

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

Case Number: 2017/11539

13/3/2018

In the matter between:

LML NOAH obo Minor

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

MOKOSEAJ

- [1] This is a loss of support claim under Section 17 of the Road Accident Fund Act 56 of 1996 (as amended) by the plaintiff in her capacity as the biological mother and natural guardian of her minor child, R P M who was aged 5 years at the time of the accident.
- [2] The plaintiff's claim arises from the death of Lebohang Abraham Mabuya who was involved in a motor vehicle collision which occurred on 5 July 2015 on the N3 Toll Road near Warden between motor vehicle bearing registration number [...] being driven by the deceased and motor vehicle bearing registration number [...] driven by the insured driver.
- [3] It was agreed between the parties that the determination of the merits and quantum be separated. The determination of the quantum is therefore

postponed. The only issue to be determined between the parties is the merits, that is, the liability of the defendant for the damages suffered by the plaintiff as a result of the motor vehicle collision. The plaintiff bears the onus of establishing on a balance of probabilities the negligence of the insured driver being the primary cause of the collision. Similarly, the defendant bears the onus of proving that the negligence of the deceased was the sole cause of the collision.

[4] It is common cause that the plaintiff only need prove the proverbial 1% negligence on the part of the insured driver in order to get 100% damages that he or she is entitled to recover from the defendant.

[5] The plaintiff alleges in her particulars of claim that the insured driver was the sole cause of the accident in that he was negligent in one or more or all of the following respects:

- (i) he failed to keep a proper lookout;
- (ii) he drove too fast under the circumstances;
- (iii) he drove without consideration for safety of other road users, in particular the plaintiff;
- (iv) he failed to keep the insured vehicle under proper control;
- (v) he failed to avoid a collision when, by the exercise of reasonable care and consideration, he could and should have done so; and
- (vi) he failed to apply the brakes of the said vehicle timeously or at all.

[6] In its plea the defendant denied all the grounds of negligence and specifically pleaded that the deceased was the sole cause of the accident. It prayed that the plaintiff's claim be dismissed with costs. The defendant relied on the following grounds of negligence, that the plaintiff:

- (a) failed to keep a proper look-out;
- (b) failed to take any, alternatively sufficient cognisance of the presence, the actions and the visibly intended and/or probable further actions of the driver of the insured vehicle;
- (c) failed to avoid a collision when by the exercise of skill and care he

could and should have done so;

- (d) travelled at an excessive speed under the circumstances;
- (e) failed to have any, alternatively adequate regard for other vehicles on the road, in particular to the vehicle driven by the insured driver;
- (f) failed to exercise any, alternatively, proper control over the motor vehicle he was driving; and
- (g) failed to apply his brakes timeously, adequately or at all.

[7] The matter had previously been brought before court but was postponed due to the lack of witnesses. In dealing with liability two witnesses being the insured driver and a police officer who attended on the accident were subpoenaed to appear in court.

[8] Fakazi Herbert Mbhele, the insured driver gave evidence that on the day in question, he was driving a Dodge Caliber bearing registration number [...] at approximately 18:00 on the N3 Toll Road in a southerly direction towards Durban. He testified that although he worked in Limpopo, he was not at work due to his company having been affected by strike action.

[9] Mr Mbhele testified that the traffic flow on the day in question was heavier in the direction of Johannesburg. The weather conditions were clear as also the road which was also flat. It was dusk and there were no street lights in the area.

[10] The insured driver testified that the speed limit on that stretch of the road was 120 km per hour and that he was driving at that approximate speed. He testified further that there were two lanes of travel in both directions and that he was travelling on the extreme left-hand lane when he suddenly noticed a silver-grey VW Polo cross the barrier line, enter his direct path of travel and travel towards his motor vehicle. He could not avoid the vehicle and a head-on collision ensued.

[11] Mr Mbhele could not remember anything else of the accident as he fell unconscious on impact but offered an explanation that the cause of the accident was the loss of control of the motor vehicle driven by the deceased driver. He confirmed further that as a result of the impact the

engine of the Ford Caliber, which he was driving, was dislodged from the car and landed on the road.

[12] In cross-examination, Mr Mbhele conceded that it was possible that he was driving at slightly over the speed limit but not over 135 km per hour as he was in a hurry to get back to Durban as his fiancée was going to work the next morning. He indicated that it was also possible that he was driving at a speed less than the limit. He was not sure about the point of impact but was of the opinion that he was not the sole cause of the accident as per the particulars of claim. Furthermore, Mr Mbhele confirmed that he failed to apply his brakes as he believed that doing so would have caused a bigger accident. He could not have done anything to avoid the accident as it happened very fast.

