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

CASE NO: [illegible]

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.
10/12/2010
DATE
SIGNATURE

In the matter between:

M. S. MLENGA **PLAINTIFF**

31/1/2011

And

ROAD ACCIDENT FUND **DEFENDANT**

JUDGMENT

MOLOPA-SETHOSA J

The Plaintiff, Mhlupheki Simon Mlenga ("the Plaintiff") has instituted an action against the Defendant for damages arising out of a motor vehicle collision which occurred on 03 September 2005 along the Potchefstroom-Johannesburg road, between a motor vehicle with registration letters and number DMB 565 NW ("the 1st insured vehicle") there and then being driven by one N A MARTINSON ("the 1st insured driver") and a motor vehicle with registration letters and number CHK 383 NW, there and then being driven by the Plaintiff; also involving an unidentified motor vehicle ("the 2nd insured vehicle" or "kombi") driven by an unidentified driver ("the 2nd insured driver").

When the trial commenced, the Plaintiff made application for separation of liability and damages, i.e. separation of merits and quantum in terms of Rule 33 (4) of the uniform Rules of the Superior Court, which application was not opposed by the Defendant and the order for separation was granted. The matter thus proceeded on the merits only and the quantum is postponed *sine die.*

The Plaintiff seeks full liability from the Defendant. If the driver of the 1st insured vehicle, alternatively, if the driver of the 2nd insured vehicle is found to be negligent, further alternatively, if both insured drivers are found to be jointly negligent, full damages against the Defendant are recoverable by the Plaintiff. If the Plaintiff is found to be contributory negligent then an apportionment to his damages will be applied.

It is common cause that a collision occurred on 03 September 2005 along the Potchefstroom-Johannesburg road, between a motor vehicle with registration letters and number DMB 565 NW ("the 1st insured vehicle") there and then being driven by N A MARTINSON ("the 1st insured driver") and a motor vehicle with registration letters and number CHK 383 NW, there and then being driven by the Plaintiff.

The issue for determination in this matter is whether the driver of the 1st insured vehicle was negligent as alleged in paragraph 4 (4.1.1-4.1.8 of the particulars of claim) page 5 of the paginated papers, or whether the driver of the 2nd insured vehicle was negligent as alleged in paragraph 4 (4.2.1-4.2.9 of the particulars of claim) pages 5 and 6 of the paginated papers; and whether the Plaintiff was negligent as alleged in paragraph 4 (4.1.1-4.1.7 of the Defendant's plea) page 12 of the paginated papers, and/or what degree of fault, if any, can be attributed to the Plaintiff in relation to the collision that occurred on 03 September 2005.

The Plaintiff, Mr Mhlupheki Simon Mlenga ("Plaintiff") testified that on 3 September 2005 he was involved in an accident/collision which occurred at around 15H30 along the N12, viz. the Potchefstroom-Johannesburg road. Further, that on the day the collision took place the sun was shining, and that visibility was very clear. That the road where the accident took place is a tarred road.

He confirmed that the road in question has one lane on each direction; i.e. the lane going Southern direction towards Potchefstroom and the lane going Northern direction towards Johannesburg, as depicted in the sketch plan marked Exhibit A.

He testified that on the day in question he was driving behind a kombi (mini bus)/the 2nd insured vehicle, and while still behind it he noticed that the kombi/ the 2nd insured vehicle was travelling slowly and that there was enough/ample space in front of the 2nd insured vehicle, for him to overtake the kombi/2nd insured vehicle. Further that there were other vehicles travelling behind him, and other vehicles in front of the kombi, in the same direction as him and the kombi/ the 2nd insured vehicle prior to the collision.

He testified that the space between the kombi/2nd insured vehicle and a vehicle marked A on Exhibit A, which vehicle was in front of the kombi/2nd insured vehicle, was enough/ample space for him to safely overtake the kombi and move in between the kombi and motor vehicle A. Further, that in the position he was behind the kombi and in overtaking it there was enough space in between him and a motor vehicle marked B on Exhibit A, approaching from the opposite direction, to execute the overtaking without hindrance.

