IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE		
(1)	REPORTABLE:	~~YES~~/NO
(2)	OF INTEREST TO OTHER JUDGES:	~~YES~~/NO
(3)	REVISED Yes	
DATE:	24/3/2022	
SIGNATURE:		

Case No. A170/2018

In the matter between:

NINTERETSE, FELIX **APPELLANT**

And

ROAD ACCIDENT FUND **RESPONDENT**

Coram: Baqwa, Neukircher *et* Millar JJ

Heard on: 9 March 2022

Delivered: 24 March 2022 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the Gauteng Division and by release to SAFLII. The date and time for hand-down is deemed to be 10H00 on 24 March 2022.

Summary: Motor vehicle collision – driver of following vehicle failing to keep a proper lookout and take precautions to avoid a slowing vehicle ahead – maxim res ipsa loquitur of no application – no sudden emergency - collision foreseeable and avoidable had appellant acted reasonably.

ORDER

On appeal from: The High Court, Pretoria (Raulinga J sitting as Court of first instance):

(1) The appeal is dismissed with costs.

JUDGMENT

MILLAR J

1. This is an appeal against the dismissal of the appellants action for damages brought against the respondent. The court a quo was seized only with the determination of negligence and after hearing the evidence led, dismissed the action with costs. The appeal is brought before this court with leave having been granted by the court a quo.

2. The appellant suffered injuries in consequence of his involvement in a motor vehicle collision which occurred during the day on 20 April 2011. The appellant had been riding a motorcycle in a westerly direction along Lynnwood Road in Pretoria. The road has two lanes for traffic travelling in each direction. He was travelling behind the insured drivers' vehicle – a Mercedes Benz sedan. The day was clear and dry. There was only one witness who testified in the trial – the appellant – and this appeal is to be decided on whether the court a quo's assessment of his evidence was correct or not.

3. The common cause evidence relating to the way the collision occurred is set out in the judgement of the court a quo as follows:

> '8. On the day of the accident the plaintiff was driving behind the insured driver's vehicle at a speed of approximately 60 kilometres per hour. When he was about 4,5 metres away from the insured driver's vehicle, he noticed that it was slowing down because the insured driver had applied brakes. In his mind he thought that the insured driver was just reducing speed and he would then proceed with his driving. In light of this, the plaintiff then reduced the speed he was travelling at.
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> 9. When he was about 2,5 metres away from the insured driver's vehicle, he realized that it had stopped in the middle of the road without any prior warning to alert other road users. The plaintiff tried to avoid the accident by swerving to the right and consequently his left shoulder hit the right rear end of the insured driver's vehicle.
>
> 10. He also testified that he could not swerve to the left of the road ("outer lane") in that there were other vehicles travelling on the outer lane towards the same direction and further that were trees and vehicles parked outside the road. He took all the necessary steps to avoid the accident but, due to the negligent driving of the insured driver who suddenly stopped in the middle of the road, the accident could not be avoided.'

4. It was argued on behalf of the appellant that the cause of the collision was that the insured vehicle had 'stopped in the middle of the lane of travel of the appellant without any warning to other road users. Notwithstanding that the appellant had collided into the rear of the insured vehicle[1], it was argued that the act of stopping, suddenly as it was argued, had created a situation of sudden emergency for the appellant and one in which, had the insured driver been keeping a proper lookout (in his rear-view mirror) he would have foreseen. It was the combination of res ipsa loquitur and sudden emergency that make the insured driver the party whose negligence caused the collision. Furthermore, since the insured driver was not called to testify and no explanation was furnished to the court for this, the appellant argued further that an adverse inference ought to be drawn against the respondent.

5. Firstly, for the *maxim res ipsa loquitur* to find application:

'The occurrence must be one which common experience does not ordinarily happen without negligence. How strongly the facts of the occurrence must point to negligence depends upon the extent to which they can be supplemented by inferences from the defendant's failure to give an explanation. Less evidence will be necessary when the causes of the accident are peculiarly within the defendant's knowledge and there is no apparent reason why he or she should not be able to explain them; more in cases in which he or she cannot reasonably be expected to know what happened.

