IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 16152/2019

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

[redacted]

18 MARCH 2022

Date **K. La M Manamela**

In the matter between:

JOHNNY KHULONG LEOLO Plaintiff

and

ROAD ACCIDENT FUND Defendant

DATE OF JUDGMENT: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time of hand-down is deemed to be 10h00 on **18 MARCH 2022**.

JUDGMENT

KHASHANE MANAMELA, AJ

Introduction

[1] The plaintiff, Mr Johnny Khulong Leolo, an adult male person of Soshanguve, Pretoria was involved in a motor vehicle accident on 25 August 2018. The accident occurred along Aubrey Matlala Road in Soshanguve. He was a pedestrian along that road when he was hit by a motor vehicle. He sustained injuries due to the accident and sued the defendant, the Road Accident Fund (RAF), for the damages suffered as a result of the injuries sustained in the accident and/or their *sequelae*. He blames the negligent driving of the insured driver for the accident and, consequently, sued RAF for damages he suffered in the amount of R800 000.

[2] Summons issued at the instance of the plaintiff was served on RAF in March 2019 and, thereafter, RAF appointed attorneys to represent it in the matter. Pleadings, including a plea and other notices were exchanged between the parties. But at some stage thereafter it appears that RAF parted ways with its attorneys of record and, thereafter, continued in the matter without legal representatives. From the papers, it is apparent that the plaintiff served documents, including the notice of set down of the matter for trial directly on RAF, after its attorneys were terminated. On 02 August 2021, the plaintiff obtained an order from this Court *per* Phahlane, AJ to the effect that RAF's defence, as pleaded or contained in its plea dated 09 June 2021, is struck out with costs. Therefore, the matter thenceforth proceeded including at the trial, as proceedings towards default judgment.

[3] The matter came before me on trial on 19 November 2021. Mr M Sello appeared for the plaintiff. For the reasons mentioned above there was no appearance on behalf of RAF. The trial in the matter proceeded only with regard to the issues relating to the merits. The issues relating to *quantum* are to be postponed *sine die*. As there was no agreement or order for the

separation of those issues, as contemplated by Uniform Rule 33(4),[1] I will include this aspect as part of any order made favourably to the plaintiff. After listening to brief oral submissions by Mr Sello I reserved this judgment. I also directed that the accident report and a draft reflecting the orders sought, be filed before this judgment is handed down. There has been compliance in this regard. Mr Sello had also filed written argument or submissions for which I am grateful.

Evidence and submissions on behalf of the plaintiff

[4] The plaintiff filed a statement under oath or affidavit explaining how the accident took place. The sworn statement or affidavit was deposed to in Pretoria before a named practising attorney acting as a commissioner of oaths on 27 October 2021.

[5] The following is the material part of the affidavit or sworn statement by the plaintiff:

> " 2.
>
> I am competent to depose this Affidavit and the facts contained hereinafter, unless the context indicate otherwise, are within personal knowledge and belief both true and correct.
>
> 3.
>
> On or about 25th August 2018, I was a pedestrian walking along Matlala Road entering the Soshanguve Crossing Mall in Gauteng Province when a motor vehicle with registration letters and numbers SMS 232 GP which entered the Mall using the exit collided with me.

[1] Uniform Rule 33(4) provides: " If, in any pending action, it appears to the court *mero motu* that there is a question of law or fact which may conveniently be decided either before any evidence is led or separately from any other question, the court may make an order directing the disposal of such question in such manner as it may deem fit and may order that all further proceedings be stayed until such question has been disposed of, and the court shall on the application of any party make such order unless it appears that the questions cannot conveniently be decided separately."

4.

As a result of the accident, I sustained injuries on the right knee and the right hand and was evacuated to the Soshanguve clinic situated at BB Section.

5.

I was paying attention to other motor vehicles that were travelling on the road and keeping a proper lookout. The sole cause of the accident is the insured driver of the mentioned motor vehicle bearing registration letters and numbers SMS 232 GP which entered the Mall using the exit as the entrance to the Mall."

[6] The plaintiff, as mentioned above, filed a police report at the direction of this Court made at the hearing or trial. The police report corresponds - in material respect – with the evidence by the plaintiff on how the accident took place, including that the insured driver was on the wrong side of the road (as he used an exit for an entrance) upon impact or coming into contact with the plaintiff.

[7] The plaintiff seeks that RAF be held liable for 100% of his proven or agreed damages. In the particulars of claim attached to the summons, the plaintiff had specified the alternative grounds upon which it is alleged that the insured driver was negligent in the driving of the insured vehicle. Obviously, the sworn statement or affidavit deposed to by the plaintiff did not adopt the approach taken in the particulars of claim. But the contents of the affidavit clearly set out how and why the insured driver is alleged to have been negligent in the driving of the insured vehicle.