He testified that when he took action to overtake, the kombi/2nd insured vehicle, which was in front of him, suddenly accelerated and closed the gap between him and motor vehicle A. That when the kombi started accelerating he/the Plaintiff was on the other side of the centre line in the opposite lane of travel, at the point marked X1 on Exhibit A. That when he was at point X1 and the kombi/2nd insured vehicle started accelerating, it was not possible for him to go back to his side/lane of travel because the two vehicles which had been travelling behind him had already closed the space/gap towards the kombi, he therefore could not fall back into his lane again. Further that there was no longer a gap between the kombi/2nd insured vehicle and motor vehicle A, and thus there was no space for him to move in, the space was closed by the 2nd insured driver.

He further testified that while he was at position X1 there was sufficient distance between him and motor vehicle B; that there was a gap.

He testified that since he could not get between the kombi/2nd insured vehicle and motor vehicle A, nor behind the kombi/2nd insured vehicle since other vehicles had closed the gap, he went outside the road. That he moved to his right hand side, out of the road that comes from the Potchefstroom to Johannesburg side, to the point marked X2, (0n the outside gravel portion of his opposite lane of travel). That when he moved out of the road to his right side, to point X2 aforesaid, travelling to the direction of Potchefstroom, he applied his brakes and there was dust; that motor vehicle B passed him, and that as he applied his brakes his motor vehicle came to a standstill on the gravel part on the side of the road and there was dust.

He testified that he did not loose control of his vehicle, that it came to a standstill, and that when it came to a standstill he was on the gravel side of the road. Further that he did not, at any stage, move back into the tarred road into the lane of travel of Potchefstroom to Johannesburg.

He further testified that when the dust started to go down a Toyota Tazz motor vehicle, the 1st insured vehicle collided with him outside the road at the point marked X3 on Exhibit A.

He testified that the front portion of his vehicle was hit/struck by the Tazz/the 1st insured vehicle. That at the time of the accident he did not know/see which part of the Tazz/the 1st insured vehicle hit the front of his vehicle. That there was still some dust when the collision occurred.

Further that looking at Photo no.2 in Exhibit B his BMW motor vehicle was totally damaged in front and that it was written off. Further that subsequent to the collision he realised that it was a typical head on collision.

Further that looking at Photos 3, 4 and 5 of Exhibit B the damage to the Tazz/the 1st insured vehicle is on the left front side and left corner. That looking at Photo 2B damages were more on his side, and there were no damages on the passenger side to the back of his vehicle on the left.

He testified that when he tried to overtake, it was safe to do so; that there was enough/ample space and time to do so and to move around and in front of the kombi/2nd insured vehicle. He further testified that when he realised that he could not overtake nor could not go/fall back to his side/lane of travel, the only action he could take was to move to the right, outside the road. And that in moving out towards his right he did not collide with motor vehicle B; that motor vehicle B had ample time to pass him safely.

He testified that the collision happened after he had applied his brakes, and having stopped. That there was nothing he could have done to avoid the collision other than to move outside the road, that otherwise there would have been a huge accident and all the cars were going to be involved in the accident; so he took the best action he could under the circumstances to try to avoid the collision.

He further testified that if the kombi/2nd insured vehicle did not accelerate and close the gap between itself and motor vehicle A, he would have had ample time and opportunity to move in between the kombi/2nd insured vehicle and motor vehicle A. Further, that according to him the problem was caused by the kombi/2nd insured vehicle when the 2nd insured driver accelerated and closed the gap.

He testified that while busy executing the overtaking movement he did not at all in any way foresee that the kombi/2nd insured vehicle is going to accelerate and close the gap. That the reason why he wanted to overtake the kombi/2nd insured vehicle is because at the time the kombi/2nd insured vehicle was travelling very slow. Further that when he moved outside the road coming to a standstill at point X3 aforesaid he did not at all think that Tazz/1st insured vehicle would collide with him.

