REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 19868/13

6/2/2018

In the matter between:

MCEBISI PETROS NTAKA Plaintiff

and

ROAD ACCIDENT FUND Defendant

JUDGMENT

TEFFO, J:

INTRODUCTION

[1] The plaintiff sued the defendant for damages suffered as a result of bodily injuries sustained by him in a motor vehicle collision.

[2] The collision occurred on or about 23 July 2009 at approximately 04h55 on the Schweizer-Reneke Road, Vryburg between the motor vehicle with registration letters and numbers [….] there and then driven by the plaintiff at the time and a stationary motor vehicle with registration letters and numbers [….] there and then driven by a driver who could not be identified

at the time (hereinafter referred to as the *"insured driver').*

[3] The defendant denies liability.

[4] At the commencement of the trial I was requested to separate the issue of quantum from the merits and determine liability only in terms of Rule 33(4) of the Uniform Rules of Court. I accordingly granted the order and the issue of quantum was postponed for later determination.

BACKGROUND

[5] The following facts are common cause between the parties: The *locus standi* of the plaintiff to institute the action, the fact that the collision took place, the date and place of the accident and the defendant's liability to compensate the plaintiff for the injuries sustained **as a** result of the collision save for the apportionment of damages.

THE ISSUE

[6] The issue for determination is whether or not the plaintiff was in part, if at all, contributory negligent in causing the collision and whether an apportionment in terms of the provisions of the Apportionment of Damages Act, No 34 of 1956 as amended, is applicable.

THE PLEADINGS

[7] The basis of the plaintiff's claim is that the sole cause of the collision was the negligence of the insured driver of the defendant. He specifically pleaded in paragraph 7 of his particulars of claim that the insured driver was negligent in one or more or all of the following respects:

7.1 he failed to pay due regard to other road users, in particular the plaintiff;

7.2 he failed to keep the insured vehicle under adequate or proper control;

7.3 he failed to avoid the collision when, by the exercise of reasonable

care, he could and should have done so·,

7.4 he parked his vehicle in the middle of the highway;

7.5 he left his vehicle unattended in the middle of the highway and failed to place a triangle or any other warning device behind his vehicle.

[8] At paragraph 5 of its amended plea, the defendant denied liability. It pleaded in the alternative that should it be found that its insured driver was negligent as alleged or at all, all of which is denied, such negligence was not the cause of the collision. The defendant further pleaded in the alternative that should it be found that its insured driver was negligent as alleged or at all, all of which is denied, the cause of the collision was the joint and contributory negligence of its insured driver and the plaintiff. It contended that the court should grant an order that the damages suffered be apportioned to the extent at which the plaintiff could be found to have been contributory negligent in terms of the provisions of the Apportionment of Damages Act No 34 of 1956, as amended.

[9] The defendant pleaded that the plaintiff was contributory negligent in one or more or all of the following respects:

9.1 he failed to keep a proper look-out;

9.2 he failed to avoid a collision when with the exercise of reasonable care and skill, he could and should have done so;

9.3 he failed to apply the brakes of his vehicle adequately, timeously or at all;

9.4 he drove too fast having regard to the prevailing circumstances;

9.5 he failed to keep his vehicle under proper control;

9.6 he failed to satisfy himself as to the presence of other traffic, alternatively, failed to respect the rights of other road users;

9.7 he failed to exercise the care a reasonable person would have exercised under the prevailing circumstances.

THE EVIDENCE

[10] The plaintiff testified in support of his case and also called Warrant Officer, Kalamore. The defendant closed its case without calling any witnesses.

[11] The plaintiff testified that on 23 July 2009, he was travelling in a truck from Alrode, Gauteng on his way to Upington. His co-worker took over the driving from Klerksdorp until at Schweizer-Reneke road where he bought refreshments, which included an energy drink, at a filling station. He took over the driving from there and proceeded in the direction of Vryburg. It was dark. As he was driving the truck on the Schweizer-Reneke road, at a distance of ± 20 km towards Vryburg, he collided with the insured vehicle which was stationary on the road. There was no triangle next to the insured vehicle. He tried to reduce the speed prior to the collision. In his endeavour to reduce the speed, he saw lights of an oncoming motor vehicle from the opposite direction. He failed to bring the truck to a standstill and the truck collided with the stationary vehicle.

