Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

REPORTABLE

CASE NO: 17170/2008

In the matter between:

GARETH RUSSEL BLAAUW Plaintiff

and

KATRINA GERTRUIDA VEENMAN Defendant

CORAM	:	**D H ZONDI J**
JUDGMENT BY	:	**D H ZONDI J**
FOR THE PLAINTIFF	:	**ADV. DC JOUBERT**
INSTRUCTED BY	:	**WERKSMANS ATTORNEYS**
FOR THE DEFENDANT	:	**ATT. AS WEBSTER**
INSTRUCTED BY	:	**WEBSTER INC**
DATES OF HEARING	:	**7, 8, 14 MARCH 2012** **11, 12 APRIL 2012** **2, 3, 17 MAY 2012**
DATE OF JUDGMENT	:	**28 JUNE 2012**

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JUDGMENT DELIVERED ON 28 JUNE 2012

ZONDI, J:

[1] This is an action for damages arising out of a motor vehicle collision which occurred on the N2 between Heidelberg and Swellendam on 7 September 2007 at about 18h30. At the time of the collision the defendant, who was driving a Hyundai motor vehicle with registration number CA752913 proceeding along the N2 in the direction from George to Cape Town collided with a BMW motor vehicle with registration number VNN289GP, which was being driven by the plaintiff and which at the same time was proceeding in the same direction. The plaintiff alleges in his particulars of claim that the collision was solely due to the defendant's negligent driving and that as a result thereof, his motor vehicle was damaged beyond economical repair.

[2] The plaintiff's claim is for the payment of the sum of R120 648.73 which is made up as follows:

2.1 the replacement value of R140 000.00 less R25 670.87 representing the salvage value.

2.2 towing charges in the amount of R2 622.00

2.3 the hiring costs of an alternative vehicle in the amount of R3 697.60.

[3] The plaintiff has set out the facts on which he relied for the allegation that the defendant was negligent and liable for the damages which he suffered. The defendant's defence is one of general denial.

[4] The parties agreed that there would be no separation of the issues and accordingly the matter proceeded on both the merits and quantum.

[5] The plaintiff testified and called two witnesses whilst the defendant led no evidence, the reason being, as Mr **Webster** who appeared for the defendant put it, the defendant had no version as she had no recollection of the events which occurred immediately before and during the collision. This assertion is, however, inconsistent with the basis upon which the defendant had lodged her third party claim for damages for injuries she sustained in this accident. The defendant lodged her third party claim on the basis that the plaintiff's motor vehicle had been the cause of the collision. And in doing so, the defendant relied on the statement made by a person who was a passenger in her motor vehicle at the time of the collision.

[6] The plaintiff testified that on the day in question, he was driving his Hyundai motor vehicle from George to Cape Town. The first time he became aware of the

defendant's motor vehicle ("the BMW") was when he overtook it shortly after Riverdale where he had stopped for a break. He stated that the defendant followed him. When the plaintiff accelerated the defendant would do so and when he slowed down the defendant would do likewise. The plaintiff formed the view that the defendant was using the plaintiff as a pace setter. The defendant was driving too close behind him. The plaintiff estimated the speed at which he was travelling to have been between 130 – 140 km/hr. The defendant stayed behind him until the plaintiff reached a sharp bend. This was shortly after he had overtaken a motor vehicle which was travelling in an emergency lane. As the plaintiff negotiated a sharp bend he saw a patrol vehicle travelling at an extremely slow speed. It must have been about 20 metres in front of him when he first noticed it. The patrol vehicle was driving partly in the emergency lane and partly in the road. At this point the N2 is a two way road and the plaintiff braked hard to ensure that he stayed behind a patrol vehicle as there was no sufficient room for him to safely overtake it. At that point in time he must have been travelling at about 120 km/hr.

