IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA 15/12/2016.

CASE NO: 6629/2015

1. Reportable: ~~Yes~~/No
2. Of interest to other judges: ~~Yes~~/No
3. Revised: Yes/~~No~~

15 December 2016

(Signature)

In the matter between:

GN CHIPWATALI **Plaintiff**

and

ROAD ACCIDENT FUND **Defendant**

JUDGMENT

DE VILLIERS, AJ:

1 The quantum of the plaintiff's claim was separated in terms of Uniform Rule 33(4).

2 The issue in this case should simply have been if the opening of the driver's door of a vehicle, forms part of the driving of a motor vehicle as

contemplated in section 17(1)(a) of the **Road Accident Fund Act** 56 of 1996. The section reads (underlining added):

> "*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) ...,*
>
> *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.*"

3 The particulars of claim averred that the plaintiff's damages were caused by, or arose, from the driving of the (insured) vehicle as contemplated in section 17. The plea thereto read:

> "*The Defendant admits allegations contained in these paragraphs in so far as they accords with provisions of the **Road Accident Fund Act** of 56 of 1996 (as amended).*"[1]

4 This plea seems to be an admission that the **Road Accident Fund Act** would cover the incident:

4.1 See Uniform Rules 18(4) and (5:

> "*(4) Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto.*
>
> *(5) When in any pleading a party denies an allegation of fact in the previous pleading of the opposite party, he shall not do so evasively, but shall answer the point of substance.*"

4.2 See Uniform Rule 22(3):

> *"Every allegation of fact in the combined summons or declaration which is not stated in the plea to be denied or to be admitted, shall be*

deemed to be admitted. If any explanation or qualification of any denial is necessary, it shall be stated in the plea."

5 Yet, and despite the plea that seemed like an admission to the contrary, in the end the defendant's only case in argument was that section 17(1)(a) of the **Road Accident Fund Act** 56 of 1996 did not apply.

6 The plaintiff did not plead that the insured driver opened his door when it was not safe to do so, its real case.[2] Instead, the plaintiff pleaded the normal grounds of a failure to keep a proper lookout, as well as a number of other standard negligence grounds (including a failure to brake timeously and driving at an excessive speed). The defence was a plea that the defendant had no knowledge of the matter, alternatively that the plaintiff cycled too fast, did not apply his brakes in time and other similar standard defences. There appears to have been no reason to plead a "*no knowledge*" version as the primary defence.[3]

7 The common cause facts were uncomplicated:

7.1 The plaintiff, a worker at a diary, was on his way to work on his bicycle at 13H00 on 14 January 2014 when he collided with a door of a vehicle that was opened in his path of travel;

7.2 He had been cycling on Nellmapius Road, a tarred road, with a lane in each direction;

7.3 Visibility was good; it was a clear day;

7.4 The road carried traffic, it was especially the opposite lane that was busy;

7.5 According to the photographs tendered, the road was a straight, flat road both leading up to the place of collision and where the collision occurred;

7.6 The insured vehicle was Toyota Hilux bakkie. It had been travelling in the same direction as the plaintiff. The insured driver was also on his way to work;

7.7 Immediately prior to the collision, the insured vehicle was stationary at a tarred parking area to the left of the lane where busses or taxis can stop to collect or offload passengers;

7.8 The insured driver did not have his vehicle's hazard or indicator lights on;

7.9 The insured driver freely admitted that he had not look to the back when he opened his door. He was apologetic from the start and had taken the plaintiff to the hospital immediately after the collision.

8 Not all the facts turned out to be common cause:

8.1 On the plaintiff's version, when he came alongside the vehicle, it started moving and the driver's door was opened in his path of travel. He did not describe a sudden swerve by the insured vehicle;

8.2 On the insured driver's version, he had collected his vehicle from a mechanic in the area, upon driving away, he was not satisfied that the fault had been repaired. He had stopped to open the bonnet and to inspect the fault. He was stationery when he opened his door.

9 On this aspect (moving vs stationary), I am faced with two mutually destructive versions. In such a case I have to approach the matter as set out in **Oosthuizen v Van Heerden t/a Bush Africa Safaris** 2014 (6) SA 423 (GP) at Para 31 and 32:

> *"[31] Where a court is faced with mutually destructive or irreconcilable versions on the part of the plaintiff and the defendant, it must proceed as follows. It must first determine whether the matter may be resolved on the probabilities. This involves considering the credibility of the witnesses, their reliability and,*

finally, determining on the probabilities whether the party with the onus has succeeded in discharging it. See in this regard ***Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others*** *2003 (1) SA 11 (SCA) para 5;* ***National Employers' General Insurance Co Ltd v Jagers*** *1984 (4) SA 437 (E) at 440D – F.*

[32] If there are no probabilities upon which to assess the irreconcilable versions, then the court must apply the approach set out in the often- cited dictum of Wessels JA in ***National Employers' Mutual General Insurance Association v*** *Gany 1931 AD 187 at 199:*