[12] He got trapped in the cabin of the truck. Glass particles penetrated his eyes and he had no vision thereafter. His co-workers, Wiseman and Andile with whom he was travelling, summoned emergency services who took him out of the truck.

[13] He was rushed to the hospital in Vryburg and later transferred to a Medi-Clinic in Bloemfontein.

[14] Under cross-examination he testified that the truck he was driving, was loaded with pallets of water bottles, juices and chocolates. He did not know the weight of the load on the truck, and the truck's load capactiy. It was a big truck. He drove the truck on the road where the speed limit was 120 km per hour. He was driving at a speed limit of 80 km per hour prior to the collision. His lights were on bright and immediately he saw the lights of the motor vehicle which was coming from the opposite direction, he switched them to dim. His headlights were on dim when the collision took place. He first saw the oncoming motor vehicle's lights before he saw the insured vehicle. He could not tell how long in seconds he switched his lights from bright to dim before the collision. All what he said was that immediately after he had switched his lights to dim, he noticed the stationary vehicle on the road. He testified that his concentration was on the road and on

the oncoming motor vehicle. When his lights were still on bright, he did not see the stationary motor vehicle. He does not know what happened to the oncoming vehicle because after the collision the glass particles penetrated his eyes and he did not see anything.

[15] He could not elaborate how much time it took after he switched his lights to dim for the collision to take place because the collision happened fast. He denied that the accident happened for a short period of time. He was adamant that because he was driving a truck and not a small sedan, the accident could have taken a long time. This, he testified, could have been because the load on the truck also had an impact for it to stop quickly. He could not tell whether the time that lapsed prior to the collision and after he switched his lights from bright to dim, was short or long.

[16] He was cross-examined about the affidavit that he made to his attorneys. The affidavit appears on page 57 of Bundle "C" - The documents. The crux of the cross-examination was that he did not mention the oncoming motor vehicle in the affidavit and why he did not mention it. Paragraphs 3 and 4 of his affidavit read as follows:

> *"3. On the 23rd July 2009 at about 04h50, I was the driver of a truck with registration letters and numbers [….] which was travelling on the Schweizer-Reneke Road in Vryburg.*
>
> *4. Whilst travelling I suddenly hit* a *stationary trailer which had no lights, indicators or triangle."*

[17] He confirmed that the signature on the affidavit was his. He testified that he told his attorney about the oncoming vehicle but denied seeing the affidavit beforehand.

[18] warrant Officer Garenamotse Michael Kalamore also testified. His evidence was as follows: He is a police officer with 27 years' service in the South African Police Service stationed at Makgobistad in Mafikeng. On 23 July 2009 he was stationed in Vryburg. On the same day in the early hours of the morning around 04:00, he was at work. He was performing his duties together with Constable Congwane posted outside the police station. He received a message

from the police station on a two way radio that a collision took place between a truck and a motor vehicle on the road between Vryburg and Schweizer-Renek.e He and Constable Congwane immediately rushed to the scene. Upon their arrival at the accident scene, he noticed a damaged truck on the road, clothing, blankets, mirrors and some luggage were lying around the truck. There were two male persons who turned out to be passengers who were in the truck prior to the collision. The two male persons pointed out a van to him that had a trailer and told him that the van collided with the truck. As he was looking at where the van and the trailer had landed, he also noticed another three male persons.

[19] The two male persons who told him that they were passengers in the truck further informed him that the driver of the truck was trapped in the cabin of the truck. He immediately phoned the head office to send them the necessary personnel and the ambulance services.

