



28/4/17.

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

**CASE NO: 57900/2014**

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

NOT REVISED

In the matter between:

**E. V obo MINORS**

Plaintiff

and

**THE ROAD ACCIDENT FUND**

Defendant

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**JUDGMENT**

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**Baqwa J**

[1] This is an action in terms of the Road Accident Fund Act No. 56 of 1996 (*'the Act'*) in which the plaintiff sues in her personal as well as her representative capacity as natural guardian and mother of the following

minors:

- 1.1 T M born [...] 2008
- 1.2 S M born [...] 2004
- 1.3 R M born [...] 2005
- 1.4 P V born [...] 1999

- [2] The matter is defended and all forms of negligence have been denied by the defendant. The Court made an order for the separation of issues in terms of Rule 33 (4) of the Uniform Rules of Court and the matter proceeded only on the question of liability. The issue of quantum has been held over for later determination.
- [3] The claim arises out of an accident which occurred on 30 October 2011 at approximately 21h15 on the N3 highway in the area of Warden in the direction of Harrismith when a motor vehicle with registration letters and numbers B[.] GP, a silver Polo Vivo driven by M M (the deceased) was allegedly forced off the road by an unidentified vehicle driven by an unidentified driver.
- [4] As a result of the collision, the deceased was fatally injured and died on the scene of the accident.
- [5] Only two witnesses were called by the parties, namely, E M for the plaintiff and Mufirifiri Dlamini for the defendant.
- [6] The versions presented by the two witnesses are mutually destructive in that according to the plaintiffs witness the accident was caused by a Nissan Sentra which obstructed the deceased's line of travel in a manner which caused him to swerve thereby causing his vehicle to overturn whereas according to the defendant's witness the accident occurred due to the deceased losing control of his vehicle.

- [7] E M was a passenger in the deceased's vehicle together with the deceased's young daughter who was sleeping at the back seat of the vehicle when the accident occurred. The portion on which they were travelling was a dual carriage road in each direction. It was a tarred roadway with road markings. It was a dark rainy night even though Eric Molise could not state whether it was still raining at the time of the accident.
- [8] He testified that he was seated at the front passenger seat conversing with the deceased when he suddenly saw an old Nissan Sentra motor vehicle moving slowly in front of them. He warned the deceased about it. Without verbally reacting to the warning, the deceased swerved his vehicle firstly to the right and apparently, upon realising that there was oncoming traffic, he swerved again to the left and at that point lost control of his vehicle which overturned. Molise was later assisted out of the overturned vehicle by a stranger. He requested the use of a cell phone from the stranger so that he could inform his other brother and his sister in law about the accident.
- [9] It was common cause that about thirty minutes thereafter the police and ambulances arrived on the scene and all three, namely, M, the deceased's daughter and the deceased were taken to hospital in one ambulance and the deceased was certified dead upon arrival in hospital.
- [10] Molise confirmed that prior to being taken to hospital he spoke to one of the two policemen who were the first to arrive on the scene being Constables Mufirifiri Dlamini and female Constable Mofokeng. He also stated that he was surprised when Dlamini called him by his first name whereupon he realised that Dlamini was a childhood friend with whom he had grown up. He confirmed that Dlamini enquired as to what had happened and that he gave him a brief explanation to the effect that he had been a passenger in the deceased's vehicle when the deceased lost control of his vehicle.

[11] Dlamini also testified on behalf of the defendant and by and large confirmed the version given by M. He testified that he was on patrol in his capacity as Constable from the Warden Police Station when he received a report about an accident which had occurred. It took him about thirty minutes to reach the accident scene where he found an African male and female seated on the pavement whilst another African male was lying face down on the road surface. He immediately recognised M and had a brief conversation with him as narrated above.

[12] What this Court has to determine therefore is which of the two versions is more probable than the other.

[13] The correct approach to be adopted regarding mutually destructive versions was set out in the case of **National Employers General Insurance Ltd v Jagers** 1984 (4) SA 437 E at 440 E – G, where Eksteen AJP said:

*“...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, 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.”*

[14] The defendant's counsel submits that the plaintiff's version ought to be rejected because the plaintiff has presented three versions before the Court which are irreconcilable. The first version is the one which M first narrated to Dlamini at the scene of the accident.

[15] The second version is contained in an affidavit which was sworn to by Molise at Warden Police Station three days after the date of the accident. That version was presented in the form of exhibit B83 which is a sworn statement dated 3 November 2011 which was signed and sworn to by M before a Commissioner of Oaths. Paragraph 3 thereof reads as follows:

*"As we were travelling on the N3 road about 25km towards Warden, the late M M lost control from the slow lane and straddled over fast lane facing the on coming traffic and the car rolled over the road, overturned. We all three sustained injuries and the ambulance took us to Harrismith hospital."*

[16] The third version is contained in the police report which was referred to during the evidence of Dlamini which was also to the effect that the accident was caused by the deceased losing control of his vehicle.

[17] These versions have to be weighed against the evidence given by Molise in court, to the effect that it was the presence of a Nissan Sentra vehicle in front of the deceased's vehicle which caused the accident.

[18] It is trite that the plaintiff always bears the onus of proving negligence on the part of the insured driver on a balance of probabilities. See **Sardi and Others v Standard and General Insurance Co. Ltd** 1977 (3) SA 776 (A) at 780 C - H. In deciding whether the plaintiff has succeeded in discharging this onus the Court has to view the totality of the evidence led during the trial.

[19] It is common cause that there is a consistency in the versions presented by Molise prior to his testimony in court. The common thread in those versions is that the accident occurred as a result of the deceased losing control of his vehicle. Those versions are irreconcilable with the version presented in court. The inevitable consequence of the aforesaid contradiction is a serious dent to the credibility of Molise who is the plaintiff's sole witness.

[20] The only conclusion that this Court can come to therefore is that the plaintiff has failed to discharge the onus to prove her case on a balance of probabilities.

[21] In the result I make the following order:

21.1 The plaintiffs claim is dismissed.

21.2 The plaintiff is ordered to pay the defendant's costs.

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**S. A. M. BAQWA**  
**JUDGE OF THE HIGH COURT OF SOUTH AFRICA**  
**GAUTENG DIVISION, PRETORIA**

Heard on: 28 April 2017

Delivered on: 28 April 2017

For the Plaintiff: Advocate R. G. Bowles

Instructed by: Savage Jooste & Adams

For the Defendant: Advocate R. Strydom

Instructed by: Tau Phalane Incorporated