Under cross-examination he stated that the collision occurred on the right hand side, on the outside of the road.

He further stated that he has had his driving license for about 10 years, and that with his level of experience as a driver, before overtaking one must first check the vehicles behind one and check in front if there is any car that is coming.

He stated that when he was trying to overtake he was already in the opposite direction lane, i.e. the Potchefstroom to Johannesburg lane. He reiterated that the driver of the unidentified vehicle, the 2nd insured driver, accelerated when he/Plaintiff tried to overtake.

He further stated that when he when he tried to overtake the kombi/2nd insured vehicle there were no cars approaching from the opposite direction at that stage, stating that he cannot overtake if there is a vehicle in front of him on/from the opposite direction.

He stated that the road in question was a straight road. That when he was in the opposite lane while overtaking and the road being straight, he saw the approaching motor vehicle B for the first time when it was still far, approximately 38m away. That he did not know at what speed the motor vehicle B and the 1st insured driver were driving as it is impossible to can know or say. He confirmed (from what was put to him by Defendant's counsel), that there is a possibility that they (vehicle B and the 1st insured driver) were driving at high speed to close up the gap quickly.

He stated that he does use the road in question frequently; that he is used to the road, and further that it is a very busy road.

He further stated that when he started to manoeuvre to overtake the kombi/2nd insured vehicle, it was safe to do so, that if the driver of the kombi/2nd insured vehicle had not decided to accelerate, he/Plaintiff had ample time to overtake; confirming (as put to him by Defendant's counsel), that the 2nd insured driver accelerated thus refusing him access to go back into his (correct) lane, and that the vehicles approaching from the other/opposite direction were 38m away.

He stated that when he overtook he was travelling at 120km p/h; that before he overtook he was driving at 110km p/h, and he increased his speed with 10km p/h when he overtook.

He stated that what caused the accident, according to him, was the kombi/2nd insured vehicle. That when he realised that the kombi/2nd insured vehicle did not give him space to pass by he immediately went out to the gravel surface of the road.

He further stated that between him and the insured drivers it was the 1st insured driver who created a situation of emergency because motor vehicle B, which was in front of the 1st insured vehicle, had managed to pass him. He stated that according to him the 1st insured driver could not see what was happening beyond motor vehicle B.

He reiterated that seeing that he could not go back to his lane since the kombi/2nd insured driver had closed the space, he had swerved to his right on the opposite direction, and that he applied his brakes when he entered the gravel road and he stopped, and that there was dust.

He stated that it is the 1st insured driver who bumped into his vehicle; that he did see the 1st insured driver when he/the 1st insured driver bumped him, moving towards him. That when he applied the brakes of his vehicle the dust rose; the other car, vehicle B passed and the 1st insured driver bumped into him. Further, that the collision occurred where he stopped at point X3 and that the distance between X3 (where he stopped) and X2 (where he went off the road on the opposite direction) is approximately 4m. He stated that when he came to a standstill it did not take time before the accident occurred.

He denied that he was the one who created an emergency by driving on his wrong side of the road, stating that when he drove on his wrong side of the road he was trying to avoid the accident.

He further denied that he overtook when it was an inopportune time for him to do so, stating that it was safe for him to overtake because there was ample space.

He also denied (as the version of the 1st insured driver was put to him by the Defendant's counsel), that he/Plaintiff is the one who bumped him/1st insured driver inside on his correct lane of travel.

Under re-examination he stated that prior to overtaking he was aware of vehicles coming from the opposite direction, but that the car was very far. Further, that at that stage his focus was on the kombi/2nd insured vehicle and the manoeuvre that he was doing to overtake.

He further stated that after he moved to the right hand side of the road and came to a standstill at point X3, motor vehicle B passed him safely on its lane to his left; that if the 1st insured driver had continued on his lane the accident would not have occurred; that he/the 1st insured driver would not have collided with him because he/Plaintiff was on the side of him.

