

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 4994/2009

In the matter between:-

MATHULO LYDIA MOKGADI (MOLETSANE) Plaintiff

and

ROAD ACCIDENT FUND Defendant

HEARD ON: 2 AUGUST 2011

JUDGMENT BY: RAMPAL, J

DELIVERED ON: 18 AUGUST 2011

[1] These were action proceedings. The plaintiff sued the defendant for compensation in the sum of R1 124 291,00 plus interest thereon at the rate of 15,5% per annum *a tempore morae* as well as the costs of the action. The claim was based on delict. The plaintiff sued in her personal and representative capacities. The defendant denied liability.

[2] The version of the plaintiff was narrated by one witness, namely Mr. Thapelo Melesi. He testified that he was involved in a road accident which took place between

Winburg and Bloemfontein on Saturday, 1 February 2008. On that day he and six others were returning home in Bloemfontein from Winburg. They were travelling by a Volkswagen minibus with registration number DKJ594FS. The minibus was owned by his mother, but driven by a certain Mr. Barks Tsomela. He was a front seat passenger. Among the other passengers was Mr. Thabo Mokgadi. He was a back seat passenger.

- [3] They left Winburg in the early hours of that particular morning. They used the N1 highway. They safely reached Verkeerdevlei Toll Gate. From there they proceeded further towards Bloemfontein. The minibus was travelling well. He and the driver were having a conversation. A speeding motor vehicle appeared from behind and tried to overtake the minibus. However, it gave a narrow berth to the minibus. In that process of overtaking, it unexpectedly but quickly moved over to the left onto the path of travel of the minibus. Mr. Tsomela swerved to the left in an attempt to avoid collision. However, the offending motor vehicle clipped the minibus on the right flank. The offending motor vehicle forced the minibus off the road. The minibus went out of control and

overturned.

- [4] In the process the witness became unconscious. As a result of loss of consciousness he had no further recollection of what happened on the scene of the accident. He was already in hospital when he regained his state of consciousness. He stated that the accident occurred so fast that he could not identify the offending vehicle. He had no idea what happened to it after the collision.
- [5] Of the seven occupants of the minibus, five died. Among them were the aforesaid Mr. Tsomela and Mr. Mokgadi. He and a certain young lady were the only two survivors. She could remember absolute nothing significant about the accident, because she was fast asleep at the time.
- [6] During cross-examination he answered that the unidentified vehicle was even with the minibus when he first saw it. It really never managed to get in front of the minibus. Instead it bumped into the right side of the minibus. It physically came into contact with the right nose of the minibus. By this I understood the witness to mean the right front bumper of

the minibus. He admitted that he never went to see the police in connection with the accident. Besides the occupants, his refrigerator, mattress and bedding were loaded on the engine compartment of the minibus. He denied the suggestion that the minibus was overloaded and that it left the road as a result of the alleged overload. He also denied the suggestion that Mr. Tsomela could have avoided the collision by reducing the speed at which he was travelling. He and the driver were wearing seatbelts. Since he was unconscious he could not comment about the presence or absence of glass debris on the scene.

[7] During re-examination the witness replied that the aforesaid victim, Mr. Mokgadi, was sitting on the back seat. He added that besides the front seat of the minibus the rest were not fitted with safety seatbelts.

[8] As regards the merits, the plaintiff's case was then closed. So was the defendant's. The defendant had no witness to call.

[9] On behalf of the plaintiff Mr. Marais submitted that the

plaintiff had shown that the driver of the unidentified motor vehicle was negligent. On behalf of the defendant Ms De Kok chose to leave the matter in the hands of the court.

[10] In her amended particulars of claim the plaintiff alleged that a road accident occurred on the freeway in Bloemfontein on 1 February 2008 when a minibus in which her husband was travelling as a passenger collided with an unidentified motor vehicle. She further alleged that the collision between the vehicles was occasioned by the sole negligence of the driver of the minibus or the sole negligence of the driver of the unidentified driver or the contributory negligence of both drivers. In its plea, the defendant denied all the plaintiff's allegations concerning both the occurrence of the accident and the negligence of the driver(s).

[11] The defendant's plea was a bare denial. However, the minutes of the pre-trial conference held on 8 March 2011 revealed that the defendant admitted the averments contained in paragraph 3 of the particulars of claim concerning the occurrence of the accident, but still denied the alleged grounds of negligence. The defendant continued

to deny the subsistence of the plaintiff's marriage and the paternity of her daughter. On account of the vagueness in which the defendant's challenge to the dependant's claim was cast, I provisionally assume that the facts averred in the particulars of claim pertaining to the relationship between the deceased and the dependants, are true.

[12] The plaintiff's witness, Mr. Melesi, acquitted himself fairly well as a witness. He testified in a simple and straight forward manner. He was consistent. He did not contradict himself. He was candid. No critique was levelled against him. I could find no reason to disbelieve him. Therefore I accept his evidence as a credible and reliable account of the accident.

[13] Before I consider the evidence in relation to the negligence, as attributed to the driver of the unidentified motor vehicle, it is necessary to briefly deal with the issue of negligence as imputed to the driver of the identified motor vehicle. In her particulars of claim the plaintiff alleged five grounds of negligence against him. However, the evidence given on her behalf did not expressly implicate him.

