IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE:~~YES~~/**NO**
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/**NO**
(3) REVISED **NO**

DATE: 2 March 2023.....
SIGNATURE: .....

Case No. 64633/2019

In the matter between:

GOVENDER, SASHIN **PLAINTIFF**

And

GUARDRISK INSURANCE COMPANY LIMITED **DEFENDANT**

_____

Coram: Millar J

Heard on: 28 February 2023

Delivered: 2 March 2023 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the Gauteng Division and by release to SAFLII. The date and time for hand-down is deemed to be 14H00 on 2 March 2023.

ORDER

It is ordered: -

1. The Defendant is ordered to pay to the Plaintiff R1 827 500.00 (One Million Eight Hundred and Twenty-Seven Thousand Five Hundred Rand).

2. The Defendant is ordered to pay to the Plaintiff interest on the sum referred to in paragraph 1 at the rate of 10.75% per annum from 30 August 2019 to date of payment, both days inclusive.

3. The Defendant is ordered to pay the Plaintiff's taxed or agreed costs of the action to date on the scale as between attorney and client, which costs are to include:

    3.1 The costs of counsel.

    3.2 The costs of the expert witnesses, Mr. B Grobbelaar and Mr. D Moss.

    3.3 The costs of the experts are to include the cost of their attendance at court for the trial provided however that such costs are not to be limited to the costs recoverable in terms of Section 4 of the tariff applicable to witnesses

in civil matters as set out in Government Gazette No. 30953 (R394) of 11 April 2008.

3.4 The taxing master is directed to have regard to the contents of paragraph 28 of the judgment when taxing the bill of costs.

JUDGMENT

MILLAR J

1. On the evening of 22 February 2019 and in inclement weather, the Plaintiff and his mother, while driving along William Nicol Road in Fourways Johannesburg, were involved in a motor vehicle collision. This was occasioned as a result of the Plaintiff losing control and colliding with a lamp pole on the island separating the north bound from the south bound lanes of the road.

2. Fortunately, neither the Plaintiff nor his mother suffered any serious injuries in the collision. His vehicle however, a red Ferrari California was catastrophically damaged beyond repair. The front end of the vehicle was separated from the body on the passenger side almost splitting the vehicle in half.

3. The Plaintiff insured the vehicle with the Defendant. It was common cause that the insurance policy was effective on the date of the collision. After an investigation, the Defendant repudiated liability under the policy. When the matter came to trial, the single issue upon which the repudiation was based was that the Plaintiff had failed to *". . . take all reasonable precautions to prevent loss, damage, accidents. . ."* as required by clause 3 of the general terms and conditions of the policy of insurance.

4. The repudiation was predicated upon the view of the Defendant that the Plaintiff had been travelling at an excessive speed having regard to the inclement weather and that this had been so excessive that the Plaintiff was regarded as having been reckless, breached clause 3 and thus not entitled to indemnification in the policy.

5. The excessive speed which the Plaintiff was said to have been travelling at was 135km per hour. This speed was alleged to have been determined by an expert engaged by the Defendant. I will return to this aspect later in this judgment.

6. The evidence led at the trial was uncontroversial. The Plaintiff testified as did his mother as well as Mr. Grobbelaar (an Engineering expert). The Defendant called only one witness, a Mr. Giezing (its Assessor).

7. The Plaintiff testified that on the evening in question, he and his mother had attended a work function in the Pretoria area. At approximately 21h30 they had left the function and travelled back to Johannesburg on the N1 freeway. On route, it had begun to rain quite heavily. The Plaintiff testified that he had been travelling at a normal speed and in consequence of the rain, had slowed down and, besides his vehicle headlights which were on, put on his emergency lights so as to make his vehicle more visible to other traffic.

8. His windscreen wipers were on and were moving fast. After exiting the freeway, they had travelled along William Nicol Drive in a northerly direction and were in the middle lane or right-hand lane adjacent to the island. He had travelled through 2 sets of traffic lights after exiting the freeway and at the 3rd set, which is a little way past the Monte Casino Complex had stopped at the red traffic light.