On a question from the court he stated that the speed limit on the road in question is 120km p/h.

That concluded the Plaintiff's evidence, and that was the case for the Plaintiff.

The Defendant led the evidence of the 1st insured driver, Willem Adolph Martinson ("the 1st insured driver" or "Martinson"). He confirmed that he is aware of accident that occurred on 03 September 2005, and that he was involved in the collision aforesaid.

He testified that on the day in question he was driving on the N12 road coming from Potchefstroom towards Johannesburg, and his wife was with him; that they were not married at the time and they were on their way to pick up his parents in law (his wife's parents) from the airport.

He testified that before the collision occurred there was another vehicle in front of him travelling in the same direction as him, viz. a Honda Jazz (motor vehicle B aforesaid). That he can't remember if there were any vehicles behind him; and that there were vehicles approaching on the opposite direction travelling on the other lane.

He testified that they were driving to Johannesburg in their lane when they saw the dust of the gravel road going up; they saw a BMW (Plaintiff's vehicle) on his left hand side on the gravel road, driving there and loosing control, coming towards them; his wife pointed out to him to look at that car/BMW. It came towards them and hit them on the passenger side where his wife was sitting.

He testified that when he first saw the vehicle (BMW) coming towards him he did not move towards his right because there was oncoming traffic in the lane on the other side. That to try to avoid the collision he tried to avoid the car/BMW by going to the right hand lane but couldn't because there was oncoming traffic, and when there were no more cars, just when he wanted to go to his right, the BMW hit them on the left side on the passenger side.

He further testified that when the collision occurred he was basically in his lane and the BMW came from the gravel road into the tarred road and connected with them/1st insured vehicle in that lane.

He testified that before the collision he did not see the BMW because there were vehicles in front of him. That what he thinks caused the accident is that the Plaintiff tried to pass vehicles on his side and he could not, so when he couldn't make it he went to the gravel road and lost control on the gravel road and hit them. That therefore he thinks that the Plaintiff is the one who caused the accident. I may state here that this is pure speculation, not what he/1st insured driver observed or know for a fact; neither was this speculation y the 1st insured driver confirmed by anyone as a fact.

He further testified that while he was driving he never left his lane/path of travel, but that when the car/BMW hit him it hit him to the other side of the road. I may mention here that there is no evidence before this court of where the respective vehicles landed after the collision.

He testified that the damage to his vehicle was on the front left wheel on the passenger side. That looking at the photos, Exhibit B, the damages on the Plaintiff's vehicle was on the front side.

He testified that he does not think that there was any means/way he/1st insured driver could have avoided the collision.

Under cross-examination he stated that the first time when he observed the BMW it was already on the gravel portion of the road, to the left of his lane of travel. That he did not see the BMW before it came to gravel road because there were other vehicles in front of him obscuring the BMW. Further, that he cannot say what made the BMW to go to the gravel road. That if there were any emergency or difficulties with which the BMW was faced with, which caused it to move onto the gravel road, he would not deny it because he would not know about it.

He confirmed his statement on page 1 of Exhibit B. He further confirmed that on his sketch on page 1 of Exhibit B he placed the BMW on his left hand side right on the edge of the road totally away from the other vehicles.

He further confirmed that when the BMW went to the gravel there was a lot of dust, stating that he could still (despite the dust) see what was happening; that he could see the BMW and in which direction it was going to travel. Further that the accident happened at a split of a second and that he could not have taken any evasive action because he knew the BMW was coming in that direction so he needed to get out of the way.

He confirmed and agreed (on what was put to him by Plaintiff's counsel) that the Plaintiff went off to the gravel road and braked hard to try to bring the BMW to a standstill therefore the extensive dust coming from the gravel.

He denied that he got a fright when he saw the dust and swerved to his left to avoid whatever was coming on and collided with the BMW on the gravel road.

