IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

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

Case no: 3989/2022

In the matter between:

PAUL STEVEN STENGER **Plaintiff**

and

ROAD ACCIDENT FUND **Defendant**

CORAM: MTHIMUNYE, AJ

HEARD ON: 24 OCTOBER 2023

DELIVERED ON: 09 JANUARY 2024

[1] The plaintiff claims damages from the defendant for injuries sustained pursuant to a motor vehicle accident that allegedly occurred on 18 February 2020 at Pasteur Street, Hospital Park in Bloemfontein. On that day the plaintiff was driving a Toyota Bus when an unknown vehicle drove onto his lane. The defendant repudiated the claim on the basis that there was no contact between the vehicles and as such it believes that the plaintiff was the sole cause of the accident. This court is called upon to determine negligence on the part of the defendant and as such the merits of the plaintiff's claim.

[2] Two witnesses testified for the plaintiff viz, the plaintiff himself and his father. The plaintiff testified about how the accident happened and his father gave evidence on where the car was found after the accident. The defendant called no witnesses and argued its case only on paper.

[3] The plaintiff testified that he is employed as a driver of a 25 seater school bus at Bloemfontein High School. His job is to pick up pupils in the morning from different pick up points and take them to school. On 18 February 2020 he left his house at about 05:50am as usual and on his way to pick up the first child in Pasteur drive. There was no traffic and although a bit cloudy, his vision was clear. He was used to the route and was driving at 60 -80 kilometres per hour. As he was approaching a curve where he was going to turn, he noticed a white Toyota driving in the opposite direction coming towards him but it was on its lane. As he was about to turn the white Toyota suddenly came half into his lane causing him to swerve to the left to avoid a collision. His front wheel hit the pavement and the vehicle swerved and hit a tree. It was about 6:20am. After he hit the tree, the Toyota stopped for a short while and immediately drove off. There was no physical contact between his bus and the Toyota. After he hit the tree, he could not stand or move, he was stuck in the bus.

[4] The next car that came by stopped and other people started coming and called the paramedics. A lady from the paramedics told him he would not be able to come out they must wait for the fire brigade to come and cut him out of the car. After she told him this, he passed out and woke up at the hospital. He had a

fracture on his thigh and foot and was in hospital for about a month. Only after he was discharged was he able to make a statement to the Police.

[5] A statement he made to the police was also admitted into evidence as Exhibit C and read into the record. The statement was dated 12 March 2020. At the time of making a statement, no police plan was shown to him. There was a discrepancy in the statement in respect of the weather as in his testimony he said it was cloudy but clear and on the statement he told the police that it was raining. In my view, nothing much turns on this. He could see and his vision was not impaired by anything.

[6] Three exhibits were handed up and admitted into evidence without any objection. These were the Google Street Map print out as Exhibit ‘A’, the Street Map as Exhibit ‘B’ and the statement made by the plaintiff to the police after he was discharged as Exhibit ‘C’.

[7] Mr Ralentshwe Charles Stenger, the Plaintiff’s father testified that on 18 February 2020 the plaintiff’s wife called him to inform him of the accident and he went to the scene. When he approached the scene he saw a bus and a number of people, he drove past and walked back to the scene. On arrival he was told his son had been taken by an ambulance. He identified the tree next to which

he found the car on Exhibit “A” and explained that from his observation of the damages on the car, it appeared that it had hit the tree with its front part. Thereafter he went to pick up the family and went to hospital. He could not testify about how the accident happened since he was not there.

[8] The defendant denied the claim but put no version or explanation to the court. Its only contention is that other steps could have been taken to avoid the collision and further that the plaintiff was the sole witness and not collaborative evidence was led. It then prayed for the claim to be dismissed alternatively be apportioned in terms of the Apportionment of Damages Act 34 of 1956.

[9] Counsel for the plaintiff argued that this is a miss and run kind of accident and that since there is no police report or any evidence by the defendant to the contrary, the court should accept the plaintiff’s version that another car was involved and as such find that there was negligence on the part of the defendant. He referred the court to the full bench decision of this Division *viz*. **Chauke v RAF (A59 /2022) [2023] ZAFSHC 214 (31 May 2023)**, which case he argued was on all fours with this one and after the claim was disallowed and the court *a quo* rejecting the plaintiff’s evidence despite the absence of contradictory evidence, the full bench upheld the appeal and found the defendant to be liable for 100% of the plaintiff’s damages.

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[10] It is trite that the plaintiff bears the onus to prove, on a balance of probabilities, that the insured driver was negligent and was the cause or contributed to the accident – **Ntsala & Others v Mutual & Federal Insurance Co.Ltd 1996 (2) SA 184 (T) at 190E-F**. What this court is called upon to determine is whether or not the plaintiff has discharged that burden.