[8] The Plaintiff's injuries are stated in the hospital records and RAF 1 Form as including soft tissue injuries to the right leg with no fractures. From the plaintiff's affidavit it is stated that he also sustained an injury to his right hand. I have also noted that there are expert reports

which have been filed regarding the plaintiff's injuries and their *sequelae*. But the contents of these expert reports would occupy the Court when the matter proceed to trial on the issues relating to *quantum.*

[9] The legal submissions or argument by Mr Sello for the plaintiff included the following. It was argued that as the plaintiff was walking outside on the road and there was nothing he could do to avoid the accident the negligent conduct of the insured driver ought to be ruled the sole cause of the accident. Counsel relied on the decision in *Manuel v SA Eagle Insurance Company Limited*[2] in which it was held that:

> "The principles to be extracted from these cases are as follows. A motorist who sees a pedestrian on the roadway, or about to venture thereon, should regulate his driving so as to avoid an accident. The pedestrian may by his conduct convey to the motorist the impression that he recognises, and intends to respect, the motorist's right of way. When such an impression is conveyed by the pedestrian, the motorist may proceed on his way accordingly. Whether the motorist is reasonably entitled to assume or infer, from the conduct of the pedestrian, that his right of way is being recognised and respected, is a question of fact to be decided in each case. Some examples are to be found in the decisions cited above. When the assumption is not justified, the motorist must regulate his driving to allow for the possibility, or probability, that his vehicle may not enjoy an unobstructed passage. Where a pedestrian reacts appropriately to the presence of an approaching vehicle, or to a warning by the vehicle, the critical enquiry is whether a reasonable motorist would foresee the reasonable possibility that the pedestrian might nonetheless act irrationally by moving, perhaps suddenly, into the vehicle or its path. That possibility exists for young children, for adults who are plainly drunk, and may arise in other cases."[3]

[10] It is submitted that there is a causal *nexus* between the negligent driving of the insured driver and the injuries sustained by the plaintiff.[4] Therefore, it is concluded that the plaintiff

[2] *Manuel v SA Eagle Insurance Company Limited* 1982 (4) SA 352 (C).
[3] *Manuel v SA Eagle Insurance* at 357.
[4] *Miller v Road Accident Fund* (A 134/2013) [2013] ZAWCHC 131.

ought to succeed to recover his full or 100% of proven or agreed damages against RAF with regard to the plaintiff's claim arising from the accident. I have considered the submissions by counsel above. I just need to add or to expand on the applicable legal principles before turning to the determination required in this matter.

[11] In *Delict (LAWSA)*[5] it is stated against the construction in *Perlman v Zoutendyk*[6] on the law of delict that the basic principle is to the effect that all harm caused by conduct which is wrongful and blameworthy or culpable is capable of recovery through a delictual action.[7] Also, that to claim compensation for patrimonial loss, a claimant should establish that he sustained harm (*damnum*) which was wrongfully and culpably (*iniuria*) caused (*datum*) by the party being sued or the defendant.[8]

[12] The test for negligence is as set out in the durable authority of *Kruger v Coetzee*.[9] In the relatively recent decision in *Oppelt v Department of Health, Western Cape*[10] the Constitutional Court endorsed the proper approach for establishing the existence or otherwise of negligence in *Kruger v Coetzee*.[11]

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[5] Midgley, JR. 2016. *Delict*: in Law of South Africa (*LAWSA*), 3rd ed, vol 15 (LexisNexis online version - last updated on 31 March 2016) (hereafter *Midgley Delict (LAWSA)*).

[6] *Perlman v Zoutendyk* 1934 CPD 151 at 155. See also *Universiteit van Pretoria v Tommie Meyer Films* (*Edms*) *Bpk* 1977 4 All SA 610 (T); 1977 4 SA 376 (T) 383.

[7] *Midgley Delict (LAWSA)* at par [26].

[8] *Midgley Delict (LAWSA)* at par [26] relying on *Smit v Abrahams* 1992 4 All SA 238 (C); 1992 3 SA 158 (C) 160.

[9] *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E-F in which it was held: "[f]or the purposes of liability *culpa* arises if - *(a)* 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 *(b)* the defendant failed to take such steps."

[10] *Oppelt v Head: Health, Department of Health Provincial Administration: Western Cape* (CCT185/14) [2015] ZACC 33; 2016 (1) SA 325 (CC); 2015 (12) BCLR 1471 (CC) (14 October 2015).

