NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

JOHANNESBURG

CASE NO: 2049/00

DATE:2002-09-17

In the matter between

SAND, K D Plaintiff

and

ROAD ACCIDENT FUND Defendant

JUDGMENT

WILLIS, J: The plaintiff claims against the Road Accident Fund in terms of the provisions of the Road Accident Fund Act No. 56 of 1996. The parties agreed that the standard application to separate the merits from the quantum should be made and I was pleased to grant such an order. This judgment, therefore, affects only the merits of the particular case.

It is common cause that a collision did indeed take place between the plaintiff who was lying on the beach and a Ford F250 vehicle having registration number NPN 72765 driven by the insured driver on the beach at Cape Vidal in KwaZulu-Natal on 4 February 1995. It is also common cause that the plaintiff did indeed receive the injuries of which he complains. All that is in issue is the question of negligence which may conveniently be divided into two parts:-

(a) Was there negligence on the part of the insured driver;

(b) was there contributory negligence on the part of the plaintiff. The plaintiff was a tourist to this country from Germany. He was born on 17 March . It would seem that he has had and enjoyed a number of holidays in South Africa, and particularly at various coastal resorts in South Africa. He visited South Africa with his fiance\ Ms Renate Borchers. There they joined up with an old friend, Mr Gert Imelmann. Mr Imelmann was with his young son who was somewhere between three and five years of age at the time. The evening before the collision they had stayed overnight at Umhlanga Rocks. They arrived at Cape Vidal at about noon. There they checked in to a holiday establishment which consists of various wooden chalets. There is a reception area at this resort which was sometimes described as a camp. The plaintiff did not go to the reception area. It seems that he had been watching baboons (or probably monkeys) playing in the bushes in the vicinity. After the party had unpacked their goods at the chalet, they took a walk along a well used footpath to the beach. They arrived there somewhere between 13:00 and 14:00 in the afternoon. There they had noticed a number of vehicles parked some 200 metres north of where they settled down on the beach. This area where a number of vehicles were to be seen was right next to a sand road which provides access to the beach. It is common cause that from this beach power boats are launched into the ocean. Some 50 metres south of them there were four or five other such vehicles.

Near the place where they settled down was a natural rock pool where people were fishing and children were playing in the sea. They took towels with them and lay down on the beach to sunbathe. The little boy who was the son of Mr Imelmann played in the water in this shallow tidal pool. The three adults lay some 15 metres from the water line with their heads in the direction of the sea. Their feet, therefore, were pointed in the direction of the dunes which provide the natural boundary between the tropical vegetation and the soft sand on the beach.

They fell asleep and after approximately one hour of having been on the beach, in other words in broad daylight, the plaintiff awoke in excruciating pain, a wheel of the vehicle in question having crushed his ribcage. According to the plaintiff the driver of the vehicle then reversed slightly, came forward a little more and the plaintiff sustained soft injuries on his face. The plaintiff said that at the time he was under the vehicle in question and his fianc6 and Mr Imelmann as well. In response to his screams both Ms Borchers and Mr Imelmann leapt from under the vehicle and by banging on the vehicle and screaming etcetera drew the attention of the driver of the insured vehicle to the plight of the plaintiff. The plaintiff was in great pain, unable to move and was later taken by helicopter to a hospital in Durban where he was in the intensive care unit for a number of days and indeed had to be kept under an oxygen tent to assist his breathing. The plaintiff, if one is to take the reference point of how people were lying looking towards the dunes, was on the extreme left, his fiance" in the middle and next to his fiance Mr Imelmann.

There are discrepancies in the evidence of these three persons who testified in the plaintiff's case with regard to precisely which wheel of the vehicle it was that had crushed the plaintiff's chest and the precise angle etcetera at which they were lying. These discrepancies are, in my view, entire irrelevant to an evaluation of the case.

The three witnesses for the plaintiff all testified that they had seen no signs forbidding them from lying on the beach and that nobody had informed them that they could not lie on the beach. Furthermore, they had seen other people relaxing and enjoying themselves in the vicinity and considered that as there was an aggregation of vehicles some 200 metres away to the north and a few vehicles some 50 metres to the south, that it would be entirely safe for them to have relaxed on the beach in the manner in which they did.

The driver of the insured vehicle testified. He accepted, in fact he was emphatic, that he had not seen the plaintiff or his friends lying on the beach in question. He made a very weak impression upon me. In the first place he was contradictory and confused as to whether or not persons were allowed to sit on the beach, to lie on the beach, to swim or to fish, and if so, where. He was entirely unconvincing when he said that a photograph taken some time after this accident showing the road that gives vehicles access to the beach and prominent notices informing people that they could not swim, sit or sunbathe on the beach. In my view, had there indeed been such advices on the notice board or the board in question, we would have had much more satisfactory evidence to show that. In any event, there was no challenge to the credibility of the plaintiff and his fiance and his friend, Mr Imelmann that they had not indeed gained access to the beach by walking along the road on which these signs were.

It is furthermore clear that no "No Swimming" signs, if they were in operation at the time, were portable in other words, that there were not fixed signs drawing people's attention to the fact that they could not swim at certain parts of the beach. The plaintiff and his supporting witnesses credibly denied that they had not seen any such signs.