[20] He subsequently approached the other three male persons. He introduced himself to them and asked them what happened. They informed him that they were from Pakistan. They were travelling in the bakkie that was involved in an accident with the truck. They had just gone to do some shopping for items they had intended selling in the neighbourhood.They further informed him that the driver of the bakkie left them at the scene in order to go and seek help in Vryburg. He asked them what happened that led to the accident. One of them informed him that one of the rear wheels of the bakkie dislocated from the bakkie and the driver managed to bring it to a standstill though it was still on the road. He asked them how come did the truck collide with the bakkie from the rear. They were hesitant to tell him. In the process they were exchanging calls with their acquaintances. One of them said he only noticed the truck coming and colliding with the bakkie from behind. They further told him that they were standing outside the road and not inside the bakkie when the collision between the bakkie and the truck took place. Because the scene was messed up, the emergency services assisted in putting the cones on the road and also to direct the traffic. As the emergency services were busy with the driver who was trapped in the truck, he marked the points of impact. He also wrote his statement.

[21] The driver of the truck was then transported to the hospital. He also took

down the names of the passengers of the truck. They informed him that they were asleep and were awaken by the sound of the collision.

[22] He also phoned the police station to check the whereabouts of the accident sketch plan team and the investigators. Unfortunately they did not come. The charge office sent them a nearby breakdown to remove the truck on the road. Eventually he and his crew member, Constable Congwane left the scene and proceeded to Vryburg police station where they captured the information. He did not take statements from the passengers of the truck. He only interviewed them.

[23] The accident report was compiled by Constable Congwane. He marked the points of impact with a stone. He made markings where the truck was standing still, and where the wheels of the truck were on the tarred surface of the road. He also took loose stones and placed them where the trailer landed. He was asked where was the point of impact and he explained that from his observation and the explanation that was given to him by the passengers of the bakkie, where the bakkie lost its wheel there is a marked shaft on the wheel which had started to make a whole on the road and where it was pointed out to him as the standstill point. There were also some markings of the impact between where the truck and the bakkie was up to where the truck came to a standstill. The markings were on the surface of the road and this includes the point of impact between the truck and the trailer. He explained that the collision between the truck and the trailer was on the road and that as a result of the collision, the trailer was ejected from the road on to the grass part outside the road.

[24] Under cross-examination he testified that by virtue of his work, he does the markings on the road and the accident sketch plan department will come to do the measurements with a measuring tape.

THE LAW

[25] Section 17(1) of the Road Accident Fund Act 56 of 1996 *("the* Act") provides that there must be negligence in order to establish liability of the Road

Accident Fund ("RAF').

[26] In *Kruger v Coetzee* 1966 (2) SA 428 (A) the following remarks were made:

> *"When* a *person is negligent he or she is reproached for his or her conduct or attitude of carelessness and his or her inattentiveness because his or her conduct does not comply with the standard of care legally required of him or her. The standard used to judge the conduct of* a *person is that of a reasonable person or bonus paterfamilias. If the principle of negligence is applied to* a *motor vehicle accident, the court places itself as far* as *possible in the place of a driver at the time of the accident. The conduct of the driver is then compared to that of a reasonable person under the then prevailing circumstances. A driver of* a *motor vehicle is negligent if he or she is capable of reasonably foreseeing that his or her conduct will cause damage and such driver does not take reasonable steps to prevent such damage from occurring."*

[27] The slightest degree of negligence is sufficient to satisfy the requirements of negligence under section 17(1) of the Act and consequently to render the RAF liable (see Van der Walt and Midgley *Principles and* Cases Vol 1 par 96, Cooper *Delictual Liability in* Motor *Law* 77) .

[28] In *Road Accident Fund v Mehlomakulu* 2009 (5) SA 390 (E) the full court of the same division was confronted with almost similar set of facts as in the present matter except that the accident happened at night and that it took place on a road that was curving. In its judgment the court said the following:

> *"The plaintiff came around* a *curve on an open country road at night. He* was *suddenly faced with an unlightened, stationary vehicle immediately in front of him in his lane of travel, which he was unable to avoid. He does not know how it got there or what it was doing there. But he does not know that it should have been there. He is entitled to say re ipsa loquitur. It is then over to the defendant to explain how the*

obstruction got there, what it was doing there and why it was still there when he arrived. There is nothing unfair about the law imposing a *duty of rebuttal on the defendant in these circumstances. It was after all the insured vehicles, for which the defendant is by statute liable, which formed the dangerous obstruction in the road, and their drivers would have caused them to be there. Absent an explanation by the defendant which tells the remainder of the story and which is sufficient to displace the inference of negligence, evidence of the creation of* a *danger in the roadway at night, to my mind compels an inference of negligence. Is there before the Court an explanation, based on fact and not speculation, sufficient to displace the inference."*

