REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA)

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

…….. ……..
DATE **SIGNATURE**

DATE: 27/2/2014
CASE NO: 3481/12

In the matter between:

ALAN JACK GATLEY **Plaintiff**

And

ROAD ACCIDENT FUND **Defendant**

JUDGMENT

KGANYAGO AJ

[1] The plaintiff in this matter is claiming damages for bodily injuries arising out of a motor vehicle accident. It is common cause that the accident occurred on the 24th October 2008. At the time of the accident, the plaintiff was the driver of the motor bike with registration number R[…]. The insured driver was driving motor vehicle with registration number N[…].

[2] The plaintiff alleges that the insured driver was the sole cause of the accident as he allowed his passenger to alight from the stationery vehicle when it was unsafe to do. The insured driver denies the allegations levelled against him.

[3] At the commencement of the trial, the parties agreed to separate the issues of merits and quantum of damages of the plaintiff's claim. I ruled that the matter proceed on the issue of merits of the claim only.

[4] The plaintiff was the only witness to testify in his case. He testified that on the 24th October 2008, he was the driver of the motorbike with registration number R[…]. He was involved in a collision at the off-ramp at R21 - Nelmapius Road.

[5] The accident happened during the busy morning traffic. At the off-ramp there are three lanes leading to the robots. Traffic were slow and vehicles were making a que at the robots. He was riding his bike between the first and second lane.

[6] The insured vehicle was in front of him and stationery. There were also other vehicles in front of insured vehicle. As he was about to pass the insured vehicle, the passenger from that vehicle opened the door and was alighting from it. He hit that door of the insured vehicle and fell on the tarred road. In the process of falling, he was injured and his bike was also damaged.

[7] Under cross-examination, he stated that he could not avoid the collision as the door of the insured vehicle was opened in a split second as the passenger in a hurry to go and seat with the insured driver in the front. He denied that he had contributed to the accident. He further stated that in South Africa, it was acceptable for motor bikes to ride between cars.

[8] The insured driver and the passenger testified. The insured driver testified that on the 24th October 2008, he was the driver of a motor vehicle with registration number N[…]. He was with a passenger Percy Thubane who was sitted at the back seat.

[9] He was driving towards Kempton Park on the R21 road. He took the Nelmapius off-ramp. Immediately after the off-ramp there are robots. Towards the robots, other cars were standstill. He was driving in the middle lane. At the robots he stopped waiting for the robots to turn green.

[10] As he was waiting for the robot to turn green, he called his passenger who was sitted at the back seat to come and seat with him in the front passenger seat. As the passenger was opening the back passenger door, he saw the plaintiff falling in front of the car.

He did not see him colliding with the door. There was nothing he could have done to avoid the accident as his vehicle was stationery.

[11] The insured driver was cross-examined and he conceded that he is the one who called the passenger to come and sit with him in front. He conceded that passengers were not allowed to alight from vehicle where his vehicle had stopped. He denied that he had created a dangerous situation by allowing the passenger to alight from the vehicle. He conceded that had he kept a proper lookout on the mirror, he would have seen the plaintiff.

[12] The passenger Percy Thubane testified. He testified that on the 24th October 2008 he was a passenger in the insured vehicle. He was seated at the back seat. At the robots, the insured driver called him to come and seat with him in front. As he was alighting from the vehicle, the plaintiff knocked the door of the insured vehicle with his bike.

[13] The passenger was cross-examined and he admitted that he did not see the bike as it knocked the door of the insured vehicle.

[14] It is common cause that the plaintiff and the insured driver were travelling in the same direction. It is common cause that the plaintiff was travelling in a motor bike between cars when he collided with door of the insured vehicle as the passenger was alighting from it. It is common cause that at the time of the collision, the insured vehicle was stationery.

[15] Section 17 (1) of the Road Accident Fund Act, 1996 as amended ("the Act") reads as follows:

"(1) The Fund or an agent shall-

> *(a) subject to this Act, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of the owner or the driver thereof has been established;*
>
> *(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: Provided that the obligation of the Fund to compensate a third party for non-pecuniary loss shall be limited to compensation for a serious injury as contemplated in subsection (1A) and shall be paid by way of a lump sum."*

[16] The issues which must be determined by the court are the following:

16.1 Whether the injuries sustained by the plaintiff had been caused by or arising out of the driving of the insured vehicle by the insured driver;

16.2 Should I find that the injuries were sustained as a result of driving of the motor vehicle by the insured driver, I must determine whether the insured driver was negligent or not;

16.3 The apportionment of negligence, if applicable.

[17] According to the Act, the fund will be liable to pay a claim arising from the driving of a motor vehicle. The defendant contends that the accident did not arise out of the driving of a motor vehicle. The plaintiff contend that the insured driver should have foreseen that by requesting the passenger to alight from the vehicle, he was endangering other road users and therefore the accident occurred out of the driving of the motor vehicle.

