IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO:34072/2011

DELETE WHICHEVER IS NOT APPLICABLE

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

20/12/2016 .....
DATE SIGNATURE

21/12/2016

In the matter between:

PIETER JOZEF VAN DYK **PLAINTIFF**

and

PDB LOGISTICS **FIRST DEFENDANT**
M SABELO **SECOND DEFENDANT**

JUDGMENT

RANCHOD J:

Introduction

[1] The plaintiff claims damages as a result of a collision on 30 July 2010 between his Subaru Impeza 2.5 WRX STi motor vehicle (the Subaru) driven by the plaintiff, and a wheel which became dislodged from the first

defendant's truck-trailer combination ('the truck' or 'the trailer" or in combination 'the articulated truck') driven by the second defendant (Mr Sabelo).

[2] Two issues were in dispute at the commencement of trial, viz.-

2.1 The plaintiff's ownership of the Subaru; and

2.2 The negligence of the first defendant and/or Mr Sabelo, alternatively contributory negligence on their part.

However, during argument the defendants conceded the plaintiff's ownership of the Subaru hence only the issue of negligence has to be determined.

[3] It was also agreed between the parties that only the issue of liability was to be determined and that the issue of quantum be separated and postponed sine die. I made an order accordingly.

Common Cause Issues

[4] It is common cause that:

4.1 the plaintiff was the driver of the Subaru and Mr Sabelo was the driver of the articulated truck.

4.2 that a wheel from the articulated truck, which was travelling in a direction opposite to the direction travelled by the plaintiff came off one of the two trailers and it collided with the Subaru;

4.3 that on 30 July 2010 at about 5h30 the plaintiff was travelling on the R35 road between Bethal and Middelburg in the direction of Middelburg;

4.4 that the articulated truck was driven by the second defendant;

4.5 that the Subaru's headlights were still engaged at the time as it was still dark;

4.6 that whilst the two vehicles were passing each other the plaintiff noticed a dark object about two meters from his vehicle which, immediately thereafter, struck the plaintiff's vehicle;

4.7 that the collision caused the plaintiff's vehicle to veer to its right in the face of oncoming traffic and collide with a Toyota Land Cruiser;

4.8 that the plaintiff's vehicle thereafter came to a standstill on his left side of the road;

4.9 that the Subaru was written off as beyond economical repair; and

4.10 that the plaintiff could not possibly have prevented the collision. (This latter point is apparent from the fact that under cross-examination the plaintiff's version as to how the collision occurred was not disputed);

4.11 that the second defendant acted within the course and scope of his employment with the first defendant and that the first defendant would be vicariously liable for any negligent conduct on the part of the second defendant.

The evidence

[5] The plaintiff testified that through his experience (*albeit* not of an expert nature) the only way the wheel could have dislodged itself from the trailer was if the wheel nuts had not been fastened properly.

[6] It was put to him under cross-examination that the wheel nuts (even if one were to assume they were loose) could have come loose in a manner which was not as a result of the first defendant's negligence or that they could have come loose for example, by driving on a gravel road. The plaintiff could not dispute it.

[7] And there lies the nub of the issue. It would in the nature of things be virtually impossible for the plaintiff to prove that the wheel came off because the nuts were loose. I will revert to this issue presently.

[8] The only witness who testified for the first defendant was a Mr Klopper. He testified in evidence-in-chief that he is the general manager of the first defendant and has been since 2006. The first defendant's articulated truck had been maintained before the collision. He said although he did not complete the 'VEHICLE PRE-USE INSPECTION LIST', he oversaw that it was duly completed by Sabelo and that he was satisfied that the articulated truck was in good working order on the day of the collision and that it had been serviced on 9 June 2010 as per the 'Truck and Trailer Job Card'. As at

30 July 2010, the articulated truck: was maintained; was not defective; and the wheels were fastened and in good working order. The first defendant took all reasonable steps to prevent the wheels of the truck-trailer combination from becoming dislodged.

[9] Mr Klopper further testified that it was the duty of the first defendant to ensure that the vehicles of the first defendant were in proper working order. That the wheels of a vehicle in proper and working order should not detach from the vehicle. He spontaneously testified that the nuts attaching the wheels to the trailers were attached by way of a "torque multiplier" and that they were fastened to 800 newton meters.

