IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED

CBBhoola

_____ 24 August 2021

SIGNATURE **DATE**

CASE NO:

AMANDA GUMEDE **Plaintiff**

and

THE ROAD ACCIDENT FUND **Defendant**

JUDGMENT

BHOOLA AJ

I INTRODUCTION

[1] The plaintiff in this matter, acting in her representative capacity sued the defendant in terms of the *Road Accident Fund Act* 56 of 1996 (the Act), for injuries sustained by her minor child in a motor collision which occurred on the 13 February 2017.

[2] The plaintiff was subsequently substituted since the minor child had become a major.

[3] At the material time of the collision, the minor child was travelling to school from Amandawe to Umzinto. It was contended by the plaintiff that the accident was caused by one Dlamini (the insured driver) when he lost control of his pick-up truck thus causing it to capsize by turning on its side.

[4] Since the matter was set down only for the merits, the merits and the quantum for damages were separated in terms of Rule 33(4) of the Uniform Rules of Court. Consequently, the only issue to be determined by this court is the merits of the plaintiff's claim.

[5] The defendant was initially represented; however, due to a policy decision taken by the defendant, the defendant subsequently terminated its contract with its legal representatives, substituting their representation for its own state-funded and in-house counsel. As at the date of hearing being 1st June 2021, the defendant's legal representatives had not tendered a formal notice of withdrawal. In addition, and with reference to the papers before me, no notice of set-down was served on the defendant's attorneys but there was a set down served on the defendant personally. The matter stood down so that the plaintiff's attorney could ensure the defendant's attorneys were informed the matter was set down for trial.

Subsequently, the defendant's notice of withdrawal as attorneys of record was furnished.

[6] Counsel for the plaintiff requested to proceed with the matter by way of affidavits in support of its case on the merits. The acceptance of evidence in this manner is congruent with an approach to balance the disposal of cases as against minimizing the danger of spreading Coronavirus (Covid-19). I accordingly ordered that the matter may proceed by way of affidavits.

II PLEADINGS

[7] The plaintiff relied on the particulars of claim, official documents and a pre-trial minute dated 21st February 2020 in order to prove her case.

[8] According to the pre-trial conference which was held on 21st of February 2020, the following was common cause between the parties:

[8.1] that the driver of the motor vehicle was trying to avoid a truck and collided with the truck where he lost control of the vehicle and it overturned.

[8.2] that the passengers are entitled to 100% of what they claim for without any negligence attributed to them as per the Act.

[8.3] The defendant agreed that it is obliged to compensate the plaintiff for her proven or agreed damages suffered as a result of a motor vehicle accident which was caused by the negligent driver of the motor vehicle with registration numbers and letters [….]; and

[8.4] All time periods were complied with;

[9] At the pre-trial conference the following was placed in dispute between the parties:

[9.1] Both the merits and quantum;

[9.2] *Locus standi* for want of the minor child's unabridged birth certificate. This was rectified by virtue of the fact that the minor subsequently became a major and was substituted ad the plaintiff;

PLAINTIFF'S CLAIM

[10] On the day of the collision the plaintiff, then a minor child was on her way to school. She was a passenger in a bakkie with registration letters and numbers [….] (insured vehicle) when the driver lost control of the vehicle and it capsized by turning on its side, consequently causing the minor child injuries.

[11] Since the plaintiff was a minor at the time the action was instituted, her mother in her representative capacity, provided the Road Accident Fund (Fund) with an affidavit in terms of section 19(f) (statutory affidavit) of the Act, explaining how the collision occurred. According to her affidavit, she did not witness the accident but she was informed by the police, that the minor child, who was a passenger the motor vehicle driven by one *JP Dlamini* was involved in a motor collision. She was also informed that the said driver, lost control of the vehicle whilst trying to avoid a truck. Consequently, her daughter sustained soft tissue injuries to her right elbow and a small laceration to her right hand. She was subsequently taken to GJ Crookes hospital.

