(1) REPORTABLE : ~~YES~~ / NO

(2) INTERESTED TO THE JUDGES : ~~YES~~ / NO

(3) REVISED

11/7/17

DATE SIGNATURE

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

CASE NO: 2379/2016

In the matter between:

CONTSANCE MOYAHABO HUMA obo SELF and MINORS	**PLAINTIFF**

And

ROAD ACCIDENT FUND	**DEFENDANT**

JUDGMENT

MOKGOHLOA DJP

1. The plaintiff, in her personal capacity and as the mother of her two minor children, sues the defendant for damages occasioned by the death of her husband (the deceased) in a collision between the motor vehicle (Toyota

Tazz) driven by the deceased and another motor vehicle (Volkswagen microbus) driven by insured driver.

2. The said collision occurred on 19 July 2015 at around 5h00 along the N1 South Road, Botlokwa, Limpopo. The plaintiff avers that the collision was caused solely as a result of the negligence of the insured driver in that he failed to keep a proper lookout and failed to give due regard and consideration to the safety of other road users, in particular, the deceased. The plaintiff further alleges that the insured driver parked his motor vehicle in a dangerous position on the road thereby causing a dangerous unlit obstruction or alternatively failed to take sufficient steps to warn other road users more specifically the deceased of his presence on the road surface.

3. The defendant filed a plea in which it denies liability and alleges negligence on the part of the deceased. The defendant alleges that the deceased was negligent in one or more of the following respects, namely that he failed to keep a proper lookout and drove at an excessive speed; he failed to apply the brakes of his motor vehicle timeously or at all; he failed to observe other motor vehicles travelling on the road in particular the insured driver's motor vehicle.

4. The defendant pleaded in the alternative that should the court find negligence on the part of the insured driver and that such negligence contributed to the collision, then the collision was caused by the joint negligence of both the insured driver and the deceased.

5. The issue that I have to determine is the question of negligence which led to or caused the accident which would then establish which party is liable for damages caused.

6. At the commencement of the trial, the parties agreed that the issue of liability be separated from the determination of quantum. I have accordingly ordered the separation of those issues in terms of R33 (4) of the Uniform Rules of Court.

7. Three witnesses were called by both parties that is, two by the plaintiff and one by the defendants. The plaintiff further handed in Bundle 'B' containing a photo album compiled by W/O Nelushi, depicting the position of both vehicles after the collision. This album was extensively used by both parties during the trial.

8. The first witness to testify was Constable Baloyi from Botlokwa police station. She stated that she received a message regarding an accident that had occurred along the N1 road to Polokwane. She proceeded to the scene where she found a microbus and Toyota Tazz involved in an accident. Both cars were stationed as it is depicted on the photo album. The driver of the Toyota was in his car and was certified dead at the scene. Constable Baloyi obtained a statement from the insured driver, Mr Rhangani. According to Constable Baloyi the lights and emergency lights of the microbus were off. She did not see or notice any reflective triangle on the scene of the accident.

9. The next witness was W/O Nelushi who is a crime scene reconstructive expert. He was called as an expert testify as to the point of impact, the general observation of the scene of the accident and to also give his opinion as to how the accident could have happened in relation to the damages to both vehicles and marks or debris found on the road surface. W/O Nelushi stated that he arrived at the scene and certain points were indicated to him. He made his own observations, took photographs of the scene of the accident and prepared a sketch plan marking out all relevant points.

10. W/O Nelushi investigated the scene of the accident looking for other evidence that can assist him in the reconstruction. According to him, the lights and emergency lights of the microbus were off. He looked around specifically searching for a reflective triangle if same was put up by the insured driver but he could not find it.

11. As to the point of impact, W/O Nelushi stated that the point of impact is on the emergency lane (normally termed the yellow lane). He pointed the said point of impact to be on point B as depicted on photos 1 and 2 in Bundle B. He stated that he was able to determine the point of impact because of the pieces of glasses on that spot and the brake marks. He conceded that the brake marks were not easily identifiable through the naked eye and he had to take photos of such brake marks in an elevated position to capture them. This, according to W/O Nelushi, is a skill normally used by expert photographers in such situations. He stated that the reason he was not able to capture the brake marks in a normal way was that on impact, and depending on whether the handbrake of the microbus was engaged and the speed at which the Toyota Tazz was travelling, it is possible that the microbus would have been forced to move forward leaving superficial brake marks on the road surface. He however could not state whether those brake marks were from the microbus or the Toyota Tazz.

12. Regarding the positions of both motor vehicles after the accident, W/O Nelushi stated that the momentum at the time of collision would have made the two vehicles to move forward and swerve out of the road surface (point of impact). He stated that the microbus after being hit from the rear moved forward and turned into the westerly direction.

13. W/O Nelushi testified further that he inspected both motor vehicles to check their roadworthiness. He inspected their tyres and found that tyres on both

motor vehicles were in good condition. He did not observe any flat or burst tyre.