[7] When the plaintiff looked at his rear view mirror he observed that the BMW was too close on his left side and was travelling fast. The next moment the BMW collided with the left front door of his motor vehicle. Thereafter the BMW swung across the road in front of the plaintiff's motor vehicle and collided with an oncoming motor vehicle. The plaintiff's motor vehicle was extensively damaged in the collision to such an extent that it had to be written off. It is common cause that at the time of the collision the plaintiff's motor vehicle was insured with Santam Insurance (Santam) which settled the plaintiff's claim including the towing charges in the amount of R2622.00. During the investigation of the plaintiff's claim Santam in accordance with the terms of the plaintiff's insurance policy, hired a motor vehicle from Avis for the

plaintiff for which Santam paid R3 697.60.

[8] During cross-examination the plaintiff pointed out that the defendant must have been trying to avoid colliding with his motor vehicle from behind when she swerved to the left and because of a barrier rail on the left shoulder of the road she tried to cut in front of the plaintiff's motor vehicle. The plaintiff lost control of the motor vehicle after colliding with a BMW motor vehicle.

[9] Thereafter Mr **Webster** on behalf of the defendant sought to amend the defendant's plea so as to incorporate the defence of sudden emergency and contributory negligence in the light of the plaintiff's suggestion during cross-examination that the presence of a patrol vehicle created an unexpected danger for him which caused him to apply brakes abruptly and that his speeding might have contributed to the occurrence of the collision. Mr **Joubert** opposed the application for the amendment. After hearing full argument from both parties, I dismissed the defendant's application for the amendment as the reason for bringing it at such a late stage was not properly explained and in my view it was clear that it was an attempt by the defendant to build her defence as she went along. There is nothing in the amendment which indicated prima facie that the defendant had something deserving of consideration, in the sense of a triable issue. Moreover Mr **Webster** had told the Court that the defendant would not testify as she did not have a version as to how the accident occurred and in light thereof it was clear that the defendant did not have supporting evidence for the issue she sought to place in dispute and granting amendment in those circumstances would have served no purpose. (*CIBA-GEIGY (Pty) Ltd v Lushof Farms (Pty) Ltd en 'n Ander* 2002 (2) SA 447 (SCA) at 462 G – H).

[10] The matter was postponed as the plaintiff's expert witness, Mr Viljoen was not available to testify. The Court was informed that he was sick. It is common cause that Mr Viljoen, who would have testified regarding the quantum of the plaintiff's claim, and in respect of which the plaintiff had served a notice in terms of Rule 36 (9) (a) and (b) of the Uniform Rules, subsequently passed away and in his place the plaintiff called Mr Kobus Laubscher also employed by Santam as a senior assessor to give expert evidence.

[11] Mr Laubscher confirmed that in formulating his opinion he had had regard to the assessment report together with accompanying documentation prepared by Mr Viljoen with whose opinion he was in agreement. He said the assessment report was in Mr Viljoen's handwriting and bore his signature with which he was familiar. Mr Laubscher had worked with Mr Viljoen for over 15 years. He stated that Mr Viljoen had used a correct methodology in assessing and quantifying damage to the plaintiff's motor vehicle. In his opinion the plaintiff's motor vehicle was written off in accordance with standard insurance practice. He pointed out that it was clear from the photographs depicting the plaintiff's motor vehicle after the collision that it was damaged beyond economical repair. He testified that the plaintiff's motor vehicle was a 2007 model and that its market value was correctly assessed by Mr Viljoen as being R140 000.00 which is consistent with the value placed on the vehicle by the Auto Dealer's Guide. He explained that, in terms of the insurance policy which the plaintiff had with Santam, the plaintiff was liable for the excess of R7 000.00 which was deducted from R140 000.00. The salvage value was R25 670.87 which is 18% of the market value of the motor vehicle. Mr Laubscher's evidence also covered the amount of R2 622.00 which Santam paid to Hoeks Bakwerke for towing and storage charges in respect of the plaintiff's motor vehicle and which, in his opinion was reasonable.

[12] Much of the cross-examination was directed at challenging the contention that the plaintiff's motor vehicle was damaged beyond economic repair. It was suggested that the motor vehicle was not damaged to the extent that it had to be written off. The suggestion is, however, rejected on the basis that it is highly improbable that an experienced assessor such as Mr Viljoen would exaggerate the damage to the plaintiff's motor vehicle in a manner that would result in Santam being held liable for its replacement value. There would be no motive for him to act against the interest of Santam and none was suggested by the defendant.

