REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 2008/16641

In the matter between:

KEKANA, KGOWAKGOWA JOHANNES Plaintiff

and

ROAD ACCIDENT FUND Defendant

J U D G M E N T

MOSHIDI, J:

INTRODUCTION

[1] This trial raises the issue of the validity of the plaintiff's claim. The plaintiff has issued summons against the defendant for damages resulting from a motor vehicle accident on 4 July 2007 to 5 July 2007.

[2] At the commencement of the trial, and by agreement between the parties, the issues of the merits and the quantum of damages were separated in terms of Rule 33(4) of the Uniform Rules of Court. Consequently, the only issue to be determined was the merits of the plaintiff's claim.

THE PLEADINGS

[3] The pertinent allegations contained in paras 4 to 6 of the particulars of claim read as follows:

> "*4. On the 4th July 2007 on a public road known as Beyers Naude and/or Blueberry Street an accident occurred involving a motor vehicle bearing registration number JGS 270 GP and a BMW motor vehicle with unknown registration numbers.*
>
> 5. *Plaintiff was a driver of motor vehicle bearing registration number DGS 270 GP and was injured when he failed to negotiate the curve having collided on the side whilst the driver of the BMW vehicle with unknown registration numbers was forcing him out of the road.*
>
> *6. The collision was caused solely by the driver of the BMW vehicle with unknown registration who was negligent in one or more of the following respects:*
>
> 6.1 *He deliberately drove his vehicle recklessly by driving towards the lane in which Plaintiff was driving.*
>
> *6.2 He deliberately drove his motor vehicle at an excessive speed in the circumstances.*
>
> *6.3 He failed to keep a proper lookout of other dangers of the road.*
>
> 6.4 *He failed to keep the vehicle driven by him under proper control.*

6.5 *He failed to avoid the collision by exercise of a reasonable care he could and should have done so.*

6.6 *He disobeyed the road traffic rules.*"

[4] In resisting the claim, the defendant filed a plea, the relevant parts whereof are contained in para 5 of the plea, as follows:

"*5. <u>AD PARAGRAPHS 4, 5 & 6</u>*

5.1 The Defendant denies each and every allegation contained in these paragraphs as if specifically traversed and puts the Plaintiff to the proof thereof.

5.2 <u>Alternatively</u>, and in the event of the above Honourable Court finding that the collision did occur, which is denied, then and in that event only, the Defendant pleads that the collision was caused by the sole negligent driving of the Plaintiff who was negligent in one or more or all of the following respects:

5.2.1 he failed to have and keep a proper look-out;

5.2.2 he entered the said road at a time and place when it was dangerous and inopportune to do so;

5.2.3 he crossed the said insured driver's path of travel at a time when it was dangerous and inopportune to do so;

5.2.4 he failed to give adequate warning of his presence to other road users and more specifically the said insured driver;

5.2.5 he failed to avoid the collision when by the exercise of reasonable care, he could and should have done so.

5.3 <u>Alternatively</u>, and in the event of the above Honourable Court finding that the said insured driver was negligent as alleged or at all, which is denied, the Defendant pleads that such negligence did not cause or contribute to the collision which was caused solely by the negligence of

the Plaintiff who was negligent in one or more or all of the respects set out in paragraph 5.2 above.

5.4 Further alternatively, and in the event of the above Honourable Court finding that the said insured driver was negligent as alleged or at all and that such negligence caused or contributed to the collision, all of which is denied, the Defendant pleads that the said collision was caused partly by the negligence of the said insured driver and partly by the negligence of the Plaintiff who was negligent in one or more or all of the respects set out in paragraph 5.2 above."

THE PLAINTIFF'S EVIDENCE

[5] The plaintiff, the only witness in the trial, testified. At the time of the accident on 4 July 2007 he was about 49 years old. He was employed by Nedbank as a Manager since 1996. The plaintiff's version regarding the collision with an unidentified motor vehicle, was clear and straightforward. The version, which he substantiated and elaborated upon during his testimony, is succinctly set out in an affidavit he made subsequently on 15 November 2007. The affidavit forms part of Bundle 2 in the trial. It is convenient to reproduce the contents of paragraph 2 of the affidavit:

"*2. On the 4th July 2007 at around 23h30 I was driving my Toyota Cressida, bearing registration number JGS 270 GP along Beyers Naude Drive into Blueberry Street. The aforesaid road is tarred and I had no passengers and I was sober and well alert. Whilst driving along the aforesaid street I noted a red sedan BMW driving behind me. The lights of the sedan BMW were flicked and I did not stop. The BMW then overtook me and immediately stopped in front of me. I immediately applied my brakes slightly and served on the other side and also overtook the said vehicle. A firearm was welded at me and I sped off and the said BMW gave chase and the driver thereof was trying to force me out of the road and whilst negotiating the curve I lost control of my vehicle and passed out.*"

The plaintiff testified that during the accident, he was unable to note the registration numbers of the BMW motor vehicle. He was alone in his motor vehicle. However, the plaintiff observed that the BMW motor vehicle had four occupants who appeared to be white males. The accident report compiled by the traffic officer who visited the scene shortly after the accident, corroborates the plaintiff's version. The same applies to the police docket opened at the Honeydew Police Station. The plaintiff testified that he lived in the area and thus knew the accident area fairly well. His wife was also employed in the area. Shortly before the accident the plaintiff had dropped off a fellow churchgoer in the area. The plaintiff had been to church that evening. The plaintiff sustained severe injuries in the accident. The statement of the traffic officer, W M Mashobane, states that he arrived at the accident scene at about 02h15. The plaintiff was seriously injured. The statement proceeds to state:

> "*The driver* [the plaintiff]*, after he was freed from his badly damaged vehicle, ER24 Ambulance driven by Mr Piet Schoeman removed him to Helen Joseph Hospital for medical treatment of his serious injuries.*" (my insertions)

[6] It is clear from the plaintiff's evidence that there was contact between his motor vehicle and the BMW motor vehicle shortly before the plaintiff crashed into the wall of a nearby complex. The plaintiff was cross-examined intimately. He consistently stuck to his version. In the accident, the plaintiff suffered a fracture of the right femur; fracture of the right tibia; fracture of the left ankle; injury of the right forearm; fracture of the mandible; and a head

injury with loss of consciousness for about three weeks. His motor vehicle was written off. All this was common cause. The plaintiff testified that some time after his discharge from hospital, he sought advice from friends. He eventually landed up with his current attorney of record who duly instituted the claim against the defendant.

THE LAW AND THE ROAD ACCIDENT FUND ACT

[7] It is trite law that the *onus* is on the plaintiff to prove, on a balance of probabilities, that his injuries were caused as a result of the negligent driving of the unidentified driver of the BMW motor vehicle. He also has to prove that there was contact between his motor vehicle and the BMW motor vehicle. Indeed, s 17(1)(b) of the Road Accident Fund Act 56 of 1996, provides that:

> "*The Fund or an agent shall –*
>
> *(b) subject to any regulation made under section 26, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of neither the owner nor the driver thereof has been established, 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 or herself 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 the injury or death is due to the negligence or other wrongful act of the driver or of the owner of the motor vehicle or of his or her employee in the performance of the employee's duties as employee.*"

Regulation 2(d), framed under s 26 of the Road Accident Fund Act 56 of 1996, provides:

"*2(1) In the case of any claim for compensation referred to in section 17(1)(d) of the Act the Fund shall not be liable to compensate any third party unless –*

(d) the motor vehicle concerned (including anything on, in or attached to it) came into physical contact with the injured or deceased person concerned or with any other person, vehicle or object which caused or contributed to the bodily injury or death concerned."

In determining the causal *nexus* between the negligent driving of the driver of the insured vehicle and the injuries sustained by the plaintiff, Van Oosten J, in *Miller v Road Accident Fund* [1999] 4 All SA 560 (W), at p 565(i), formulated the inquiry as follows:

"*Two distinct enquiries arise, which were formulated by Corbett CJ in International Shipping Co (Pty) Ltd v Bentley 1990 (1) SA 680 (A) at 700E–I as follows:*

"The first is a factual one and relates to the question as to whether defendant's wrongful act was a cause of the plaintiff's loss. This has been referred to as 'factual causation'. The enquiry as to factual causation is generally conducted by applying the so-called 'but-for' test, which is designed to determine whether a postulated cause can be identified as a causa sine qua non of the loss in question. In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such an hypothesis plaintiff's loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the plaintiff's loss; aliter, if it would not so have ensued. If the wrongful act is shown in this way not to be a causa sine qua non of the loss suffered, then no legal liability can arise. On the other hand, demonstration that the wrongful act was a causa sine qua non of the loss does not necessarily result in legal liability. The second enquiry then arises viz whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether, as it is said, the loss is too remote. This is basically a juridical problem in the

solution of which considerations of policy may play a part. This is sometimes called 'legal causation'."