9. He recalled the specific traffic light that he had stopped at as it is relatively close to his home and has a permanent speed camera there. Also, it is a short distance before the road passes under a bridge over which runs Witkoppen Road.

10. His evidence was that he had pulled off from the traffic light and passed under the bridge. He testified that he was travelling at approximately 80km per hour when his vehicle had suddenly pulled to the left. He had instinctively corrected by steering to the right and at that stage had lost control of the vehicle when it started to spin. The vehicle spun a number of times and eventually came to a stop. When he got out of the vehicle and after seeing to his mother, he realized the extent of the damage and that the vehicle must have hit a lamp pole.

11. The Plaintiff's evidence was corroborated by that of his mother insofar as the inclement weather and his driving in a reasonable and safe manner was concerned. The Plaintiff's mother testified that she had not been paying particular attention to the road ahead and had been looking out of her passenger window when the vehicle had begun to spin and had then come to a standstill. Her evidence was that she could not get out of the vehicle on her own and that the Plaintiff had had to help her.

12. The Plaintiff testified that he did not know what had caused the vehicle to pull to the left and assumed that it had been water on the road as a result of the inclement weather. He thought he had hit a "puddle" in the road.

13. Mr. Giezing, the Defendant's Assessor interviewed the Plaintiff at his home a few weeks after the collision. He discussed the incident with the Plaintiff and prepared a report. Save for his recording in his report that the Plaintiff had told him that he had been travelling at approximately 100km per hour, there was nothing that could be disputed that had been told to him by the Plaintiff. He had in fact verified everything the Plaintiff had told him as being correct save in respect of the speed.

14. He testified that although he was not an expert in either speed or the assessment of damages, the extent of the damage to the vehicle was a factor that led him to recommend that Mr. van der Merwe be appointed to investigate the speed of the vehicle. To this end, he had arranged with the Plaintiff for the

"black boxes" to be made available to Mr. van der Merwe for examination. These boxes are computer modules that record real-time data relating to the performance of the vehicle, speed and other technical data. He testified that one of the boxes, the one from the left side of the vehicle where it had been separated was irreparably damaged and of no value. However, the right-hand black box was undamaged and was handed to Mr. van der Merwe.

15. Unfortunately, Mr. van der Merwe was unable to access any of the data in the black box. Apparently, the manufacturer of the motor vehicle - Ferrari is the only party who can access the data and they were unwilling to assist.

16. Mr. van der Merwe's field of expertise was to extract data from the black boxes of vehicles and to then verify the accuracy of that data with reference to calculations done independently by him. In the present matter, he did not have any black box data but nonetheless proceeded to prepare a calculation predicated entirely upon the "tensile strength" of the material from which the Ferrari was manufactured. Using this approach, he was able to reach the conclusion that the Plaintiff had in fact been driving in excess of the 80km per hour speed limit at 135km per hour.

17. The Plaintiff conceded that he may have told Mr. Giezing that he was driving at approximately 100km per hour. The Plaintiff was adamant however that he was not driving at 135km per hour and testified that if he had been driving at that speed over such a short distance the vehicle's inbuilt acceleration warning would have alerted him.

18. The crisp issue for determination was whether, having regard to the prevailing weather conditions, the Plaintiff had been travelling at a speed which was so excessive that it amounted to recklessness. The parties were agreed that it was only a finding of recklessness that would absolve the Defendant from liability under the policy.

19. Mr. Grobbelaar was qualified as an expert in evidence. His knowledge and experience in dealing with particularly road accident collisions is extensive. Mr. Grobbelaar testified that on the objective evidence available, it was not possible for him to opine that the Plaintiff was not driving at 80km per hour or put differently, that the Plaintiff was driving at a speed above that.