[11] In **Sardi v Standard and General Insurance Co Ltd 1977 (3) 776 (AD) at 780 C-D,** the Appellate Division, as it then was, held the following:

> *"At the end of the case, the Court has to decide whether, on all the evidence and the probabilities and the inferences, the plaintiff has discharged the onus of proof on the pleadings on a preponderance of probability, just as the Court would do in any other case concerning negligence. In the final analysis, the Court does not adopt a piecemeal approach of (a), first drawing the inference of negligence from the occurrence itself, and regarding this as prima facie case; and then (b) deciding whether this has been rebutted by the defendant's explanation".*

[12] The 'preponderance of probabilities', requires the court to satisfy itself that, based on the evidence before it, it more likely than not that the incident did happen in the manner that the plaintiff alleges.

[13] Both exhibits ‘A’ and ‘B’ showed and it was accepted that the accident occurred on the plaintiff’s correct side of the road. Having considered the evidence before this court and the submissions I am persuaded that under this circumstances, the maxim *res ipsa loquitur* applies and in this regard, one must consider the decision of **Arthur v Bezuidenhout and Mieny 1962 (2) SA 566 (A) at 573 C-H** where the Appellate Division held:

> “*I am of the opinion that on the facts of the present case the maxim may rightly be applied. For when plaintiffs proved that defendant’s truck for no apparent reason suddenly swerved onto its correct side there to collide with their truck, plaintiff proved facts from which an inference of negligence against the defendant may, in the absence of any explanation be drawn – res ipsa loquitur”.*

[14] The *res ipso loquitur* maxim gives rise to an inference of negligence unless the defendant’s evidence counters that inference by producing evidence that shows that the accident may have occurred without negligence on its part, the explanation must be reasonable and persuasive – see **Rankisson & Son v Springfield Omnibus Services (Pty) Ltd 1964 (1) SA 609 (D)** at 616.

[15] Counsel for the plaintiff also submitted that the doctrine of sudden emergency finds application in this case. The doctrine was formulated as follows: *‘a man*

who, by another's want of care, finds himself in a position of imminent danger, cannot be held guilty of negligence merely because in that emergency he does not act in the best way to avoid the danger' – **R v Cawood 1944 GWL 50 at 54.**

[16] A driver confronted with a sudden emergency is one who has neither the time nor opportunity to weigh the pros and cons of the situation in which he finds himself. The effect of this doctrine is that a driver acting in the best way to avoid danger in a sudden emergency is not negligent – **Ntsimane v Maluleka and Another (2278/2010) [2013] ZANWHC 49 (**30 May 2013).

[17] The defendant made an issue with the fact that during his evidence, the plaintiff said it was a bit cloudy but nothing blocked his vision and he could see clearly whilst on the police statement he said it had been raining. Under cross-examination he did not dispute that he told the police that it had been raining. In my view, nothing much turns on this since first the plaintiff did not use visibility as an issue instead he explained that it was a few seconds between the time he observed the Toyota for the first time and when he then suddenly saw it in his lane. At that moment and in a split second, to avoid a collision, he had to quickly swerve out of the road and that is how the accident occurred. He had to do

something quickly, and he did and took the only reasonable alternative available.

[18] Although the defendant prayed for apportionment, I found no basis to order same as no version or justification thereof was put before this court by the defendant. Apportionment is applicable where damage is caused partly by the plaintiff's fault and partly by the defendant's fault. No version was put before this court showing that the plaintiff partly caused this accident, all the defendant said was that other steps could have been taken to avoid the accident, without demonstrating to the court with evidence what those steps are and how they could have been taken. That the plaintiff was the sole witness to the accident can also not be the basis for apportionment, especially if the plaintiff's evidence was honest and reliable, which in my view it was. Applying both the maxim *res ipsa loquitor* and the doctrine of sudden emergency as explained above, I am persuaded that the plaintiff cannot be said to have been negligent at any point in respect of the accident that occurred on 18 February 2020.

Consequently, I make the following **Order**:

1. The defendant is liable for 100% of the plaintiff's proven or agreed damages.
2. The defendant is liable for the plaintiff's costs to date.

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D.P. MTHIMUNYE, AJ

Appearances:

For the Plaintiff	:	Adv D Grewar
		Bloemfontein Society of Advocates
Instructed by		H B Booysen Attorneys
		Bloemfontein
For the Defendant:		Ms M Booysen
Instructed by		Office of the State Attorney
		Bloemfontein

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