[13] Mr Laubscher's evidence regarding the nature and extent of damage to the plaintiff's motor vehicle as well as its value before and after the collision was challenged by the defendant on the ground that it was hearsay and therefore inadmissible. The defendant's objection also extended to the photographs allegedly depicting the plaintiff's motor vehicle after the collision. These photographs are annexed to the plaintiff's notice in terms of Rule 36 (10) and were allegedly taken by Mr Viljoen.

[14] Mr **Joubert** invoked the provisions of section 3 of the Law of Evidence Amendment Act, 45 of 1988 ("the Act") in seeking to have the evidence of Mr Laubscher and the disputed photographs admitted. I admitted the evidence of Mr Laubscher and the photographs annexed to Mr Viljoen's report and to a Rule 36 (10) notice for the following reasons.

[15] Section 3 (4) of the Act defines hearsay evidence as evidence "*whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence*". It will not be entirely correct in the

present matter to treat the whole of the evidence of Mr Laubscher as constituting hearsay evidence within the meaning of section 3 (4) of the Act. To a certain extent, the probative value of his evidence depends upon his own credibility, for an example the evidence about the exercise he undertook in determining the market value of the plaintiff's motor vehicle before the collision. The probative value of this aspect of his evidence does not depend on the credibility of Mr Viljoen. (*Mdani v Allianz Insurance Ltd* 1991 (1) SA 184 (A) at 181 I – J; *Hewan v Kourie No And Another* 1993 (3) SA 233 (T) at 236 E). Apart from this to a greater extent the probative value of this evidence depends upon whether Mr Viljoen in his assessment report correctly reflected the value of the plaintiff's motor vehicle after the collision. In other words, that aspect of the evidence depends upon the credibility of Mr Viljoen (the deceased).

[16] The Act is one of the statutory exceptions to the hearsay rule. Section 3 of the Act provides that, subject to certain exceptions, hearsay evidence is inadmissible. The relevant provisions for the purposes of this judgment are contained in section 3 (1) (c) which provides as follows:

> "***3 Hearsay evidence***
>
> *(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-*
>
> *(a) ...*
>
> *(b) ...*
>
> *(c) the court, having regard to-*
>
> *(i) the nature of the proceedings;*
>
> *(ii) the nature of the evidence;*
>
> *(iii) the purpose for which the evidence is tendered;*

(iv) the probative value of the evidence;

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admission of such evidence might entail; and

(vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice."

[17] The correct approach to section 3 (1) (c) was considered by the Court in *Hewan v Kourie No and Another, supra.* It held at 239 C – D that section 3 (1) (c) requires the Court, in the exercise of its discretion, to have regard to the collective and interrelated effect of all the considerations set out in para (i) – (vi) and also to "*any other factor which should in the opinion of the Court be taken into account*". The Court went on to point out that when doing that, the reliability of the evidence will no doubt play an important role and that the less reliable the evidence, the less its probative value will be.

[18] In accepting the evidence of Mr Laubscher, I had regard to various factors as set out in paras (i) – (vi) of section 3 (1) (c), namely that the evidence is sought to be admitted in the civil proceedings, where the standard of proof is a balance of probabilities. Secondly, the purpose of the evidence which is sought to be admitted is to establish that the plaintiff's motor vehicle was so extensively damaged that it was uneconomical to repair same. In this regard there is objective evidence by the plaintiff himself, confirming that his motor vehicle was damaged in the collision and that the

nature of the damage as depicted on the disputed photographs is in accordance with his observation of his motor vehicle at the scene immediately after the collision. The plaintiff was cross-examined extensively on this aspect but nothing came out of it.

[19] The suggestion was made by the defendant that the possibility existed that Mr Viljoen might have exaggerated the extent of the damage to the plaintiff's motor vehicle which if established would render his report less reliable. Mr Laubsher was cross-examined on this aspect and it emerged from his evidence that there would be no motive for Mr Viljoen to have done so.