20. He testified that having regard to the inclement weather, condition of the road (which was free of pot holes or indentations) and the camber of the road, the likelihood was that water was flowing across the road from the left hand side to the right hand side at the time that the collision occurred. Photographs taken of the scene and tendered into evidence demonstrated the effect of this with the sediment buildup in the area adjacent to the curb and running towards the stormwater drain on the right-hand side of the road.

21. When he met with Mr. van der Merwe to prepare a minute, while they were unable to reach agreement on several aspects, they both agreed that the effect of water on the surface of the road, even in small amounts, can cause hydro or aquaplaning. This is where the vehicle's tyres lose contact with the road surface as a result of the water. Mr. Grobbelaar opined that it was this hydro or aquaplaning that was the probable cause for the Plaintiff loss of control of his vehicle.

22. During his evidence, Mr. Grobbelaar fairly conceded that hydro or aquaplaning was less likely to occur at speeds of 80km per hour or less but testified that without knowing how much water was flowing across the road it could not be excluded.

23. His evidence then turned to deal with the damage to the vehicle. This evidence was technical in nature and required Mr. Grobbelaar to explain various engineering concepts as a pre-cursor to his evidence. During this explanation, and upon questioning by the Court, Mr. Grobbelaar indicated that although he had asked Mr. van der Merwe when they had met, to disclose the basis upon

which he had calculated the tensile strength of the metal in the Ferrari, he had not done so. Various reasons were given to him such as that Mr. van der Merwe's computer records had become irrecoverable.

24. During Mr. Grobbelaar's evidence, counsel for the Defendant was able to consult with Mr. van der Merwe who was also present in Court. The Court was informed from the bar that no part of the Plaintiff's Ferrari had been examined or tested to determine tensile strength. Mr. van der Merwe had used a European Union standard measurement which apparently derived from the testing of wheel rims by Mercedes Benz AG in Germany. The Court enquired from counsel for the Defendant whether or not the wheel rims were made of the same material as the Ferrari or whether they had been manufactured in Italy. Mr. van der Merwe was unable to provide an answer.

25. In consequence of this exchange, the Defendant indicated that it would no longer be calling Mr. van der Merwe as an expert.

26. It was argued on behalf of the Defendant that the probable speed that the Plaintiff was travelling at immediately prior to the collision was 100km per hour. It was argued that since the Plaintiff had told Mr. Giezing this, in circumstances where he did not know that what he was saying may well be used against him, it was to be regarded as a "truthful" having been made in an unguarded moment. To bolster this, the Defendant argued that Mr. Giezing's verification of everything else the Plaintiff had told him as being true, elevated the Plaintiff's approximation of the speed at which he was travelling to being a fact.

27. Irrespective of the speed at which the Plaintiff was travelling, it seems to me that an important consideration first and foremost is whether the presence of water on the road in a manner and a quantity which was likely to cause hydro or aquaplaning, foreseeable? The evidence established that the road surface was good and with a camber to the right which would have caused water to flow across it from the left to the right towards the stormwater drain.

28. It is well accepted that *" The proposition that a motorist should drive at a speed at which he is able to stop within the range of his vision has never been seriously challenged, and the case for the recognition of this rule remains unanswered."*[1]

29. Was it foreseeable that there would be sufficient water on the road surface to cause aquaplaning? The evidence of the plaintiff was that he did not see it. He thought he had driven into a puddle. The evidence established that there was no puddle. The probabilities overwhelmingly favour water running across the road from the left to the right.

30. Having regard to the evidence of Mr. Grobbelaar, the evidence by the plaintiff that he was travelling at 80 km per hour could not be excluded. Perhaps most significantly was his evidence that aquaplaning, although less likely, could not be excluded at 80 km per hour.

31. It was not in issue between the parties that it was the Defendant who bore the onus of establishing on a balance of probabilities that the Plaintiff was reckless in the circumstances.

