

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 18283/18

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED:

.....
SIGNATURE

.....
DATE

In the matter between:

KRUGER DAVID JOHANNES

Plaintiff

And

THE ROAD ACCIDENT FUND

Defendant

JUDGMENT

FLATELA A.J

Introduction

[1] The matter served before me on 29 October 2021 for the determination of liability. on 3 November 2020 Haput AJ considered the readiness and recorded that the matter should proceed on liability only and that the liability and quantum should be separated in terms of section 34 (1). I considered the matter on pleadings.

[2] The plaintiff instituted an action for damages arising from a vehicle collision which occurred on 27 February 2016. At about 20H30 and at the at the intersection between Paull Kruger and Fred Nicolson Streets, Mayville, Pretoria, a motor vehicle collision occurred between a vehicle with registration number [....] driven by M Khakhu (the insured driver) and the plaintiff's motorcycle with Registration number [....].

[3] The plaintiff avers that the driver of a vehicle had parked his vehicle in a parking bay in Paul Kruger Street when he suddenly reversed to the street the plaintiff was travelling in without looking at the incoming traffic.

[4] The Defendant's defence was struck out on 20 October 2021.

Plaintiff's case

[5] The Plaintiff aver that the collision was due to the negligence of the driver in that:

5.1 He failed to take the rights of other road users, more in particular that of the Plaintiff into account, alternatively properly into account.

5.2 He failed to apply the brakes of his vehicle timeously or at all.

5.3 He failed to keep his vehicle under any alternative proper control, thus losing control of his vehicle.

5.4 He failed to avoid a collision when by the exercise of reasonable care and control he could and should have done so.

5.5 He failed to have regard to the presence of the Plaintiff and collided with the left side of the Plaintiff's motorcycle, whilst reversing out of a parking bay.

[6] As a result of the collision, the Plaintiff sustained injuries and received treatment at Steve Biko Academic Hospital.

6.1 A soft tissue injury of the cervical and lumbar spine;

6.2 Multiple bruises and lacerations;

6.3 Emotional shock and trauma.

[7]. In support of the amount claimed, the Plaintiff submitted four authorities¹. I have considered all the authorities. They are summarised as follows:

7.1 In the case of **Fordsham vs Aetna Insurance Company Limited 1959 (2) SA 271 (A)**, the Applicant had sued the Respondent for personal injury caused to him by the driving of a motor vehicle insured by it. The accident had

occurred whilst the Applicant was, in day light, walking down the middle of a ramp inside a building. He had been struck from behind by a motor car, which was reversing slowly down it. The ramp was intended for cars going to and in and coming from a repair garage situated on the second floor of the building in which the Applicant was employed but which was used by pedestrians moving up and down between the ground level and the first floor. The Trial Court had found that the accident was due in part to the negligence of the Applicant and in part to that of the driver and had applied an appointment of damages. The matter went on appeal. On appeal, the Court had held that the collision had occurred two thirds down the ramp. The pedestrian had made certain that no vehicles were reversing down the ramp before walking down same. The Court therefore held that there was no duty on the pedestrian to look backwards, as he was walking down the ramp and held that the accident was due to the sole negligence of the driver reversing down the ramp.

7.2 In the matter of **Kleynhans vs Santam Versekeringmaatskappy Bpk 1974 (3) SA 53 (A)**, a slow-moving truck reversed down the road. An approaching motorist travelling at a high speed did not observe the reversing truck and collided with the rear of the truck. The Court held that the motorist, who was killed in the collision, was the sole cause of the collision and absolution from the instance was granted. However, on appeal, the Court held that the truck driver and the approaching motorist were equally negligent. The Court held that if the reversing truck had been keeping a proper look out, he would have timeously have observed the vehicle and would either have

brought his vehicle to a halt or he would have warned the approaching driver that he was reversing down the road.