He agreed that he cannot say what made the BMW to move onto the gravel portion of the road. Further, he conceded that when he first saw the BMW it was in a peculiar and an unfamiliar situation that he did not expect. That even if the BMW lost control it cannot necessarily be said that the Plaintiff was negligent.

He agreed that other vehicles that were in front of him safely passed the BMW on his left without being hit (by the BMW).

He stated that he has been driving for approximately 8yrs; further, that he accepts that once one looses control of a vehicle there is nothing one can do about it.

He agreed that none of them (him and/or the Plaintiff) could have avoided the collision.

That concluded the evidence for the Plaintiff and the evidence pertaining to the whole case.

At the end of all evidence both counsel argued their respective cases. As appears from the evidence set out above, each side i.e. the Plaintiff and the Defendant presented the evidence of one witness each, viz. the Plaintiff himself and the 1st insured driver/Martinson.

It is trite that the Plaintiff bears the onus to prove his case on a balance of probabilities; in this case that the collision was caused by the negligence of either the 1st insured driver or the 2nd insured driver or both insured drivers as alleged in paragraph 4 of his Particulars of claim.

On the evidence of the Plaintiff, the gist of his case is that the collision occurred because the 2nd insured driver accelerated and closed the space/gap in which the Plaintiff was supposed to go in when the Plaintiff attempted to overtake him, thus necessitating that the Plaintiff move over/swerve to the gravel portion of the road on the opposite side/lane of travel. In fact the Defendant did nit lead any evidence whatsoever to rebut the Plaintiff's evidence that there was a kombi, the 2nd insured vehicle, which accelerated and blocked his way to get back into his lane of travel when he tried to overtake it, causing him to eventually swerve to the gravel side of the opposite lane of travel, thus leading to the collision in question herein. I may mention here that counsel for the Defendant, in fact during his argument conceded that he cannot dispute that the 2nd insured driver accelerated and closed the space/gap in which the Plaintiff was supposed to go in when the Plaintiff attempted to overtake him, thus necessitating that the Plaintiff move over to the gravel portion of the road on the opposite side/lane of travel.

Counsel for the Defendant however, contends that the Plaintiff took long to take any evasive action and/or that he overtook at an inopportune time and when it was not safe to do so. On the evidence before this court that cannot be so. The Plaintiff gave a full account of the action/steps he took when he realised that the 2nd insured driver was blocking his way of getting back into his lane of travel by closing the space/gap between his/kombi's and vehicle A. this is further dealt with below.

The Plaintiff further contends that while on the other side of the road aforesaid, the 1st insured driver/Martinson lost control of his vehicle and came over to the gravel road and collided with him, which is disputed by the 1st insured driver, who in turn contends that it is the Plaintiff who lost control of his vehicle and came over into his lane of travel and collided with him.

From the evidence before this court, the Plaintiff maintains that when he did not see his way in getting back into his lane of travel after the kombi/2nd insured vehicle (and the vehicles following it) had blocked his way from getting back into his lane of travel, he moved/swerved over to his right to point X2 of Exhibit A, onto the gravel portion of the road on the opposite side, where he applied his brakes, thus causing a lot of dust, and that his vehicle then came to a standstill at point X3 of Exhibit A, which is about 4m from point X2 aforesaid.

The 1st insured driver corroborates the Plaintiff that at some stage the Plaintiff was driving on the gravel portion of the road on his left side and that there was a lot of dust coming from the gravel road. The Plaintiff further maintains that after his vehicle had come to a standstill at point X3 aforesaid, the 1st insured driver lost control of his vehicle and came over to the gravel portion of the road and collided with him at point X3, and this is disputed by the 1st insured driver.

On the other hand the 1st insured driver testified that while driving to Johannesburg in their lane of travel they saw the dust of the gravel road on his left side going up; that they saw a BMW (plaintiff's vehicle) on his left hand side on the gravel road driving there and loosing control, coming towards them, and his wife pointed out to him to look at that car/BMW. That it came towards them and hit them on the passenger side where his wife was sitting. The Plaintiff disputes that he at any stage lost control of his vehicle.