[20] I also considered the prejudice which the defendant could suffer by reason of reception of Mr Viljoen's assessor's report without the defendant having had an opportunity to cross-examine him to test its reliability. The assessor's report setting out what the value of the plaintiff's motor vehicle was before the collision and the document indicating what its salvage value was, were annexed to the particulars of claim and formed part of the plaintiff's claim. The defendant therefore had ample opportunity to find evidence in rebuttal. The prejudice which the plaintiff would suffer, having regard to the fact that the person who compiled the report is now deceased, if Mr Laubscher's evidence were to be rejected is more than that which the defendant would suffer if it were to be admitted. For these reasons I allowed the evidence of Mr Laubscher and accompanying photographs as in my opinion its reception was in the interest of justice.

[21] The issues for determination are, whether the plaintiff has established negligence on the part of the defendant and the damages which he alleges he has suffered, as a result of the defendant's negligence.

[22] The plaintiff's claim against the defendant is based on delict and in order to succeed in his claim the plaintiff will have to prove that the defendant was guilty of conduct which is both wrongful and culpable; and which caused the plaintiff patrimonial loss; (*Natal Fresh Produce Growers' Association and Others v Agroserve (Pty) Ltd and Others* 1990 (4) SA 749 (N) at 756 I – 757 A.

[23] As to the negligence, the question is whether a reasonable driver in the position of the defendant would foresee the reasonable possibility of her conduct colliding with the plaintiff's motor vehicle and causing him patrimonial loss; and would take reasonable steps to guard against such occurrence; and whether the defendant failed to take such steps (*Kruger v Coetzee* 1966 (2) SA 428 (A) at 430 E to F). For a delictual liability to arise there must be a causal nexus between the defendant's negligent conduct and the plaintiff's damages.

[24] In order to succeed in its claim for damages, the plaintiff must establish both the factual causation and legal causation. The question in relation to the former is whether the defendant's negligent act or omission caused or materially contributed to the harm giving rise to the claim. If it did, the second question is whether the negligent act or omission is linked to the harm sufficiently closely or directly for legal liability to ensue, or whether the harm is too remote (*Gibson v Berkowitz and Another* 1996 (4) SA 1029 (W) at 1039 F – G) See also *Minister of Police v Skosana* 1977 (1) SA 31 (A) at 34 E – F; *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) at 700 E.

[25] In the present case, I am satisfied that the collision occurred in the matter as testified to by the plaintiff. He gave his evidence in a clear and satisfactory manner and

did not try to exaggerate the defendant's negligent driving. He was prepared to make concessions which appeared to favour the defendant. The impression I gained was that he was a truthful witness and that being so there is no reason to reject his version regarding the occurrence of the collision.

[26] Mr **Joubert** submitted that once it was found that at the time of the collision the defendant, was driving too closely to the plaintiff's motor vehicle, it must be inferred, on the basis of the principle of *res ipsa loquitur*, in the absence of an explanation from the defendant that the defendant was negligent. For this proposition he referred to Cooper, Motor Law, vol 2 at 101 in which the following is said:

> "*Proof that a motor vehicle in a stream of traffic collided with the vehicle is prima facie proof of negligence. A driver must anticipate the possibility of a vehicle travelling ahead in a stream of traffic stopping suddenly. A following driver is thus under a duty to regulate his speed and his distance from the vehicle ahead as to be able to avoid a collision should the vehicle ahead stop suddenly. If the driver of the following vehicle is unable to do so and a collision results the inference is that he was either travelling too closely to the vehicle ahead or too fast or that he was not keeping a proper look-out. Hence, proof of negligence: in fact, res ipsa loquitur*".

