IN THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 75502/18

REPORTABLE: YES/NO

OF INTEREST TO OTHER JUDGES:YES/NO

REVISED

Date: 26/02/2021

CHAUKE CEDRIC **PLAINTIFF**

AND

ROAD ACCIDENT FUND **DEFENDANT**

JUDGMENT

KHUMALO J

Introduction

[1] This is an action instituted in terms of the Road Accident Fund Act, 56 Of

1996 (“the Act”) against the Defendant (also referred to as the Fund), as the body that is responsible for any loss suffered arising from the negligent driving of motor vehicles. The Plaintiff, a 32-year old driver, is suing for damages he suffered as a result of a personal injury he sustained in a motor vehicle accident that occurred on Kromatart Road in Giyani on 27 October 2016.

[2] The Plaintiff alleged in his particulars of claim that the collision occurred between a motor vehicle with registration number [...] driven by him and a motor vehicle with registration number [...] (“the insured motor vehicle”) whose driver’s sole negligence was the cause of the collision. All the incidents of duty of care that could possibly have been breached by the insured driver were mentioned as having possibly been the cause of the collision rendering the Defendant liable for the damages suffered by the Plaintiff.

[3] The injury sustained by the Plaintiff was an open fracture elbow and he is claiming an amount of R11 000 000, for all the damages arising therefrom.

[4] In its Plea, the Defendant denied any liability to the Plaintiff’s claim and or for any negligence, putting the Plaintiff to the proof thereof. It pleaded in the alternative that the negligent driving of the Plaintiff caused the collision, also stating the catch all grounds of breach of duty of care. In a further alternative the Defendant pleaded contributory negligence on the part of the plaintiff, requesting the court to apportion plaintiff's damages in terms of the Apportionment of Damages Act, Act 34 of 1956, as amended. The Defendant also delivered two Special Pleas relating to the issue of quantum.

[5] In terms of the minutes of the parties’ first pre-trial conference, held on 5 September 2019 following the closing of the pleadings, the summary of facts as stated by the Plaintiff was that; the motor vehicle accident occurred when the

Plaintiff was a driver in a motor vehicle with registration numbers [...]which lost control and overturned, notwithstanding the averments in its particulars of claim. The Defendant's summary was that the driver (Plaintiff) was driving along Kromatrat Road in Giyani and lost control of the motor vehicle and collided with a taxi with registration number [...].

[6] In the minutes of their second pre-trial conference held on 11 February 2020, two weeks before the trial, the Plaintiff's summary of facts was altered to that "the Plaintiff was driving his vehicle along Kromatrat Road when motor vehicle with registration number […], driven by Mdaka Brian (herein referred to as the "insured driver") collided into his motor vehicle."

[7] A separation of the issue of merits from that of quantum in terms of Rule 33 (4) of the Uniform Rules of Court ("the Rules") was mooted and an order granted accordingly, with the issue of quantum postponed *sine die*.

[8] The issue that was to be decided was whether when the accident occurred there was negligence on the part of the insured driver.

[9] It is common cause that the Plaintiff's third party claim duly submitted as prescribed in terms of s 24 of the Act was repudiated for the reason that neither in the Accident Report's statements made by both the plaintiff and the insured driver nor in the Plaintiff's s 19 (f) Affidavit that was attached to the third party claim Form in compliance with s 24, is negligence imputed to the insured driver.

[10] The Plaintiff s 19 (f) Affidavit, together with the Accident Report and the Hospital Records were discovered by the Plaintiff as part of the documents the Plaintiff was going to rely upon to prove his claim at the trial.

[11] At the commencement of his testimony, the Plaintiff confirmed the contents of his s 19 (f) Affidavit, stating that he therein explained in brief, how the accident

occurred. He said on 27 October 2016 he was driving from Polokwane towards Giyani, when he saw a motor vehicle which looks like a taxi, driving towards the opposite direction coming to his lane. He tried to move away and two of his left hand side wheels went off the road on to the gravel on the side of his lane. It was too late to avoid the oncoming vehicle. It hit his vehicle on the fan belt. The front right wheel of his vehicle burst and his vehicle spun around and faced the direction he was coming from. He thereafter could not see anything as he was unconscious. He regained consciousness in hospital. His travelling speed was 50 - 54 km/h and was not sure of the speed limit on that road. The other vehicle (insured vehicle) hit him head-on. Then he said it hit his vehicle on the side of the driver where he was seated. The collision happened on his lane and after the wheel burst, his vehicle moved towards the other lane. He refuted his Counsel's intimation that the insured vehicle moved into his lane because it was overtaking. He said the collision occurred because he was trying to avoid the insured vehicle from hitting him. He confirmed that there was nothing else he could have done to avoid the accident, taking into consideration all the steps he had taken and the fact that it happened so quickly.

