IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA DIVISION)

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(1) NOT REPORTABLE.

(2) NOT OF INTEREST TO OTHER JUDGES

(3) REVISED.

Case No. 3898/ 2016

5/9/2017

In the matter between:

POTSHELA BUTI SEKHOTO **PLAINTIFF**

and

ROAD ACCIDENT FUND **DEFENDANT**

JUDGMENT

MILLAR, AJ

[1] This is an action for damages arising out of the negligent driving of a motor vehicle brought by the Plaintiff against the Defendant, the statutory body established in terms of the Road Accident Fund Act 56 of 1996 to deal with such claims[1].

[2] At the commencement of the trial the Plaintiff applied for a separation of

[1] The defendant was established in terms of The Road Accident Fund Act 56 of 1996 "The Act". Its specific object is stated in section 3 to be "the payment of compensation in accordance with this Act for loss or damage wrongfully caused by the driving of motor vehicles". It steps into the shoes of the wrongdoer and in terms of section 21 no claim lies against the wrongdoer unless the

issues in terms of Rule 33(4) of the Uniform Rules of Court in the following terms:

2.1 The issue of liability be decided first and separate from the issue of the alleged quantum of the plaintiff's damages;

2.2 The issue of liability shall encompass the following paragraphs of the pleadings:

2.1.1 Plaintiff's particulars of claim, paragraphs 1 to 5 (both inclusive) and the introductory portion of paragraph 6;

2.1.2 Defendants amended plea, paragraphs 1 to 5 (both inclusive), 6.1 and 6.2;

2.1.3 The issue of the alleged quantum of the plaintiff's damages is postponed *sine die*

[3] The application was not opposed and I granted the order sought. The trial proceeded on the issues of:

3.1 The negligence, if any, on the part of the insured driver; and

3.2 Whether the plaintiff had suffered any injury in the incident.

[4] It was common cause between the parties that on 14 April 2015 and at approximately 11h00, in the vicinity of Danother Crushers on the Amersfoort-Kromdraai road an accident occurred. The Plaintiff, an assistant mechanic was at the time working on the back of a Mercedes Benz truck FWS 981 MP[2] which was at the time owned by his employer PJ Swart Boerdery. The truck was a 10 wheel-tipper truck with a red load bin and white cab. The truck had had to have gearbox repairs and the Plaintiff and his foreman Mr. Johannes Jacobs together with another assistant, Mr. Saul Nkosi had been effecting those repairs. On the day in question they were putting the repaired gearbox back into the truck. In order to remove and reinstall the gearbox the load bin had been raised. The load bin was held in place by a safety arm. In order to effect the repairs work had to be done

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defendant is unable to pay such compensation.

[2] Exhibit B page 16 is a photograph of the truck in question

underneath the load bin.

[5] After the gearbox had been installed, the truck had been started and an air leak from one of the air hoses detected. The plaintiff climbed onto the diesel tank[3] under the load bin in order to repair the leaking hose. He effected the repair and while still on the diesel tank and gathering his tools, the truck had suddenly lurched, causing the safety arm to dislodge and the load bin to fall onto the Plaintiff.

[6] The parties differed as to what had caused the truck to lurch. The evidence led dealt with this issue. The plaintiff testified and also called Mr. Saul Nkosi ("Nkosi") as a witness. Two expert witnesses were also called by the plaintiff - Mr. M Dreyer ("Dreyer")an expert in gearboxes and Mr. B Grobbelaar ("Grobbelaar") an accident reconstruction expert and forensic engineer. The Defendant called Mr. J Jacobs ("Jacobs"), the insured driver. The defendant also briefed Professor J Hillman, an expert in motor vehicle accident analysis, who although it ultimately decided against calling him as a witness was present in court throughout the hearing of evidence. He had met with Grobbelaar and they had produced 2 separate minutes.