7.3 The case of **Venter v Dickson 1965 (4) SA 22 (E)**. It was held that 'a greater degree of fault attaches to a motorist who negligently reversed from a private entrance onto a highway.

7.4 In the matter of **Watt vs Western Assurance Co Ltd 1952 (3) SA 778 (W)**, a motorist brought his vehicle to a halt at a robot-controlled intersection and the reversed up the road, but collided with a pedestrian crossing the road diagonally behind his vehicle. The Court held that the pedestrian had no reason to expect that the motorist would reverse and was thereafter held not to be negligent.

7.5 The plaintiff submitted that on considering the above authorities, the Court have held under certain circumstances that where a driver reverses his vehicle and collides with another motor vehicle or even a pedestrian walking or playing behind his vehicle, that the driver is either the greater negligent or the sole negligent party.

7.6 The basis for this reasoning is that the driver of the reversing vehicle is expected to keep a proper look out for vehicles and/or pedestrians behind his vehicle. However, the Courts have also held that the motor vehicle and/or even a pedestrian can also be held to be contributorily negligent if he places

himself behind a vehicle in such a way that the driver cannot observe the vehicle and/or pedestrians behind his vehicle.

7.7 I was called to determine whether the reasonable insured driver would have or should have foreseen the possibility that the Plaintiff was travelling on the road as the insured driver was about to reverse.

Legal Principles

[8] Liability depends on the conduct of the reasonable person. The test for negligence was stated in *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430 E-G as follows:

" For the purpose of liability *culpa* arises if-

1. A *diligens paterfamilias* in the position of the defendant-
 - (i) Would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
 - (ii) Would take reasonable steps to guard against such occurrence; and
2. The defendant failed to take such steps,

..... Whether a *diligens paterfamilias* in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend upon the particular circumstance of each case. No hard and fast basis can be laid down."

[12] Tlhapi J in *Fox v RAF* ² held that

"It is trite that the onus then rests on the plaintiff to prove the defendant's negligence which

² (A548/16) [2018] ZAGPPHC (26 April 2016)

caused the damages suffered on a balance of probabilities. In order to avoid liability, the defendant must produce evidence to disprove the inference of negligence on his part, failing which he/she risks the possibility of being found to be liable for damages suffered by the plaintiff”

[13] I considered the following decided cases on motorcycle accidents:

THERON v RAF³

[14] An accident between a vehicle and a motorcycle at an intersection, the insured driver failed to stop at the stop sign and a collision occurred between her motor vehicle and the plaintiff’s motorcycle. The insured driver accused the plaintiff of driving at a high speed, by failing to keep a proper look out and undertook an inherently dangerous move without sufficient care. The Court found that the action of the insured driver was the sole cause of the collision as a result of which the Plaintiff sustained his injuries.

Codier v Road Accident Fund⁴

The appellant sued the RAF for injuries sustained as a result of the collision that occurred between his motorcycle and the bakkie. The appellant’s evidence was that he was following the bakkie which was travelling slowly. He decided to overtake it in the right side and the driver suddenly swerved to the right where there was no right turn. The appeal was based on the trial court’s findings that the contributory negligence on the part of Mr Fox was due to (a) his failure to keep a safe berth between his motorcycle and the insured driver (b) that the seriousness of his injuries showed that he travelled at an excessive speed and rejected Mr Fox’s version with regard to the speed travelled (c) in finding that there was contributory negligence where no evidence was presented by the respondent for making an apportionment 30% on Mr Fox’s side and 70% on the side of the insured driver. The appeal court held that the trial court should have found that the plaintiff swerved to the right in an attempt to avoid a collision with the insured driver who had taken a sudden swerve to the right, where there were no roads turning off the main gravel road to the right. It is therefore appropriate, given the circumstances of this case to conclude that the defendant had failed to prove negligence on the part of the plaintiff or that there was

³ 17111/2016 2017 ZAGPJHC

⁴ 44331/2013 20115 ZAGPJHC

a causal link between the damages incurred by the plaintiff and his negligent conduct. The trial court should have found that the insured driver was negligent and solely responsible for the collision.

