REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

CASE NO: 4098/2020

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

(2) OF INTEREST TO THE JUDGES: **YES**/NO

(3) REVISED.

DATE: 5-9-2024

SIGNATURE:

In the matter between:

MHLARI GABAZA EUNICE **PLAINTIFF**

And

THE ROAD ACCIDENT FUND **DEFENDANT**

JUDGEMENT

MASHAMBA AJ

INTRODUCTION

[1] Mhlari Gabaza Eunice (hereinafter referred as "the plaintiff''), issued a summons on the 06 July 2020 against the Road Accident Fund (hereinafter referred as "the defendant") for delictual claim as a result of the motor vehicle accident occurred on the

10th October 2019. The plaintiff was a driver of the motor vehicle with registration numbers and letters C[…], a white Hyundai i20, when collided head on with another motor vehicle with registration number and letters D[…], a white ford ranger double cab, driven by Baragwanath Keith Roy (hereinafter referred to as “the insured driver”). The accident occurred at magoebaskloof road, a public road, around Haenersburg, in the Limpopo province.

[2] On the 11th June 2024, the matter was before this court for the determination on the issues of merits. The plaintiff gave *viva voce* evidence as the first witness, thereafter, she called Mixo Mhlari as the second witness who had occupied the front seat as a passenger in the plaintiff’s motor vehicle. The plaintiff further called third witness, the accident reconstruction expert, Mr Strydom. The defendant informed the court that he intends to call only the insured driver to give evidence on how the accident occurred. The plaintiff and Mixo Mhlari led their evidence on the 11th June 2024 and on the 12th June 2024, Mr Strydom led his testimony, thereafter, the plaintiff closed his case. On the 11th June 2024, the defendant indicated that the insured driver is not going to be available on the 12th June 2024 and requested the court to postpone the matter until the 29th July 2024. The matter was postponed to the 29th July 2024 for the hearing of the last witness, the insured driver. On the 29th July 2024 the trial continued and the defendant had an opportunity to call the insured driver to tender his evidence.

COMMON CAUSE

[3] The following are the material common cause facts:

3.1. That a collision occurred on the 10th October 2019;

3.2. That the collision occurred at about 08h55 am;

3.3. The collision occurred on the R71 Magoebaskloof public road;

3.4. The collision occurred between motor vehicle with registration letters and numbers D[…] (Ford Ranger) and motor vehicle with registration letters and numbers C[…] (Hyundai i20);

3.5. The plaintiff was the driver of the Hyundai at the time of the collision and the Ford Ranger was driven by the insured driver, Mr Keith Roy Baragwanath;

3.6. The accident occurred on the road depicted in photographs in the trial bundle;

3.7. It was further common cause that the road was slightly wet on that morning and that there was light mist over the area where the collision occurred;

3.8. The plaintiff's vehicle was travelling from Tzaneen to Polokwane and the insured driver's vehicle was travelling in the opposite direction.

THE PLAINTIFF'S EVIDENCE

[4] The plaintiff's version is that on the 10th October 2019, she was driving from Tzaneen heading to Polokwane via Magoebaskloof road at 08h55 am. The plaintiff indicated that she is familiar with magoebaskloof road since she has been driving the same road 3-5 days per week for business purposes. She had three passengers in her car, Mixo Mhlari her daughter, who was in front seat and other two passengers occupied the back seat, namely, Y[..] M[..], 3-4 years old minor child and Ms Green Leaf Risimati. The plaintiff confirmed that the road was slightly wet with light mist. The plaintiff further indicated that she could see at the distance of approximately 20 metres. The plaintiff confirmed that the road has sharp curve and that she could not see far as a result of the mist, and she further estimated that when on the curve she could see even less at the distance of approximately 5-10 metre as the road has a sharp curve. The plaintiff alleged that she was driving below the speed limit of 60km as she was at the curve.