The 1st insured driver further confirmed, as already stated above, that when the BMW went to the gravel side there was a lot of dust; stating that he could still, despite the dust, see what was happening, i.e. that he could see the BMW and in which direction it was going to travel. That all this happened at a split of a second.

Looking at all the evidence before this court, in my view the Plaintiff gave a full account of what transpired, most of which stands undisputed, especially in so far as the presence of the 2nd insured vehicle and the conduct of the 2nd insured driver, and also how he swerved to the gravel side of his opposite lane of travel and applied his brakes to stop his vehicle to try to avert the collision, hence a lot of dust testified to above.

On the facts before this court I am of a considered view that the Plaintiff honestly gave an account of what really transpired on the day of the collision, and that he tried his best to try to avoid and/or avert the collision in question herein. However, looking at the damages to the respective motor vehicles herein, and on a balance of probabilities I do not believe that the Plaintiff's vehicle managed to come to a complete standstill just before the collision when he applied his brakes. I shall deal with this aspect further below.

On the other hand, looking at the 1st insured driver's evidence above, I do not think that the 1st insured driver saw the Plaintiff at all prior to the collision coming towards them amidst the dust on his left side as he testified, otherwise why would his wife have pointed out to him to look at the Plaintiff's car; the 1st insured driver's wife did not in any event testify to confirm this. In all probabilities the 1st insured driver was confused by the dust coming from the gravel road and was trying to concentrate on his vehicle not knowing, as he testified, what was happening where the dust came from.

He confirms what was stated by the Plaintiff that the vehicle which was in front of him, motor vehicle B aforesaid, safely passed the Plaintiff without any hitches; adding that in front of motor vehicle B there was a truck which also managed to pass the Plaintiff safely. I may mention here that the issue of the truck was never put to the Plaintiff by the Defendant's counsel; though counsel for the Plaintiff in cross-examining the 1st insured driver at some stage disputed that there was any truck in front of vehicle B. From the 1st insured driver's evidence himself it is clear that the Plaintiff was driving on the gravel portion of the road, hence, at least, motor vehicle B managed to safely pass on its lane of travel.

On his own version he (1st insured driver) never saw the BMW prior to the collision. If one has regard to what is stated in his statement at page 1 of Exhibit B, in relation to his evidence in court, which is totally different, he clearly, in my view, does not know how the collision occurred nor where exactly (point of impact) the collision occurred.

In so far as the point of impact is concerned, there is a discrepancy/dispute between the Plaintiff and the 1st insured driver's versions. However, on several occasions in his evidence the 1st insured driver, corroborates the Plaintiff, as already stated above, that the Plaintiff was on the gravel portion of the road on his/1st insured driver's left side prior to the collision. He confirmed his statement, which includes a sketch plan, on page 1 of Exhibit B.

On his/1st insured driver's sketch plan (page 1of Exhibit B) he/ the 1st insured driver placed the BMW (Plaintiff's vehicle) on the verge of the gravel road. He confirmed and/or conceded under cross examination that on his sketch on page 1 of Exhibit B aforesaid he placed the BMW (Plaintiff's vehicle) on his left hand side, right on the edge of the road totally away from the other vehicles.

I may mention that he/1st insured driver did not make any attempt to indicate where the point of impact, according to him, was; he merely stated that it was in his path of travel. The question is more or less where exactly! The only person who indicated the point of impact is the Plaintiff.

If one looks at the point of impact as indicated by the Plaintiff, X3 on exhibit A, it is almost on the verge of the gravel road, not far from the point where the 1st insured driver placed the BMW on his sketch (page 1of Exhibit B). This to me indicates that on the one hand, the Plaintiff himself may, on a balance of probabilities, not have managed to bring his vehicle to a complete standstill when he applied his brakes, and his vehicle probably veered more to the verge of the gravel. On the other hand the 1st insured drive also, probably in the confusion, veered to his left, hence the collision more or less on the verge of the gravel portion of the road.

