

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NUMBER: 2018/15270

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

25/11/2022

DATE

SIGNATURE

In the matter between:

MALESHANE T S

PLAINTIFF

And

THE ROAD ACCIDENT FUND

DEFENDANT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be at 10h00 on 25 November 2022.

Summary: Default judgment- dealing only with liability. Quantum postponed sine die. The principles governing negligence restated.

JUDGMENT

Molahlehi J

[1] The plaintiff instituted this action for damages following the motor vehicle accident that occurred on 21 May 2021. The collision occurred at about 19h00 at [...] Road Ext [...] Jouberton, North West Province. The plaintiff was a pedestrian who, at the time of the accident, was crossing the road. He avers in his particulars of claim that the driver of the insured motor vehicle was negligent in the manner in which he drove the motor vehicle in particular in that:

- “4.1 He failed to keep a proper lookout;
- 4.2 He failed to avoid the accident whilst he could and should have done so with the exercise of reasonable care;
 - 4.2.1 He failed to exercise proper control over the insured vehicle;
 - 4.2.2 He drove too fast under the prevailing circumstances;
 - 4.2.3 He drove the insured vehicle without due consideration to the rights of other road users and in particular without consideration of the rights of the plaintiff;
 - 4.2.4 He failed to apply the brakes of the insure vehicle at all alternatively /sufficiently, alternatively timeously and further alternatively he drove a vehicle of which the brakes were defective.”

[2] Despite the notice of set down for the trial being properly served on the defendant, it did not appear at the hearing. As appears later, the judgment is granted in favour of the plaintiff following the application for a default judgment. The issues of liability and quantum were separated after the request to do so by the plaintiff. Thus this court considered only the liability of the defendant. The issue of quantum was postponed *sine die*.

[3] As appears from the particulars of claim the plaintiff alleges that he suffered harm as a result of the negligent conduct of the insured driver. The plaintiff being the person who asserts negligence on the part of the insured driver bears the onus of proving that it is the negligent conduct of the insured driver that caused him the harm or the loss.¹ In *Fox v RAF*,² the court held that:

“It is trite that the onus then rests on the plaintiff to prove the defendant's negligence which caused the damages suffered on a balance of probabilities. In order to avoid liability, the defendant must produce evidence to disprove the inference of negligence on his part, failing which he/she risks the possibility of being found to be liable for damages suffered by the plaintiff.”

[4] The case of the plaintiff is that the conduct of the insured driver was wrongful in that he was under a legal duty to prevent the harm he suffered. The test for determining wrongfulness or failure to act in delictual claims was set out in

¹ See *Van Wyk v Lewis* 1924 AD 438 at 444. In that case the court held that: “The general rule is that he who asserts must prove. A plaintiff who relies on negligence must establish it.”

² (A548/16) [2018] ZAGPPHC (26 April 2016).

Van Eden v Minister of Safety and Security (Woman's Legal Centre Trust, as amicus curiae),³ as follows:

[9] ... and omission is wrongful if the defendant is under a legal duty to act positively to prevent the harm suffered by the plaintiff. The test is one of reasonableness. A defendant is under a legal duty to act positively to prevent harm to the plaintiff if it is reasonable to expect of the defendant to have taken positive measures to prevent the harm. The court determines whether it is reasonable to have expected of the defendant to have done so by making a value judgment based, *inter alia*, upon its perception of the legal convictions of the community and on considerations of policy. The question whether a legal duty exists in a particular case is thus a conclusion of law depending on a consideration of all the circumstances of the case and on the interplay of many factors which have to be considered..."

[5] In *Kruger v Coetzee*,⁴ the court held that negligence arises if:

"(a) *diligens paterfamilias* 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.*"

³ 2003 (1) SA 389 (SCA) ([2002] 4 All SA at 346).

⁴ 1966 (2) SA 428 (A).

- [6] In this matter the plaintiff is the only witness who testified about the accident. He testified that the motor vehicle which the insured driver, Mr Molefi, drove collided with him whilst crossing the road. The insured driver was driving a blue Opel Monza with registration number [...] NW. He further testified that the insured driver was travelling at high speed in a residential area. There was nothing he could do to avoid the collision. He also testified that he suffered injuries consequent to the collision.
- [7] The accident is also confirmed by the police report in which, amongst others, the insured driver confirmed having collided with the plaintiff whilst driving close to house number [...] [...] Road Extension [...] Jouberton, North West.
- [8] In the absence of a contrary version from that of the defendant, the only conclusion to reach is that the insured driver failed to keep a proper lookout and to carry out his duty of care and consideration for road users. In other words, he did not act like a reasonable man and keep a proper lookout for pedestrians, who could, like the plaintiff, cross the road at any moment.
- [9] As alluded to earlier, there is no evidence from the defendant to contradict the plaintiff's version. There is also no evidence on the part of the defendant to indicate if there is any contributory negligence on the part of the plaintiff. I am thus satisfied that the plaintiff has discharged his onus of proving on the balance of probabilities that the defendant is liable for the harm he suffered as a result of the accident. In light of this, I am inclined to award merits at 100% in favour of the plaintiff.

Order

[11] The following order is made:

- (1) The defendant is liable for 100% of the plaintiff's damages.
- (2) The determination of the quantum of damages is separated from liability and postponed *sine die*.
- (3) The defendant is liable for the plaintiff's costs on a party and party scale.

E MOLAHLEHI
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION
JOHANNESBURG.

REPRESENTATION:

For the Plaintiff: Adv M. Mapelana

Instructed by: MacRobert Incorporated
Cnr Justice Mohamed & Jan Shoba Streets
Brooklyn

For the Defendant: No appearance.

Date heard: 17 November 2022

Date delivered: 25 November 2022