[7] The Plaintiff is a 48-year-old man whose first language is isiZulu. His evidence was translated into English by an interpreter. He attended school to standard 2 and has no formal qualifications. He had been working as an assistant mechanic to Jacobs at the PJ Swart Boerdery for 3 years. The gearbox on the truck had been removed and had been repaired. On the day in question he had been working with Jacobs and Nkosi to get the truck running again. The gearbox was installed and an attempt made to start the truck. The truck had been standing for about 2 weeks and so it was necessary to use "quick start" and the manual diesel pump[4] to assist with this. He explained that he had sprayed the quick start into the air filter. The truck was started and he had then heard the noise of one of the air hoses leaking. The clutch and gears on that particular truck operate on a compressed air or pneumatic system and so it was necessary to repair the hose. He testified that he had told Jacobs that he was going to repair

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[3] Exhibit B page 19 shows the diesel tank relative to the load bin.

[4] See footnote 6 infra.

the hose and proceeded to do so, climbing onto the diesel fuel tank so that he could get access to the hose. When he had heard the air leaking from the hose, Jacobs was still inside the truck after having started it. The cab of the truck was in its driving position - it was not tilted up. The engine of the truck continued running. The reason for Jacobs staying in the cab was because he needed to see if the air pressure was going up.

[8] He finished the repair of the hose and was in the process of gathering up his tools when the truck "kicked forward" as he described it. This was preceded by a "krrrrk" sound which he described as the sound made when an attempt was made to force the truck into gear. This "kick forward" (lurch) had caused the safety bar which was put in place to prevent the load bin from falling to move and the load bin fell onto him. The vehicle did not move again but the engine continued running. He was immediately injured and could not feel his legs. He has never been able to walk again.

[9] He testified that he had screamed for Jacobs who had alighted from the cab of the truck and who had together with Nkosi helped him onto the ground. It was only after this that the engine had been switched off. They had then taken him to the Standerton Hospital where he was admitted.

[10] The plaintiff was cross examined at some length on an affidavit that had been submitted to the defendant.[5] The plaintiff can neither read nor write in English and his evidence was that he had told the person who prepared the affidavit what had happened. He did not read it once it had been typed and it was brought to him to sign in the car where he was seated outside the police station because of his paraplegic state. I will deal with this aspect later and also in regard to the other witnesses who gave statements or affidavits.

[11] Saul Nkosi is a 59-year-old man whose first language is isiZulu. He was educated to standard 4 and was working as an assistant to Jacobs. He was present on the day of the incident and working with the plaintiff and Jacobs. He testified that he had been standing with the plaintiff and Jacobs on the driver's

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[5] Exhibit B pages 2-3. This was the affidavit submitted in compliance with section 19(f)(i) of the Act which requires the submission of an affidavit in which "particulars of the accident which gave rise to the claim are fully set out".

side of the truck[6] when they started it. They had had to use "quick start". Jacobs had climbed into the truck and started it. Once the engine was running and the plaintiff had climbed onto the diesel tank he had gone to stand on the other side of the truck. He was standing in the vicinity of the back of the front wheels at an angle[7]. He wasn't paying any particular attention to the plaintiff. The engine was running. He heard a noise, which he described as "grrrr" sound. This was a medium noise which he said made it clear to him that the clutch had not been engaged. Then the load bin fell. It made such a noise that he took fright and ran about 8 metres. He then stopped, turned and ran back to the other side of the truck where he found the Plaintiff and Jacobs. He helped Jacobs to take the plaintiff off the truck and lay him on the ground. He had then gone to the truck and switched it off. They thereafter took the plaintiff to hospital where he was admitted for the treatment of his injuries. He was adamant that Jacobs had been in the truck from the time he started it until after the load bin fell.

[12] Nkosi was cross examined at length on whether he had needed to use the diesel pump on the top of the engine or the one on the right -hand side near the diesel tank. He was adamant that he had used the one on the side[8]. He was also cross examined about a statement.[9]

[13] Mr. Dreyer was called to testify as an expert in gearboxes.[10] His expertise was not placed in issue. His evidence dealt primarily with whether it was possible for the gearbox on the truck to be in a position of a "false neutral" while the engine was running and for the gearbox to then, once the air pressure had built up, to move itself into gear.