In *Bezuidenhout v Road Accident Fund* [2003] 3 All SA 249 (SCA) at para [17], the Vivier JA, said:

"*[17] In Prinsloo (supra) Smalberger JA said at 575C–D that there was good reason for the requirement of physical contact in unidentified vehicle cases. He relied on the judgment in Mbatha (supra) at 718J where Harms JA did not mention the requirement of physical contact but merely stated generally, as I have indicated above, that there was good reason for having stricter requirements for unidentified vehicle cases. Smalberger JA also relied on Khumalo v Multilateral Motor Vehicle Accidents Fund [1997] 2 All SA 341 (N) at 346f–g where Broome DJP gave the prevention of fraudulent claims as the reason for the requirement of physical contact. No other reason has been suggested for this requirement and I can think of none. Assuming a case of well-evidenced and fully proved negligent driving of an unidentified vehicle, as one should do in considering the matter. The undifferentiated imposition of the requirement of physical contact may well be regarded as unreasonable. Postulate the case of the negligent driver of an unidentified vehicle swerving on to his incorrect side of the road, his vehicle just scraping one oncoming car, missing a second one altogether but forcing both these vehicles to leave the road in trying to avoid him. To exclude by regulation a claim for compensation in the one case but not in the other may well be said to be such unequal discrimination as to be invalid for unreasonableness since the intention could never have been to authorise it (S v Mahlangu and others 1986 (1) SA 135 (T) at 144B–145A). It is not, however, necessary for me to decide this point.*"

In *Engelbrecht v Road Accident Fund and Another* 2007 (6) SA 96 (CC), at para [23], Kondile AJ, said:

"*[23] The applicant's current claim has been created by a statute, namely, the Road Accident Fund Act. The Act can be employed by anyone who is injured in consequence of the negligent driving of a vehicle in a hit-and-run situation to claim compensation for any loss sustained. The Act is the latest statute in a long line of national legislation beginning with the Motor Vehicle Insurance Act 29 of 1942. The stated primary concern of the Legislature in enacting these statutes is, and has always been, 'to give the greatest possible protection . . . to persons who have suffered loss through a negligent or unlawful act on the part of the driver or owner of a motor vehicle'.*"

[8] Although the defendant's attitude in resisting the claim as not valid, and denying that the accident occurred, is understandable as it has a duty to guard against fraudulent claims, the duties of the defendant are succinctly set out in *Madzunye and Another v Road Accident Fund* 2007 (1) SA 165 (SCA). At para [17] of this judgment, Maya JA says:

> "*[17] In an unreported judgment of this Court, Road Accident Fund v Roman Klisiewicz , case No 192/2001, handed down on 29 May 2002, Howie JA set out the extent of the respondent's responsibilities, saying in para [42]:*
>
> > *'The [Road Accident Fund] exists to administer, in the interests of road accident victims, the funds it collects from the public. It has the duty to effect that administration with integrity and efficiency. This entails the thorough investigation of claims and, where litigation is responsibly contestable, the adoption of reasonable and timeous steps in advancing its defence. These are not exacting requirements. They must be observed."*"

[9] In the present matter, there is no doubt at all that the accident occurred as contended for by the plaintiff. His bodily injuries arose out of the negligent driving of the BMW motor vehicle. The plaintiff's evidence that the BMW motor vehicle bumped his motor vehicle on the left-hand side and caused the plaintiff to lose control of his motor vehicle, is exceedingly credible and probable. The plaintiff was the only witness in the trial. His evidence was not contradicted by any other opposing evidence, except cross-examination which tentatively attempted to cast some doubt on the plaintiff's version. I could find no well-founded suggestion that the plaintiff was engaged in a fraudulent claim. Such allegations are indeed extremely serious and should not be made lightly without a proper basis. He is a bank manager for some time with

a reasonable salary. The witnesses who attended the accident scene shortly after the accident, confirm that there was an accident as alleged by the plaintiff. The plaintiff was a hugely impressive witness. He testified in English throughout.

CONCLUSION

[10] I conclude that the plaintiff must succeed in his claim. He has discharged, on a balance of probabilities, the *onus* that rests upon him.

ORDER

[11] In the result the following order is made:

1. The defendant shall be liable for the plaintiff's damages consequent upon the injuries sustained by the plaintiff during the accident on 4 July 2007 to 5 July 2007.

2. The determination of the plaintiff's quantum of damages is postponed *sine die*.

3. The defendant is ordered to pay the plaintiff's costs.

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D S S MOSHIDI

JUDGE OF THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

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