IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**NO**
Of Interest to other Judges:	**NO**
Circulate to Magistrates:	**/NO**

Case number: 3141/2022

In the matter between:

HENDRIK JACOBUS VAN ZYL PLAINTIFF

And

ROAD ACCIDENT FUND DEFENDANT

HEARD ON: 05 SEPTEMBER 2023

JUDGMENT BY: VELE, AJ

DELIVERED ON: 09 NOVEMBER 2023

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[1] The plaintiff has issued summons against the Road Accident Fund (hereinafter referred to as "the RAF" or "the defendant") for the payment of R 2 152 599 – 39 as damages arising from the motor

vehicle accident that occurred on 03 September 2020, along the R59 between Hoopstad and Hertogville. The plaintiff was the driver of the motor vehicle bearing the registration numbers and letters FSL 836 FS that collided with vehicle bearing registration number CK 14716 driven by Mr A Mutswangwa (hereinafter referred to as "the insured driver"). Prior to instituting the proceedings, the plaintiff complied with the statutory requirements as set out in the Road Accident Fund Act.[1]

[2] In his summons, the plaintiff alleged that the sole cause of the collision was negligent driving of motor vehicle CK14716 by the insured driver, resulting in the plaintiff sustaining the following bodily injuries: injury to the left hip involving a fracture of the left acetabulum and associated injury to the sciatic nerve. Lower back injury involving the nerve roots and the left knee injury involving a fracture of the proximal left tibia involving the plateau. The RAF defended the action as it denied that it was liable to compensate the plaintiff, alleging that the sole cause of the collision was the plaintiff's negligence driving. The RAF further raised two special pleas.

[3] During the pre – trial meeting, the parties agreed to separate the merits and quantum, with only the merits portion to proceed whilst the quantum portion stand over for later adjudication. The Defendant conceded that the Plaintiff compiled with the statutory requirements prior to instituting the current proceedings, and abandoned both special pleas at the commencement of the trial.

[4] The Plaintiff Mr HENDRIK JACOBUS VAN ZYL; gave evidence that could be summarised as follows:

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[1] Road Accident Fund Act 56 of 1996, (hereinafter referred to as "RAF Act")

[5] He was residing at house number 51 Hoofde Street in Hoopstad, Free State. On 03 September 2020, he was involved in a motor vehicle collision at around 13H00, whilst driving along the R59 Road from Hertogville towards Hoopstad. He drove a Toyota Hilux 2.5 long wheel – based, LDV with registration number FCL 836 FS. It was a tarred with a single lane in each direction, separated by the broken line. As it was a sunny day, the road surface was dry, flat, straight and free of potholes. He could see far ahead as he was travelling at the speed of 100KM/H. He was on his way to procure the outside – bearing of the Silo's outside Argur, as the one he had secured was incompatible. When he was about 10KM from Hoopstad, there was a truck with two grain – trailers in front of his with registration number CK 14716; he could not immediately pass due to oncoming traffic. He reduced his speed to about 80KM/H and remained behind it for about two Kilo – meters. He kept a distance of about 20 Meters behind the truck, which allowed him to see at least two oncoming traffic vehicles. Once an opportunity presented itself, he put on his right indicator and accelerated to about 90KM/H in an attempt to overtake the truck. Whilst in the process of overtaking and past the rear trailer, he realised that the truck has moved in front of his motor vehicle, as it commenced turning to the right without indicating. He applied brakes, but his brakes locked and the vehicle skidded until it collided with head's right rear – wheel with his left front side, as the truck had already turned with its heard past the right hand – side of the road way.

[6] The Plaintiff referred to the discovered photo – album that contained 11 photographs. In Photo 3, both truck – head and first – trailer are

reflected already on the gravel off the tarred road, with the plaintiff's vehicle attached to the rear wheel. Photo 2 reflects Plaintiff's vehicle stuck under the trailer attached to the deflated rear – tyre of the head. Photo 8 reflects impact caused damage on plaintiff's front left side. Photo 9 reflects plaintiff's vehicle under the trailer. His motor vehicle was a write – off following the accident. There was nothing, he could do to avoid the accident. He denied that his negligence was the sole cause of the collision.