[14] This was the case for the defendant as to why the incident had occurred. He was adamant that the only time the "false neutral" situation could occur was when the gearbox was assembled but that once it had been installed in the truck this could not occur. He explained that on the particular shaft in the gearbox there

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[6] Exhibit B page 17 - he identified the specific truck involved. He marked with an "X" on the Photograph of the truck where the manual diesel pump was located.

[7] He used the Afrikaans word "skuins" to describe where he stood relative to back of the front wheels.

[8] See footnote 6 supra.

[9] Exhibit 8 pages 13-14 - a typed document which was not signed by him and which he testified he had never seen before.

were two "v" shaped indents (slots). These are the positions for either the high range or low range of the gearbox. The gearbox must be in one or other to operate.

[15] A "detent"[11], a small pin on the selector shaft goes into one or other of these "v" slots to keep it in place. It not possible without the pneumatic system operating at a minimum of 4.5 bar of pressure to change this selection manually as the detent needs to be "pushed" out of the "v". Once it has been pushed out, very little force is required to move the detent into the other "v" and so if there had been a "false neutral" when the gearbox was assembled, as the pressure had built up, the detent would have been pushed into position.

[16] He was adamant that it would not have required a significant build up of pressure to push the detent from the "false neutral" into the "v" for either the high range or the low range as there was almost no friction between the detent and the shaft and once the engine was started the gradual pressure build up would have pushed the detent into one of the two positions. This would definitely not have happened suddenly as was described in the present case. His further evidence was that in any event whether or not the splitter on the gearbox had engaged with either high or low range would not cause the vehicle to move unless the main gearbox was in gear.

[17] The evidence of Mr. Grobbelaar[12] was corroborative of that of Dreyer. Both were adamant that the "false neutral" on the selector shaft would not on its own have led to the lurching of the vehicle[13].

[18] During the evidence in chief of Jacobs, the plaintiff moved for an amendment of the grounds of negligence originally set out in the particulars of claim[14]. The defendant opposed the amendment. The proposed amendment does not introduce any new grounds of negligence and only, in my view restates,

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[10] See Exhibit C pages 19-25 for his report.
[11] A *detent* is defined in this context as *"Any stop or catch in* a *machine which prevents* a *motion until released'* in the Shorter Oxford English Dictionary, 5t h Ed . Vol 1 at page 658.
[12] See Exhibit C pages 9-16 for his initial report and pages 26-36 for his addendum report.
[13] Mr. Grobbelaar and Prof. Hillman prepared a joint minute on this aspect but were unable to resolve the dispute. It became academic when Prof. Hillman was not called as a witness for the defendant. See Exhibit E pages 1-4.
[14] Exhibit A paragraphs 5.1 to 5.8 on pages 6 and 7

in the context of the evidence, those grounds of negligence already pleaded. There being no prejudice to the defendant I allowed the amendment.[15]

[19] The only witness who testified for the defendant was Mr. Jacobs. He is a 48-year- old diesel mechanic. He attended school to standard 8 and then completed an apprenticeship. He has worked in this capacity for 29 years. Although his home language is Afrikaans he chose to testify in English. On occasion when he needed to, he expressed himself in Afrikaans.

[20] He testified that on the day in question he had left the plaintiff and Nkosi at the truck to complete the installation of the gearbox. He confirmed that the truck had broken down previously and that it had been towed to Danother Crushers where the gearbox had been removed and taken away for repairs.

[21] He testified that he had been the one who had repaired the gearbox at the workshop. He had sent parts to the engineer in Standerton and when they had come back he had reassembled the gearbox. When he did so it had been in "neutral". He explained that besides the main gearbox being in neutral he had also assembled the high-low range selector shaft in neutral position - the "false neutral". He did this because it was easier to finally assemble the gearbox and it prevented parts falling into the gearbox and his having to do the job again.

