

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

REPUBLIC OF SOUTH AFRICA



4/4/16

CASE NUMBER: 25207/2014

(1) REPORTABLE: YES / NO

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

(3) REVISED

31.3.2016

DATE

SIGNATURE

In the matter between:

MAGALANE JOYCE THIPE

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

- [1] The plaintiff instituted a claim for damages against the defendant consequent upon injuries she sustained in an accident on 24 April 2010 on the Modimolle-Tuinplaas road, Limpopo. The plaintiff was a passenger in the vehicle, which vehicle was driven by her husband ("the insured driver").
- [2] At the inception of the trial, the parties indicated that the trial will only proceed on the merits of the plaintiff's claim. An order facilitating the separation of issues was duly issued.
- [3] The parties, furthermore, indicated that only the issue of the insured driver's negligence is in dispute.
- [4] In the particulars of claim, the plaintiff relied on the following instances of negligence:

"

6.

*The collision was caused by the sole and exclusive negligence of the insured driver who was negligent in one or more of the following respects:-*

*6.1 he failed to keep a proper lookout.*

*6.2 he drove at a high speed in the prevailing circumstances.*

*6.3 he failed to keep the Toyota under proper and/or adequate control.*

*6.4 he failed to avoid the collision when by the exercise of due and reasonable care he could and should have done so.*

*6.5 he failed to apply brakes in time or at all."*

- [5] The defendant's plea contains a bare denial of these allegations.
- [6] Neither party called any witnesses and I was informed that, by agreement between the parties, the affidavit of the insured driver will serve as the only evidence in the trial.
- [7] The relevant portion of the affidavit reads as follows:

"

4.

*While along Modimolle road and in the direction of Tuinplaas, the vehicle got right front wheel puncture just when we were approaching a T-Junction to turn into Marble Hall direction.*

5.

*After the puncture I lost control of the vehicle, veered off the road going towards the T-Junction and hit the chevron."*

- [8] Mr Sanders, counsel for the plaintiff, submitted that the insured driver's version clearly establishes that he was negligent. Mr Phahlamohlaka counsel for the defendant, argued that the puncture was the cause for the accident and therefore the insured driver was not negligent.

### NEGLIGENCE

- [9] It is trite law that the *onus* is on the plaintiff to prove that the insured driver was negligent and that his negligence caused the accident. This principle was succinctly formulated in *Arthur v Bezuidenhout and Mieny* 1962 (2) SA 566 AD at 574B as follows:

*"There is, in my opinion, only one enquiry, namely: has the plaintiff, having regard to all the evidence in the case, discharged, the onus of proving, on a balance of probabilities the negligence he has averred against the defendant?"*

- [10] The test for negligence rests on two legs, namely: the reasonable foreseeability and the reasonable preventability of damages. [*Vide Law of Delict* Neethling-Potgieter-Visser, 7<sup>th</sup> edition at 148]
- [11] Having regard to all the evidence, the question firstly arises whether the insured driver should reasonably have foreseen the possibility that the right front wheel tyre of the vehicle would puncture.
- [12] Secondly and if the answer to the above question is positive, the question arises whether the insured driver took reasonable steps to prevent the vehicle from veering off the road and hitting the chevron.
- [13] There is no evidence to suggest that the puncture to the tyre was foreseeable. The plaintiff did not aver, as a ground of negligence, that the insured driver failed to maintain the tyres of the vehicle properly.

- [14] Secondly and even if one accepts that the puncture to the tyre could only have resulted from a failure to properly maintain the tyres of the vehicle, the question arises, whether a reasonable person in the position of the insured driver would have been able to prevent the vehicle from veering off the road.
- [15] No evidence was tendered in respect of the speed the insured driver was traveling at the time. Similarly, there is no evidence in respect of the prevailing conditions at the time of the accident, such as the surface of the road, the weather conditions, the type of surface and conditions of the area next to the road.
- [16] Would a reasonable person in the position of the insured driver faced with a puncture in the tyre of the vehicle in the prevailing circumstances, have been able to avoid the accident? I do not know. The fact that the insured driver lost control of the vehicle does not in itself lead to the inescapable conclusion that he was negligent.
- [17] For such an inference to be drawn, the court should find that the evidence produced by the plaintiff, for instance in the present matter the fact that the insured driver lost control of the vehicle, give rise to a *res ipsa loquitur* situation. It is then for the defendant to explain why the insured driver lost control of the vehicle. In the present matter, the plaintiff, by introducing the affidavit of the insured driver into evidence, provided an explanation for the fact that the insured driver lost control of the vehicle.
- [18] There is no *onus* on the defendant to prove that the insured driver was not negligent. In *The South African Law of Evidence* Zeffertt & Paizes, 2<sup>nd</sup> edition at 221 and 222, the law is stated as follows:

*"Proof of a res ipsa loquitur situation, as we have said above, calls for an answer from the defendant, without which he runs the risk of having judgment given against him, but does not require him to prove that he was not negligent. If he can show that the facts are at least equally consistent with an explanation not involving negligence, or adduce sufficient evidence of proper*

*care to leave the court in doubt, the appropriate order will be absolution from the instance."*

[19] The above citation is apposite to the facts under consideration. Having regard to the contents of the affidavit of the insured driver, I am in doubt whether he was negligent in one or more of the respects relied upon by the plaintiff in the particulars of claim.

## ORDER

In the premises, I make the following order:

Absolution from the instance with costs is granted.



**N. JANSE VAN NIEUWENHUIZEN**  
**JUDGE OF THE HIGH COURT OF SOUTH AFRICA**  
**GAUTENG DIVISION, PRETORIA**

## Appearances:

Counsel for the Plaintiff	:	Advocate J A Saunders
Instructed by	:	Mphela and Associates
 Counsel for the state	 :	 Advocate Phahlamohlaka
Instructed by	:	Tsebane Molaba Inc