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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHERS JUDGES: NO
- (3) REVISED

CASE NO: 46899/17

12/6/2019

In the matter between:

L F VAN DER MERWE

PLAINTIFF

V

THE ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

NEUKIRCHER J:

- [1] The plaintiff has sued the defendant for damages sustained by him in a motor vehicle accident which took place on 12th June 2016 at approximately 06h20 whilst he was on his way to Ladysmith. He was the driver of a Toyota Aygo registration number [....].
- [2] At the outset, Mr Dreyer, who appears for the plaintiff, informed me that the parties have agreed to separate merits and quantum and that the issue before me was the issue of merits and, in particular the cause (or as he put it, the 'mechanism') of the accident as the other vehicle was an unknown vehicle.

- [3] Paragraph 3.3 of the particulars of claim states;
"collision occurred when the insured vehicle (i.e the 'unknown vehicle') passed so close to the plaintiffs vehicle that the plaintiff had to swerve in order to avoid an accident with the insured vehicle, causing the plaintiff to lose control of the vehicle and the vehicle overturning."
- [4] Chapter 6.13 of the Practice Manual of the North Gauteng High Court which became operational from 25th July 2011 provides that
"3.5 if the parties do not settle the matter:
 3.5.1...
 3.5.2...
 3.5.3 *there shall be an automatic separation of merits and quantum in accordance with rule 33(4) unless the parties agree that there shall be no separation .*
- [5] Bearing this in mind and the issues to be determined, in my view it was convenient to hear the separated issue as agreed by the parties and the matter proceeded on the merits.
- [6] The plaintiff testified that:
- 6.1 on 12th June 2016 at approximately 06h20 he was on the highway from Johannesburg to Durban on his way to Ladysmith and he was travelling in a Toyota Aygo. It was not quite light outside and he was travelling with his headlights on and he had no passengers with him;
 - 6.2 he was travelling in the left hand lane and had to pass a slower moving vehicle, which he did and he stayed in the right hand lane¹ as the speed limit was 120km and he was travelling at 120km;
 - 6.3 he checked his rearview mirror regularly;
 - 6.4 he first became aware of the unidentified vehicle when he heard a loud noise and realized it was the sound of the engine of the motor cycle travelling at a high speed;
 - 6.5 when he heard the noise he checked his rearview mirror and saw that the motor cycle was right behind him and it looked as though it was

- going to collide with him so he swerved quickly to the left;
- 6.6 this is when he lost control his vehicle - it overturned and when it eventually came to rest it ended up in the road on its roof;
- 6.7 the motor cycle never stopped-it sped off;
- 6.8 someone else stopped and he was taken to Alberton Union Hospital as he had sustained serious injuries;
- 6.9 no police officer or traffic officer was at the at the scene of the accident when he was there, none came to the hospital and he never reported the accident;
- 6.10 the accident report that was completed by Constable Ndumo was done without consulting him and he never signed it;
- 6.11 from the time he overtook the slow-moving vehicle in the left-lane, to the time of the accident was about 1-2 minutes.
- [7] In cross-examination he conceded that apart from the other slow-moving vehicle there were no other vehicles on the road and there was sufficient space for him to have moved back into the left-hand lane after he passed the slower vehicle so that the motorbike would have simply passed him.
- [8] He denied that he did not keep a proper lookout.
- [9] Prof. Gerald Lemmer was then called. Prof. Lemmer holds a BSc, BSc (Honours), MSc (Natal) and a PhD (Cambridge). His expertise was not placed in dispute by the defendant. Professor Lemmer was requested to provide an opinion on whether or not, given the manner in which the plaintiff described how the accident occurred, his version was plausible. Professor Lemmer's report states:
- "From the point of physics, Mr van der Merwe's version is perfectly plausible. A sudden swerve to the left will induce an anticlockwise rotation of the vehicle together with a broadside skid. The slightest disturbance to one of the right wheels of the vehicle would cause the vehicle to overturn."*
- [10] Prof. Lemmer also testified that plaintiff probably reacted in the way anyone would have - he jerked his vehicle to the left and based on plaintiffs version,

¹ The **road is a dual carriageway** In both directions.

there was no reason for plaintiff to move into the left lane earlier and from the⁴ point of view of physics, nothing rebels against plaintiffs version.