> *'Where there are two stories mutually destructive, before the onus is discharged, the court must be satisfied that the story of the litigant upon whom the onus rests is true and the other false. . . . It must be clear to the court of first instance that the version of the litigant upon whom the onus rests is the true version. . . .'*

See also ***African Eagle Life Assurance Co Ltd v Cainer*** *1980 (2) SA 234 (W) at 237."*

10 The cross-examination of the plaintiff consisted in essence of questions aimed at a repetition of the evidence in chief. No version was put the plaintiff, nor was he told that it would be argued that his evidence should be disbelieved. The only mildly critical question put to the plaintiff was if the plaintiff had applied a safe following distance from the insured vehicle when it started moving.[4]

11 In **President of the Republic of South Africa and Others v South African Rugby Football Union and Others** 2000 (1) SA 1 (CC) the court dealt with cross-examination as follows in paragraphs 61 to 66. I highlight the following four principles:

11.1 "*The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness-box, of giving any explanation open to the witness and of defending his or her character*";

11.2 "*If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct*";

11.3 "*The rule ...* (referred to above) *is not merely one of professional practice but 'is essential to fair play and fair dealing with witnesses*'";

11.4 "*It should be made clear not only that the evidence is to be challenged but also how it is to be challenged. This is so because the witness must be given an opportunity to deny the challenge, to call corroborative evidence, to qualify the evidence given by the witness or others and to explain contradictions on which reliance is to be placed*".

12 At the end of the examination-in-chief and cross-examination I did not know:

12.1 Exactly where the collision occurred with reference to the three lanes that exist at the bus stop;

12.2 The dimensions of the insured vehicle and its door.

13 As stated, the plaintiff's evidence was not challenged as untruthful in cross-examination and he was not given an opportunity to comment on the insured driver's version. It therefore came as no surprise that the plaintiff closed its (unchallenged) case and did not call the reconstruction expert.

14 The insured driver testified on behalf of the defendant. The plaintiff objected to his evidence as the defendant had pleaded that it had no knowledge of the collision as its primary defence. However, the defendant did not plead a bald denial in that it had pleaded in the alternative why it averred the plaintiff was negligent and caused the collision. I allowed the testimony.

15 At the end of the examination-in-chief and cross-examination I did not know:

15.1 Where the mechanic's workshop was in relation to the scene of the collision;

15.2 What was wrong with the insured driver's vehicle;

15.3 If the insured vehicle was in gear or in neutral when the insured driver prepared to open his door and opened his door;

15.4 If the insured driver had kept the engine running when he opened his door;

15.5 If the insured vehicle's key was still in the ignition;

15.6 If and when in the sequence of events the insured driver had used a functioning hand brake;

15.7 Exactly where the collision occurred with reference to the three lanes that exist at the bus stop.

16 The counsel for the plaintiff suggested in cross-examination that the insured driver had made up a version in that he had already inspected the vehicle earlier, then drove off to return to the mechanic, when the collision occurred. The insured driver denied the suggestion. No other possible explanation was put to him to for the vehicle to have been in motion when the driver's door was opened.

17 The defendant closed its case.

18 Based on the limited facts known to me, the insured driver's version is the more probable. One rarely sees the driver's door of a moving vehicle being opened. In addition, the insured driver had no reason to lie about whether or not his vehicle was stationary or not. His explanation was logical. He freely (even in evidence in chief and in re-examination) stated that he had not looked to the rear before he opened his door. This was an honest admission. I could not find on the probabilities that the insured vehicle was in motion when the insured driver opened the door, leaving aside for the moment the pleadings and the cross-examination on behalf of the defendant. I cannot reject the insured driver's evidence as false, as suggested in cross-examination.

19 The real issue then is if the words in section 17(1)(a) of the **Road Accident Fund Act** "*arising from the driving of a motor vehicle*" on the face thereof carries a meaning of a vehicle in motion.

20 The counsel for the plaintiff quoted **Van Der Poel v AA Onderlinge Assuransie Assosiasie Bpk** 1980 (3) SA 341 (T) at 353 to 354 as a basis for an extended interpretation of "*driving*" to include the opening of the driver's door. This case dealt with a parked tractor that started moving. This was covered by a further section that allocated liability in the case of a parked vehicles (judgment at 350E to F and 352H).

21 Corbett J, as he then was, dealt in **Wells and Another v Shield Insurance Co Ltd and Others** 1965 (2) SA 865 (C) with the following facts (underlining added):

> "*According to the declaration and two sets of further particulars filed by plaintiffs at the request of second defendant, the third defendant, one Johan Jacobus Spies, parked his motor car, C.A. 26828, at approximately 8.45 a.m. on the above-mentioned date in a parking bay on the eastern side of Long Street and opened the right front door of his motor car. The precise sequence of events, as particularised in the particulars dated 15th March, 1965 (which were handed in from the Bar) was as follows: Spies manoeuvred his motor car into the parking bay; he switched off the engine; he applied the hand-brake; he reached behind him to remove an article from the back seat; and he then opened the door preparatory to alighting from the motor car. At this moment a trackless tram owned by the City Tramways Ltd. and being driven by one Robertson was proceeding in the eastern carriage-way of Long Street from north to south. The opened door of Spies' motor car protruded into the path of the oncoming trackless tram with the result that the trackless tram struck the door. This caused the trackless tram to career onto the western carriageway and to crash into motor car C.A. 3308 which at the time was being driven by first plaintiff along Long Street in a northerly direction.*

