

REPUBLIC OF SOUTH AFRICA

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

**DATE: 2/9/2016
CASE NO: 71326/2013**

In the matter between:

J DE WEE

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

J U D G M E N T

MALI J

[1] The plaintiff sued the defendant in terms of the Road Accident Fund Act of 1996 for damages suffered as a result of injuries sustained in a motor vehicle accident which occurred on 23 February 2012. The

plaintiff's claim is for the amount of R425 500.00. The defendant denies liability.

[2] The plaintiff is a 57 year old widowed gentleman. He described himself as an adult male employed as a Production Manager and residing at [3...]Warwick Crescent , Sherwood in Port Elizabeth.

[3] The defendant is an entity established in terms of the Road Accident Fund Act No 56 of 1996, ("the Act") and which is liable for compensation of victims of motor-vehicle accidents, for personal injuries sustained from such accidents.

[4] The claim for damages arises out of the injuries sustained by him because of the collision involving an unknown vehicle, driven by an unknown person. The said unknown vehicle collided with a motor vehicle with registration letters and numbers **FZL [6...] GP**, driven by the plaintiff at the time of the accident.

[5] The parties have agreed to a separation of the merits and quantum and an order had been made to such an effect. The quantum is postponed sine die. The matter proceeds on merits with this court being tasked to make a determination thereon.

LAW

[6] It is trite law that the onus is on the plaintiff to prove, on a balance of probabilities that the plaintiff's injuries were caused as a result of the

negligent driving of the unidentified driver of the insured motor vehicle.

See **Laas v Road Accident Fund** 2012 (1) SA 610 (GNP).

[7] It is also expected that he should prove that there was contact between the unidentified motor vehicle and him

[8] I now turn to inquire whether the collision was caused by the sole negligence of the driver of the unknown vehicle.

THE EVIDENCE

[9] The defendant did not lead any evidence and the trial proceeded only on the evidence presented by the plaintiff.

[10] The plaintiff testified that he has 36 years of experience in driving motor vehicles. He further stated that he drove a company car for 33 years, therefore driving motor vehicles has been a large part of his employment and he had to exercise caution all the time.

[11] The plaintiff further testified that on the day of the accident he left home at 5h30 in the morning and started at Sun Ridge Mall (" the Mall") to withdraw money from the bank's automated machine services. ("ATM"). He then drove from the Mall, at approximately 5h55, and turned left into Canna Road with the intention of joining Kragga Kama Road (" the Road") by executing a turn to the right. The road has two lanes in both directions and connects with Canna Road by means of a T junction.

[12) The plaintiff further stated that the lights of his motor vehicle were on as the weather was not really good, because it was misty and raining. The visibility was poor and sunrise had not occurred. As the plaintiff intended to turn right, since the traffic light was green for him, he put on the indicators indicating to the right. As he turned the vehicle to the right a dark object, which later proved to be a motor vehicle truck with no lights on, abruptly appeared from the right whilst the traffic light were red from its side.

[13] The plaintiff further testified that in order to avoid the accident he accelerated his vehicle. This was his attempt to manoeuvre his vehicle as he could not apply the brakes because it was wet due to the rain.

[14] The plaintiffs motor vehicle slipped and he heard and felt the banging sound behind him as the truck hit his motor vehicle at the back. The plaintiff further testified that he lost control of his motor vehicle due to the truck hitting his motor vehicle. There was nothing further he could do to avoid the accident.

[15) Under cross examination the plaintiff stated that he was hospitalised for a period of 3 months and he never saw his motor vehicle again. He further stated that the scrap yard took possession of his vehicle without him seeing it because of the trauma he suffered due to the accident. He further stated that his late wife took the photographs of his car whilst he was hospitalised. The photographs were in his late

wife's cellular phone and he was not interested in viewing the photographs again because of the trauma. The photographs were later deleted by his late wife. He further clarified that he knew that his motor vehicle was hit at the back because he heard and felt the bang at the back and his motor vehicle went across and plunged into a tree.

[16] The plaintiff's credibility was attacked because in the motor accident plan it was recorded that the surface of the road was good and that there were no obstructions. This is because the road was straight; the plaintiff agreed that in general it is a good road, however on the day of the accident the road was not dry as it had been raining.