[5] The plaintiff testified that there were two lanes going to the same direction of her travel and one lane from opposite direction. She drove on her left lane, there was a taxi in front of her which was emitting smoke from the exhaust. The plaintiff tried to avoid the taxi which was emitting smoke by driving in her right second lane from Tzaneen to Polokwane.

The plaintiff overtook the taxi through the second lane, thereafter, she saw a white ford ranger, coming in an excessive speed from the opposite direction, which had lost control and swerved to her lane of travel. In cross examination, the plaintiff, conceded that she does not know the speed the insured driver was driving at the time of the collision. According to the plaintiff, the motor vehicles collided head on at her correct lane. The plaintiff testified that she was driving at a speed of 60km per an hour and that she did not apply brakes as the collision abruptly occurred.

MIXO MHLARI'S EVIDENCE

[6] Mixo Mhlari is the daughter to the plaintiff. Mixo Mhlari testified that on the date in question she was a passenger occupying the front seat when the accident occurred. She testified that she saw how the accident occurred as she was occupying the front seat. She confirmed that there was a taxi in front emitting smoke from the exhaust. The plaintiff changed left lane to the right lane since there were two lanes going to the same direction. The plaintiff was avoiding the taxi which was emitting smoke from the exhaust in front of their motor vehicle. Mixo Mhlari testified that suddenly, after a short while she heard a scream from Green Leaf Risimati, who was seated at the back, when she saw the ford ranger which had encroached on the plaintiff's lane. She looked back and quickly in front and she saw the insured motor vehicle, a ford ranger which was driving on their lane of travel coming from opposite direction. She indicated that she saw the insured motor vehicle at a distance of approximately 10 metres, she was absolutely terrified and she closed her eyes, then, the accident occurred. She confirmed that the

plaintiff motor vehicle was driving at the speed of 60km per hour. She further stated that the plaintiff applied brakes to avoid the accident.

MR STRYDOM'S EXPERT'S OPINION

[7] The plaintiff called an expert witness, Mr Darrel Strydom in order to assist the court in determining the most probable version between the one for the plaintiff and that of the defendant.

Parties agreed that Mr Strydom is an expert in the field of accident reconstruction. He testified that his instructions were to assist in determining how the accident occurred, the point of impact, the cause of the accident, and whether the collision could have been avoided.

[8] Mr Strydom testified that he visited the scene of accident on the 30th March 2023. He consulted with the plaintiff, Mixo Mhlari and Green leaf Risimati. He took some photos, and considered all witness statements and photos from the Haenertsburg Police Station docket under Cas number: 14/10/2019[1]. Mr Strydom testified that after the assessment of the whole matter he concluded that the insured driver probably lost control of his motor vehicle and swerved to the plaintiff's lane. Mr Strydom indicated that the damage of the plaintiff's motor vehicle made him to conclude that it was probable that the insured driver lost control and encroached to the plaintiff's lane, thereafter, tried driving back to his left lane. Mr Strydom opined that during the moment the insured driver was trying to drive back to his lane, he unfortunately, collided with the plaintiff's motor vehicle which was driving on his rightful lane.

[9] Mr Strydom indicated that the reason the insured motor vehicle had a huge damage on the right front side is because it collided to the left side of the plaintiff's motor vehicle during the time the insured driver was trying to return to his lane. Mr Strydom emphasised that the collision occurred at the moment the insured driver was

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[1] Joint Bundle, page 68

trying to avoid the collision by swerving back to his left lane of travel. The quarter of the plaintiff's motor vehicle was pushed to the right as a result of force of gravity during the collision. The above opinion was drawn to clear the fact that the quarter of the plaintiff's motor vehicle was found facing the oncoming traffic and the insured motor vehicle was found on the left of his lane. He testified that the final stationery of both motor vehicles as appears in photo album, taken on the date of accident assisted him to draw his opinion[2]. Mr Strydom opined that nothing the plaintiff could have done under the circumstances to avoid the accident, as there were other motor vehicles which were traveling on the left and right side of the plaintiff's lane.