22 At that stage the relevant section in the then applicable act also required a finding that the bodily injury was caused by or arose out of the driving of the insured motor vehicle. The court held at 871H:

> "*Upon consideration I do not think that the opening of the door can be said to be part and parcel of the 'driving' of Spies' motor car, using the word 'driving' in*

> *both its ordinary and its extended sense. In the ordinary sense of the word the 'driving' of the vehicle in this case had terminated before the door was opened and this latter act had nothing to do with the urging on, direction or control of the vehicle while in motion. The door was opened in order to enable the driver to gain exit from the vehicle but that, in my view, does not make it part and parcel of driving in its ordinary sense ...*"

23 The judgement is in point, even although a tram and not a bicycle was involved.

24 A case involving facts in point, namely a collision between a cyclist and a door opened by the driver, is **Khoza v Netherlands Insurance Co of South Africa Ltd** 1969 (3) SA 590 (W) a judgment by Nicholas J as he then was. In that case the court came to the same conclusion as Corbett J did. The court held at 952 that the opening of a door is "*entirely independent of the driving of the vehicle*".

25 The counsel for RAF quoted section 17(1)(a) of the **Road Accident Fund Act** 56 of 1996 as his contribution to the legal argument, and again referred to a failure to keep a proper following distance (from the stationery vehicle).

26 I am not prepared to interpret plain words in a legislation to mean more than what they clearly mean, as found by Nicholas and Corbett. The views of IWB de Villiers AJ in the **Van Der Poel**-case at 354E to F, in my understanding, are obiter.

27 My function is to interpret legislation, not to legislate. The legislature is aware of the dangers faced by a very large number of cyclists who cycle in traffic to get to work. One sees them every day. The legislature has been so aware for fifty years. Yet, the legislature has not changed the legislation to give RAF protection to the cyclists. I cannot do so based on the interpretation of the relevant section.

28 At the end of the matter I was faced with:

28.1 An admission in a plea about the applicability of the legislation that is wrong in law (if the plea were an admission);

28.2 A trial potentially conducted in an unfair manner in that the defendant's counsel failed in his duties with regard to cross-examination. However, I do not believe that the plaintiff suffered real prejudice in presenting its case; and

28.3 Facts where I cannot find that the plaintiff's version is the more probable.

29 In the end, I have decided the matter on the facts. There was no evidence before me that the defendant is liable for the plaintiff's losses.

30 Due to the conduct of the attorney and counsel acting for the defendant, I make the order set out below. I believe that the attorney ought to bring this judgment to the attention of a senior official of his client.

31 The attorney acting for the defendant and the counsel for the plaintiff saw me in chambers at about 11H10. The attorney told me that his counsel was on his way to court, but that he believed that the matter could be settled if he were to be given until 11H40. Against the practice in this court, I agreed not to commence at the normal time 11H30.

32 When I arrived in court at 11H40, the attorney was nowhere to be seen. The counsel for the plaintiff informed me that no settlement negotiations took place. According to him, the request for time was a ploy to give the counsel for the defendant time to come to court.

33 The counsel for the defendant did not apologise for not having introduced him to me. He informed me that he was a member of the Pretoria Bar. Upon questioning, he based this on having served his application for admission of an advocate upon them.

34 I told the counsel for the defendant to get his attorney to court. Upon being asked to explain himself, the attorney said that he had asked for a higher offer from the defendant as the matter had been allocated to a judge. If this is indeed how the defendant operates, I would find it offensive. Its function is to compensate claimants fairly, and not to encourage litigation. This request, for which he did not need half-an-hour, was the attorney's alleged attempt to settle the matter and for which he had asked for extra time.

35 At the end of the matter it transpired that the counsel for the defendant was briefed at about 09H00, and only obtained his brief when he arrived at court. Initially he said that he had consulted with the insured driver before the trial commenced. Upon being questioned on the time-line, he conceded that he had not done so and relied on what his attorney had told him in presenting the case.

Consequently, I make the following order:

1 I grant absolution from the instance, each party to pay its own costs.

DP de Villiers
Acting Judge of the High Court
Gauteng Division

Heard on:	**2 December 2016**
On behalf of the Applicant:	**Adv EJJ Nel**
Instructed by:	**Erasmus-Scheepers**
On behalf of the Respondent:	**Adv Mahlaba**
Instructed by:	**Maluleke Msimang & Associates**
Judgment handed down:	**15 December 2016**

[1] I endeavor to avoid the use of "sic";
[2] The counsel who appeared did not sign the particulars of claim;

[3] The counsel who appeared did not sign the plea;
[4] There are several textbooks available from which the art can be learned, and every day there are opportunities to attend to court to observe cross-examination by other counsel;