- [11] Of course, in cross-examination Prof. Lemmer quite correctly conceded that it was possible that plaintiff did not have to swerve as he did and he stated that, in his opinion, based on the laws of physics, there are also other possible outcomes of the scenario, of which the plaintiffs is but one.
- [12] Mr Thabethe, for the defendant, then used the table set out in his expert's report² "the speed-distance-time calculation". In essence the experts agreed that it would take the plaintiff's vehicle +-6 seconds to travel a distance of 200m if traveling at 120km/h. Using the same table and postulation they agreed that the motor-cycle was travelling the same distance but at 240km/h it would take 3 seconds and if travelling 200km/h it would take 4seconds to travel 222m.
- [13] This concluded the plaintiff's case.
- [14] The defendant then called Mr J.P Strydom. His expertise was likewise not placed in dispute by Mr Dreyer and accordingly to his report he is a "trained and experienced traffic accident analyst."
- [15] Mr Strydom testified that he conducted an inspection *in loco* at the scene of the accident. He found that the road surface was flat but that one cannot see past a certain point because of the incline in the road facing towards Johannesburg at a point of 200m south of the roadside marker.
- [16] He never inspected the plaintiff's vehicle itself or the damage to the vehicle but opined that given the facts, the plaintiff could comfortably have moved out of the way for the motorcycle to have passed without the necessity of swerving and over-steering.
- [17] His opinion was that the plaintiff could have done more to avoid him losing control over his vehicle resulting in a single vehicle collision and that plaintiff would have seen the motor cycle had he kept a proper lookout.
- [18] In cross examination Mr Strydom conceded that:
- 18.1 he relied on an accident report which was not only drafted without plaintiff's input but also makes no mention of a second unidentified vehicle. He conceded that he would have to take the second vehicle

² Mr J. P Strydom of J.P Strydom Accident Consultants CC

into account for purposes of his report and conclusion;

- 18.2 that his report does not take into account what time of the day the accident occurred and that this does make a difference to his conclusions;
- 18.3 that a rear-view mirror can distort images which would be a factor in plaintiff's observations and this was not taken into account by him;
- 18.4 that the top speed of the Toyota **Aygo** is 160km/h and if the plaintiff had geared down he could have reached this speed - but he conceded that there was a "drag time" on how long it would take the vehicle to speed up which he had not taken into account and therefore he could not state with certainty that plaintiff would have been able to avoid an accident had he sped up to the vehicle's maximum speed.

- [19] This then was the end of the defendant's case.
- [20] Mr Dreyer argued that there was in actual fact, only one version of what occurred on 12th June 2016 and that the facts stand uncontroverted. He argues that the plaintiff thought the only maneuver he could safely perform was to swerve left and that Prof. Lemmer had stated that this was what everyone probably would have done, which was not controverted in cross-examination or any other evidence.
- [21] The plaintiff was not doing anything wrong by travelling at 120km/h in the fast lane - he was entitled to travel in this lane by virtue of the speed at which he was travelling. Furthermore, the plaintiff's evidence was that merely from the sound of the oncoming motorcycle, he realized it was travelling at a very high speed which is what prompted him to look in his rearview mirror but by then it was too late.
- [22] Mr Dreyer postulated that if the motorcycle travelled at for example, 240km/h it meant that it travelled a distance of 200m every three seconds. This meant that (on defendant's version) plaintiff was expected to check his rearview mirror every three seconds and that the question is whether it can be reasonably expected of plaintiff to have done so.
- [23] Mr Dreyer submitted that:
 - 23.1 there was no real dispute between the two experts;
 - 23.2 nothing the plaintiff did was unreasonable;

23.3 the driver of the unidentified vehicle was 100% negligent

23.4 that the defendant has not pleaded an apportionment of damages and is therefore not entitled to one;

23.5 costs should follow the result.

