REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No: 15257/20

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED: YES
13 JULY 2022

NAIDOO KRISANN PLAINTIFF

and

ROAD ACCIDENT FUND DEFENDANT

JUDGMENT

NDLOKOVANE AJ

INTRODUCTION

[1] This is a claim against the Road Accident Fund arising out of an accident which occurred on 30 January 2019, between a motor vehicle ("the insured vehicle") bearing registration letters and numbers, [....], there and then driven by one Mr. Narain ("the insured driver"), and the plaintiff, who was a pedestrian at the time of the

collision.

[2] The plaintiff's claim is based on Section 17 (1) of the Road Accident Fund Act, Act 56 of 1996 ("the Act").

[3] The plaintiff has pleaded that the defendant was at all material times, and more specifically on the 30 January 2019, in terms of section 17(1) of the Act, obliged to compensate plaintiff for any loss or damage suffered by herself as a result of any bodily injury 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 such injury or death is due to the negligence or the wrongful act of the driver or the owner of the motor vehicle or of his or her employee in the performance of the employee's duties as an employee.

[4] The defendant in its plea denies that an 'incident' occurred on 30 January 2019 between a motor vehicle driven at the time by the insured driver and the plaintiff, and puts the plaintiff to proof thereof. I hasten to mention that in the letter also forming part of the record before me marked as annexure A42 on Caselines, wherein the defendant repudiates the plaintiff’s claim.

[5] At the commencement of the trial, the parties by agreement made an application for the separation of merits and *quantum* in terms of Rule 33(4) of the Uniform Rules of the Superior Court, which order will be pronounced later in this judgement. The parties agreed that this matter will proceed in respect of the merits portion of this matter only.

Evidence of the Plaintiff

[6] The plaintiff called two witnesses, namely, the plaintiff itself and her erstwhile fiancé. Mr. Sujay Narain as summarised as follows:

> 6.1 On 30 January 2019 and at approximately 12H10, the plaintiff was a pedestrian in her driveway at her home. Her fiancé started the motor vehicle, VW Golf motor vehicle as described above. This car belonged to the

plaintiff's mom but was used by both the plaintiff and her fiancée. On the day in question, as she walked down the driveway to open the gate. Her fiancé had in the meantime gone into the house to get something. The plaintiff continued picking up rubbish when she was struck by the same vehicle which had rolled down the driveway after her fiancé went back into the house. She was knocked unconsciously by the impact and she woke up in the hospital.

6.2 The plaintiff's second witness, Mr. Narain in his testimony corroborated the version of the plaintiff in all material respects and testified that on the day in question, he had returned home from work. He was residing with the plaintiff, he received a call from his uncle and needed to go out thereafter. He got into the VW Golf motor vehicle and started it. The vehicle was a manual transmission vehicle. The vehicle is owned by the plaintiffs' mother. He called to her asking her to fetch his cell phone charging cable from the house. She did not fetch the cable for him as she was at the foot of the steep driveway. It is then that Mr. Narain got out of the vehicle to fetch the charger from the house, when he did so, he left the engine running and did not engage the handbrake. While he was inside the house, he heard an impact and ran outside and saw the motor vehicle he left had run down the slope and struck the Plaintiff initially assisted her and later the neighbours took over whilst he remained in shock and entered the house to fetch the cable.

Evidence of Defendant

[7] The Defendant has presented no version of how the accident happened nor did it dispute the accounts of either the Plaintiff or Mr. Narain.

[8] The question for determination before the court is whether the insured driver's actions constituted 'driving', which resulted in the injuries sustained by the plaintiff.

[9] In order to determine whether the injuries sustained were caused or arise from the driving of a motor vehicle, one has to look at the concept of driving.

[10] For purposes of the Act, and from authorities referred to by the parties, the

concept of driving has two meanings, namely:

10.1 Driving in the ordinary sense as contemplated in section 17(1) of the Act.

10.2 Driving in an extended sense as contemplated in section 20 (1), (2) and (3) of the Act.

[11] Section 17 (1) of the Act provides as follows:

"17 Liability of Fund and agents

(1) The Fund or agent shall-

(a)…

(b)….

…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 ... caused by or arising from the driving of a motor vehicle ..., 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 ... "

[12] From the reading of s 17 (a) *supra* it is clear that the driving of the motor vehicle is the core of success in claiming compensation under section 17 (1) (a), where the identity of the driver thereof has been established. Refer ***Wells and Another v Shield Insurance Co Ltd*** **1965 (2) SA 865 (C).** Therefore, in order for the defendant to incur liability for loss or damage suffered as a result of bodily injuries, such loss or damage arising from injuries must have been *caused by or arising from the driving of a motor vehicle"* (my underlining).

[13] The identity of the driver herein, as well as his negligence is not an issue .

[14] Section 20 of the Act provides as follows:

"20 Presumptions regarding driving of motor vehicle

(1) For the purposes of this Act a motor vehicle which is being propelled by any mechanical, animal or human power or by gravity or momentum shall be deemed to be driven by the person in control of the vehicle.

(2) For the purposes of the Act a person who has placed or left a motor vehicle at any place shall be deemed to be driving that motor vehicle while it moves from that place as a result of gravity, or while it is stationery at that place to which it moved from the first-mentioned place as a result of gravity.