[7] He was cross – examined and denied being in hurry to get back to work. He confirmed that road was bumpy but not on the section where the collision occurred. He could not give an estimate of the distance between his vehicle and the truck prior to overtaking; merely stating it was enough to see oncoming traffic. He confirmed moving to the right side of the road saying it was safe to do so. He further stated he could have slowed down, if oncoming traffic appeared. He confirmed that he was travelling at 90KM/H during his attempt to pass the truck. Attorney referred to Photo 1 of the bundle, which reflects long skid – marks of about 30 – 40 meters. He could not explain as to how it happened that he could make such long skid – marks if when he applied brakes he was already past the rear – trailer. He further stated that due to his vehicle's age, it was not fitted with the ABS system, which made sudden braking easy.

[8] This was his evidence in a nut – shell. The plaintiff applied for a postponement in order to secure a witness in support of his case. Matter was postponed to the following day. Counsel of the plaintiff informed the court that said witness has immigrated to Australia and

not available to attend to court. Plaintiff closed his case, as he did not have further witnesses to call.

[9] The RAF also closed its case without calling any witnesses, nor giving any explanation as to why the insured driver was not available.

[10] The plaintiff's claim arises from driving of a motor vehicle, which ended up in a collision with another motor vehicle, resulting in him sustaining personal injuries. It is a requirement of the RAF Act that in an instance where someone sustain injuries in a motor vehicle accident, a copy of the police docket with witnesses statements and the accident – report by the police – officer who attended the scene, which includes the sketch – plan of the scene; must be part of documents lodged with the claim. The plaintiff did not call the police – officer who attended the scene and opened the case docket, nor produce same as part of his evidence. No Accident – Report was also not availed to the court, nor was any explanation for failure to do so provided. In terms section 19 (f) (ii)[2], provides:

[11] "The Fund or the agent shall not be obliged to compensate any person in terms of section 17 for the loss or damage – (f) if the third party refuses or fails – (i) …, (ii) to furnish the Fund or such agent with copies of all statements and documents relating to the accident that gave rise to the claim concerned, within reasonable period after having come into possession thereof."

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[2] RAF Act

[12] The above makes it compulsory to make all document available for the consideration of the claim. It is also applicable to a plaintiff, who want to proof that he or she is entitled to compensation.

[13] Photograph 6 to the plaintiff's photo – album reflects the cover of the case docket, as well as what appears to the Road – Accidents – Register. The Regulations require that the Accident – Report, which contains the versions of both drivers and the sketch – plan form part of supporting documents attached to claim Form 1 in terms of section 24 (1) (a)[3]. The Accident - Report could have shed some light into what the scene was like and the measured length of the skid – marks. The police would have measured the skid – marks and given us the insight of what was the length thereof. In the absence thereof, the court has to rely on the guess – work based on Photo 1. Surely, the Plaintiff's attorneys must be aware of this minimum requirement.

[14] The Defendant also closed its case without calling the insured driver.

[15] Both parties filed heads of argument. In the plaintiff filed the heads of argument, it was stated that he has discharged the onus put on him on the balance of the probabilities, which was disputed by the RAF.

[16] The Fund is liable to compensate any third – party, injured due to negligent conduct of the insured driver, who is a person other than the plaintiff. The plaintiff must prove the causal link between the conduct of the insured driver and consequences he suffered. In the

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[3] RAF Act

matter of Lee v Minister for Correctional Services[4], at paragraph 38 and 39 causation was set out as follows:

[17] "[38] The point of departure is to have clarity on causation. This element of liability gives rise to two distinct enquiries. The first is a factual enquiry into whether the negligent act or omission caused the harm, giving rise to the claim. If it did not, then that is the end of the matter. If it did, the second enquiry, a juridical problem arises. The question is then whether the negligent act or omission is linked to the harm sufficiently closely or directly for legal liability to ensure or whether the harm is too remote. This is termed legal causation.

[18] [39] This element of liability is complex and is surrounded by much controversy. There can be no liability if it is complex and is surrounded by much controversy. There can be no liability if it is not proved, on a balance of probabilities, the conduct of the defendant caused the harm. This is so because the net of liability will be cast too wide. A means of limiting liability, in cases where factual causation has been established, must therefore be applied. Whether an act can be identified as a cause depends on a conclusion drawn from available facts or evidence and relevant probabilities."