[13] Further in cross-examination, Mr Mbhele conceded that the road had a shoulder and that he could have moved onto it. The vehicles driving both in front of him and behind him were at a fair distance as to enable him to move onto the shoulder or the other lane, should he have so required. He conceded further that he has no knowledge whether he would have avoided the accident had he been driving at a slower speed.

[14] The second witness was Makoko Ephraim Malefane, a policeman stationed at the Roadside Police Station in the Free State. He testified that his job included investigations of motor vehicle accidents. He confirmed that he had attended at the scene of an accident on 5 July 2015 in which the two abovementioned vehicles had been involved on the N3 Toll Road.

[15] Mr Malefane testified that the traffic was heavy in the northerly direction due to it having been a weekend when there was much social activity in Durban. It was not so of the traffic flow in the southerly direction. He confirmed that the point of impact was on the fast lane (right-hand lane) in the southerly direction, that is, towards Durban. He confirmed further that the vehicle being driven by the deceased crossed the barrier line and also that the engine of the Dodge Caliber was dislodged on impact.

[16] Mr Malefane testified that the deceased's motor vehicle could not have been driving at an excessive speed due to the heavy traffic flow in the direction in which he travelled. He was unable to ascertain the speed of

the VW Polo as it did not have a tracking device. The Dodge Caliber's tracking device was also not working due to its insurance having been cancelled some two months prior to the collision. He confirmed that in a subsequent interview with the driver, he was not given any confirmation as to the speed he drove at as he had no recollection at all. The insured driver did however confirm to him that he could not avoid the accident and that he was in a hurry to get back to Durban as his fiancée was due to return to work the next day.

- [17] At the close of the plaintiff's case the defendant applied for absolution from the instance. Counsel for the defendant submitted that there was no *prima facie* proof that the insured driver had been negligent and suggested that the threat of sudden emergency caused the negligent action on the part of the insured driver. He relied on the judgement of Hughes J in the matter of **Grobler v Road Accident Fund 2013 ZAGPHC 417** at para 25 where it was said that:

“The enquiry does not end there I have to determine whether the insured driver was negligent in any way. In addressing this, I considered the following extract also stated in Kloppers (*supra*) on page 21 para 5:

A driver is permitted to make errors of judgment if a reasonable driver could have made the same error in the circumstances. An error of judgment may be present even when there is no suddenness or unexpectedness. A driver is also not negligent when he acts 'negligently' when threatened by a sudden and imminent danger.”

- [18] Counsel for the plaintiff rejected this argument of sudden emergency as it had not been pleaded by the defendant nor did the insured driver give evidence of such. He argued that there was negligence on the part of the insured driver who drove at an excessive speed and failed to keep a proper look out.
- [19] The application for absolution was dismissed on the ground that there was a *prima facie* case that had been made out by the plaintiff.
- [20] The defendant closed its case without calling any witnesses.

[21] A duty to keep a proper look out and a duty to drive at a reasonable speed are logically interrelated. Consequently, for a driver at night to travel at a speed which does not permit him to stop within his range of vision means that he will be driving towards a section of the road which his eyes cannot see. Such a speed precludes a driver from keeping a proper look out.

WE Cooper: Delictual Liability in Motor Law (1996) ed. p139

[22] In his evidence, the insured driver confirmed that the visibility at the time of the collision was not as clear as daylight. It was dusk. He furthermore conceded that he had been driving at a speed faster than the speed limit and that he failed to apply his brakes as he thought by so doing, it would cause a big accident. I am of the considered view that the insured driver had failed to keep a proper look out especially at a time when the visibility was unclear.

[23] It cannot be concluded that there had been an error in judgment on the part of the insured driver nor can it be said that the insured driver failed to react to the oncoming vehicle because of shock. This was not pleaded by the defendant. The defendant merely pleaded that an incorrect action had been taken by the insured driver.

[24] I am of the considered view that the insured driver was negligent. As such, I make the following order:

- (i) The defendant is 100% liable for the plaintiff's proven or agreed damages;
- (ii) The defendant is liable for costs of suit.

MOKOSE AJ
Acting Judge of the High
Court of South Africa
Gauteng Division,
Pretoria