[17] Counsel for the defendant questioned the plaintiff on Doctor Gerald Lemmer's ("Dr Lemmer") report, an accident reconstructionist. The issue is that Dr Lemmer stated in his report that he can neither prove nor disprove the existence of unidentified vehicle as it was a matter of direct evidence. The plaintiff could not to answer that, be that as it may, Dr Lemmer's report at page 15 of the paginated papers states as follows:

"It can, however, be stated that Mr De Wee's version is completely plausible fom (sic) the point of view of physcis. Had it not been for the slight collission with the right rear comer of his car it is most probable that he would have retained control of his car in the right tum into Kraggakama and continued his journey with impunity. Furthennore, in my view, his decision to accelerate was probably the correct one. If he

had jammed on his brakes the truck would most probably have collided with the right side of his car in a T-bone (sic) collision and he would have taken the full brunt of the collision. "

[18] The above account by Dr Lemmer corroborates the plaintiff's version; which the defendant could not disprove. The defendant did not call the police officer who drew the accident plan to testify. The defendant seems to rely on the accident sketch plan taken 15 minutes post the accident. The sketch plan remains as such as it is not an affidavit. In fact Constable Thomas who drew the sketch plan had never even made an effort to meet the plaintiff. The defendant's case, supposedly made from the sketch plan, is that the surface was dry and there were no obstructions. The plaintiff has already testified satisfactorily on the issues raised by the Counsel of the defendant.

[19] It was further argued by the Counsel for the defendant that the plaintiff failed to keep a proper look out, he could have seen the unknown vehicle 6 metres away and should have stopped instead of proceeding with the turning manoeuvre to the right. As indicated above stopping the vehicle would have involved the application of breaks, an exercise which would have proved fatal had the surface in fact been wet.

ASSESSMENT OF THE EVIDENCE

[20] It is common cause that the only evidence before me is that of the plaintiff. The plaintiffs evidence was not contradicted by any other opposing evidence. The plaintiff impressed me as a candid and reliable witness. I found him to be a credible witness who testified in an honest and trustworthy manner. When he was cross examined about the fact that he failed in his affidavit to state that his motor vehicle was hit at the back, he stated that the statement was taken 6 months after the accident occurred. Counsel for the defendant could not take the matter further.

[21] It is abundantly clear that the plaintiff could not reasonably have and possibly have avoided the collision as his motor vehicle was hit from behind by a truck, a vehicle commonly excepted as having more weight, as opposed to a passenger vehicle, and therefore higher momentum.

[22] I could find no well- founded suggestion that the plaintiff was engaged in a fraudulent claim. On defendant's own admission the police officer who attended the accident scene, shortly after the accident, found that there was an accident and that indeed there was an impact with a tree. The defendant's admission is in line with the plaintiff s evidence.

CONCLUSION

[23] Having regard to the above and on the evidence before me, the plaintiff has succeeded in proving on a balance of probabilities that

the collision was caused by the sole negligence of the driver of the unidentified motor vehicle and that there was contact between the unidentified motor vehicle and him. His evidence as to how the collision occurred is clear, credible and remains uncontested

[24) The defendant did not prove contributory negligence on the part of the plaintiff, neither was it argued on its behalf that the plaintiff contributed to the collision. Consequently, the defendant must be held 100% liable for the plaintiffs proven or agreed damages.

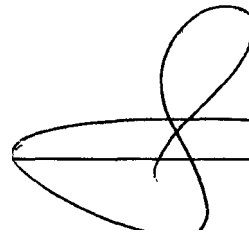
ORDER

[25) In the result I make the following order;

25.1 The defendant is liable in full for the plaintiffs proven or agreed damages consequent upon the injuries the plaintiff sustained during the collision.

25.2 The defendant is ordered to pay the costs of the trial on the merits.

25.3 The determination of the plaintiffs quantum of damages is postponed *sine die*.

A handwritten signature in black ink, consisting of a stylized, looped 'M' shape with a horizontal line passing through it.

N.P. MALI

JUDGE OF THE HIGHCOURT

Counsel for the Plaintiff:

J Barn

Instructed by:

EHLERS ATTORNEYS

Counsel for the Defendant:

B STshauke

Instructed by:

DIALE MOGASHOA ATTORNEYS

Date of hearing:

28 April 2016

Date of Judgment:

02 September 2016