[12] According to him he regained consciousness in hospital on the following day the 28th October 2016. He denied making a statement to the police whilst in hospital but only after his discharge. It was after the police had told him about their own. He recalled that according to the police statement written in his absence whilst he was in hospital, he was guilty of reckless driving. He however managed to convince the police when they were supposed to be in court in Giyani that it was not him who was guilty. After he explained to them what happened, the matter did not proceed. The police said they will come and fetch him to draw another sketch

plan. That is when he enquired as to what happened at the scene. After he did that he was informed that the matter has been withdrawn. The accident happened between about 5 - 6 pm.

[13] During cross examination, Plaintiff confirmed that he is disputing the contents of the accident report. He said though he could have seen the report before, since his English is not good so he could not argue with the police, so he was only disputing it now. He disputed that his vehicle was protruding on to the side of the other lane of the oncoming vehicles as it was illustrated on the sketch plan and key of the accident report.

[14] He also disputed what was stated in the hospital records that he was fully awake and well communicating when he was brought in. It was recorded therein that a 28-year-old male was brought in a stretcher accompanied by a private EMS involved in an MVA as a driver and sustained an injury on the right hand, fully conscious, alert with an open fracture bleeding on the right elbow. He said he woke up when he was already put in bed.

[15] His comment on the deposition in his s 19 (f) affidavit that he lost control of the vehicle and it overturned, was that it is possible that is what is written, however there might have been a communication problem with his attorneys in terms of language. When his attorneys spoke to him he could understand some issues but it could have been tough since he is Tsonga. He did not remember his attorneys reading his statement back to him but he proceeded to sign it anyway. He vehemently disputed that he lost control of his vehicle as stated in his s 19 (f) Affidavit and the Accident report.

[16] He said even though it was the insured vehicle that came into his lane, he ended up in the other lane because he was hit on the front side where he was

sitting and the front wheel burst. He was then pushed towards the back and his vehicle twisted and turned around. At the time he was no longer in control of his vehicle as he was already broken. When he noticed the insured vehicle it was already moving out of its lane and very close in front of him. If he had seen it whilst it was still far away he could have been able to avoid it. He was driving at 50km per hour and the insured vehicle driving straight. He was able to swerve but the insured vehicle was already very close. His two tyres were already on the gravel road when the insured vehicle collided with him. The sun was setting and slightly dark. There were no clouds. The Accident Report differs because when it was written he was already in hospital.

[17] On re-examination he said after his vehicle stopped, he attempted to get out of it and failed. He bled profusely until he lost consciousness. Since he disputed the statement the matter did not go on trial.

[18] Plaintiff closed his case. The Defendant also closed its case.

[19] The Plaintiff, in his s 19 (f) Affidavit, only mentioned that he was the driver of the vehicle that lost control and overturned. After the said accident he was taken to Khensani Hospital and treated for an injury, open fracture of the right elbow. No mention was made of a collision with or involvement of another vehicle and being unconscious.

[20] Mr Makgopa for the Plaintiff, argued for a 100% concession on the basis that the Plaintiff acted reasonably on his right of way trying to avoid collision but failed. He only discovered about his alleged statement in the Accident Report after being discharged from hospital. He objected to the Accident Report's admissibility as evidence. He submitted that Plaintiff's testimony is a repeat of what he said in his s 19 (f) Affidavit.

[21] The Plaintiff's testimony obviously differed from his s 19 (f) Affidavit. In any case not only did the Plaintiff renounce its contents, he also alleged to have signed the affidavit without understanding or the contents of the Affidavit being read back to him prior to signing. The renouncement was notwithstanding having confirmed its contents in his evidence in chief.