The insured driver put forward an utterly ridiculous explanation for how it was that he had the accident with the plaintiff without seeing him. He said that they must have climbed under the vehicle in question in order to get shade on the hot afternoon. He said that he had taken some young children whom he does not know and whom he never saw again to the beach on the back of this particular vehicle, stopped at the beach for about ten minutes and watched some people fishing and then gotten into his vehicle. It had difficulty starting. It made a huge noise while he endeavoured to start it. The accelerator pedal had to be pumped and then in first gear, in 4 x 4 mode, he engaged the vehicle and drove not more than two metres before he heard the screams and the commotion.

In my view it is utterly fanciful to imagine that a tourist who have come to the beach would wish to get shade under a vehicle of this kind. Although it is huge, the ground appearance is not so large as to make it cavernous. It would very obviously have been dangerous for any sensible person to have done this. But even more surprising is that all three persons would have fallen asleep within ten minutes and remained asleep while the vehicle made this clatter and din as he endeavoured to activate it into driving mode.

Furthermore, I find the insured driver's explanation of how difficult this vehicle was to start and how noisy it was quite unconvincing. Photographs were taken of the vehicle some time after the accident. The insured driver accepted that these photographs depicted the vehicle in the condition in which it was at the time of the accident. It is a vehicle seemingly in mint condition (or at least it would have been in mint condition in 1995). The insured driver said that the vehicle had been extremely well looked after by himself and his family.

The insured driver was about 20 years of age at the time. It seems to me that there are really

only two possibilities that explain the accident. The first is that he had been driving along the beach and had not been looking where he was driving and must at a certain stage have made a turn of the vehicle which would explain how he hit the plaintiff and most fortunately the other persons with the plaintiff were not injured. The other explanation is that the insured driver did indeed stop the vehicle near where the plaintiff and his fiance" and his friend were sunbathing but that when he returned to the vehicle he did not look around him in the vicinity of the vehicle to see if there was anyone nearby. He accepted that given the size of the vehicle if one is in the driver's seat there would be a blind spot immediately to the left of the vehicle.

Mr Nigrini who appears for the Road Accident Fund conceded fairly during the course of his submissions that he could not seriously advance the theory that the plaintiff and his fiance and Mr Imelmann had climbed under the vehicle to find shade. The insured driver, on his own version of events, would have seen children around playing in a very nearby vicinity in the natural tidal pool. He would also have seen other persons enjoying themselves fishing and so on. Given these facts, if he did not look around the vehicle before climbing into it and starting the engine, he would in this situation have very clearly been negligent. If this is not the scenario which explains the accident and he was simply driving on the beach and drove into the plaintiff, then clearly he was not keeping a proper lookout. On this basis too he would quite clearly have been negligent.

The last question that needs to be considered is whether there was contributory negligence on the part of the plaintiff. Mr Nigrini advanced an argument which strikes me as being novel. He accepted that the plaintiff and his fiancS could not really be criticised for deciding to sunbathe where they did but were to be criticised for falling asleep when they were aware that there were some vehicles in the nearby vicinity on the beach. It must be pointed out in the first

instance that it certainly was not the case that the plaintiff and his party decided to sleep there, rather they decided to sunbathe. Falling asleep is an entire natural phenomenon that can occur. Both Mr Nigrini for the defendant and Mr du Plessis accepted that there was no reported case dealing with a comparable situation. In other words, no reported case where a person on a beach suffered injuries as a result of an accident with a motor vehicle.

It seems to me that one can comfortably derive assistance from the case law with regard to accidents involving pedestrians and vehicles driven by insured drivers. In an old Scottish case Lord Montreith said:-

"When a driver of a machine in broad daylight drives down a person crossing where he had a perfect right to cross, the presumption in fact and in law is that he was in fault and the sooner this is understood the better. See Clerk v Petrie 11879) 16 SLR 626 at 626-7. This dictum was as the learned author Cooper in Motor Law, vol 2, Principles of Liability, Juta's 1987 at 102 says originally followed in our courts. He paints out that:

"There can be no presumption of law that a motorist who knocks down a pedestrian is negligent." (See Ft v Sacco 1958 (21 SA 349 (N) at 351-2; Norwich Union Fire insurance v Tutt (2} 1962 (3) SA 993 (A) and submits: "South African courts prefer not to use the word 'presumption' even when an inference of negligence can be drawn against the driver of a motor vehicle which has knocked down a pedestrian" (See the cases referred to earlier)." Cooper submits that the approach of the South African courts does not preclude the application of res ipsa loquitur when a pedestrian is knocked down by a vehicle. He goes on to submit:-

"Where 'all the known facts' were that the pedestrian was on the side or in the centre of the road in broad daylight when he was knocked down by the motor vehicle driven by the defendant, it would not be inappropriate to say res ipsa loquitur because a reasonably careful driver does not knock down a pedestrian in such circumstances'."

If this applies in the case of pedestrians and drivers of motor vehicles, how much more so must it apply in the case of persons relaxing on a beach. In my_view, the finding has to be that the collision was wholly attributable to the negligence of the insured driver.

The following finding and order is made:-

1. The collision which took place between the plaintiff and a Ford F250 vehicle having registration number NPN 72765 driven by the insured driver on the beach at Cape Vidal in Kwazulu-Natal on 4 February 1995 was caused solely as a result of the negligence of the aforesaid insured driver.

2. The costs of yesterday and today are to be paid by the defendant.