REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case No: 2018/027323

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

18 April 2023

DATE **A.M. VAN DER MERWE**

In the matter between:

COLBRAN, ANNETTA DAVINA First Plaintiff

COLBRAN, ZARA LOUISE SHANNON JACE Second Plaintiff

COLBRAN, ALANIS NICOLE DARION Third Plaintiff

and

ROAD ACCIDENT FUND Defendant

Neutral Citation: *Colbran and Others v Road Accident Fund* (Case no: 2018/027323) [2023] ZAGPJHC 349 (18 April 2023)

JUDGMENT

VAN DER MERWE AJ:

Introduction

[1] The plaintiffs claim loss of support as a result of the untimely demise of Gary James Colbran ("the deceased") who was involved in a motor cycle collision on 17 July 2018 which occurred on N1 North Highway, Randburg. The first plaintiff was married to the deceased and the second and third plaintiffs were born of their relationship.

[2] The first plaintiff instituted action against the Road Accident Fund on 31 July 2018 for loss of support in her personal capacity and in her capacity as mother and natural guardian of her two daughters who were minors at the time. The daughters have since attained the age of majority and at the onset of the trial, by agreement between the parties, the plaintiff as described in the particulars of claim was substituted for the first, second and third plaintiffs in their personal capacities, being Annette Davina Colbran, Zara Louise Shannon Jace Colbran and Alanis Nicole Darion Colbran respectively.

[3] The plaintiffs allege that the said collision was caused due to the negligence of an unknown insured driver which resulted in the deceased's fatal injuries.

[4] Merits and quantum were previously separated on 7 June 2022.

[5] The defendant denies liability and accordingly the only issue to determine is whether the defendant should be held liable for the plaintiffs' damages to be proved.

Evidence

[6] The plaintiff called one independent eye witness, Mr. Gareth van Vollenstee and his evidence is summarized as follows:

[7] Mr. Van Vollenstee testified that on the morning of 17 July 2015 between 07h00 and 08h00 he was driving to work on the N1 Western Bypass during slow peak hour traffic, which he also described as bumper to bumper traffic. It was a clear morning and the visibility was good. There were four lanes going in the same direction. He was travelling in the far right lane at approximately 30-40 kilometres per hour between Beyers Naude and Malibongwe Drive. The road bends under the bridge at the Malibongwe split. When he was close to the Malibongwe off-ramp he noticed a motor cycle approaching from behind travelling in the emergency lane. He testified that the motor cycle was “on the other side of the yellow lane”. The emergency lane is approximately 2 metres wide (that is the distance from the yellow line to the concrete barrier in the middle of the freeway).

[8] As the motor cycle approached, Mr. Van Vollenstee moved slightly to the left of his lane, making way for the motor cyclist to pass on his right. He first saw the motor cycle when it was about 5 to 6 car lengths behind him. After looking into his mirror and when he looked to the front again, he noticed a tyre in the emergency lane.

[9] The motor cycle collided with the tyre and Mr. Van Vollenstee testified that the motor cycle flipped over and forward past the motor vehicle in front of him. He saw the deceased fall. The deceased did not hit anything else. After the collision Mr. Van Vollenstee stopped his motor vehicle, put his hazards on and called an

emergency number. Whilst dialling another ambulance which was on its way to hospital, arrived at the scene and Mr. Van Vollenstee assisted the paramedic to attend to the deceased. This witness had contact with the first plaintiff once after the collision and informed her that he would be available should she need any information.

[10] Mr. Van Vollenstee described the tyre in his own words as “a rim and tyre with the internal parts still in it” or as “a wheel and axle”. The tyre was also referred to as a “wheel assembly”. According to him this wheel assembly emanated from a motor vehicle, although the motor vehicle it emanated from was not seen by him. During cross examination he testified that the tyre was not as big as a truck’s tyre, but rather the size of a bakkie’s - or a 4 x 4 vehicle’s tyre. When asked he testified that it was a heavy object.

[11] The tyre was in the middle of the emergency lane and he confirmed it covered about 60% of the emergency lane. There was not enough space for the deceased to pass it and that the tyre was a major hazard. Being a motor cyclist himself, in his view there was nothing that the deceased could have done to avoid the collision. He himself prefers to drive in between motor vehicles when on a motor cycle and not in the emergency lane. Just before the collision occurred it looked like the deceased was slowing down as he approached the tyre / wheel and axle and it looked like he moved slightly to the right. He conceded that had the deceased seen the wheel and axle earlier he could have avoided it. Mr. Van Vollenstee himself only noticed the wheel and axle when it was about half a car’s length away. He confirmed that the wheel assembly was only visible when he was almost upon it and

that the deceased's motor cycle was a Harley Davidson type which is quite wide. There were no warning signs to alert other motorists of the hazard.