An inference of negligence from the nature of the accident is permissible only while the cause remains unknown. Once the cause of the occurrence is known, the foundation for the reasoning of the res ipsa loquitur type falls away.'[2]

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[1] Union & South West Africa Insurance Co Ltd v Bezuidenhout 1982 (3) SA 957 (A)
[2] The South African Law of Evidence, 2nd Ed., DT Zeffert & AP Paizes, Lexis Nexis 2007, p.221

5. The main factor which militates against the application of the maxim in the present matter is the evidence of the appellant himself. Although it was pleaded on behalf of the appellant that the insured vehicle with which he had collided was itself involved in a collision with a vehicle in front of it, and the primary allegation of the negligent causation of the appellants collision being made against this other vehicle, no evidence was led in this regard at all. The alternative claim against the insured vehicle was the one that came before the court.

6. The evidence established that the insured vehicle did stop but there was no evidence led as to why that vehicle had come to a stop. The appellants own evidence was that he had been keeping a proper lookout and travelling about 4,5 metres behind the insured vehicle, a distance he had considered a safe following distance, and he had seen its brake lights and that it had begun to slow down. It follows that if the insured driver had been keeping a proper lookout in his rear-view mirror before bringing his vehicle to a stop that he would have seen the appellant at a safe distance behind him with sufficient time to stop or avoid colliding with him.[3]

7. Secondly, the evidence of the appellant must be considered objectively and his conduct in the circumstances measured against that of the reasonable man or diligens paterfamilias – it was held in Herschel v Mrupe[4] that:

> 'the circumstances may be such that the reasonable man would foresee the possibility of harm but would nevertheless consider that the slightness of the chance that the risk would turn into actual harm, correlated with the probable lack of seriousness if it did, would require no precautionary action on his part. Apart from the cost or difficulty of taking precautions, which may be a factor to be considered by the reasonable man, there are two variables, the seriousness of the harm and the chances of its happening.

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[3] Van As v Road Accident Fund 2012 (1) SA 387 (SCA), Potgieter v AEG Telefunken (Edms) Bpk 1977 (4) SA 3 (O)

[4] 1954 (3) SA 464 (A) at 477A-C; see also Santam Insurance Co Ltd v Nkosi 1978 (2) SA 784 (A) at 792B

If the harm would probably be serious if it happened the reasonable man would guard against it unless the chances of it happening were very slight. If, on the other hand, the harm, if it happened would probably be trivial the reasonable man might not guard against it even if the chances of it happening were fair or substantial.'

8. The appellant had assessed the situation as being one in which the insured vehicle slowed momentarily but would continue without stopping. By the time that the appellant realized that his assessment was wrong, he was only about 2,5 metres from the insured vehicle, and it was too late for him to stop safely or avoid a collision.

9. Accepting the evidence of the appellant that he had been travelling at 60 kilometres per hour and had kept a safe following distance, it cannot be said that he found himself in a 'perilous situation that was not of his own making' or situation of sudden emergency[5] or even that an inference should be drawn that the insured drivers' negligence was the cause of the collision. The appellants failure to properly assess the situation and to act accordingly when he had sufficient opportunity to do so is the reason for the occurrence of the collision[6].

10. Lastly, for an inference to be drawn against the respondent for failing to call the insured driver[7], the inference sought to be drawn must be available on the evidence before the court[8]. In the present case, the appellant had sufficient opportunity to observe the insured vehicle and take action to avoid colliding with it.

11. In the circumstances the appeal must fail.

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[5] Neethling-Potgieter-Visser Law of Delict, 7th Ed., Neethling & Potgieter, Lexis Nexis, 2015; p.156; see also Brown v Hunt 1953 2 SA 540 (A)

[6] Goode v SA Mutual Fire & General Insurance Co Ltd 1979 (4) 301 (W)

[7] Galante v Dickinson 1950 (2) SA 460 (A)

[8] Sampies v Bay Passenger Transport Ltd 1971 (3) SA 577 (A)

12. Accordingly, I propose that the appeal be dismissed with costs.

A MILLAR

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

I AGREE, AND IT IS SO ORDERED

S BAQWA

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

I AGREE

B NEUKIRCHER

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

HEARD ON:	9 MARCH 2022
JUDGMENT DELIVERED ON:	24 MARCH 2022
COUNSEL FOR THE APPELLANT:	ADV. BU MAKUYA
INSTRUCTED BY:	MPHOKANE ATTORNEYS

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