[22] The truck was still at Danother Crushers when the gearbox was to be put back. He had left them there in the morning and had gone to Ermelo to buy other spares that he needed for the truck. When he returned the plaintiff had told him that they had finished putting the gearbox into the truck and were ready to start it. He testified that he had started the truck whilst standing outside the truck. He said that because the cab of the truck was slightly raised he had had to put a "brick" onto the accelerator in order to keep the truck idling. He also testified that the "guide" pipe which kept the gear lever in the cab aligned with the gear link connected to the gearbox on that truck was missing[16] at the time and so whenever the cab was either raised or lowered the two parts would

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[15] Moolman v Estate Moolman 1927 CPD 27 at 29

[16] The reason for this was because when they had previously changed the gearbox on that truck they had replaced the factory fitted one which had a lever on the left and the spare with which they had replaced it had a lever on the right. He testified that the correct spares were hard to find and expensive. He testified that when you work for someone and they tell you to make a plan, you make a plan.

disconnect and the link to the gearbox would drop down onto the engine.[17] His evidence was that, because of this, sometimes when the cab was jacked up or even lowered it could pull the gearbox into gear.

[23] He said that they heard an air leak in one of the hoses and that the plaintiff had climbed onto the diesel tank in order to repair it. When the repair was done the plaintiff had told him to go and press the clutch "for safety" and while climbing into the truck with his one hand on the steering wheel and the other on the handle and just as he stepped onto the step of the truck it had lurched and he fell backwards. The engine stalled. He heard no sound of grating of gears before the truck lurched. Afterward he heard the plaintiff scream and then called Nkosi to come and help. They had taken the plaintiff off the truck and then taken him to hospital. He was absolutely adamant that he had not been in the cab of the truck at all that morning or that he had engaged the clutch.

[24] He was also cross examined on a statement that he had made shortly after the accident. He testified that he couldn't remember what he had told the person who had written down the statement. He said the same when asked what he had told Prof. Hillman of the accident when he had telephoned him to discuss it. He conceded that he should have checked to see that the gearbox was in neutral and that he should have waited for the plaintiff to complete the repairs to the air pipe and collect his tools before starting the truck.

[25] The evidence of the plaintiff and Nkosi was clear and unequivocal. Jacobs was in the cab of the truck at the time that it lurched forward. He was the one in control of the vehicle. Jacobs on the other hand sought to distance himself from the event by insisting that he was not in the cab and also that he had depressed the clutch or done anything to cause the truck to lurch.

[26] His evidence on this aspect was unsatisfactory and during cross examination his evidence was punctuated with periods of silence. Besides this aspect, the evidence of the parties did not materially differ. None of the witnesses were able to read the statements that had been taken from them before their testimony in court. The contradictions, such as there were, between their

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[17]Exhibit C page 35 photographs 9 and 10 show these two parts with the guide rod *in situ.* This was not the condition on the day of the accident.

testimony and the statements, were in the case of both the plaintiff and Jacobs, not material in my view. Their respective levels of education and the fact that neither of them read their statement before signature render the statements of evidentiary value only insofar as they are corroborative of the evidence given in court. The evidence for both the plaintiff and the defendant establishes that Jacobs was the person who was in control of not only the truck in the day in question but also of the plaintiff and Nkosi. Jacobs conceded, correctly so, that he should have waited for the plaintiff to get off the truck before the engine had been started.

[27] Two questions arise. Firstly, was Jacobs the driver of the truck, whether he was in the cab or not? Secondly, was he negligent?

[28] In regard to the first question, our courts have held that:

> *"The word "driving", as used in relation to the insured motor vehicle, means, ordinarily, in my view, the urging on, directing the course and general control of the vehicle while in motion and all other acts reasonably or necessarily incidental thereto. It would thus include, inter alia, the starting of the engine and the manipulating of the controls of the vehicle" see* Wells & Another v Shleld Insurance Co. Ltd & Another[18]

[29] By virtue of his control of the truck and his starting of it I find that Jacobs was the driver of the truck. His presence in the cab is immaterial in the consideration of whether he was the driver for purposes of the Act but may be relevant to the determination of whether he was negligent or not.