[29] In *Hoffman v South African Railways and Harbours* 1955 **(4) SA** 476 (A) the following principle was articulated:

"If he Crown proves that a *pedestrian or cyclist or other object with which the motorist collided, was visible so that* a *person keeping* a *proper look-out or driving at a reasonable speed in the circumstances ought to have* seen *the obstruction in time to avoid the accident, then the inference of negligence can be drawn. But where the evidence does not show that the person with whom the car collided was visible in that sense then there is no ground for drawing the inference of negligence.*

'Could with the exercise of reasonable care' is a *legitimate elaboration of the word 'should,' provided that due emphasis on the word 'reasonable' is preserved and that one does not slip into the error of supposing that, if the collision could have been avoided, it therefore could have been, in the sense that failure to avoid it proves negligence ... No rule of law can be laid down that* a *person driving in the dark must be able to pull up within the limits of his vision. It is of course difficult to refrain from generalising in* a *matter of this kind; careless driving of swift vehicles is certainly dangerous and there is obviously* a

> *relationship between speed and visibility. But the generalisations regarding night driving, of which our reports contain many examples, must not be construed as laying down a rule of law can be applied* as *governing the facts of each case of this kind ... This ultimate issue always is whether the facts establish negligence, not whether they show that the driver in question failed to keep his speed within the range of his vision, though such failure may in* a *particular* case *be* a *crucial factor in deciding whether or not there was negligence."*

[30] The only evidence before court is that of the plaintiff. Although no evidence was presented on behalf of the defendant, it was argued that should the court find that the insured driver of the defendant was negilgent in causing the collision, it should also find that the plaintiff was also contributory negligent in causing the collision. It was argued that the plaintiff was hesitant in answering questions during cross-examination pertaining to when did he switch the lights of the truck he was driving at the time of the collision from bright to dim and how long did that happen prior to the collision. It was submitted that he testified during cross-examination that immediately after he dimmed his lights, he collided with the insured vehicle. It was further submitted that at some stage during cross-examination, he testified that there was a longer period since he dimmed the lights and collided with the insured vehicle.

[31] The evidence of the plaintiff and Warrant Officer, Kalamore was not contested. Their evidence corroborated each other in respect of the fact that the insured vehicle was left unattended on the road, there was no triangle on the accident scene and the driver thereof was not in the vicinity.

[32] On a balance of probabilities these are the objective facts of what had happened: The plaintiff was driving a truck with a cargo on a dark road on the highway between Schweizer-Reneke and Vryburg in the early hours of the morning in July 2009. He was in the company of his two crew members who were asleep at the time. They were awaken by the sound of the collision. As he was driving he came across an unattended stationary motor vehicle on his lane of travel. The insured vehicle was loaded and carrying a trailer. It did not have

lights and there was no sign or triangle next to it to alert the traffic approaching, including the plaintiff, of its presence on the road. He tried to reduce the speed of the truck he was driving. In the process he noticed the lights of the oncoming motor vehicle. He immediately switched his bright lights to dim. Shortly thereafter he collided with the insured vehicle. He could not swerve to the right to avoid the collision because there was an oncoming motor vehicle approaching. He saw the unattended motor vehicle at close range. There is no evidence that the plaintiff was negligent, in my view. According to his evidence, the plaintiff could not move to the right to avoid the collision because there was oncoming traffic on the opposite direction.

[33] I find the plaintiff and his witness, Warrant Officer Kalamore to have been impressive good and credible witnesses. In my view there is no evidence to suggest that the plaintiff was contributory negligent.