[22] Ms Swartbooi on the other hand argued that the court must actually make do with three versions of the Plaintiff on the collision. The first one being the one Plaintiff made on 27 October 2016 stating that he lost control of his vehicle and to have been the sole cause of the accident in relation to the other vehicle that was on the road. He mentioned for the first time in court, that he lost consciousness and his position of the vehicle, whilst on his admission in hospital it was recorded that he was fully conscious. In Plaintiff's s 19 (f) Affidavit which was attached to his claim to the Defendant in January 2018, he said he lost control of his vehicle and it overturned. He never brought it up that there was a language difficulty between him and his attorney when he deposed to the Affidavit or between him and the police when he made his statement to the police. Ms Swartbooi argued that the Accident report was placed on record by the Plaintiff and actually rectified what the Plaintiff failed to mention that there was another vehicle and that he went on the other side of the road. The report must be admissible as evidence. She pointed out that when the Defendant repudiated the claim, it was because according to the Accident report the Plaintiff lost control and left his side, colliding with the other vehicle on its side of the road that was going to the opposite direction. Ms Swartbooi argued that the Plaintiff did not discharge the onus on him to put the insured driver to blame for anything.

[23] The issue that remained to be determined was whether the Plaintiff has

established or proven on a balance of probabilities the insured driver's negligence for which the Defendant was to assume liability.

Legal framework

[24] Section 17 of the RAF Act imposes on the Defendant an obligation '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 . . . 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 . . .'. Where the identity of the driver or owner has been established (as in the present case) this obligation is stated in s 17(1)(a) to be 'subject to this Act'.

[25] The statutory nature of liability is therefore such that the Defendant is liable to the third party "for any loss or damage which the third party has suffered as a result of any bodily injury to himself … **if the injury … is due to the negligence or other wrongful act of … the insured driver"**; see S 17(1) of the Act. The analysis is confined to a personal claim as in casu.

[26] **Wrongfulness, in that instance is inferred from the fact that the insured driver negligently caused the accident**; see *Minister van Polisie v Ewels* 1975 (3) SA 590 (A); *Minister of Law and Order v Kadir* 1995 (1) SA 303. Thus, once negligence of the insured driver is proven, wrongfulness, that is liability, is generally assumed. It must then be shown that the loss suffered by the claimant is due to the negligent/wrongful act in issue.

[27] It is trite that the onus **rests on the plaintiff to prove on a balance of**

probabilities the insured driver's negligence which allegedly caused the damages he suffered. For the plaintiff to succeed in his claim, he has to meet the requirements in terms of section 17(1) of the Act of proving negligence for the statutory liability of the defendant; see **Klopper, H.B The Law of Third Party Compensation, (3ed), 2012** at 75, it is indicated that even the slightest degree of negligence on the part of the driver of the insured vehicle is sufficient to satisfy the requirement of negligence, whilst absence of negligence means wrongfulness does not arise. The true criterion for determining negligence is whether, in the particular circumstances, the conduct complained of fell short of the standard of the reasonable person; see *Sea Harvest Corporation (Pty) Ltd and Another v Duncan Dock Cold Storage (Pty) Ltd and Another* 2000 (1) SA 827 (SCA) [21]. The elements thereof being (i) duty (ii) breach (iii) causation and (iv) damages.

[28] Section 24 prescribes the procedure to be followed for a claim for compensation under section 17(1) that provides for the establishment of the Fund's liability at an early stage prior to the institution of an action, by requiring the Plaintiff to deliver a third party claim form 1, duly completed, to the Defendant. In terms of s 19 (f) of the Act, s 17 liability of the fund is excluded on failure by the Plaintiff to deliver the Form with an Affidavit in which the Plaintiff sets outs fully, the particulars of the accident that gave rise to his claim.

[29] The approach to adopt when interpreting s 24 (1) (a) of the Act was stated by Petse JA in *Pithey v Road Accident Fund* **2014 (4) SA 112 (SCA)** at [18] as follows:

> "[18] I pause to say something about the primary purpose and objectives of the Act. It has long been recognised in judgments of

this and other courts that the Act and its predecessors represent 'social legislation aimed at the widest possible protection and compensation against loss and damages **for the negligent driving of a motor vehicle**. Accordingly, in interpreting the provisions of the Act, **courts are enjoined to bear this factor uppermost in their minds and to give effect to the laudable objectives of the Act.** But, as the Full Court correctly pointed out, the Fund which relies entirely on the fiscus for its funding should be protected against illegitimate and fraudulent claims."(my emphasis)