[14] In the plea, the defendant denied the alleged grounds of negligence. Ms De Kok insinuated that the minibus driver was somehow negligent. Her insinuation, that the aforesaid driver could have avoided the collision by reducing speed, was denied by the witness, as was her insinuation that the minibus was overloaded.

[15] For the sake of argument, let me assume that the minibus, in which the plaintiff's husband was travelling as a social passenger, was the only motor vehicle involved in this accident. By suggesting that the minibus was overloaded and that its driver could and should have avoided the accident by reducing the speed at which it was travelling, the defendant implicitly admitted that the driver was negligent and that his negligence was effectively the contributory cause of the accident. As a passenger, the plaintiff's husband was not to blame for the overloading of the minibus, if at all it was. Similarly, he was not at all to blame for the driver's failure to slow down, if at all the accident could have been avoided in that way. Since the plaintiff's husband was an innocent victim, the defendant's contentions did not

constitute a valid defence to the dependants' claim. In my view, the defendant has hopelessly failed to show that the breadwinner was the sole cause of his death. That was the only way the defendant could avoid liability.

- [16] The foregoing entailed that the requisite one percent minimum degree of negligence has been established against the minibus driver. I would, therefore, hold the defendant liable to the plaintiff by virtue of such negligence. Before 17 February 2011 the legal position was that a claim of each dependant, whose breadwinner was killed as a result of the exclusive negligence of the driver of a motor vehicle in which he was conveyed as a passenger, was limited to a maximum compensation of R25 000,00. In the landmark decision delivered on 17 February 2011, section 18 of the Road Accident Fund Act, 56 of 1996, which prescribed the cap on monetary compensation payable to each dependant of such a passenger victim, was declared inconsistent with the Constitution and therefore invalid – *vide* **MVUMVU AND OTHERS v MINISTER FOR TRANSPORT AND ANOTHER** 2011 (5) BCLR 488 (CC).

[17] Now I turn to the unidentified driver. There was credible and reliable evidence given on behalf of the plaintiff that the unidentified motor vehicle was travelling at a high speed; that it tried to overtake the minibus at the time when it was unsafe to do so; that it encroached onto the traffic lane of the minibus; that it moved dangerously close to the minibus; that it physically collided with the minibus and forced it to veer off the tarmac of the highway.

[18] The witness was steadfast that had it not been for the offensive driving of the unidentified vehicle the minibus would not have left the road; that it would not have gone out of the driver's control and that it would not have overturned as it did. On the facts, I have no hesitation to find that the unidentified driver did not keep a proper lookout and that he did not give the minibus a reasonably wide and safe berth at the critical moment when he was endeavouring to overtake it.

[19] In the circumstances I make the following findings as regards the disputed issues pertaining to the merits:

- That a road accident occurred in Bloemfontein on

Saturday, 1 February 2008 at or about 06h00.

- That the scene of the accident was in the vicinity of Glen on the N1 highway;
- That two motor vehicles were involved in the accident.
- That one of them was a Volkswagen minibus with registration number DKJ594FS then and there driven by a certain Mr. Tsomela;
- That the other motor vehicle and its driver or its owner were unidentified;
- That the physical collision between the two motor vehicles involved was, on a balance of probabilities, occasioned by the prime negligence of the driver of the unidentified motor vehicle;
- That the negligence of such driver was the effective cause of the accident;
- That Mr. Tsomela as well as four of his passengers sustained fatal bodily injuries;
- That Thabo Plaatjie Mokgadi was a back seat passenger in a Volkswagen minibus DKJ 594FS at the time of the accident;
- That he sustained fatal injuries in the accident; and

- That the witness, Mr. Melesi, was injured in the accident.

[20] In order to succeed, the dependants of the deceased breadwinner were required by law to establish that, the unidentified driver or Mr. Tsomela was at least 1% negligent. I am of the firm view that the plaintiff has succeeded, on a balance of probabilities, to discharge the onus.

[21] Accepting the version of the plaintiff as substantially correct and assuming, in the defendant's favour, that perhaps Mr. Tsomela ought to have become aware of the danger posed by the unidentified motor vehicle earlier than Mr. Melesi did and that he could have done more at an earlier stage to avoid the collision, I am nonetheless unable to acquit the driver of the unidentified motor vehicle of negligence. I am of the view that his negligent driving largely contributed to the tragic accident.

[22] The liability of the defendant to compensate the dependants of the aforesaid breadwinner, who regrettably met a tragic accident which resulted in his untimely death, has been established.

[23] Mine was to adjudicate the issues relative to the merits of the matter only. At the beginning of the hearing I made an order in terms of Rule 33(4) for the separate adjudication of the issues relative to the merits, on the one hand, and the issues relative to the quantum, on the other hand. Therefore the latter issues will stand over for later adjudication in accordance with that order.

[24] Accordingly I make the following order:

24.1 Judgment is granted in favour of the plaintiff as regards the merits.

24.2 The defendant is liable to compensate the plaintiff in a personal capacity, as well as a representative capacity, in such amount of damages as the plaintiff may prove that she and her minor child has suffered, provided all other issues relevant to quantum are established.

24.3 The costs of the action shall be borne and paid by the defendant.

M.H. RAMPAL, J

On behalf of plaintiff:

Attorney J.J. Maree
Instructed by:
Schoeman Maree Inc
BLOEMFONTEIN

On behalf of second defendant:

Adv. D. de Kok
Instructed by:
Stiglitz Botes Attorneys
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