[27] I am in full agreement with the views expressed by the author. In the present case there is an undisputed evidence by the plaintiff that the defendant was travelling at a high speed and too close behind him, the defendant had been "*tailgating*" him for a while before the accident and was in fact using the defendant as a pace setter. According to the plaintiff's version when he applied brakes suddenly to avoid colliding with a patrol vehicle which was about 20 metres in front of him, the defendant, who

had been following him, suddenly moved to the left of the plaintiff's motor vehicle and in an attempt to avoid colliding with a barrier rail on the left shoulder of the road, swiftly moved to the right and collided with the plaintiff's motor vehicle. In fact, it was the plaintiff's evidence that at that stage his motor vehicle and the defendant's motor vehicle were moving almost side by side. There is no evidence by the defendant to rebut the inference of negligence. Her inability to do so because of her amnesia cannot operate in her favour. There is, in my view, overwhelming evidence that the collision was caused by the defendant's negligent driving. A reasonable driver in the position of the defendant would foresee the reasonable possibility that if she drove too closely to the plaintiff's motor vehicle she would be unable to avoid a collision should the plaintiff's motor vehicle stop suddenly; and would take reasonable steps to guard against such occurrence. The defendant failed to take such steps.

[28] During cross-examination of the plaintiff, it was suggested by the defendant that the damages to be awarded to the plaintiff should be reduced as the plaintiff was contributorily negligent in relation to the occurrence of the collision. There were two bases for this suggestion. Firstly, it was the concession by the plaintiff that immediately prior to the collision he had been driving at a speed of 130 – 140 km/hr which was in excess of a speed limit of 120km/hr. The second was the assertion by the plaintiff that after a violent impact to his motor vehicle emanating from the defendant's motor vehicle "*he closed his eyes and covered his head with his arms*". Relying on the authority of the dictum in *AA Mutual Insurance Association Ltd v Nomeka* 1976 (3) SA 45 (A) at 55D, Mr **Webster** submitted that although the plaintiff's contributory negligence was not specifically pleaded that did not preclude the defendant from raising apportionment because the defendant had placed the plaintiff's fault in issue.

[29] The defendant's contention must be considered in light of the case that was pleaded by the parties. Very little in this matter was common cause. But for the reasons that will follow I shall proceed on the assumption that it is common cause that the collision occurred. The plaintiff in his particulars of claim alleges that on or about 7 September 2007 on the N2 between Swellendam and Heidelberg on route to Cape Town a collision occurred between the plaintiff's motor vehicle and the defendant's motor vehicle. In her amended plea the defendant pleaded that she had no knowledge of the collision and challenged the plaintiff to prove it. This averment by the defendant can, however, not be correct for three reasons.

[30] First, in para 3 of her amended plea the defendant admits that the collision as alleged by the plaintiff took place within the jurisdiction of this Court which admission belies the defendant's earlier denial of the accident. Secondly, the defendant's denial of the accident contradicts the content of the statement she made to the police in which she set out how the collision had occurred. The correctness of the content of this statement was admitted by her in her reply to further particulars which was in response to the plaintiff's Rule 37 (4) notice. Thirdly, it is common cause that the defendant instituted a third party claim against the Road Accident Fund arising out of this accident. This claim was instituted on the basis that the plaintiff was at fault and therefore liable to her for her damages.

[31] The defendant in her amended plea denied further that she was negligent; that she was liable in law to pay the plaintiff damages and that she is responsible for the damages. It is clear, upon a proper analysis of the defendant's amended plea, that she makes no allegation that the collision was caused by any negligence on the part of the plaintiff. If that is the case, then there is no factual basis for the contention that the

plaintiff contributorily contributed to the occurrence of the collision. The plaintiff's fault was not put in issue. (*AA Mutual Insurance Association Ltd v Nomeka supra, at 55 D – 56 C)*; *Ndaba v Purchase* 1991 (3) SA 640 (N) at 641 H – 642B). The present matter is on the facts distinguishable from the case of *AA Mutual Insurance Association v Nomeka* supra, as in that case although contributory negligence had not been pleaded, the negligence of the plaintiff had been placed in issue. In the present case neither the apportionment has been pleaded nor the plaintiff's fault placed in issue. The defendant's defence is a bare denial.

[32] There is another reason why the defendant's contention should fail and that is, the fact that the plaintiff admitted that he was driving at a speed in excess of a speed limit is not of itself negligence. It is merely a factor to be taken into account in determining whether or not it was negligent to drive at the speed driven (*De Jong v Industrial Merchandising Co (Pty) Ltd* 1972 (4) SA 441 (R) at 445 B).