[10] The most relevant part of Klopper's evidence was his concession that a wheel fastened to the proper specifications (800 newton meters) will not come loose. Klopper conceded that should this contention be accepted it would result in the only conclusion being that the wheel that detached from the trailer of the first defendant was not properly fastened. He could not offer any direct evidence that the articulated truck had been properly maintained prior to the collision. His evidence was of a secondary nature which was from reports compiled by other persons such as the second defendant, who was not called to testify.

The applicable legal principles

[11] It is trite that negligence has to be proven on a balance of probabilities. This may, in an appropriate case be achieved by the application of the principle of *res ipsa loguitur* ('the facts speak for themselves'). In *Mitchell v Maison Lison 1937 TPD 13* it was said –

'Human experience shows us that in certain circumstances it is most improbable that the occurrence under investigation would have taken place without negligence.'

[12] The onus is on the plaintiff to prove – in a civil case upon a preponderance of probabilities – that the defendant was negligent. In certain circumstances the facts of the case itself give rise to an inference of

negligence on the part of the defendant. The maxim *res ipsa loguitur* is then said to apply: the plaintiff establishes a *prima facie* case of negligence merely by proving the facts of the occurrence. (The Law of Delict; Boberg, Vol 1, Aquilian Liability pp 377-378).

[13] In *Arthur v Bezuidenhout and Mieny 1962(2) SA 566(A)* it was held that the maxim does not shift the onus of proof to the defendant. It is simply an argument available to a plaintiff who has little evidence at his disposal, to avoid judgment of absolution from the instance being given against him at the close of his case.

[14] But the application of the maxim does, however, indicate a probability in the plaintiff's favour, and to escape liability the defendant must displace that probability, offering an explanation of the occurrence that neutralizes the inference of negligence originally drawn. Then the plaintiff, who has not discharged the *onus*, fails.

Discussion

[15] Defendant's counsel submitted that Mr Klopper's evidence exonerates the defendant hence an inference of negligence against the defendants cannot be drawn. Klopper's evidence, said counsel, shows that the first defendant did everything to ensure that its truck was maintained and that, *inter alia*, the wheels were properly fastened each time before the truck left the premises. I am not persuaded by the submission.

[16] As I said, Mr Klopper could not offer any direct evidence that the wheel of the trailer concerned had been properly fastened prior to the collision. But his evidence was based on information in logs or maintenance sheets completed by someone else as regards routine maintenance. It was his evidence that it was the driver of the articulated truck whose duty it was to ensure that the wheels were properly fastened before it left the premises. The driver was not called to testify and no explanation was furnished as to why he was not available to testify. In any case the evidence of maintenance related to the truck ('horse') and not the trailer involved. The evidence also does not

show that the trailer concerned was inspected on the relevant day, being the day of the collision.

[17] Thousands of vehicles traverse the roads of the country every day. It is not an ordinary occurrence that a wheel comes off a motor vehicle whilst it is travelling on a road. In the absence of any other explanation as to why the wheel came off the trailer it seems to me that the only inference that can be drawn is that the wheel was not properly fastened. The application of the *res ipsa loguitur* principle is appropriate.

[18] In these circumstances, I am of the view that the plaintiff has discharged the onus, on a balance of probabilities, of proving negligence on the part of the first defendant.

[19] Insofar as the defendant's allegation of negligence on the part of the plaintiff is concerned it is insufficient to merely allege negligence alone. Particular grounds of negligence must be set out. The defendant has failed to do so.

[20] I make the following order:

1. The first defendant is liable to the plaintiff for the plaintiff's proven or agreed damages.
2. The issue of quantum is postponed sine die.
3. The first defendant is to pay the costs of the action thus far.

RANCHODDU
JUDGE OF THE HIGH COURT

Appearances:

Counsel on behalf of Plaintiff	: Adv R. Raubenheimer
Instructed by	:Swanepoel & Swanepoel Attorneys
Counsel on behalf of Defendant	: Adv G. Steyn
Instructed by	: Molefe Knight Attorneys
Date heard	: 13 September 2016
Date delivered	: 21 December 2016