[30] In *Pithey*, paragraph 20, the SCA quoted with approval what was said in *Multilateral Motor Vehicle Accident Fund v Radebe* 1996 (2) SA 145 (SCA); where Netstadt JA said:

"It is true that the object of the Act is to give the widest possible protection to third parties. On the other hand, the benefit which the claim form is designed to give the fund must be borne in mind and given effect to. The information contained in the claim form allows for an assessment of its liability, including the possible early investigation of the case. In addition, it also promotes the saving of the costs of litigation These various advantages are important and should not be whittled away. The resources, both in respect of money and manpower, of agents and particularly of the fund are obviously not unlimited. **They are not to be expected to investigate claims which are inadequately advanced.** There is no warrant for casting on them the additional burden of doing what the regulations require should be done by the claimant " (my emphasis)

[31] Section 19 (f) of the Act reads:

> ***"The Fund or an agent shall not be obliged to compensate any person*** *in terms ofsection 17 for any loss or damage-*
>
> *(f) if the* ***third party*** *refuses* ***or fails****-*
>
> *(i)* ***to submit to the Fund or such agent, together with his or her claim form*** *as prescribed or within a reasonable period thereafter and if he, or she isin a position to do so,* ***an affidavit in which particulars of the accident that gave rise to the claim concerned are fully set out****; or*
>
> *(ii)* ***to furnish the Fund or such agent with copies of all statements anddocuments relating to the accident that gave rise to the claim concerned****, within a reasonable period after having come into possession thereof.*

[32] The Affidavit therefore that is to be attached to the form is, as prescribed by s 19 (f) (i) imperative that it describes or discloses fully how the accident occurred, for the liability ofthe Fund to be determinable. In ***Pithey*** **at** [17] the SCA held that:

> "[T]he affidavit and copies of statements and the documents mentioned in s 19 (f) are required to provide details of how the accident giving rise to the claim arose. It is abundantly clear that the purpose of this provision is, inter alia, to furnish the Fund **with sufficient information** to enable it to investigate the claim and determine whether or not it is legitimate." (*my emphasis)*

[33] A claimant is therefore enjoined to give full particularity of the accident for the affidavit to fulfill its statutory purposes. It also goes without saying that the information should be accurate. The Fund is as a result excused from liability in

the event of non- compliance with this prerequisite. Since it would not only have been denied of a valuable resource for further investigation and establishing the validity or credibility of the claim, but also of prospects to curtail legal proceedings and further incurrence of legal costs.

[34] The rejection of Plaintiff's third party claim being common cause, it is also common cause that Plaintiff's s 19 (f) Affidavit that was attached to the third party claim Form in compliance with s 24 only mentions that he was the driver of the vehicle that lost control and overturned. Not anything is said of a collision with or involvement of another vehicle or beingon the wrong lane.

[35] The Plaintiff renounced the contents of his own affidavit, notwithstanding having in his evidence in chief, confirmed and alleged the contents to be his brief description of how the accident occurred. During cross examination he disputed the content in its entirety although he confirmed signing the Affidavit. He alleged that there was a language problem with his attorneys who did not even read the Affidavit back to him.

[36] There was obviously inconsistency and contradiction in the Plaintiff's version and an obvious conflict between him and Mr Makgopa who in his closing argument inexplicably persisted that the testimony of the Plaintiff accords with his s 19 (f) Affidavit, when in essence it was renounced and contradicted by the Plaintiff. Mr Makgopa failed in rebuttal to address the obvious conflict and contradiction. The Plaintiff clearly could not be taken on his word. It was very difficult to determine were the truth lies with him.

[37] However the gist of the matter is that the Plaintiff's Affidavit filed with the claim Form did not meet the requirements of s 19 (f) as it contained neither a comprehensive or an accurate explanation of how the accident occurred. By

Plaintiff's own admission the Affidavit was brief and its contents incorrect. In the circumstances the Plaintiff failed to comply with s 19 (f) and s 24. It, as a result, does not set out fully the particulars of the accident.

[38] In ***Road Accident Fund v Monjane*** 2010 (3) SA 641 (SCA) the SCA held at [5] that in certain circumstances s 19 excludes altogether the liability of the Fund, as contemplated in s 17 of the Act. Section 19 (f) is one of the relevant subsections that strictly outlines statutorily determined circumstances where the liability of the Fund is altogether excluded. The section is therefore peremptory and key to finding liability; See ***SA Eagle Insurance Co Ltd V Pretorius***. Non-compliance therewith have the effect of totally absolving the Fund.