(3) Whenever any motor vehicle has been placed or left at any place, it shall, for the purpose of this Act, be presumed, until the contrary is proved, that such vehicle was placed or left at such place by the owner of such vehicle."

[15] The plaintiff contends that, the insured driver who on his own version had left the vehicle unattended, on a slope, without engaging the handbrake and with the engine running is deemed to be driving and by leaving a vehicle on a slope in a condition in which it could roll was negligent, same resulting in the insured vehicle moving forward and collided with the plaintiff, causing her injuries. Not only did this had cause the injuries to the plaintiff, the insured driver conduct also constituted driving as envisaged in the Act. Counsel for the plaintiff submitted that the deeming provisions of s20(1) and (2) of the act finds application in this matter.

[16] On the other hand the defendant in his heads of arguments denies that the actions of the insured driver constituted an act of driving and contends that the plaintiff failed to keep the proper look and was therefore the author of her own misfortune. I hasten to mention that, this version only appears in the heads of arguments which are referred as Defendant's submissions and was never tested in cross-examination. I also considered the pre-trial conference minute in this regard, wherein it was recorded that the defendant's version is as recorded in its plea. A proper consideration of the plea to look for its version as pleaded, I could not find its version therein as well except to find the paragraphs containing what is known as 'bare

denials'. The submission of the plaintiff in this regard is that:

> 16.1. The failure to cross-examine either the Plaintiff or Mr. Narain on their versions is fatal to the Defendant in light of the decision of the Constitutional Court in ***President of the Republic of South Africa and Others v South African Rugby Football Union and Others*** **(CCT16/98) [1999] ZACC 11; 2000 (1) SA 1; 1999 (10) BCLR 1059** *(10 September 1999)* where the Constitutional Court found that **it is impermissible to argue that a witness was not truthful unless this was put to the witness in cross examination** (my emphasis). Here the court at paragraphs 60 – 62 quoted the famous rule in in ***Browne v Dunn*** which states that:
>
> > "*The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct.*"

[17] Therefore, the plaintiff submits that in the absence of cross examination, the evidence of the Plaintiff and Mr. Narain is unchallenged and must be accepted as fact. Secondly, it is also unchallenged evidence that the motor vehicle moved under gravity and according to Sections 20(1) & (2),the insured driver may be presumed to be in control of and driving the motor vehicle, even if he was not in it at the time it struck the plaintiff, so the plaintiff's arguments goes.

[18] Reverting to section 20(1) of the Act which extends the meaning of driving to include the specific cases where a motor vehicle is not driven in the ordinary sense.

[19] To properly interpret section 20(1), one should have a look at the words "propelled by any mechanical, animal or human power or by gravity or momentum".

[20] If one considers the words "any mechanical" followed by the words "animal or human power or by gravity or momentum" and when applying the *eiusdem generis* rule of rule of interpretation *"any mechanical ...power"* is intended to mean mechanical or other power other than that of the motor vehicle concerned. (My underlining)

[21] I agree with counsel for the plaintiff's submissions that, the insured driver got into the motor vehicle on the day in question and started it. The vehicle being a manual transmission vehicle. Mr. Narain got out of the vehicle to fetch the charger from the house, when he did so, he left the engine running and did not engage the handbrake, resulting in the insured vehicle rolling down the slope and have collided with the plaintiff, Further, Section 17 (1) of the Act clearly confers on any person who got injured as a result of the accident, an unlimited claim against the Road Accident Fund for loss or damages suffered as a result of bodily injury. This clearly indicates that there must be negligence on the part of the insured driver of the insured motor vehicle in order to establish liability of the Fund. The slightest degree of negligence is sufficient to satisfy the provisions of section 17 of the Act. I am therefore satisfied that the actions of the insured driver in the present case as summarised above, indeed constitutes driving as envisaged in s17 (a) of the Act.

[22] Regarding negligence on the part of the insured driver, Mr. Narain conceded not to have pulled the handbrake up when he left the motor vehicle, after he had started it. I find Mr. Narain to have failed to exercise care legally required of a reasonable driver of a motor vehicle in his position within the circumstances as described by him in his testimony, by failing to either pull the hand brakes on or to re-engage the gear to its former position prior to him leaving the car. I find the insured driver to have been negligent rendering the Defendant liable in terms of section 17.

[23] On the totality of the evidence of the plaintiff as summarised above and the proven facts herein and on a balance of probabilities, I find that the conduct and actions of the insured driver amounts to, and/or constitutes driving as envisaged by the

Act. I also find that the absence of the version of the defendant's is trite that in the circumstances as described above, I have only the evidence of the plaintiff for consideration.

ORDER

In the result, the following order is made:

1. The issue of liability and *quantum* are separated.

2. The Defendant is 100% liable for the Plaintiff's proven agreed damages, for the injuries she sustained on 30 January 2019.

3. The Defendant is ordered to pay the Plaintiff's taxed or agreed party and party costs on a High Court scale.

N NDLOKOVANE AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Delivered: this judgment was prepared and authored by the judge whose name is reflected and is handed down electronically and by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of his matter on Caselines. The date for handing down is deemed to be 13 July 2022

APPEARANCES

FOR THE PLAINTIFF:	ADV. J ERASMUS
FOR THE DEFENDANT:	E VAN ZYL
HEARD ON:	16 MAY 2022
DATE OF JUDGMENT:	13 JULY 2022