REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: 1601/2022

REPORTABLE
OF INTEREST TO OTHER JUDGES
REVISED
DATE: 23/04/2024

In the matter between:

VENGO SYLVIA MIYAMBO OBO MINOR **PLAINTIFF**

And

ROAD ACCIDENT FUND **DEFENDANT**

JUDGEMENT

KGANYAGO J

[1] On 10th September 2021 the plaintiff's husband (deceased) was the driver of the first insured vehicle when he was involved in a motor vehicle collision with second insured vehicle. The deceased died at the scene of the accident as result of the injuries which he had sustained during the collision. The plaintiff has instituted an action against the defendant claiming loss of support. The plaintiff is acting in her personal and representative capacity of her minor child.

[2] The defendant is defending the plaintiff's action. The defendant in its plea had denied liability and had pleaded that the collision was caused by the sole negligence of the deceased. The defendant had also denied that the deceased was the biological

father of the minor child in that the plaintiff has failed to lodge a copy of the unabridged certificate. The parties have agreed to dispose the issue of liability first, whilst quantum will be postponed sine die.

[3] The plaintiff has called Maceke Pretty at her only witness. She testified that on 10th September 2021 she had witnessed a motor collision that occurred at Punda Maria road at about 17h00 between the first and second insured vehicles. At the time of the collision she was a pedestrian standing next to the road. On that date the weather was clear, and the road which the collision took place had potholes. The maximum speed limit on that road might have been 60 km per hour.

[4] As she was standing next to the road facing the direction of Malamulele, she saw the second insured vehicle travelling from that direction. When she looked at the direction of Salem, she saw taxi coming from that direction. Behind the taxi was the first insured vehicle. She saw the taxi putting on its hazards lights, an indication that it was going to stop. The first insured vehicle overtook the taxi and immediately flickered its head lights for the second insured vehicle which was coming from the opposite direction to give way for it. The first insured vehicle tried to swerve back to its correct lane but it was too late and a collision between the first and second insured vehicles occurred.

[5] The second insured vehicle collided with the first insured vehicle resulting in the first insured vehicle to spin and face the direction it was coming from. The road on which the collision occurred was a two-way road, and the point of impact was on the middle centre line. Both insured vehicles were travelling at a high speed. According to her

observation, the insured driver of the second insured vehicle could have avoided the collision as where the collision occurred the road was wide, and there were also people who were boarding or alighting from the taxis. The driver of the second insured vehicle did not warn the driver of the first insured vehicle.

[6] The witness was cross-examined and she stated that at the time of the impact, the driver of the first insured vehicle was trying to drive back to his correct lane. The witness stated that as per her observation, the drivers of both insured vehicles did not try to reduce the speed of their vehicles prior to the collision. The witness stated that prior to the collision she was standing a metre from the tarmac road on gravel site. It was put to the witness that had the driver of the second insured vehicle swerved to the left, he would have knocked her. The witness denied that and stated that on the left there was enough space as there was a gravel road leading to the village.

[7] The witness conceded that where she standing, she was knocked by the first insured vehicle after it had collided with the second insured vehicle. The witness conceded that after the impact, the first insured vehicle came to a standstill on the gravel side. The witness stated that when the first insured vehicle started overtaking the taxi, the second insured vehicle was about 5 paces from it. That concluded the evidence of the plaintiff and she closed her case.

[8] The defendant called Mahungu Eric Chauke as its only witness. He testified that on 10th September 2021 he was the driver of the second insured vehicle. He was driving from Thohoyandou and was in the company of his family. He driving at a speed of 40

and 50 km per hour when he was involved in a motor vehicle collision with the first insured motor vehicle. The collision occurred around 18h00. Before the collision occurred, he saw the first insured vehicle coming from the opposite direction flickering its head lights at him. By then he was about 10 metres from the first insured vehicle which was traveling in his lane of travel.

[9] On the right side of the road, there was a taxi coming from the opposite direction and was about 6 metres from him. On the left side of the road there were people who were standing and some were walking. He therefore could not have swerved to the left or right. He tried to apply brakes but it was too late and a head-on collision occurred between his vehicle and the first insured vehicle. He and his family sustained some serious injuries as a result of the accident and were transported to hospital by the emergency services people. The speed limit in the area where the collision took place is 60 km per hour.

[10] Where the collision took place is a two-way road. When the first insured vehicle flickered its head lights, the lights from the first insured vehicle was all over the lanes and he did not know what to do, hence he applied brakes. Between him and the taxi there was no space. If there was a space, he could have swerved to the right. Where the collision took place was a busy area. The first insured vehicle came at a high speed hence he applied brakes. As the first insured vehicle came at a high speed, there was nothing he could have done to avoid the collision.

[11] The witness was cross-examined and he stated that where the collision occurred it was not that clear and that he saw multiple lights coming from the opposite direction.

According to the witness these multiple lights might been from two vehicles as they were coming from two lanes. When asked whether he had tried to warn the driver of the first insured vehicle, he responded by stating that he was shocked and his only option was to apply brakes. The witness conceded that at the time of the collision he was familiar with the road. The witness stated that where the collision took place there was a street to the left of the road. The witness stated that the collision occurred in his lane of travel, just next to where there is a road that off ramp to the gravel. The witness stated that his vehicle was damaged in the front, but could not tell where the two insured vehicles came to a standstill after the impact. When asked to estimate the number of people who were on the side road, he responded by stating that he cannot tell as he was concentrating on the road. That concluded the defendant's evidence and it closed its case.