[30] A summary of the authorities relied upon in our courts in regard to the test for negligence is set out in **Neethling v Oosthuizen[19]**

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[18] 1965 (2) SA 865 (C) at 870 H. The defendant relied on Flynn v Unie Nasional Suid-Britse Versekerings-Maatskappy Bpk 1974 (4) SA 283 (NC) for the proposition that the mere starting of a vehicle would not necessarily constitute driving. I do not agree that this is authority this view. It was held there that in the predecessor legislation to the Act that the word "drive" was to be accorded an extended meaning. Furthermore, it is distinguishable on the facts - in the present case Jacobs deliberately started the vehicle in Flynn the vehicle had been accidentally started. See also GC Behrens v Road Accident Fund an unreported judgment of this court under case no. 4110/2013 delivered on 8 July 2016.

[19] 2009 (5) SA 376 (C) at 3791 - 380 1; Motor Law, Cooper Vol. 2, Juta 1987 page 48-49 and the footnotes thereto and page 72 paragraph 2 and the footnotes thereto.

"[6] *Negligence in the form of culpa has been defined as the failure to exercise* a *degree of care and skill that* a *reasonable person would have exercise in the circumstances . Holmes JA in Kruger v Coetzee 1966(2) SA 428(AO at 430E-F held that negligence arises for the purpose of liability if-*

'(a) a *diligens paterfamiliias. In the position of the defendant-*

(i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and

(ii) would take reasonable steps to guard against such occurrence;

And

(b) the defendant failed to take such steps.

[7] In Mukheiber v Raath and Another 1999(3) SA 1065 (SCA) ([1999] 3 All SA 490) at 1077E-F the test for negligence was stated as follows:

'For the purpose of liability culpa arises if-

(a) a *reasonable person in the position of the defendant-*

(i) would have foreseen harm of the general kind that actually occurred;

(ii) would have foreseen the general kind of casual sequence by high the harm occurred;

(iii) would have taken steps to guard against it; and

(b) the defendant failed to take those steps.

[8] After examining the formulation of the test set out in the above two cases, Scott JA in Sea Harvest Corporation (Pty) Ltd and Another v Duncan Dock Cold Storage (Pty) Ltd and Another 2000 (1) SA 827 (SCA) ([2000J1 All SA128) at 839 F-H concluded:

'(I)t should not be overlooked that in ultimate analysis the true criterion for determining negligence is whether in the particular circumstances the conduct complained of falls short of the standard of the reasonable person. Dividing the injury into various stages, however useful, is no more than aid or guideline for resolving the issue. It is probably so *that there can be universally applicable formula which will prove to be appropriate in every case.'*

[9] Scott JA quoted with approval the remarks of Lord Oliver in Caparo Industries pie v Dickman and Others [1990J 2 AC 605 (HL) ([1990] 1 A ER 568) at 633 F-G (AC) in fine -586a(AII ER):

'(T)he attempt" to state some *general principle which will determine liability in an infinite variety of circumstances serves not to clarify the law but merely to bedevils its development in* a *way which corresponds with practicality and common sense.'*

[10] The court said in Herschel v Mrupe 1954 (3) SA 464 (A) at 490 E-F:

'The concept of bonus paterfamilias is not that of a *timorous faint-heart always in trepidation Jest he or others suffer* some *injury; on the contrary, he ventures out into the world, engages in affairs and takes reasonable chances. He takes reasonable precaution to protect his person and property and expects other to do likewise."*

[31] Having regard to the test to be applied, it is of no moment for the determination of whether Jacobs was negligent whether he was in the cab of the truck or not. The conduct of Jacobs, whether by commission or omission is to be judged as against the reasonable experienced diesel truck mechanic, supervising and responsible for those over whom he had been placed in authority. If Jacobs was in the truck then the "lurch" could only have been caused by something that

he did, such as engaging the gears or something that he did not do, such as failing to depress the clutch. If he were not in the cab then, on his own evidence he knew that the gears could be accidentally engaged because of the condition of the gear link- something he did not check, and this is what caused the truck to "lurch".