14. The insured driver, Mr Musa Rhangani testified. He stated that he was travelling from Vleifontein to Johannesburg along the N1 South Road. He had passengers in the microbus. Whilst driving, and at around 3h30 he had a tyre puncture on the front right wheel. He managed to drive his motor vehicle off the road onto the gravel side. He called his mother to bring him a jack, switched on the emergency lights and put a reflective triangle at the back of the vehicle to warn other road users of his presence.

15. His mother arrived at the scene around 4h30. He got out of the car to show her the punctured tyre. He walked towards the puncture tyre whilst his mother stood at the sliding door of the microbus talking to the passengers. Whilst standing next to the punctured tyre, he heard a loud bang. He immediately checked for his mother and found her injured lying on the ground. He attended to her and moved to the rear of his microbus that is when he realised that a Toyota Tazz had collided with his motor vehicle. He proceeded to check the driver of the Tazz and he found him already dead. He peeped through the window of the Tazz and he noticed a bottle of whisky and a bottle of water with some concoction or mixture like drugs.

16. The insured driver stated that it was possible for W/O Nelushi to have not noticed that the microbus had a flat/punctured tyre because the microbus had 17 inch rim tyres. He further stated that it was possible that the lights of the microbus were off at the time W/O Nelushi arrived at the scene because the electric cables were damaged during the collision.

17. In order to determine negligence, one has to first locate the point of impact in the accident. In W/O Nelushi's version, the accident occurred on the

emergency lane whilst the insured driver's version is that it occurred outside the road surface on the gravel road.

18. These two versions are mutually destructive in the sense that the acceptance of one must necessarily lead to the rejection of the other. In deciding which version to accept and which one to reject, Esteen AJP (as he then was) stated the following in National Employers' General Insurance v Jagers[1]:

> *"....where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false."*

19. In Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and others[2], the Supreme Court of Appeal stated:

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[1] 1984 (4) SA 437 (E) at 440 E-G

[2] 2003 (1) SA 11 SCA at [5]

"The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it."

20. Taking considerations of the above principles, it appears that the evidence which has to be believed is that of W/O Nelushi. I find his evidence to be more probable and reliable. I can however not say the same with the evidence of the insured driver which was fraught with inconsistencies and improbabilities on the following material aspects:

20.1. He testified that the emergency lights of the vehicle were switched on before the accident and the impact caused the electrical wires to be disconnected. Whether this is possible or not is not clear from the evidence. He however changed tack under cross examination to say that after the accident, the engine of his car started to emit smoke and he removed the battery as he feared that it may catch fire.

20.2. According to him, he put a reflective triangle at the back of his vehicle immediately after he stopped on the gravel side of the road because of the tyre puncture. This he did to warn other road users of his presence. The question is why did he do this if he had stopped on the gravel side outside the road surface. Furthermore, W/O Nelushi's evidence is to the effect that he did not find anything that resembled the reflective triangle's particles on the gravel road. W/O Nelushi testified about pieces of glasses that he found on the yellow line.

20.3 As regards his discovery or notice of alcohol/drugs in the deceased's vehicle, both counsel agreed and conceded that it was still dark at that time of the morning and visibility would have been poor. It was therefore not possible for the insured driver to have noticed that.

20.4. He did not see the deceased's vehicle approaching immediately before the accident. If indeed the insured driver was parked on the gravel road, and being outside of his vehicle, then it would have been expected of him to at the least have heard the sound of the engine of the deceased's vehicle and observed its lights approaching.

20.5 Regarding the tyre puncture, W/O Nelushi and Constable Baloyi did not notice any tyre puncture on the insured driver's wheels. The insured driver's mother was not called to testify and confirm his evidence. In my view, the size of the rim makes no difference, if there was a puncture, W/O Nelushi would have noticed.

I therefore find the insured driver's evidence unreliable.

21. The defendant's counsel argued that the insured driver's version should be preferred to that of W/O Nelushi. He referred me to a case of Stacey v Kent[3] where the court held that, because the expert witnesses rely on assumptions

[3] 1992 (4) SA 495 (C)

and because of the natural tendency of an expert to build a case in favour of his own side, a court is compelled to weigh expert testimony carefully, especially if it conflicts with apparently reliable direct evidence. I fully agree - However, I have already found that the insured driver's evidence is not reliable. I therefore cannot find any reason to reject W/O Nelushi's evidence.

22. To sum up, I find that the insured driver had stopped his vehicle on the emergency (yellow) lane where the accident occurred. The insured driver failed to switch on the emergency lights. He failed to put the reflective triangle. I therefore find that he was negligent and thereby caused the accident. I find it unnecessary to consider the question of contributory negligence because this is a loss of support matter that requires the plaintiff to prove only 1% negligence. In my view, the plaintiff succeeded to discharge the *onus* placed on her.

23. Having stated the above, the following order shall issue:

Order

1. The defendant is ordered to compensate the plaintiffs' proved or agreed damages arising out of the collision.

2. The defendant is ordered to pay costs of suit

MOKGOHLOA DJP

REPRESENTATIONS

1. For the Plaintiff	: Advocate Molai
Instructed by	: NK Vukeya Incorporated
2. Counsel for the defendant	: Adv Motlatle
Instructed by	: Pule Incorporated
3. Date of hearing	: 07 June 2017
4. Date handed down	: 11 July 2017