[34] It is my view as alluded to by the plaintiff that a truck with a cargo would not stop promptly like a sedan motor vehicle. The amount of time it takes to stop would not be the same. The fact that the plaintiff testified that he dimmed his lights when he noticed the lights of the oncoming motor vehicle, was in my view, the right thing to do. A reasonable driver in his position would have done the same, otherwise the consequences of the collision would have been too ghastly to contemplate. The plaintiff testified during cross- examination that his lights were on bright and immediately he saw the lights of the oncoming motor vehicle, he switched them to dim. He first saw the oncoming vehicle's lights before he saw the insured vehicle. He could not tell how long in seconds she switched his lights from bright to dim before the collision. He testified that immediately after he had switched his lights to dim, he noticed the stationary vehicle on the road and when the collision took place, his lights were on dim. He was clear that when his lights were still on bright, he did not see the insured vehicle. Nowhere in the evidence did he indicate that it took long after he dimmed the lights of the truck for the collision to take place.

[35] The fact that the insured vehicle was left in the middle of a dark road stationary, unattended with no lights and a triangle or road signs to alert other road users of its presence on the road is, in my **view,** sufficient to establish

negligence on the part of the insured driver who left it there unattended and in those circumstances. In the absence of his evidence to rebut the plaintiff's evidence and an explanation why it was on the road as. the plaintiff found it, the plaintiff's evidence stands uncontested. When he left the insured vehicle on the road as it was found, the insured driver reasonably foresaw that his or her conduct would cause damage but did not take reasonable steps to prevent such damage from occurring. He was therefore, in my view, negligent. By leaving an unattended stationary vehicle on the road, he formed a dangerous obstruction in the middle of the road. No rule of law can be laid down that a person driving in the dark must be able to pull up within the limits of his vision. The ultimate issue always is whether the facts establish negligence, not whether they show that the driver in question failed to keep his speed within the range of his vision, though such failure may in a particular case be a crucial factor in deciding whether or not there was negligence.

[36] The plaintiff was taken to task during cross-examination about the fact that he never mentioned the oncoming motor vehicle in the section 19(f) affidavit and that the only time he mentioned it was when he testified. He was adamant in his evidence that he mentioned the oncoming motor vehicle to his attorney and could not tell why that was not mentioned in his affidavit. He did not read his a davit beforehand although he signed it. Mention of this evidence is, in my view, immaterial. It does not take away the fact that there was this dangerous obstruction on the road which the plaintiff could not avoid under the circumstances. It was never the plaintiff's evidence that the oncoming vehicle's lights obstructed his view prior to the collision. The crux of his evidence was that he could not avoid the collision by swerving to the right due to the fact that an oncoming motor vehicle was approaching hence he had to switch his bright lights to dim which a reasonably driver could have

done.

[37] A sworn affidavit is not subject to cross-examination. It need not be as detailed as evidence in court. The plaintiff cannot therefore, in my **view,** be faulted for not mentioning the oncoming motor vehicle in the section 19(f) affidavit he made to his attorneys.

[38] Having considered the totality of the evidence, I am not persuaded in any way that there is any shred of evidence to establish any negligence on the part of the plaintiff. The Apportionment of Damages Act is therefore not applicable. The sole cause of the collision, in my view, was the negligence of the insured driver of the defendant who formed a dangerous obstruction on the road by leaving a stationary, unattended motor vehicle with no lights and/or signs in the middle of a dark road without alerting other road users of its presence. There is no evidence at all that the stationary motor vehicle was visible on the road so that a reasonable driver keeping a proper look-out or driving at a reasonable speed in the circumstances ought to have seen the obstruction in time to avoid the collision. The plaintiff's evidence that he was driving at a speed of 80 km per hour on the road with a speed limit of 120 km per hour was also not contested.

[39] Consequently I make the following order:

39.1 The plaintiff's action succeeds and the defendant is held 100% liable for plaintiff's proven damages.

39.2 The defendant's plea of the apportionment of the damage is dismissed.

39.3 The defendant should pay the costs of the plaintiff's action.

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M J TEFFO

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

APPEARANCES

For the plaintiff	J Nkeli
Instructed by	Jerry Nkeli & Associates Inc
For the defendant	C P J Strydom
Instructed by	Fourie Fismer Inc
Heard on	2 June 2017
Handed down on	6 February 2018