- [24] Mr Thabethe argued that once the plaintiff overtook the slower vehicle he should immediately have gone back to into the slow lane and that if he had done this he would have avoided the accident. This is also the rule of the road he submitted i.e keep left pass right.
- [25] That the plaintiff, in any event, should have kept a proper lookout which he failed to do.
- [26] That whatever occurred, the plaintiff was partly responsible and an apportionment of 70/30 is appropriate.
- [27] The first question to be answered was the cause of the accident: it was never placed in dispute that the plaintiff swerved to avoid a collision with an unidentified motor cycle that was travelling at an extremely high speed. It was also common cause between the experts that, had the motor cycle been travelling at the speed of 240km/h it would have travelled 200m in three seconds. In my view, to expect the plaintiff to check his mirrors every three seconds for an approaching vehicle is unrealistic. In any event, his evidence was that he regularly checked his mirrors and that from passing the vehicle on his left to the time of the accident was about minute or two later.
- [28] Given this and given the uncontroverted evidence that he heard the motor cycle, checked his rearview mirror and it seemed that it was almost "on top of him" I accept that any reasonable driver would have instinctively done what plaintiff did and that is swung out to avoid a collision.
- [29] It also is in my view that if the motor cycle was travelling at a very high speed and almost on top of plaintiff when he saw it, a gradual veering to the left would not necessarily have avoided a collision between the two vehicles and, in any event, no cross-examination took place regarding any evasive maneuvers that the driver of the motor cycle had attempted to make.
- [30] This being so and Professor Lemmer's uncontroverted evidence that the plaintiff's version is "perfectly plausible" I find in favour of the plaintiff on the merits on a balance of probabilities.

[31] On the issue of whether there should be an apportionment or not, Mr⁷ Dreyer's contention that the defendant has failed to plead an apportionment and is therefore precluded from arguing same, is incorrect:

31.1 firstly the plea states

"that defendant prays that the plaintiff claim be dismissed with costs, alternatively that the High Court makes an order having regard to the provisions of the Apportionment of Damages Act 34 of 1956...";

31.2 secondly, in AA Mutual Insurance Association Ltd v Nomeka³, Viljoen AJA stated the following:

"The weight of the decisions is, therefore that provided the plaintiffs fault is put in issue, an apportionment need not be specifically pleaded or claimed. This is the correct view in my view in my opinion. The Act has become part of the former all-or-nothing effect of the common law in this respect. I agree, with respect with O'Hagan J that upon a determination of the issues properly raised in the pleadings the Court must give judgment in accordance with the imperative direction of section 1 of the Act."

[32] Even though apportionment has not been specifically pleaded in the body of the pleading itself, it has been claimed and therefore plaintiff was forewarned of the defendant's argument. Furthermore, the plea itself (and the evidence presented) puts plaintiff negligence firmly in issue and thus I find that defendant is entitled to raise and argue the issue of apportionment.

[33] However, I find that on the facts of this matter, had it not been for the actions of the unidentified driver who was travelling at a high speed, which was in all probability in excess of the speed limit of 120km/h, this accident could have been avoided.

[34] Therefore, the defendant is 100% liable for the plaintiff's proven damages.

ORDER

³ 1976 (3) SA 45 (SCA) at SSC-E

- 35.1 The defendant is liable for 100% of the plaintiff's proven or agreed damages⁸ arising out of the motor vehicle accident of 12th June 2016.
- 35.2 The defendant is to pay the plaintiff's costs including the qualifying fees of the plaintiff's expert Professor Lemmer.

NEUKIRCHER J
JUDGE OF THE HIGH COURT

Date of hearing: 6 June 2019
Date of judgement: 9 June 2019

For the plaintiff:

Adv W J Dreyer
Instructed by VZLR Inc

For the Defendant:

Adv M I Thabethe
Instructed by Mathipane Tsibane Attorneys