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

Date of hearing: 23 March 2017

Date of judgment: 25 April 2017

Case number 63732/2015

In the matter between:

THABO SIMON MPONDO

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

BRENNER, AJ:

1. In this action for damages for personal injuries, both merits and quantum are in dispute. Merits were separated from quantum by agreement.
2. It is common cause that, on 2 June 2012, at about 20h00, the plaintiff, Thabo Simon Mpondo ("Mpondo"), (born on [...]1989), was involved in a motor vehicle collision on the road between Petrusburg and Kimberley, involving a BMW motor vehicle driven at the time by one Mazibuko, in which Mpondo was a front seat passenger. It is common cause that Mazibuko died as a result of his injuries.
3. Mpondo sustained the following injuries, namely: lacerations of the skull, a laceration under the left eye, dislocation of the left shoulder, and a back injury.
4. The only witness who testified on the merits was the plaintiff, Mpondo. At the time of the collision, that is, 2 June 2012, he was employed in the South African Defence

Force and was stationed in Kimberley. He testified that he was a front seat passenger at the time, and denied the correctness of the accident report which stated that he was the driver of the vehicle. He confirmed that his work colleague and friend, Mazibuko, (first name unknown), was driving Mpondo's white BMW at the time. The BMW was written *off* after the accident and sold as scrap.

5. On 1 June 2012, one day before the accident, he and Mazibuko had driven the BMW from Kimberley to Bloemfontein, to visit Mpondo's parents, with whom they had stayed overnight. Mpondo drove the car to Bloemfontein. He testified that he and Mazibuko had consumed alcohol on their arrival at Mpondo's parents' home in Bloemfontein.

6. Albeit that it was initially suggested by the RAF that Mpondo was the driver, Counsel for the RAF conceded in Court that Mpondo was a passenger and not the driver. Mpondo testified that he had put on his seat belt when he alighted the vehicle in Bloemfontein at between 17h00 and 18h00 on 2 June 2012. He testified that he did not drink alcohol on the way back to Kimberley.

7. Mpondo had known Mazibuko for about two years before the accident since they had worked together in the SANDF in Kimberley. They had driven several times together from Kimberley to Bloemfontein, using Mpondo's car. Mpondo would drive one way and Mazibuko would drive the other way. Mpondo described Mazibuko's driving as "perfect", and that he always felt safe when Mazibuko was driving. Mazibuko would never disregard a robot. He said that they had never been involved in a motor vehicle accident together before.

8. Mpondo said he did not know how the accident happened because he was asleep at the time. Following the accident, he woke up in the late afternoon of the following day in the Pelonomi Hospital in Bloemfontein.

9. Two statements were allegedly signed by Mpondo: a warning statement given to the SAPS, executed in Bloemfontein on 6 June 2012, in an investigation of culpable homicide

arising from the death of Mazibuko, and an affidavit in support of the claim against the RAF, signed on 8 January 2015.

10. The operative part of the warning statement states, and in this regard the date and time are mentioned as 2 June 2012 at 20:05:

"I am the owner of motor vehicle registration number [C...] and on the said date and time we we(were) from Bloemfontein to Kimberley and the driver was the deceased Mazibuko and I was asleep and I had woke up in Pelonomi Hospital. I don't know what happened before. Further, I state that we were drinking Castle lite and I became drunk it is because I give him (deceased) to drive because he was better than me."