[18] The plaintiff's counsel relied in this regard on the decision of Messina Associated Carriers v Kleinhans (122/99) [2001] ZASCA 46. The defendant's counsel relied on this regard on the decision of Wells & another v Shield insurance Co. Ltd & another [1956] (2) SA 865 (C).

[19] It is not in dispute that the door of the insured vehicle was opened by the passenger. The accident was caused by the passenger who had opened the door and was alighting from the vehicle. The passenger was alighting from the vehicle at the request of the insured driver.

[20] According to the Act, the fund liable to pay a claim for compensation arising from the driving of a motor vehicle. In the Wells case at page 867, the court laid down pre-requisites of liability upon the part of the registered insurance company for loss or damage suffered by a third party as a result of the bodily injury. These are:

(i) that the injury was caused or arose out of the driving of the insured motor vehicle and;

(ii) that the injury was due to the negligence or other unlawful act of the driver of the insured vehicle, or owner of his servant.

[21] The Messina case relates to vicarious liability. It is common cause that in the present case the passenger who opened the door was not an employee of the insured driver, and therefore the Messina case is distinguishable from this case.

[22] According to Section 17 (1) (c) of the Act, the loss or damage must emanate from 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.

[23] The question is whether the opening of the door by the passenger has any particular association with driving of the insured vehicle. The insured driver has conceded that he is the one who has called the passenger to alight from the back seat and come and seat with him in front. The insured driver has conceded that he was driving on the middle and that the traffic volume was high. The insured driver has conceded that the passenger has alighted from the insured vehicle where it was not safe to do so.

[24] In general Accident Insurance co SA LTD v Xhego and others 1992 (1) SA 580 AD at page 588 B-D the court said the following:

"Negligence on the part of the owner with regard to the leg injury suffered by Tantaswa has in any event been proved. In my view it was reasonably forseeable that passengers could sustain injuries other than fire burns in a petrol bomb attack on a bus. Should the interior of a bus be set alight by means of a petrol bomb, it is to be expected that the passengers would rush to the door to get out. It is not difficult to visualise the confusion and havoc that would in all probability reign in a burning bus filled with smoke and petrol fumes. It is reasonable to foresee that passengers might sustain other injuries besides fire burns. It is also reasonably foreseeable that passengers might jump from a burning bus and sustain fractured limbs. Negligence on the part of the owner has been proved and appellant is therefore also liable to first respondent in respect of the leg injuries sustained by Tantaswa."

[25] At the time of the collision, the insured vehicle was not parked, but waiting for the robots to turn green. By requesting the passenger to alight from the vehicle, at a place where it was forbidden, the insured driver was creating a dangerous situation to other road users. In my view, he should have foreseen that his actions were dangerous and might have resulted in an accident.

[26] At the time when the passenger alighted from the insured vehicle, the insured driver was in direct control of the insured vehicle and the engine of the insured vehicle was running. The opening of the door by the passenger is an act which was initiated by the insured driver, and in my view, was wrongful. Therefore, in my view, the opening of the door by the passenger has causal connection

between the driving itself which resulted in the plaintiff sustaining injuries.

[27] It is therefore, my considered view, that negligence of the insured driver has been established and the injuries sustained by the plaintiff arose out of the driving of a motor vehicle.

[28] Section 309 (6) (a) of the National Road Traffic Regulations, 2000 (The Regulations) reads as follows:

"Persons, other than traffic officers in the performance of their duties, driving motor cycles on a public road, shall drive in single file except in the course of overtaking another motor cycle, and two or more persons driving motor cycles shall not overtake another vehicle at the same time: provided that where apublic road is divided into traffic lanes, each such lane shall, for the purpose of this paragraph, be regarded as a public road."

[29] It is common cause that the plaintiff was travelling between the cars with his bike in direct contravention of the regulations. However, the contravention of the regulation itself does not amount to negligence. The plaintiff has also created a dangerous situation to the road users by travelling where it was forbidden to do so. Therefore, in my view, the plaintiff's action has also contributed to the accident.

[30] In the circumstances, I find that the apportionment of fault between the parties is 50% in respect of the plaintiff and 50 % in respect of the insured driver.

[31] I make the following order:

31.1 The plaintiff's claim on merits succeeds, provided that the amount of damages to be awarded to plaintiff shall be reduced in terms of Section 1 of the Act 34 of 1956 by 50%;

31.2 The defendant is ordered to pay the plaintiff's costs.

M F KGANYAGO

ACTING JUDGE OF THE HIGH COURT