Van Der Schyff v Road Accident Fund⁵

[18] The Plaintiff sustained injuries as a result of the motor collision which took place between the bakkie driven by the insured driver and his motor cycle. The plaintiff testified that the insured driver was driving very slowly and the Plaintiff decided to overtake it. He turned on his indicator to the right, checked for oncoming traffic in the opposite lane, checked for traffic behind him and proceeded to overtake. The driver of the bakkie (the insured driver) turned right without signaling. The court held that the insured driver had failed both to signal his intention to turn and to determine properly whether it was an opportune time to turn; while the Plaintiff had both properly signaled and kept a proper lookout.

[15] Having considered the facts in this matter and the relevant case law, I find that by reversing the car from the parking bay to the street without proper lookout, the insured driver was negligent and is solely responsible for the collision. The Defendant is 100% liable for any damages arising for the Plaintiff from the injuries sustained in the accident.

[16] In the results, I order as follows:

1. An order in terms of Rule 33 (4) separating liability from quantum is granted.
2. The quantum is postponed *sine die*.
3. The Defendant is held 100% liable for any proven damages resulting from the injuries sustained by the Plaintiff.
4. Defendant pays Plaintiff's taxed or agreed party-and-party High Court scale costs of the merits of this matter, inclusive of the reasonable and taxable:
 - 4.1 Costs of senior-junior counsel were employed;
 - 4.2 Travelling, accommodation and subsistence costs of the Plaintiff and his witnesses, for attending in loco inspections, preparatory consultations

⁵ 2015 JDR 1193 (GP)

and the merits trial;

4.3 Costs incurred by the Plaintiff in respect of all subpoenas issued by him;

4.4 Costs of preparing the trial bundles and copies thereof;

4.5 Travelling costs, costs of preparing for pre-trial conferences, preparation of pre-trial minutes and costs for the attendance of pre-trial conferences by the Plaintiff's attorney and counsel where employed;

4.6 Costs of the Plaintiff's attorney and counsel, in regards to in loco inspections, consultations, preparations for and on trial;

4.7 Cost of a translator (if any) for this trial and preparatory consultations;

4.8 Cost of and relating to the initial set down on 23 September 2021, of Plaintiff's application to strike out the defence of the Defendant, which application was subsequently granted on 20 October 2021;

4.9 All other reserved costs (if any).

5. The aforementioned taxed or agreed costs, once determined, shall be paid into the Plaintiff's attorneys' trust account, details of which are as follows:

Name: ERASMUS-SCHEEPERS ATTORNEYS TRUST ACCOUNT

Branch code: 632 005

Account number: [...]

Reference: K540/16

6. The following provisions shall allow with regards to the determination of the aforementioned taxed or agreed costs:

6.1 The Plaintiff shall, in the event that costs are not agreed, serve notice of taxation on the Defendant;

6.2 The Plaintiff shall allow the Defendant 180 (one hundred and eighty) calendar days, from date of allocator, to make payment of the taxed costs;

6.3 Should the Defendant fail to timeously pay the taxed costs as provided for in the preceding sub-paragraph, those taxed costs shall carry interest at the rate of 7% per annum from date of taxation to

date of final payment (both days inclusive).

7. It is recorded that the Plaintiff has not concluded a Contingency Fee Agreement with Plaintiff's attorneys of record, in terms of the Contingency Fees Act 66 of 1997 or otherwise.

L. FLATELA

ACTING JUDGE OF THE HIGH COURT

This Judgment was handed down electronically by circulation to the parties' and or parties representatives by email and by being uploaded to CaseLines. The date and time for the hand down is deemed to be 10h00 on 21 February 2022

Date of Hearing: 29 October 2021, In Chambers

Date of Judgment: 21 February 2022

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