11. In Mpondo's affidavit in support of his claim against the RAF, he said the following:

"On the h of June 2012 at approximately 20H00, I was involved in a motor accident. The accident took place between Petersburg and Kimberley, known as the NB. I was passenger in a 318 Model BMW Sedan vehicle with registration number [C...]. The driver was Mr Mazibuko. I was wearing a seat belt. The driver Mazibuko was driving at a very high speed. While he was driving he was also consuming Heineken Beer. Approximately 20km after we have passed Petersburg on our way to Kimberley, the driver Jost control, resulting in the vehicle leaving the road. The vehicle then overturned. "

12. In evidence, Mpondo denied having signed the warning statement and denied that his signature appeared thereon. He could recall having been approached by the SAPS a few days after the accident, while in the Pelonomi hospital in Bloemfontein, but his father had told the SAPS that he "was sleeping". He could not explain how the SAPS came into possession of his personal details which appeared on the first page of the statement, such as, his full names identity number, cell phone number and address. He confirmed that these details were correct. Mpondo denied that Mazibuko was drinking Castle lite in the car on the road back to Kimberley on 2 June 2012. He could proffer no explanation for why this appeared in his statement.

13. Mpondo denied that he had informed his attorney, who drew his claim affidavit, that he had told her that Mazibuko was driving at a very high speed, and that Mazibuko was drinking Heineken beer. He could proffer no explanation as to why these statements appeared in his affidavit, albeit that he said he had read the affidavit before signing it and had passed English as a Matric subject.

14. After Mpondo's evidence, Counsel for the RAF applied to amend its plea to introduce the defence of *volenti non fit iniuria*. The amendment was granted as *prima facie* grounds had been laid by Mpondo's evidence for an argument based on this defence.

15. The RAF closed its case without calling evidence on the merits.

16. On the inherent probabilities, Mpondo signed the warning statement dated 6 June 2012, four days after the accident. He proffered no explanation for how the police could have come into possession of either his personal details or of the details contained in the contents of the statement. At this particular time, the details of the accident would have been fresher in his memory than two and one half years later when his claim affidavit was signed.

17. Considering this fact, without disabusing my mind of the contents of the claim affidavit and Mpondo's *vive voce* evidence, I am constrained to attach more probative value to what is contained in the warning statement than to what is stated in the claim affidavit, since the former would have been more reliable. In this statement he mentioned that both he and Mazibuko has been consuming alcohol. He also stated that he had fallen asleep before the accident and did not know what had happened. He mentioned further facts which were consistent with his *vive voce* evidence, namely that he was a passenger in the car driving from Bloemfontein to Kimberley, that he was asleep before the collision, and that Mazibuko was a better driver than he was.

18. In the claim affidavit dated 8 January 2015, Mpondo also mentioned the consumption of alcohol, albeit of a different kind and albeit only by Mazibuko. Nevertheless, taking into

account the timing of the warning statement, this affidavit is corroboration for the fact that, on the probabilities, they were both consuming alcohol. It was disingenuous and expedient of Mpondo to disavow in testimony that he had furnished information to his attorney in January 2015 that Mazibuko had been drinking alcohol and had been driving at a "very high speed." No plausible explanation was given for this, and, in the light of what is stated in his warning statement, and the material consistencies between the statement and the affidavit, it falls to be rejected as false.

19. When Mpondo mentioned in the claim affidavit that the BMW overturned, this was probably information which had been gleaned by him post the accident. He would probably not have known of this fact if he was asleep before the accident, and only woke up again in hospital the next day.

20. There was no evidence on the part of the RAF to suggest that the BMW had not overturned after Mazibuko had lost control of it. Mpondo was not challenged under cross-examination about his evidence that the BMW was involved in an accident and that it was a write off afterwards. Nor was there evidence to controvert Mpondo's assertions that Mazibuko was consuming alcohol while driving and was driving at a high speed. Nor was there evidence to controvert Mpondo's assertion in evidence before Court that he was wearing a seatbelt while a passenger in the vehicle.

21. As was stated by the Honourable Ms Justice Tolmay in the unreported case of **MD Janse van Vyuren NO v the RAF case As2s1201s Gauteng Division Pretoria, March 2017,** at paragraph 10;

"A vehicle which is driven properly and without negligence does not normally overturn whilst travelling along a roadway. The principle of *res ipsa loquitur* has application. The evidence points to an inference of negligence on the part of the first insured driver."