[32] On the probabilities, I find that Jacobs was inside the cab and that his action or failure to act as aforesaid was the cause of the truck "lurching". Even if the probabilities had favoured the version of Jacobs, on both versions the failure by Jacobs to ensure that the plaintiff was clear of the truck before it was started was in my view negligent and the cause of the accident in which the plaintiff was injured.

[33] The determination of whether Jacobs was negligent, which I have found, is not the end of the matter. I was also called upon to determine whether the plaintiff suffered injuries in the accident. The unchallenged evidence was that the plaintiff was mobile and able to climb onto the truck on the day in question. Immediately, after the accident he could not walk on his own - a situation that persists to this day. Accordingly, I find that the plaintiff was injured in the accident in question.

[34] There is one further aspect that requires mention. The evidence led in this matter clearly establishes that the plaintiff was injured in the course and scope of his employment with the PJ Swart Boerdery[20]. The plaintiff did not plead in his particulars of claim[21] that any award made by the Compensation Commissioner falls to be deducted from any damages to be paid by the defendant. This is a requirement in terms of s 18(2) of the Act. The damages that are to be paid by the defendant are to be reduced by such amounts as have actually been paid by the Compensation Commissioner, at that time.[22]

[35] The matter is one of great importance to the plaintiff and having regard to the defendant's denial of the occurrence and negligence until the trial, the briefing

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[20] The Plaintiff, at the time of the collision was an employee as defined in the Compensation for Occupational Injuries and Diseases Act, 130 of 1993.

[21] Exhibit A pages 4 - 11

[22] see Van Ransburg v The Road Accident Fund - case no. 2041/2006 an unreported judgment of the Gauteng High Court, Johannesburg delivered on 18 September 2007

of Senior Counsel was a reasonable precaution. All the witnesses that testified were in my view necessary given the nature of the issues in dispute. It is for these reasons that I intend to make the order for costs that I do.

[34] In the circumstances, I make the following order:

34.1 The defendant is declared to be liable for 100% (one hundred percent) of the plaintiff's proven or agreed damages flowing from the injuries which he sustained in the accident which occurred on 14 April 2015.

34.2 The defendant is ordered to pay the plaintiff's reasonable taxed or agreed party and party costs relating to the issue of liability on the High Court scale, such costs to include *inter alia:*

34.2.1 The full day's fees of senior counsel for 28, 29, 30 and 31 August 2017;

34.2.2 The reasonable traveling and accommodation expenses (including toll fees) of the plaintiff, Mrs. W Sekhoto (as an assistant to the plaintiff) and Mr. S Nkosi;

34.2.3 The costs of preparing heads of argument.

34.3 The costs (including qualifying and reservation fees) of procuring expert reports, attendance at inspection(s) of the truck, attendance of joint meetings with defendant's expert witness, compiling of joint minutes and attendance at court of the following expert witnesses:

34.3.1 Mr. B Grobbelaar (who attended court on 29 and 30 August 2017);

34.3.2 Mr. M Dreyer (who attended court on 29 August 2017);

34.3.3 The costs payable by the defendant shall bear statutory *mora* interest at 10.5% per annum calculated from date of an agreement in respect of costs or date of taxation, to date of payment.

34.4 The defendant shall pay the agreed or taxed party and party costs and any interest thereon into the trust account of the plaintiff's attorneys of record, Ayob and Associates, the details of which are as follows:

Account holder: Ayob and Associates
Bank: Standard Bank
Account: Trust Account
Branch: Hatfield
Branch code: 010145
Account number: [….]

34.5 The determination of the quantum of damages is postponed *sine die.*

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A MILLAR
ACTING JUDGE OF THE HIGH COURT

HEARD ON:	**28, 29, 30 & 31 AUGUST 2017**
JUDGMENT DELIVERED ON:	**5 SEPTEMBER 2017**
COUNSEL FOR THE APPLICANT:	**ADV P DE WAAL SC**
INSTRUCTED BY:	**AYOB AND ASSOCIATES INC.**
COUNSEL FOR THE RESPONDENT:	**ADV H VERMAAK**

INSTRUCTED BY: **DIALE MOGASHOA ATTORNEYS**