[39] The right to compensation arises only when the provisions of the Act have been complied with, which is not the position in casu. Plaintiff's claim lacks legitimacy due to incomprehensive and renounced information in the Affidavit. Therefore, as much as Plaintiff's claim was repudiated on the basis that no insured driver negligence was proven it is also rejectable for being non-compliant with s 19 (f), excusing the Defendant from any liability.

[40] The Plaintiff has in the same vein rejected an acknowledgement he made in the Accident report, that his own negligence caused the accident, despite having attached the Accident report to his claim. He denied the contents thereof including the sketch and plan which depicts his vehicle protruding on to the lane of the incoming vehicles, where his car was stationery. He then testified that he spoke to the police about that statement after his discharge from hospital and managed to convince them that he was not liable. He did not say that he made the police understand that an insured driver caused the accident, but only that he was not criminally liable. Under cross examination he admitted to have known about

the statement and alleged not to have discussed it with the police because of the language problem and to only disputing it in court. The same excuse he proffered for renouncing his s 19 Affidavit. The excuse is in direct conflict with his testimony in chief that he disputed the statement after he was discharged from hospital.

[41] Plaintiff's further narration of the accident that the insured vehicle was travelling towards the opposite direction, which coincidentally is also mentioned in the Accident report, when it moved to his lane and collided head on with his vehicle, hitting his vehicle on the fan belt and at the same time on the driver's right side, is an unlikely scenario, as that would mean the insured driver collided with his vehicle more than once. He alleged his vehicle to have been pushed back, that it twisted and turned around. At the time he was no longer in control of the car as he was already unconscious. He, regained consciousness the next day in hospital. Also that when his vehicle came to a standstill, facing the direction he came from, he had lost consciousness. But then again under re-examination he said after his vehicle stopped, he attempted to get out of the vehicle and failed. He then bled profusely until he became unconscious. There is an incongruity as to when exactly did he become unconscious. According to hospital records he was fully awake and communicating when he was brought to hospital. His unconsciousness was something that was mentioned for the first time during trial. The hospital records were therefore, another document that the Plaintiff discovered with intention to prove his claim that he disputed its contents at trial.

[42] The Plaintiff's testimony denouncing his statement in the Accident report is as a result also brought into question. He alleges that at the time of the accident he was unconscious and therefore did not make a statement to the police, when the hospital records discovered by him indicate the contrary, not only was he

conscious when he was wheeled into the hospital, but very alert.

[43] Whilst it is correct that the plaintiff's version is the only version, the argument that it suffices to uphold the plaintiffs claim cannot succeed. Plaintiff's whole evidence was riddled with incongruences and inconsistencies, showing the Plaintiff to be an unreliable witness. The issue for determination is whether the Fund is obliged to compensate the plaintiff. He failed to put forward credible evidence before the court from which the negligence of the insured driver could be established.

[44] The Plaintiff's legal representatives have also not handled this matter with the diligence that it deserves. What was pleaded differed to the summary of facts later presented at the pretrial conference. The inconclusiveness of the Affidavit was obvious and the insistence by Mr Makgopa that it is consistent with the testimony of the Plaintiff, disregarding Plaintiff's denouncement of his own Affidavit under cross examination is expressive of the kind of attention given to the matter.

[45] The Plaintiff has not only failed to comply with the provisions of s 19 (f) of the Act, he has also failed to prove the negligence of the insured driver, therefore no liability arises against the Fund.

[46] I accordingly make the following order:

1. That the Plaintiff's claim is dismissed with costs.

N V KHUMALO

JUDGE OF THE HIGH COURT OF SA

GAUTENG DIVISION, PRETORIA

For the Plaintiff: **MAKGOPA DL**

Instructed by: **Ndaba H E Incorporated Attorneys**

Ref: HN/RAF/252/17

Email: precious@ndabainc.co.za

For the Defendant: **SWARTBOOI**

Instructed by: **Morare Thobejane**

Incorporated

Ref: MAT68932/19/EM-

RAFTel: 012 343 0492

Email: : **jp@morarethobejane.co.za**