**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA**
**(MPUMALANGA DIVISION, MBOMBELA)**

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

15/07/2021

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SIGNATURE DATE

**CASE NO: 2733/2019**

In the matter between:

**FIKILE MILLICENT MAKAMO** Applicant

and

**ROAD ACCIDENT FUND** Respondent

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**JUDGMENT**

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**MASHILE J:**

[1] This is an application for leave to appeal the judgment and order of this Court dated 2 June 2021 dismissing the claim of the Applicant against the Respondent. The grounds upon which the Applicant premises her appeal are tersely that the Court misdirected itself and erred by holding that the Applicant had failed to establish on a balance of probabilities that the insured driver was 1% the cause of the collision during the occurrence of which she sustained personal injuries. The reasons for the aforesaid grounds are that:

"1. The Court did not completely go through the Plaintiff's grounds of negligence as pleaded on the latter's Particulars of claim, specifically in sub-paragraphs 7.2; 7.3;7.5 and more notably 7.6 and 7.10 which respectively allege that the Insured driver-:

(i) Drove the insured vehicle in a manner endangering the safety of the road users, especially the Plaintiff;

(ii) Travelled at an excessive speed and failed to keep the insured vehicle under proper control;

(iii) Failed to apply breaks timeously or at all; and

(iv) Failed to avoid the collision when, by the exercise of reasonable care, could and should have done so.

2. The Court omitted proper consideration of the suitable evasive actions available to the Insured Driver in the circumstances, particularly the options to slow down the vehicle and/or ultimately stop and/or otherwise to safely pull over on either side of the road and avoid the collision. (*our emphasis)*

3. The Court erred and misdirected itself in disregarding the sketch plan attached to the Accident Report and contained on the indexed and paginated Bundle “volume 1” on page 29, which sketch corroborates the evidence of the witnesses and depicts that the accident did not happen at the bridge but rather that the bridge was used as a point of reference of proximity in relation to where the accident factually occurred on the R570 road.

4. The Court further misdirected itself in readily accepting the Insured driver’s flicking of lights, hooting, and swerving to the right as the only and/or relevant evasive actions reasonable given the depicted scene referred to above.”

[2] It is correct that I did not comb all the grounds of negligence as alleged by the Applicant in her particulars of claim. That said, the grain of the judgment is that it deals virtually with each and every ground of negligence averred by the Applicant albeit that it may not have been as exhaustively as to satisfy the Applicant. This judgment must be read against the backdrop that it is trite that the Applicant had the onus of alleging and proving his case on a balance of probabilities. With that general principle in mind, below I turn to pore over those allegations, which the Applicant claims were not methodically considered.

**THE INSURED DRIVER DROVE THE INSURED VEHICLE IN A MANNER ENDANGERING THE SAFETY OF THE ROAD USERS, ESPECIALLY THE PLAINTIFF**

[3] Other than making this unadorned statement in the particulars of claim, the Applicant did not lead any testimony whatsoever to demonstrate how the insured driver endangered the safety of road users, in particular the Applicant. All that this Court heard from the insured driver was that whilst driving, a vehicle driving into the opposite direction entered his path of travel.

[4] No evidence of what the distance between the two vehicles was when the insured driver saw the other vehicle switched lanes to travel on the incorrect side was levied nor was the Court favoured with estimations of the speed at which the insured driver was travelling. Perhaps I should add here that the Applicant had opportunity to do so because the insured driver uncharacteristically testified on the Applicant's behalf when technically he should have been a witness for the Defendant.

[5] Instead, the Court was urged to take judicial notice of the grave injuries sustained by the Applicant as well as the extent of damage to the respective vehicles. Again, the Court was implored to do this in the absence of evidence of precise location of the impact on the respective vehicles. Moreover, and assuming that the Applicant as a backseat passenger is the only one of four passengers who was seriously injured, no evidence was levied why the other passengers did not sustain as serious injuries as to accord with allegations of high speed or degree of damage to the vehicles.

[6] Besides, assuming that it is correct that high speed was involved, the Court was not told which of the two vehicles drove at such high speed. Stripped of all the verbiage, the Applicant failed to prove the averments that she has made hoping that the absence of the Respondent before court would automatically assist her case. I need to emphasise that a claimant in the shoes of the Applicant is still required to allege and prove his or her case notwithstanding that a respondent is not present in court.

## THE INSURED DRIVER TRAVELLED AT AN EXCESSIVE SPEED AND FAILED TO KEEP THE INSURED VEHICLE UNDER PROPER CONTROL

[7] I have already touched on the allegation that the insured driver drove at an excessive speed. The Applicant led the insured driver but failed to elicit from him

the estimated speed at which he was driving. That failure notwithstanding, she expects this Court to make tenuous conjectures that the vehicles were travelling at excessive speeds and that the alleged resultant massive impact on the vehicles serves as proof. If the Applicant could not, through the assistance of the evidence of her two witnesses, demonstrate that the insured or the other driver or both drove at high speed, she could have engaged experts to testify on her behalf. Accordingly, this Court is not well disposed to conclude that either driver or both drove at highspeed nor is this Court permitted to find that the damage was extensive in the absence of evidence to that effect.