[12] The Accident Report (AR) contained relevant details of the driver of the insured vehicle such as, his address, identity numbers, telephone number, his vehicles' make and registration numbers and even license disk numbers. The AR also contained the names and identity numbers of various passengers, including that of the then minor child, as well as the telephone numbers of the passengers. Additionally, the AR provided a sketch by the police official at the scene of the

collision as well as a description of how the accident occurred, which was obtained from the driver of the motor vehicle. According to the AR, the insured driver afforded the following explanation of how the accident occurred *"the driver of MVA was trying to avoid the truck and he collided to the truck and lost control of the vehicle and the vehicle overturning."* This description corresponded with the plaintiff's version as alluded to in the statutory affidavit as well as the plaintiff's averments in the particulars of claim.

[13] According to the contents of the pre-trial minute it was common cause that a passenger needed only to prove the proverbial 1% negligence on the part of an insured driver in order to qualify for 100% of damages that she was entitled to recover from the Fund.

III NEGLIGENCE OF THE INSURED DRIVER

[14] The plaintiff alleged in her particulars claim that the collision was caused as a result of the sole negligence of the insured driver in one or more of the following respects:

[14.1] He failed to keep a proper lookout;

[14.2] He failed to apply the brakes of his motor vehicle adequately, timeously or at all;

[14.3] He drove at an excessive speed;

[14.4] He failed to avoid the accident when by the exercise of due and reasonable care he could or should have done so; and

[14.5] He failed to keep the motor vehicle he was driving under proper control~~;~~

IV DEFENDANT'S SPECIAL PLEA

[15] The defendant raised two special pleas:

[15.1] Firstly, the plaintiff did not have *locus standi* because the plaintiff failed to provide an unabridged birth certificate and or three (3) statutory affidavits to prove maternity. The defendant contended that the birth certificate provided to the Fund did not have the minor child's mother's name reflected on it.

[15.2] In so far as the issue of *locus standi* was concerned, the plaintiff advised that the minor child has since turned 21 and provided me with a notice of substitution which was dated 1st February 2021.

[15.3] The second special plea was that there was non-compliance with Regulation 3 of the 2008 Regulations of the RAF *Amendment Act*. Regulation 3 required that in order for the plaintiff to qualify to claim special damages, the plaintiff ought to have submitted an RAF4 form in order to justify her claim for general damages.

[15.4] The Regulations permits for the RAF4 form to be submitted subsequent to summons being issued. The plaintiff thereafter, in her replication, provided the RAF 4 form to the Fund.

V DEFENDANT'S PLEA

[16] The defendant denied negligence. I am somewhat astounded by this denial since the plaintiff's version in the pleadings as well as the section 19(f) affidavit is consistent with the defendant's version in the accident report. An admission of negligence would undoubtedly curtail unnecessary costs, especially insofar as matters of this nature are usually settled at the court doorsteps.[1]

[1] *Groenewald v Road Accident Fund* (74920/2014) [2017] ZAGPPHC 879, ("Groenewald").

[17] The defendant also pleaded contributory negligence in that the minor child failed to wear a seatbelt. From the evidence before me the plaintiff was seated in the back of a bakkie with numerous other students and there was no evidence before this court whether there were any seat belts in the back of the bakkie.

VI REPLICATION

[18] In response to defendant's special plea, plaintiff filed a Replication, whereby the plaintiff submitted herself for assessment to Dr Mafeelane, who completed the RAF 4 form and submitted it to the Fund.

VI ISSUE

[19] The crisp issue for determination is whether the defendant is liable for the injuries sustained by the plaintiff?

VII LAW

[20] It is trite law that the *onus* is on the plaintiff to prove, on a balance of probabilities, that her injuries were caused as a result of the negligent driving of the insured driver.

[21] Section 17(1) of the Act provides

> *"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) subject to any regulation made under section 26, in the case of a claim for compensation under this section arising from the driving of a motor*

vehicle where the identity of neither the owner nor the driver thereof has been established, 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."

[22] *Regulation 2(d), framed under s 26 of the Road Accident Fund Act 56 of 1996, provides:*

"2(1) In the case of any claim for compensation referred to in section 17(1)(d) of the Act the Fund shall not be liable to compensate any third party unless –

(d) the motor vehicle concerned (including anything on, in or attached to it) came into physical contact with the injured or deceased person concerned or with any other person, vehicle or object which caused or contributed to the bodily injury or death concerned"

[23] By an analysis of the above section, liability of the defendant is founded upon the principles of delict. Six jurisdictional facts will need to be proved by the plaintiff in order for the defendant be liable in each claim in respect of the Act and the Amendment Act added a seventh jurisdictional fact. These jurisdictional facts are as follows: -

[23.1] Conduct: Conduct refers to an action or a motion, which is limited to the driving of a motor vehicle, or other wrongful act as committed by certain persons within the parameters of the RAF.