Discussion

[12] In order for the plaintiffs to be successful in their claim for holding the defendant liable for damages in their particular case, they need to prove that the death of the deceased arose out of the driving of the insured vehicle and that the death was due to the negligence or other unlawful act of the driver of the insured vehicle or the owner.[1]

[13] The plaintiffs are innocent third parties claiming loss of support. It is trite that no question of apportionment of fault or damages can be contributed to them. They only need to prove on a balance of probability the proverbial 1% negligence on the part of the insured driver/owner who is guilty of some negligence which was causally connected to the collision.

[14] It is not disputed that the deceased was travelling in the emergency lane and that he collided with an object in the road. The independent witness' evidence was clear and substantially satisfactory in material respects.

[15] In *Kemp v Santam Insurance Co Ltd and another*[2] the motor vehicle in which plaintiff was passenger collided with a heavy duty wheel and tyre lying in the national road at night between Albertinia and Riversdale. In that matter the wheel had fallen from a motor vehicle which was being driven along the national road

[1] Section 17(1) of the Road Accident Fund Act; Wells and Another v Shield Insurance Co Ltd 1965(2) SA 865 (C) at 867
[2] 1975(2) SA 329 (C) at 330F

shortly before the collision. The court found that the plaintiff proved that the collision was caused by the spare wheel, that the wheel fell from the mechanical horse (or trailer), that it fell from the vehicle while in motion and that but for the negligence of the driver or owner of that vehicle, the wheel would not have fallen into the road.

[16] In *Kemp's* case there was "no information on how the insured vehicle was driven. There were no eye witnesses and the driver was not prepared to admit that he was on the road on the day in question or that he had any independent recollection of his journey. The manner in which he drove may have been impeccable but it will not necessarily avail the defendant"[3].

[17] In this matter the plaintiffs similarly need to show that the injuries/death arose out of the driving of a motor vehicle: that the vehicle was being driven or had been driven and that there is some connection between the driving and the injury.[4]

[18] It was further said by Diemond J. that "If part of the mechanism or the equipment or the accessories to a motor vehicle become detached while the vehicle is being driven and cause injury to a third party, I think it cannot be gainsaid that the injury arises out of the driving of that vehicle. The causal relationship is so real and close that it cannot be said that the occurrence is totally divorced from the driving"…. and …. "It matters not whether it is the vehicle itself or one of the appurtenances to the vehicle which causes the death or injury; in either case the mishap arises out of the driving"[5].

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[3] 331D
[4] 331F-G
[5] *Kemp* at 332C and 332E

[19] In *Manderson v Century Insurance Co Ltd* [6] the court referred to Davies and Mann, 10M. & W. 546 where the plaintiff through past negligence had caused a non-rational and partly immobilized obstruction to be on the road. It was said that "Where the object is inanimate and unattended it would be more rational to say that the negligence of the person responsible for its presence there is continuous". The driver's omission to remove his stationary vehicle from its dangerous position was the cause of the collision which operated right up to the moment of impact.

[20] In *Lee v Minister for Correctional Services*[7], the following is stated regarding the test for causation:

> [40] Although different theories have developed on causation, the one frequently employed by courts in determining factual causation, is the *conditio sine qua non* theory or but-for test. This test is not without problems, especially when determining whether a specific omission caused a certain consequence. According to this test the enquiry to determine a causal link, put in its simplest formulation, is whether "one fact follows from another". The test—
>
> "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; [otherwise] 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."

[6] 1951(1) 533 (A) at 542H to 543A
[7] 2013(2) SA 144 (CC) at paras 40-41

> [41] In the case of "positive" conduct or commission on the part of the defendant, the conduct is mentally removed to determine whether the relevant consequence would still have resulted. However, in the case of an omission the but-for test requires that a hypothetical positive act be inserted in the particular set of facts, the so-called mental removal of the defendant's omission. This means that reasonable conduct of the defendant would be inserted into the set of facts. However, as will be shown in detail later, the rule regarding the application of the test in positive acts and omission cases is not inflexible. There are cases in which the strict application of the rule would result in an injustice, hence a requirement for flexibility. The other reason is because it is not always easy to draw the line between a positive act and an omission. Indeed there is no magic formula by which one can generally establish a causal nexus. The existence of the nexus will be dependent on the facts of a particular case.' (Internal footnotes omitted.)

[21] After considering the evidence and comparable case law, the most plausible inference to be drawn is that the object emanated from the driving of a motor vehicle. The unknown driver/owners were negligent in that they failed to maintain such vehicle and allowed it to be driven on the freeway when the wheel and axle became detached from it. They abandoned the wheel and axle assembly of that vehicle in the emergency lane. It is also evident that they failed to remove the object, left it unattended and failed to place any warning signs alerting other motorists using the emergency lane of the danger it imposed. Had it not been for the insured driver/owner's said negligence the collision and death would not have occurred.