[8] Closely linked to the excessive speed is the allegation that the insured driver failed to keep the vehicle he was driving under proper control. The evidence presented in court by the insured driver suggests otherwise. His evidence was that he saw the vehicle approaching him from the opposite end but in the incorrect lane. The insured driver kept to his lane as he expected the other driver to correct his mistake but when he could not justify staying on his lane, he decided to swerve out of the way.

[9] The court knows that he chose to swing to the right-hand side and not the left-hand side. No evidence was elicited from the insured driver why he elected to swerve to the right-hand side. Strangely, this Court is expected not only to assume that the maneuver of swerving out of the way undertaken by the insured driver constituted loss of proper control but that it was also perilous and is what led to the collision. During his examination in court by the Applicant's counsel, the insured driver was never asked why he did not veer to the left-hand side of the road and that had he done so, he could have avoided the collision.

**<u>THE INSURED DRIVER FAILED TO APPLY BRAKES TIMEOUSLY OR AT ALL</u>**

[10] Without the evidence of the speed at which these vehicles were travelling towards each other, it is hard to conclude whether application of brakes was

warranted. If a driver flickers and hoots to an approaching vehicle and the oncoming vehicle obdurately remains on his path of travel, what option would such a driver have other than to swerve out of the way? In any event, the insured driver was not asked why he failed to apply brakes as a measure that he could have taken to avoid the collision. Once again, the Court is expected to speculate that his failure to apply brakes constituted negligent driving. The court could not do so.

[11] If he had assumed that the other driver would correct his mistake by swerving to his correct side of the road yet nothing of the kind happened, the insured driver was entitled to avoid the impending head-on collision by swerving to the right or left. In this case, he chose to swerve to the right-hand side and the Court was not placed in a position to understand why he did not swerve to the left-hand side. The Applicant failed to show that there was another option that the insured driver could have taken and that his failure to do so was an act of negligence.

[12] Much was made of lack of scanning of the road by the insured driver. I was totally at loss what this meant in the circumstances of this case. The insured driver, in my opinion, has demonstrated that he has been alert to what was happening on the road ahead of him hence he was able to see that a vehicle had entered his path of travel. If he was not, this accident would have taken place without his failed evasive maneuver having been undertaken.

**THE INSURED DRIVER FAILED TO AVOID THE COLLISION WHEN BY THE EXERCISE OF REASONABLE CARE, HE SHOULD AND COULD HAVE DONE SO**

[13] In the light of what I have stated above, I do not think that one could expect more than the insured driver has done short of solomonic wisdom or chameleonic caution, which is discouraged by Holmes JA in *S v BURGER* **[1975] 4 All SA 734 (A).** In fact, because of lack of basic evidence not levied before court on 1 December 2020, there are too many 'what ifs' in this matter to the extent that I

even wondered whether the Applicant ever managed to establish a *prima facie* case to be answered by the Defendant.

[14] I have already demonstrated that slowing down a vehicle depends on the distance at which the vehicles were and the speed at which they were approaching each other. If the distance was sufficiently long, slowing down and deciding whether or not to pull to either side of the road might be a reasonable step to take. However, if the distance was shorter, there may just have been enough time to flicker, hoot and swerve to either side. Unfortunately, the testimony before court did not explore all those possibilities. The lack of evidence means that the Court is disadvantaged to consider the case fully.

[15] Lack of consideration of the sketch plan could not have spun the case in favour of the plaintiff as the Applicant would have this Court believe. The sketch plan was not presented in court at all. Quite apart from that, it contradicts the evidence of the insured driver who stated that the collision occurred on the bridge. It was argued on behalf of the Applicant that 'at or near the bridge' was meant to be a point of reference of where in relation to the bridge the collision happened. Throughout the proceedings, none of the witnesses of the Applicant including the insured driver was once referred to the sketch that is now supposed to place the collision before the bridge.

[16] The Court reads uncertainty in the phrase 'at or near the bridge'. If there was certainty on where it took place, the insured driver would simply have stated that it happened near the bridge or approximately so many metres before or after the bridge. Similarly, if it occurred as he was approaching the bridge, as argued during these proceedings, then such would be in stark conflict with the documentary evidence before court. The position is simply this – the Applicant failed to show the location of the point of impact.

[17] It is possibly correct that the Court misdirected itself and erred by dismissing the claim. Given the aforegoing, I am of the firm belief that the correct pronouncement of the Court ought to have been absolution from the instance. To the extent that I did not make such a decree, I agree that reasonable prospects exist that another court would reach a different conclusion. For that reason, I grant leave to appeal to the full court of this Division. In the result, the following order is made:

1. The Applicant is granted leave to appeal to the full court of this Division; and

2. Costs hereof will be those in the appeal.

**B A MASHILE**

**JUDGE OF THE HIGH COURT OF SOUTH AFRICA**

**MPUMALANGA DIVISION, MBOMBELA**

*This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be July 15 2021 at 10:00.*

**APPEARANCES:**

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| **Counsel for the Plaintiff:** | **Adv Mabaso** |
| **Instructed by:** | **Bhila & Thobela Attorneys** |
| **Counsel for the Defendant:** | **No appearance** |
| **Instructed by:** | |
| **Date of Hearing:** | **08 July 2021** |
| **Date of Judgment:** | **15 July 2021** |