22. And at paragraph 11:

"Once a plaintiff proves an occurrence giving rise to an inference of negligence on the

part of a defendant, the defendant must produce some evidence to explain how the accident happened."

23. I am satisfied, on the proven facts, that Mazibuko lost control of the BMW and the vehicle overturned, causing bodily injuries to both him and Mpondo.

24. For the volenti defence to be sustained, the RAF must discharge the onus of proving that Mpondo consented to the risk of injury by permitting Mazibuko to consume alcohol while driving and to drive at a very high speed.

25. This ground of justification is applied with caution and circumspection. It requires the following: the consent must have been given freely and voluntarily, the person giving the consent must be capable of volition and the consenting party must have full knowledge of the extent of the prejudice.

26. In the seminal case of **Santam Insurance Co Ltd v Vorster 1973 (4) SA 764 (A)**, at the first two paragraphs of the headnote, the nature of the defence of volenti non fit iniuria is described:

"While the defence of volenti non fit iniuria and that of contributory negligence no doubt sometimes overlap, there is no adequate reason for depriving a defendant, in risk cases such as an action for damages brought by a passenger for bodily injuries alleged to have been caused by negligent driving, of the complete defence of volenti non fit iniuria, if it be shown that the facts sufficiently establish the requisites of the defence, and provided further that the volenti defence is always applied with caution and circumspection.

In an action for damages for bodily injury caused by negligent driving, in which the defendant raises the defence of volenti non fit iniuria, if it be shown that, in addition to knowledge and appreciation of the danger, the claimant foresaw the risk of injury to himself, that will ordinarily suffice to establish the "consent" required to render him volens - provided always that the particular risk which culminated in his injuries falls within the ambit of the thus foreseen risk. "

27. Applying the proven facts to the established principles, the insured driver, Mazibuko, was negligent in that Mazibuko was consuming alcohol while driving and he was driving at a very high speed. On the probabilities, these factors contributed to the loss of control of the vehicle. What matters most, in the final analysis, is that Mazibuko was negligent in losing control of the BMW and causing it to overturn. He lost his life in the process and the accident caused bodily injuries to Mpondo.

28. On the premise that Mpondo was probably drinking alcohol while in the passenger seat, and said he was drunk in his warning statement, and this would have affected his faculties, the RAF has not discharged the onus of proving that Mpondo was capable of volition in consenting to the risk of a potential accident and of having full knowledge of the extent of the risk.

29. However, the contributions to his fate made by Mpondo took the form of his permitting Mazibuko to drive his (Mpondo's) vehicle while consuming alcohol and while driving at a very high speed. The fact that Mpondo may have been intoxicated does not negate his contributory negligence. Contrasted with this are his prior experiences with Mazibuko as a safe driver, with no previous accidents in their prior travels while Mazibuko drove, coupled with Mpondo's evidence that he wore a seatbelt when he alighted the passenger seat of the vehicle in Bloemfontein.

30. I accordingly find that Mpondo was contributorily negligent in an apportioned percentage of 30%, and that the RAF is liable for 70% of any damages which Mpondo may prove.

31. Regarding costs, Mpondo was untruthful and expedient in denying that he signed the warning statement, and in disavowing certain allegations made in the complaint affidavit. It is appropriate for the Court to mark its disapproval of his conduct by abating his claim to costs on the merits, based on an equal apportionment.

32. The following order is granted:

a. The defendant is liable for the payment of 70% of the plaintiff's proven or agreed damages arising from the accident which occurred on 2 June 2012;
defendant is liable for payment of 50% of the plaintiff's costs.

T BRENNER

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

20 April 2017

Appearances

Counsel for the Plaintiff: Advocate CJS Kok

Instructed by: Van Zyl le Roux Attorneys

Counsel for the Defendant: Advocate JG van den Berg

Instructed by: Lekhu Pilson Attorneys