 1049A-C ; *Cooper and Another NNO v*

Merchant Trade Finance Ltd 2000 (3) SA 1009 (SCA) at 1027E - 1028A; *Triptomania Twee (Pty) Ltd and Another v Connolly and Another* 2003 (3) SA 558 (C) at 570C – E.

[11] In the present matter, the following facts are either proven, admitted or cannot be disputed:

(a) the collision involved three vehicles – the plaintiff's vehicle, the Beetle and the first defendant's vehicle, Hyundai;

(b) The collision occurred between the plaintiff's vehicle and the Beetle when the latter vehicle shot out of the convoy and came onto the path of the plaintiff's vehicle;

(c) Immediately after the collision, there was damage to the back of the Beetle and the front of the Hyundai;

(d) The second defendant admitted to the driver of the plaintiff's vehicle that he was the driver of the Hyundai and that he collided with Hyundai from behind.

[12] In my view, the only plausible inference from the above facts, is that the Hyundai collided with the Beetle from behind. As stated in the authorities referred to above, this inference need not be the only one. I find it to be the most natural and probable, from all the surrounding facts. It is irrelevant that the driver of the Beetle might have over-reacted. I say this because that driver is not before court, and therefore no finding of apportionment can be made in respect

of him. The first defendant elected not to file a third party notice against the driver of the Beetle, in which possible contributory negligence on the part of the driver of the Beetle is alleged. Under the circumstances, all the plaintiff had to establish is any degree of negligence on the part of the second defendant to succeed against the first defendant, depending of course, that vicarious liability is established, to which I now turn to consider.

[13] The other two requirements of the doctrine of vicarious liability (employer-employee relationship and delict) have been established- the former by admission, and the latter by a finding I have just made in the preceding paragraph. It is the third requirement that I must determine: whether or not the second defendant was acting in the course and scope of employment of his employment with the first defendant. Various tests have been established by our courts to establish this. See for example *Feldman (Pty) Ltd v Mall* 1945 AD 733 at 742, 743, 744; *Fawcett Security Operations (Pvt) Ltd v Omar Enterprises (Pvt) Ltd* 1991 (2) SA 441 (ZH) at 448G-I; *Hirsch Appliance Specialists v Shield Security Natal (Pty) Ltd* 1992 (3) SA 643 (D) at 651H- 652J.

[14] In the present case, I take into account the fact that the second defendant was employed by the first defendant; the first defendant was driving the vehicle with the permission of the first defendant. When asked in one of the pre – trial conferences what the purpose for the second defendant driving the vehicle with the first defendant's permission was, the first defendant's reply was that he did

not know for which purpose the second defendant was driving his vehicle. In my view, these facts establish a *prima facie* presumption that the second defendant was acting within the course and scope of his employment with the first defendant.

[15] It is not an untenable proposition to assume that where an employee drives a vehicle of his employer with the latter's permission, it is within the course and scope of his or her employment. This presumption can be displaced by evidence pointing to the contrary. The first defendant elected not to give evidence. He is the only person who can explain the circumstances in which he gave permission to the second defendant to drive his vehicle. He elected not to give evidence. It is therefore very clear that if he had a plausible explanation, he would simply have testified. His silence is inexplicable in the light of his own admission of having given the second defendant the permission to drive his vehicle.

[16] There is direct authority for the proposition that where a party fails to testify about facts peculiar to him or her, a negative inference may be drawn in suitable circumstances. See for example *Galante v Dickinson* 1950 (2) SA 460 (A) at 465; *Potchefstroom se Staadsraad v Kotze* 1960 (3) SA 616 (A) at 637A-C; *New Zealand Construction (Pty) v Carpet Craft* 1971 (1) SA 345 (N) at 350G-H;

[17] The first defendant's silence, in the circumstances, 'casts very grave suspicion upon his bona fides in resisting the plaintiff's action', as observed in the *Potchefstroom* case (above) at 637C. In the absence of contrary evidence or explanation, the assumption that the permission was given in the course and scope of the employment, is an irresistible one, and must be accepted to be correct. I therefore conclude that on the probabilities, the second defendant was driving the first defendant's vehicle in the course and scope of his employment with the first defendant.

[18] Lastly, with regard to the plaintiff's damage, the evidence of Mr Strydom as to the amount of the plaintiff's damage was not seriously challenged. I have no reason not to accept it.

[19] To sum up, the plaintiff has proved negligence on the part of the second defendant, which caused the Beetle to collide with the plaintiff's vehicle. The plaintiff has also established, on a balance of probabilities, that the second defendant was acting in the course and scope of his employment with the first defendant at the time of the collision. The plaintiff has also proved its damage. It is entitled to judgment. Costs should follow the event.

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

1. The first defendant is ordered to pay the plaintiff a sum of R167 315.40;
2. Interest on the above sum at the rate of 15.5% per annum, calculated from the date of issue of summons until date of final payment;

3. The first defendant is ordered to pay the costs of the action.

TM MAKGOKA
JUDGE OF THE HIGH COURT

DATE OF HEARING	**: 26 MARCH 2014**
JUDGMENT DELIVERED	**: 3 APRIL 2014**
FOR THE PLAINTIFF	**: MR HW THERON (ATTORNEY)**
FIRM	**: *HW THERON INC.*, MONUMENT PARK, PRETORIA**
FOR THE FIRST DEFENDANT	**: ADV M VAN ZYL**
INSTRUCTED BY	**: *MODUKA MORE*, PRETORIA**