[12] The plaintiff is claiming loss of support emanating from the death of the deceased who was her husband, who died as a result of the injuries that he had sustained when first insured vehicle which the deceased was driving collided with the second insured vehicle. It is trite that in matters of this nature, all that the plaintiff needed to prove in order to succeed with her claim is 1% proverbial negligence on the part of the second insured driver for the defendant to held liable for 100% of the plaintiff's proven or agreed damages.

[13] In *Minister of Police and Others v Umbhaba Estates (Pty) Ltd and Others*[1] Molemela JA said:

[1] 2023 ZASCA 85; [2023] 9 BLLR 880 (SCA); (2023) 44 IJL 2462 (SCA) (1 June 2023) at para 30

> "The proper approach for establishing the existence or otherwise of negligence was laid down in Kruger v Coetzee. This test rests on two legs, namely, reasonable foreseeability and the reasonable preventability of harm or damage. It is important to emphasise that what is required is foresight of the reasonable possibility of harm ensuing; the foresight of a mere possibility of harm does not suffice. What is or is not reasonably foreseeable in a particular case is a fact bound enquiry that entails the consideration of all the circumstances of the case. While the precise manner in which the harm occurs need not be foreseeable, the general occurrence must be reasonably foreseeable".

[14] The circumstances under which the collision of the 10th September 2021 occurred was that the deceased was trying to overtake a taxi which was travelling in front of him after the taxi had put on its hazards lights indicating that it was going to stop. According to the evidence of the second insured driver at the time the deceased was trying to overtake the taxi, he (second insured driver) was travelling from the opposite direction and was at a distance of about of 10 metres when he saw many lights flashing at him and the deceased first insured vehicle was in his lane of travel. He could not swerve to the right as there was an oncoming car, he could not swerve to the left as there were many people, and he decided to apply brakes when he saw that the accident was about to happen. Unfortunately, it was too late and a collision occurred in his (second insured vehicle) lane of travel. However, the second insured driver could not estimate as to how many people were on the side of the road.

[15] The question is whether the steps taken by second insured driver were what a reasonable driver would haven taken faced with the situation the second insured driver was in, wherein he was required to make a decision a split of seconds. Should the court find that the steps taken by the second insured driver were not reasonable, that makes him to have also been negligent. The second insured driver testified that the lights which were flickered in front him seemed to have come from two vehicles. It is clear that the second insured driver was warned of the eminent danger that was ahead him and was requested to take some swift action in order to avert that. It was no longer a question of whether he was having a right of way or not, but how to prevent that eminent danger ahead of him.

[16] The plaintiff's witness had testified that where the accident occurred, on the left side the road was wide and there is also a gravel road from the tarmac towards the village which had enough space for the second insured vehicle to have swerved to. The second insured driver had testified that where the collision occurred there was street on the left side of the road, which corroborate the version of the plaintiff's witness. The second insured driver therefore had an option to have swerved to that road without difficulties taking into consideration that he had testified that he was driving at a speed which was in the region of 40 to 50 km per hour. In my view, the steps taken by the second insured driver fell short of the steps that a reasonable driver faced with the situation in which the second insured driver was in would have taken. Firstly, two vehicles from the opposite direction have warned him of eminent danger ahead of him, and he did not immediately apply brakes to check what was happening, but only applied brakes when the accident was about to happen. Secondly, a reasonable driver who find himself in his situation would have checked

on the left side the number of people who were standing next to road and see whether he/she could not have manoeuvred and swerved to the left taking into consideration that he was driving at a speed in the region of 40 to 50 km per hour, rather than to apply brakes, standstill on the middle of the road waiting to be knocked by the oncoming car.

[17] It is trite that a driver of a motor vehicle faced with an oncoming vehicle which had swerved and entered his/her lane of travel must first try to swerve to the left side of the road and not attempt to swerve to the incorrect lane. The second insured driver did not attempt to try swerve to the left. At the speed he was travelling if there were pedestrians on left side, he could have hooted to the pedestrians, and they themselves would be seeing that there was imminent danger ahead of the second insured driver and would have made way for him as there was enough space on the gravel side. Taking into consideration the totality of the evidence adduced, the court is satisfied that the plaintiff had succeeded in proving 1% negligence on the part of the second insured driver.

[18] In the result the following order is made:

18.1 The plaintiff succeed with her claim on merits and the defendant is held liable 100% of the plaintiff's proven or agreed damages.

18.2 The defendant to pay the plaintiff's costs on a party and party scale.

KGANYAGO J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA,

LIMPOPO DIVISION, POLOKWANE

APPEARANCES:

Counsel for the plaintiff	**: Adv D Mashao**
Instructed by	**: MR Mphahlele Attorneys**
Counsel for the defendant	**: Phaswane K**
Instructed by	**: Office of State Attorney PLK**
Date heard	**: 13th March 2024**
Electronically circulated on	**: 23rd April 2024**