[23.2] Wrongfulness: Wrongfulness is presumed when an injury to a person or property has been proved by all the other delictual elements herein. *(Cape Empowerment Trust Ltd v Fisher Hoffman Sithole[2])*

[23.3] Fault: Fault encompasses both intention and negligence on the part of the insured driver. It follows that if negligence suffices as a form of fault, that intent will also give rise to liability *(Van der Merwe v Road Accident Fund and Another [3].*

[23.4] Causality: The plaintiff must allege and prove the causal connection between the negligent act relied upon and the damages suffered. The requirement that there must be a causal link between the conduct, the resulting injury or death and consequent damage is expressed by the phrase "caused by or arising from" as it is found in section 17 of RAF Amendment Act. *Grove v Road Accident Fund*.[4] In determining the causal nexus between the negligent driving of the driver of the insured vehicle and the injuries sustained by the plaintiff, *Van Oosten J*, in *Miller v Road Accident Fund [1999] 4 All SA 560 (W), at p 565(i),* formulated the inquiry as follows:

"Two distinct enquiries arise, which were formulated by Corbett CJ in International Shipping Co (Pty) Ltd v Bentley 1990 (1) SA 680 (A) at 700E–I as follows:

"The first is a factual one and relates to the question as to whether defendant's wrongful act was a cause of the plaintiff's loss. This has been referred to as 'factual causation'. The enquiry as to factual causation is generally conducted by applying the so-called 'but-for' test, which is

[2] (200/11) [2013] ZASCA 16 (20 March 2013) para 21).
[3] [2006] ZACC 4; 2006 (4) SA 230 (CC).
[4] *Grove v Road Accident Fund and Another* (36786/06) [2017] ZAGPPHC 757 (28 November 2017). (*"Grove").*

designed to determine whether a postulated cause can be identified as a causa sine qua non of the loss in question. In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such an hypothesis plaintiff's loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the plaintiff's loss; aliter, if it would not so have ensued. If the wrongful act is shown in this way not to be a causa sine qua non of the loss suffered, then no legal liability can arise. On the other hand, demonstration that the wrongful act was a causa sine qua non of the loss does not necessarily result in legal liability. The second enquiry then arises viz whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether, as it is said, the loss is too remote. This is basically a juridical problem in the solution of which considerations of policy may play a part. This is sometimes called 'legal causation'."

[23.5] Damages: Only damages for bodily injury or loss of maintenance are recoverable under the *Road Accident Fund Amendment Act (Amendment Act)*[5] subject to the limitations of section 17 of *Amendment Act*. The damages sustained must arise from the driving of a driver of the motor vehicle who was negligent. The heads of damages that can be claimed as compensation by the third party in respect of damages suffered as the result of bodily injuries are usually past medical expenses, future medical expenses, past loss of earnings, future loss of earnings and general damages. The issue of quantum of damages is not for determination today and is to be postponed *sine die.*

[5] Act 19 of 2005

[23.6] The damage must occur at any place within the Republic of South Africa.[6]

[23.7] General Damages only for Serious Injuries: The Amendment Act added a seventh element to be proved: a third party will only be compensated for non-pecuniary loss (general damages) for a serious injury.

VIII EVALUATION OF LAW AND FACTS

[24] In so far as conduct is concerned, it is common cause that the insured driver was driving a motor vehicle wherein the minor was seated in the back of the motor vehicle with several other students. It is also common cause that the insured driver was trying to avoid a truck when his motor vehicle capsized and turned on its size. It is the defendant's case that the insured driver lost control of the vehicle and the vehicle overturned. I find in so far as the conduct is concerned, the probabilities favour the plaintiff.

[25] Wrongfulness is presumed by the act of a collision which caused bodily injuries to the plaintiff. The preponderance of probabilities favour the plaintiff.