I am not persuaded that the 1st insured driver tried at all to move to his right towards the centre line. On the contrary, and on a balance of probabilities, as already stated here above, he veered more to his left, more towards the verge of the gravel portion of the road where his and the Plaintiff's vehicles collided.

Looking at the damages to the respective vehicles (the Plaintiff's and the 1st insured driver's vehicles), it is more probable that the Plaintiff, whilst his vehicle was still moving [and not yet at a complete standstill], hit the 1st insured vehicle on the left front passenger side; in my view it does not need an expert to see that this was not a head on collision; but as the 1st insured driver himself concedes, under the circumstances that prevailed at the time, no reasonable driver in the position of the Plaintiff could have done anything to bring his vehicle under his control.

I am satisfied, on the Plaintiff's evidence, that he tried his best to avoid the collision, unfortunately, as already stated probably his vehicle had not as yet come to a complete standstill when the collision occurred.

In so far as the 1st insured driver is concerned, as much as his evidence is not convincing, I am prepared to find that in the confusion that ensued, not having seen the Plaintiff at any stage prior to the collision since on his own version there were other vehicles in front of him, at least it is common cause that motor vehicle B was in front of him; seeing a lot of dust coming from his left and not knowing what was really happening, he must have found himself in a quandary, not knowing which way to go, and eventually veered to his left where he met/collided with the Plaintiff's vehicle.

On the facts before this court I find that on a balance of probabilities the point of impact is more or less on the verge of the gravel portion of the road, somewhere nearer point X3, and that the 1st insured driver has probably veered to his left in the confusion and the Plaintiff himself may also, on a balance of probabilities, not have managed to bring his vehicle to a complete standstill when he applied his brakes, and his vehicle probably veered more to the verge of the gravel and in the process it met collided with the 1st insured driver's vehicle as already stated above.

In my view, in the circumstances the two parties above (the Plaintiff and the 1st insured driver) found them, no fault can be attributed to either of them.

The source of all the mishap herein is in my view none other than the 2nd insured driver. I have no doubt in my mind that this collision happened as a result of the 2nd insured driver's conduct, who, in my view was grossly negligent.

On the undisputed evidence of the Plaintiff the 2nd insured driver drove slowly in front of him/Plaintiff and when the Plaintiff attempted to overtake him he accelerated and blocked him out so that he could not get back into his lane of travel in front of the 2nd insured vehicle; further, the other vehicles behind the 2nd insured vehicle had also closed up the space/gap behind the 2nd insured vehicle and the Plaintiff thus could not go back behind the 2nd insured vehicle. Since he was in his wrong lane he thus had to swerve over to the gravel side of his opposite lane of travel where in the panic and the circumstance prevailing, he and the 1st insured driver collided.

In my considered view, the 2nd insured driver was grossly negligent, and he maliciously and deliberately blocked the Plaintiff's way when the Plaintiff attempted to overtake him thus necessitating that the Plaintiff move over/swerve to the gravel portion on the other side of the road, his lane of travel having been blocked also by vehicles which had initially followed him.

On the evidence before this court and on a balance of probabilities I find that the 2nd insured driver was negligent in one or more or all of the respect set out by the Plaintiff in paragraph 4.2 of the Plaintiff's Particulars of claim and was solely to blame for the collision herein.

In the premises I find that the 2nd insured driver was solely negligent in the causing of the collision herein and in the circumstances the Plaintiff's claim is upheld with costs. The Defendant is liable for the payment of the Plaintiff's proven damages.

In the result I make the following order:-

1. The Plaintiff's claim is upheld;

2. The Defendant is ordered to pay the Plaintiff's costs of suite.

MOLOPA – SETHOSA J

JUDGE OF THE HIGH COURT