[11] *Oppelt v Department of Health, Western Cape* at par [69]. See also *SATAWU and Another v Garvas and Others* 2013 (1) SA 83 (CC) (2012 (8) BCLR 840; [2012] ZACC 13).

[13] Utilising the above principles to test the existence of negligence in this matter, one can state the facts found proven or established by the evidence as follows. The evidence adduced in terms of the sworn statement or affidavit by the plaintiff has successfully established the elements of delict. As a result RAF is to be held liable in respect of the damages allegedly suffered by the plaintiff. The plaintiff's uncontroverted evidence clearly establishes that the insured driver acted negligently when he drove or took the exit road whilst entering the vicinity or premises of the shopping mall. This conduct is the type of negligent conduct envisaged in *Kruger v Coetzee*.[12] Also, the conduct of the insured driver was in total disregard of the safety and rights of the other users of the road, including the plaintiff. It was also wrongful in the delictual sense and would attract liability for damages. The injuries sustained by the plaintiff were factually caused by the negligent and wrongful conduct of the insured driver. They would not have been sustained had the insured driver not conducted himself negligently and wrongfully, as stated above. Further, the injuries are closely connected to the negligence and wrongful conduct of the insured driver and therefore statutorily attributable to RAF.

[14] Plaintiff's counsel also referred to the application of the "but-for test" in the determination of causation, as formulated in *International Shipping v Bentley*[13] and reiterated in *ZA v Smith*.[14] But it is necessary to add the word of caution offered in *Minister of Finance and Others v Gore NO*[15] in which it was held that, the:

> "[a]pplication of the 'but for' test is not based on mathematics, pure science or philosophy. It is a matter of common sense based on the practical way in which the ordinary person's mind works against the background of everyday life experiences."[16]

[12] *Kruger v Coetzee* at 430E-F and footnote 9 above.
[13] *International Shipping v Bentley* at 700E-J.
[14] *ZA v Smith & another* [2015] ZASCA 75; 2015 (4) SA 574 (SCA) at par 30.
[15] *Minister of Finance and Others v Gore NO* (230/06) [2006] ZASCA 98; [2007] 1 All SA 309 (SCA); 2007 (1) SA 111 (SCA) (8 September 2006).
[16] *Minister of Finance v Gore* at par [33], cited with approval in *Oppelt v Head: Health, Department of Health Provincial Administration: Western Cape* (CCT185/14) [2015] ZACC 33; 2016 (1) SA 325 (CC); 2015 (12) BCLR 1471 (CC) (14 October 2015) at par [46].

[15] But the plaintiff is not required to establish a causal link with certainty.[17] What needs to be established by a plaintiff is more likely than not that, but for the wrongful and negligent conduct of the insured driver, his harm would not have ensued.

Conclusion

[16] The injuries to the plaintiff's right hand and leg would have caused pain and suffering to the plaintiff entitling him to compensation in the form of general damages and possibly future medical treatment. The damages resulted from the negligent and wrongful conduct of the insured driver and is therefore statutorily attributable to RAF.

[17] Therefore, I am satisfied that the plaintiff has successfully established the elements of delict and, consequently, the liability of RAF regarding his damages. In the absence of evidence to establish contributory negligence on the part of the plaintiff I will order that RAF be held 100% liable for the proven or agreed damages suffered by the plaintiff. Costs will also follow this outcome.

Order

[18] In the premises, I make the order, that:

a) the issues relating to liability is separated from that of the issues relating to *quantum* and the determination of the issues relating to *quantum* is postponed *sine die*;

[17] *Minister of Safety and Security v Van Duivenboden* (209/2001) [2002] ZASCA 79; [2002] 3 All SA 741 (SCA) (22 August 2002) at par [25], cited with approval in *Minister of Finance v Gore* at par [33]. See also *Lee v Minister for Correctional Services* 2013 (2) SA 144 (CC) at par [41].

b) the defendant is 100% liable for the plaintiff's proven or agreed damages;

c) the defendant is ordered to pay the costs of this part of the trial on party and party scale, which costs shall include the following

i) costs consequent upon the employment of counsel;

ii) costs of plaintiff's counsel and attorney for preparation and attendance of a pre-trial conference;

iii) costs relating to medico-legal and addendum reports, joint and draft joint reports, if any;

iv) qualifying fees of the experts, if any, and

v) reasonable costs consequent to attending the medico-legal examinations of both parties (if any).

Khashane La M. Manamela

Acting Judge of the High Court

Date of Hearing : 19 November 2021
Date of Judgment : 18 March 2022

Appearances:

For the Plaintiff	:	Mr M Sello
Instructed by	:	Phoshane Attorneys, Pretoria
For the Defendant	:	No appearance