[26] When it comes to the issue of fault all the plaintiff has to prove is a proverbial one percenter for the plaintiff to be successful. Counsel for the plaintiff referred me to *Groenewald v Road Accident Fund*[7] where it was stated.– "

"It is trite that the plaintiff, as a passenger claimant, need to prove only 1% negligence on the part of the insured driver in order to succeed with her claim against the defendant. ……. The tendency on the part of the defendant in not conceding merits well in advance in matters where the plaintiff need only prove

[6] HB Kl(74/10) [2011] ZASCA 55 (31 March 2011)); Klopper *The Law of Third Party Compensation* 3rd ed LexisNexis
[7] *Groenewald* (supra).

1% is mind boggling, if it is not a deliberate stratagem to unnecessarily inflate litigation costs. Such conduct needs to be depreciated in the severest measures."

[27] Proof of 1% negligence on the part of the defendant was agreed to by the plaintiff in paragraph 4.2 of the pre-trial conference minute. The AR is now common cause in terms of para 2.2 of the pre-trial minute. Since the plaintiff was being conveyed in the vehicle of the insured driver and he lost control of the motor vehicle the only inference to be drawn is that the insured driver was negligent. This probability also favours the plaintiff.

[28] The issue of contributory negligence was raised in the defendant's plea suggesting that the minor was not wearing a seatbelt. It is settled law that the failure to wear a safety belt can lead to a reduction of the damages via the *Apportionment of Damages Act*[8]. As a general rule, a person who fails to wear a safety belt is negligent.[9] However, from the perusal of the reports, it is apparent the plaintiff was seated in the back of a bakkie with other students. There is no evidence before me to suggest that the back of the bakkie had any safety belts. Even if there were safety belts in the back of the bakkie, the defendant bears the onus of proving contributory negligence. I accordingly find the plaintiff has succeeded on a preponderance of probabilities in proving negligence and that no apportionment will apply.

[29] In so far causality is concerned, the plaintiff was transported from the scene of the accident directly to CJ Crookes hospital, where she was treated. The hospital records show a clear nexus that the injuries sustained by the plaintiff was as a result of the negligent driving of the insured the motor collision.

[30] Regarding the issue of damages, it follows that as a result of the motor collision, damages have been sustained. However, the quantification of damages is postponed *sine die*.

[8] Act 34 of 1956
[9] General Accident vs Uijs NO 1993 (4) SA 228(A)

[31] It is common cause that the accident occurred within the Republic of South Africa The AR substantiates this.

[32] The special plea falls away in the light of the filing of the replication. Since the decision of awarding damages for serious injuries lies with the defendant, if the defendant does not admit the general damages the matter may be referred by the plaintiff to Health Practice Council of South Africa for consideration or the plaintiff may pursue an application in terms of the Promotion of Administrative Justice Act 3 of 2000. It is only once the defendant admitted the liability for special damages that quantum may be determined. General damages are accordingly postponed *sine die.*

[33] In deciding the issue of whether the plaintiff succeeded in proving the insured driver was 1% negligent, the uncontested evidence before me was that the driver failed to avoid a truck and lost control of the motor vehicle causing it to overturn. The plaintiff, a passenger in the motor vehicle was thrown off the motor vehicle. Adopting the doctrine of *res ipsa loquitor* there is no other evidence before me that suggests that the driver was not 1% negligent.

RULING

[34] I find that the plaintiff must succeed in this claim. She has discharged, on a preponderance of probabilities, the onus that rests upon her.

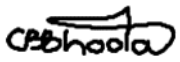
ORDER

[35] In the result I make the following order:

1. The defendant shall be liable to pay 100% of the plaintiff's proven and/or agreed
   damages consequent upon the injuries sustained by the plaintiff during 13th February 2017.

2. The determination of the plaintiff's quantum of damages is postponed sine *die.*

3. The defendant is ordered to pay plaintiff's costs in the cause.



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C. B. Bhoola
Acting Judge of the
High Court of South Africa
Gauteng Division, Pretoria

Delivered: This judgment was prepared and authored by the Judges whose names is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 24 August 2021.

APPEARANCES

Counsel for the Applicant	: Advocate D Jele
Instructed by	: Chaza Incorporated
Counsel for the Respondent	: No appearance
Instructed by	: No appearance
Date of Hearing (via MS Teams)	: 01 June 2021
Date of Judgment	: 24 August 2021