32. It was held in *Santam Ltd v CC Designing CC*[2] (quoting with approval the English case of *Fraser v BN Furman (Productions) Ltd* [3]) that:

> *" What in my judgment is reasonable as between the insured and the insurer, without being repugnant to the commercial purpose of the contract, is that the insured, where he does recognise a danger, should not deliberately court it by taking measures which he himself knows are inadequate to avert it. In other words, it is not enough that the employer's omission to take any particular precaution to avoid accidents should be*

---

[1] Delictual Liability in Motor Law, Cooper, Juta, 1996 at page 159.
[2] 1999 (4) SA 199 (C) at 210D-E
[3] [1967] 3 All ER 57 (CA)

negligent, it must be at least reckless, i.e., made with actual recognition by the insured himself that a danger exists, not caring whether or not it is averted".

33. There was no evidence before the court to establish that notwithstanding the inclement weather, he knew or foresaw that the road conditions could cause him to lose control of the vehicle. Having regard to the particular facts in this case, there is to my mind no question that the plaintiff did not act recklessly. The defendant failed to discharge the onus upon it and the plaintiff is entitled to judgment.

34. The Plaintiff sought a punitive order for costs. Ordinarily, where expert witnesses disagree and the Court prefers the evidence of one over the other in determining the dispute, a punitive order for costs is not warranted. However, in the present matter, the entirety of the Defendant's case and indeed the preparation of the present case focused upon and hinged upon the opinion of Mr. van der Merwe. The Plaintiff was put to the trouble of briefing an expert witness who was then unable to elicit from the Defendant's expert witness, the very basis upon which his opinion had been formulated.

35. In consequence of the opinion of Mr. van der Merwe, the Plaintiff's legal team and Mr. Grobbelaar were put to the unnecessary effort of trying to elicit the reasons for the opinion. The matters upon which both Mr. Grobbelaar and the legal team were thus required to prepare on, are far more complex and would have been commensurately more time consuming than one would ordinarily have expected in a case of this nature.

36. These costs were to my mind entirely avoidable. It is patent that Mr. van der Merwe was not an expert in the field that he claimed to be and that his opinion was never going to withstand the scrutiny of interrogation in Court. Put bluntly, the plaintiff ought never to have been forced to court on the basis that he was. It is for this reason that I intend to make the costs order that I do.

37. Accordingly, it is ordered:

37.1 The Defendant is ordered to pay to the Plaintiff R1 827 500.00 (One Million Eight Hundred and Twenty-Seven Thousand Five Hundred Rand).

37.2 The Defendant is ordered to pay to the Plaintiff interest on the sum referred to in paragraph 1 at the rate of 10.75% per annum from 30 August 2019 to date of payment, both days inclusive.

37.3 The Defendant is ordered to pay the Plaintiff's taxed or agreed costs of the action to date on the scale as between attorney and client, which costs are to include:

37.3.1 The costs of counsel.

37.3.2 The costs of the expert witnesses, Mr. B Grobbelaar and Mr. D Moss.

37.3.3 The costs of the experts are to include the cost of their attendance at court for the trial provided however that such costs are not to be limited to the costs recoverable in terms of Section 4 of the tariff applicable to witnesses in civil matters as set out in Government Gazette No. 30953 (R394) of 11 April 2008.

37.3.4 The taxing master is directed to have regard to the contents of paragraph 28 of the judgment when taxing the bill of costs.

_____

A MILLAR
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

HEARD ON:	20, 21 & 22 FEBRUARY 2022
JUDGMENT DELIVERED ON:	2 MARCH 2022
COUNSEL FOR THE PLAINTIFF:	ADV B BOOT SC
INSTRUCTED BY:	WEAVIND & WEAVIND
REFERENCE:	MR. N VIVIER
COUNSEL FOR THE DEFENDANT:	ADV G HARRISON
INSTRUCTED BY:	PEACOCK, LIEBENBERG & DICKINSON
REFERENCE:	MR. M MHLABA