[19] On the plaintiff's version, he was driving behind the truck for approximately 2 KM at the speed of 80 KM/H with a distance of about 20M in between the two vehicles. He accelerated to 90KM/H in order to overtake the truck, but it turned right suddenly, when he was past

[4] 2013 (1) SACR 213 (CC)

the rear trailer. He applied brakes but the vehicle continued to skid for several meters.

[20] The RAF referred to the decision of Raulinga, J in N Felix v Road Accident Fund[5], at Paragraph 28, wherein the following was stated:

[21] "Plaintiff bears the onus to prove on the balance of probabilities that the insured driver was negligent and that the negligence was the cause of the collision from which he sustained the bodily injuries. There is no onus on the defendant to prove anything. Even in the instance where the Defendant has not tendered evidence to rebut the evidentiary burden of the prima facie case presented by the plaintiff in this case, the plaintiff may not succeed with his claim depending on the nature and weight of the evidence so tendered."

[22] The general approach to adopt when dealing with the rear end collisions; is set – out in HB Kloppers[6] – Page 78:

[23] "A driver who collides with the rear of a vehicle in front of him is prima facie negligent unless he or she can give an explanation indicating that he or she was not negligent."

[24] The onus is on the plaintiff to prove that the damages he suffered; resulted from the insured driver's negligent or other unlawful conduct. The Plaintiff relied only on his evidence in court. He did not produce the police's Accident Report or call the Officer who attendant the scene to state how it looked like. He elected to rely on the photographs taken by one of his co – workers only.

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[5] Case number 29586/13
[6] The Law of Collisions in South Africa (7th Edition)

[25] Should the plaintiff's evidence that he was past the rear – trailer when the truck suddenly turned right in front of his motor vehicle, is for a moment correct, how was it possible to make the length of the skid – marks of about 30 – 40 Meters starting just where on the left side of the road ends as reflected in Photo 1? The further fact that emanates from Photo 1; is if he was past the rear – trailer, and parallel the front – trailer the time, his skid marks would be only on the right side of the road and not that long. If this was the position, logic is he should in the circumstances, have collided with the truck – head in a much shorter distance, taking into account that the truck would have been just next to his vehicle. It is clear from this photo that when he collided with the rear wheel of the truck – head, it was over the right side of the road, as they both ended being on the gravel off the tarmac. The skid marks as reflected in Photo 1, do not support his case.

[26] The onus is on the plaintiff to proof the negligence on the part of the insured driver. He collided with a huge truck; that cannot execute a sudden turn at such high speed of 80KM/H. In the absence of the official documents in support his claim, it has become difficult to apportion any blame on the insured driver. He must explain the length of the skid marks, if he was next to the first trailer with the speed difference of just over 10KM/H. He further must explain why collided with the head and not first – trailer which was just next to his vehicle. Evidence points towards the driver not keeping a proper lookout and having failed to observe the truck as he alleged, as he could have applied brakes and avoided the collision, if travelling at the alleged speed.

[27] Before calling the defendant to rebut his evidence, he must have placed a prima facie case, that if left unchallenged, he must succeed. This is not the case here, as his evidence, which was uncorroborated in any way, and Photo 1 that he provided are inconsistent. It is highly improbable that the insured driver's truck, which has two trailers, would execute a sudden turn at such high speed, as it may end up overturning. The length of the skid – marks remained unexplained in the circumstances. The fact that he completely avoided colliding with the first – trailer, which was just a few meters in front of his motor vehicle as he was skidding forward, makes it difficult to understand the length of the skid – marks.

[28] In the circumstances, the court finds that the plaintiff has failed to prove negligence on the part of the insured driver in support of his case on the merits and cannot succeed with his action.

[29] Accordingly I make the following orders:

1. The Plaintiff's action is dismissed.

2. The Plaintiff to pay the Defendant's costs on party and party scale.

PP.

S O VELE, AJ

APPEARANCES:

Counsel on behalf of the Plaintiff:	ADV. J C COETZER
Instructed by:	HONEY ATTORNEYS BLOEMFONTEIN
Counsel on behalf of the Defendant:	MRS D MKHWANAZI
Instructed by:	THE OFFICE OF THE STATE ATTORNEY BLOEMFONTEIN