[33] Mr **Webster** further submitted that the plaintiff's conduct in closing his eyes and covering his head with his arms immediately after colliding with the defendant's motor vehicle constituted an *actus novus interveniens* which broke the chain of causality sufficiently to absolve the defendant from liability for the plaintiff's damages. He argued that had the plaintiff not behaved in the manner he had, he would have avoided the second collision which aggravated the damage to his motor vehicle.

[34] The effect of the plaintiff's post- delictual negligence on the plaintiff's damages was considered by the Court in *Gibson v Berkowitz, supra.* The Court at 1052 C – F held that a distinction had to be drawn between the parties' negligence prior to the harmful event and any relevant negligence after the harmful event. It pointed out that

"in the case of a plaintiff, his pre-delictual negligence will trigger the application of contributory negligence to reduce his damages. The plaintiff's post delictual negligence will, however, affect the principles of legal causation (or remoteness) which may reduce his damages". Post delictor, the Court held, the plaintiff's negligent conduct may be regarded as an *actus novus interveniens* which breaks the chain of causality sufficiently to absolve the defendant form liability for the plaintiff's damages.

[35] In my view Mr **Webster's** submission must fail. It was the plaintiff's evidence that at the point of impact his motor vehicle and that of the defendant were travelling side by side and that in an attempt to avoid colliding with either a patrol vehicle which was driving in front of the plaintiff or a barrier rail on the left shoulder of the road, the defendant cut in front of the plaintiff's motor vehicle and forced the plaintiff's motor vehicle to veer across the road. The plaintiff testified that after the impact his vehicle lost control and he covered his head with his arms in order to preserve himself at that moment. In my view this was an involuntary act on the part of the plaintiff.

[36] With regard to the quantum of the plaintiff's claim it is common cause that the plaintiff has been indemnified by his insurer (Santam) in terms of a policy of insurance for damage caused to his vehicle. But this payment by Santam of the plaintiff's damages is *res inter alios acta* and may not in any way affect the question of the defendant's liability for the wrong done. (*Du Randt v Eriksen Motors (Welkom) Ltd* 1953 (3) SA 570 (O) at 572.

[37] The plaintiff relied on the assessor's report of Mr Viljoen, who passed away before he could give evidence and on the evidence of Mr Laubscher who testified in Mr Viljoen's stead. Mr Laubscher confirmed that the methodology followed by Mr

Viljoen in assessing the damage to the plaintiff's vehicle was correct and in accordance with standard loss assessment practice. In his opinion the plaintiff's vehicle was correctly "*written off*" and the sum of R140 000.00 represents the market value of the plaintiff's vehicle as at the time of the collision. From this figure Santam deducted an excess amount of R7 000.00 for which the plaintiff was liable in terms of his policy and a sum of R25 670.87 for salvage. He also confirmed that the towing costs in the sum of R2 622.00 and Avis charges in the amount of R3 697.60 for an alternative motor vehicle were reasonable and necessary.

[38] Mr Laubscher was an honest and credible witness and his evidence regarding the loss suffered by the plaintiff is accepted. In my view the plaintiff has placed sufficient evidence regarding the loss he had suffered and in the result judgment should be entered in his favour for the amount claimed in the summons.

[39] The last issue to consider is the question of costs. Mr **Joubert** urged the Court to award costs against the defendant on a scale as between attorney and client because of the vexatious manner in which the defendant conducted the proceedings. He argued that throughout the duration of the trial the defendant was obstructive and raised unmerited objections which led to unnecessary delays. While it is true that the defendant appeared to be very unco-operative during the trial and placed virtually all aspects of the claim in dispute, I am, however, not of the view that the defendant's conduct can be charactised as vexatious to warrant a punitive costs order being made against her. In the circumstances costs will be awarded on a normal scale.

[40] In the result judgment is granted in favour of the plaintiff for the payment of:

1. the amount of R120 648.73

2. interest thereon a temporae at the rate of 15.5% per annum.

3. costs of suit.

D H ZONDI