[22] It is so that in this matter the collision occurred in the emergency lane and the deceased collided with the tyre / wheel and axle assembly during day light in peak hour traffic. The reason for the deceased's travelling in the emergency lane is

not known. Generally the emergency lane is resorted to by motorists in situations of emergency. It is however not uncommon to see motorists on South-African roads using the emergency lane when travelling in peak hour traffic or for motorists to drive into the emergency lane making way for faster traffic to pass.

[23] Regarding the visibility of the object, it was not as large or high so that a motorist such as the deceased could have seen it from a far distance whilst driving in heavy traffic. The independent eye witness testified that he himself only saw the object at a very late stage and when he was almost upon it. One would expect from a reasonable driver/owner to remove the object from the emergency lane if it emanated from his vehicle and caused a hazard. One would also expect that he would place warning signs at a distance from the object to alert other road users of the emergency lane of the hazard ahead.

[24] The insured driver/owners ought to have reasonably foreseen that an object abandoned by him/them in the emergency lane would create a hazard for other road users and cause injury or death. They ought to have taken appropriate steps to reduce the risk of such harm. The collision could have easily be avoided had the unknown driver/owners of the insured vehicle taken steps to warn other road users about the danger it posed to them.

[25] The fact that the deceased may have been negligent in travelling in the emergency lane and that he may have had the “last opportunity” to avoid colliding with the object would not exonerate the defendant from liability in this instance.

Based on the evidence it cannot be said that the deceased was solely to blame for the collision.

Amendment

[26] Before argument, plaintiff's counsel moved for an amendment to the particulars of claim and tendered the wasted costs occasioned by the amendment if unopposed. The amendment entails inserting the words "or part emanating from the motor vehicle" in paragraph 4 and inserting two subparagraphs at the end of paragraph 5 further detailing the grounds for negligence relied upon.

[27] It is trite that a party may at any time before judgment seek to amend his/her pleadings if it is made bona fide and in the absence of prejudice. It was submitted that the amendment was sought to bring the particulars of claim in line with the evidence. The defendant opposed the amendment on the basis that it was brought at a very late stage and that the amendment sought would prejudice the defendant, without proffering any grounds for the alleged prejudice. The defendant's plea as it stands is in any event a denial of the whole of paragraphs 4 and 5 of the particulars of claim which paragraphs are the ones the plaintiffs seek to amend. No prejudice was established and accordingly the amendment ought to be granted. I do not intend to grant costs for the application to amend as it was done in preparation of argument and it was not vehemently opposed.

Conclusion

[28] The insured driver/owners were negligent by allowing the motor vehicle to be driven on the freeway in the state it was in, by abandoning a part of the motor vehicle in the emergency lane after it became detached from it and by failing to

place adequate warning signs to alert other road users of the emergency lane of the danger the object posed. They should have reasonably foreseen that their negligent acts would cause injury/death to other road users resulting in damages.

[29] I am satisfied that the plaintiffs established on a balance of probability that the defendant be held liable for their damages.

[30] As a result I grant the following order:

1. The plaintiff is substituted for Annette Davina Colbran (first plaintiff in her personal capacity only), Zara Louise Shannon Jace Colbran (second plaintiff) and Alanis Nicole Darion Colbran (third plaintiff).

2. The particulars of claim is amended as follows:

   2.1 By inserting the words *", or part emanating from the motor vehicle,"* after the phrase "motor vehicle collision with motor vehicle" in the fourth line of paragraph 4.

   2.2 By adding new sub-paragraphs at the end of paragraph 5 with the following content:

   "5.10 He failed to remove the portion of the insured motor vehicle, namely a wheel and side shaft assembly (including the tyre and rim still attached to hub and brake and axle casing) from the roadway after it become dislodged from the insured vehicle;

5.11 The insured driver, in so failing to remove the portion of the insured vehicle from the roadway, should have foreseen that the presence of the portion of the insured vehicle remaining on the roadway presented a dangerous situation to other road users, including the deceased, and failed to take sufficient, alternatively, any steps to avoid the occurrence of a collision, when he could and should have done so"

3. The defendant is held liable for 100% of the plaintiffs' damages to be proved.

4. The defendant shall pay the costs of suit up to and including trial costs of 14 and 15 February 2023.

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A.M. VAN DER MERWE
Acting Judge of the High Court

Delivered: These reasons are handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties' legal representatives by email. The hand-down is deemed to be 12 April 2023.

APPEARANCES:

For Plaintiffs : Mr. H. Kriel
Instructed by Joubert Botha Incorporated

For Defendant	:	Mr. T. Ngomane Instructed by The State Attorney
Date of hearing	:	14 and 15 February 2023
Date of order	:	18 April 2023