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26 Nov 2009	<i>[Signature]</i>
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IN THE HIGH COURT OF NORTH GAUTENG, PRETORIA  
REPUBLIC OF SOUTH AFRICA

26/11/2009.  
CASE NO: 32651/07  
32651/07.

In the matter between :

NICOLAAS JACOBUS KRUGER

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

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JUDGMENT

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ISMAIL AJ:

[1] The plaintiff instituted proceedings against the defendant in terms of the provisions of the Road Accident Fund Act 56 of 1996 for injuries he sustained out of a motor vehicle collision.

[2] At the outset of the trial I was informed by both parties that the sole issue which needed to be determined was the question of negligence. Whether the plaintiff was solely or partially negligent or alternatively whether he was not negligent at all.

[3] At the commencement of the trial the parties sought a separation of the question of the merits and the question of quantum in terms of rule 33(4) of the Uniform Rules of Court. The matter proceeded before me in respect of the merits and the question of quantum was postponed sine die.

[4] The only witness who testified during the trial was the plaintiff. A summary of his evidence would be significant in order for the court to set out reasons for its findings.

[5] Mr Kruger stated that on the day in question he was driving his vehicle when he parked his vehicle on the gravel verge in order to see the school children playing rugby. He got out of the vehicle with his door open and he had his hand on the roof of the car as he watched the school kids or learners as they are more correctly referred to playing. Standing in the position described he felt someone grabbing him from behind. At first he thought it was someone he knew who was playing with him, however he was grabbed quite aggressively away from the car by three men.

[6] He was pulled onto the street away from the vehicle by them. He fought them off and when he went towards his car he noticed a person seated behind the steering wheel. He tried to open the door however the occupant of the vehicle locked the doors. The illicit driver started the vehicle and the plaintiff instinctively got onto the bonnet of the vehicle in order to obscure the drivers vision in the hope that the latter would get out of the vehicle and run away. Instead the driver drove off with him on the bonnet clutching and holding onto the wipers for dear life.

[7] The driver swerved from side to side in the hope that the plaintiff would fall off the vehicle. Eventually the plaintiff jumped off the vehicle, and the driver collided with another vehicle.

[8] The plaintiff sustained bodily injuries as a consequence of the incident.

[9] During cross-examination the plaintiff conceded that he realized that the possibility of a person falling off from the vehicle and sustaining injuries were very high. He also stated that at hindsight what he did was dangerous, however at the time when he acted as he did, he did so in order to stop the thief from taking his vehicle.

[10] This in a nutshell was the evidence tendered during the trial and from which I need to make a determination.

[11] Mr Du Plessis acting for the plaintiff referred me to the matter of *Netherlands Insurance Co. Ltd v Van der Vyver* 1968 (1) SA 412 (A) where the court was called upon to make a finding of negligence in circumstances similar to the present matter.

Mr Makondo acting for the defendant also relied upon the *van der Vyver* matter. He contended that the conduct of the plaintiff in *casu* differed from that of the private investigator in the *van der Vyver* decision. In that matter the detective could not have foreseen that Ozen would drive away with the vehicle with him on the bonnet, whereas in *casu* the plaintiff should have foreseen such conduct on the part of the thief. According to him the injuries sustained by the plaintiff were attributed directly to his conduct, in other words but for his conduct there would not have been any injuries.

[12] The argument posed by Mr Makondo has some merit, however the question which needs to be answered is what would a reasonable man have done in the circumstances which the plaintiff found himself. Would he have attempted to prevent the thief from driving off with his vehicle or would he have stood aside and allowed the thief to merrily drive off with his vehicle. This question should not be answered in the abstract or as an arm chair critic but rather in the circumstances of the moment as things were unfurling at the time.

[13] The natural inclination of a person in such circumstances in my view would be to try and prevent the happening of the incident or to stop the thief from getting away with his conduct. At such a time a person reacts without thinking logically and one is acting instinctively. Viewed in isolation the plaintiff's conduct can be regarded as an act of bravado or recklessness where he could possibly have been shot by his assailants who dragged him onto the road or even by the driver as he got onto the bonnet. The plaintiff conceded that when he looks back at his conduct he would never do what he had done. At the time the only thought was to stop the thief from getting away, hence him getting onto the bonnet in order to obscure the drivers vision, in the hope that he would thereby stop and run away as his cohorts did.

[14] In the *Netherlands Insurance* matter supra at 422 D Milne AJA stated:

*" Die feite openbaar geen oorsaak verband hoegenaamd tussen respondent se handelinge en die gevolge van Ozen se onregmatige daad nie. Die respondent was inderdaad vandat hy op die enjinkap beland het magteloos en feitlik 'n gevangene in die hande van Ozen aan wie se genade sy lot oorgelaat is. Die gevolge waarvan*

*respondent die slagoffer geword het, is uitsluitlik veroorsaak deur Ozen se optrede."*

[15] The driver of the vehicle, the thief, could have stopped the vehicle in a cautious manner instead he choose to drive the vehicle recklessly swerving from side to side in order to dislodge the plaintiff from the vehicle. It was his grossly negligent driving which caused the plaintiff to sustain the injuries he did. Similarly the plaintiff was ' a prisoner' in driver's hand and the plaintiff was literally a sitting duck at his mercy.

[16] I agree with Mr du Plessis that in the circumstances of this matter there cannot be any negligence attributable to the actions of the plaintiff. A reasonable man in similar circumstances would have reacted in a similar fashion to stop the thief from getting away with his property.

[17] Accordingly I am of the view that the sole cause of negligence was that of the driver of the vehicle who was intent on breaking every

rule of road in order to get away from being apprehended, even if it meant that he would fatally injure the plaintiff in the process.

[18] In the circumstances I make an order in the following terms:

- (a) that the sole cause of the accident was the negligent driving of the insured driver;
- (b) that the defendant is ordered to pay the costs of the trial which costs shall include the qualifying costs of Dr. Wassemann.

A handwritten signature in black ink, appearing to read 'Ismail', is written over a horizontal line.

Ismail AJ

For the Plaintiff: Adv J A du Plessis instructed by Riette Oosthuizen  
Attorney

For the Defendant: Adv Z P Makondo instructed by the State  
Attorneys.

Date of Judgment: 26 November 2009.