[10] In summary, Mr Strydom testified that the insured driver's version that the accident occurred in his lane of travel is improbable for the following reasons: The critical curve speed (the speed at which a vehicle will start to move out of control) on the curve the plaintiff was negotiating was +- 70km/h. It is therefore improbable that the plaintiff could have lost control of her vehicle when she was travelling at 60km/h even in the slightly wet conditions of that morning; Even if the plaintiff could have lost control (which is improbable), her vehicle would have moved to her right and not to the left as alleged by the insured driver; If the collision occurred in the insured driver's lane as alleged, the plaintiff's vehicle would not have ended up in the middle of the road as appearing in the photo[3]; The plaintiff's vehicle would have stopped in the insured driver's lane of travel and closer to the verge of the grass.

[11] In cross examination Mr Strydom considered that he did not consult with the insured driver when assessing the cause of accident and further that he could not get the police officer Sergeant Maake, who attended the scene of the accident. He conceded that consulting with the insured driver would have benefitted the court. He indicated that he could not consult with Sergeant Maake because he was informed that he is no longer employed at Haenersburg Police Station, so, he could not be located. Mr Strydom indicated that although he did not consult with the insured driver, his version

[2] Joint Bundle, page 54 & 50
[3] Joint bundle, page 84

from the statement was clear, although he conceded that it would have put great value to his opinion.

[12] Mr Strydom concluded that the accident occurred in the middle or plaintiff's lane because the glasses and pieces of plastics from motor vehicles had finally rested at the direction of where the motor vehicles were traveling. He indicated that he is not in position to opine who among the drivers, was driving in excessive speed before the accident.

INSURED DRIVER'S EVIDENCE

[13] Mr Baragwanath (the insured driver) confirm that he was a driver of the insured motor vehicle on the date in question. He was traveling from Polokwane to Tzaneen via magoebaskloof road. He testified that he is familiar with magoebaskloof road. He knew that when the road is wet is too slippery, so, he was traveling at the speed of approximately 60/70 km per hour. The insured driver further testified that the plaintiff's motor vehicle was driving behind a mini bus taxi when it lost control, spun and veered to his lane of travel. He tried to avoid the collision by driving to his far left but he noticed some curbs on the side of the road, therefor, he could not do much but only hoped that the plaintiff's motor vehicle is going to pass. He thought that the side curbs might damage his tyres, then, he couldn't go much to his left, as a result the collision occurred.

[14] The insured driver testified that he knew that when magoebaskloof road is wet, it becomes too slippery and worse because of the oily leaves which are falling into the road.

PLAINTIFF'S SUBMISSIONS

[15] The plaintiff submits that from the evidence adduced, it is precise that each of the drivers maintained that the accident occurred in their respective lanes of travel and that

the other vehicle encroached into the incorrect lane. These versions are therefore mutually exclusive. The plaintiff further submits that the technique of resolving two mutually destructive versions starts with evaluating the credibility of the witnesses. The plaintiff further made submissions that her evidence and Mixo's evidence, were credible and reliable witnesses who did not contradict each other except on the issue of whether the plaintiff applied brakes or not before the collision.

[16] The plaintiff submits that minor contradiction is not material and as held **in Santam Beperk v Biddulph 2004 (5) SA 586 (SCA)**

> **"***the proper test is not whether a witness is truthful or indeed reliable in all that he says, but whether on a balance of probabilities the essential features of the story which he tells are true."*

[17] The plaintiff submits that the plaintiff and Mixo's evidence is supplemented by the evidence of the expert witness who highlighted the improbabilities of the insured driver's version with regard to the plaintiff losing control of her vehicle, the area of impact and the final resting positions of the vehicles after the accident. The plaintiff spoke freely and honestly about how she travelled on this road regularly, her knowledge of how dangerous that section of the road is, how she ensures every time that she keeps to the speed limit and how the collision occurred.

[18] The plaintiff submits that on a balance of probabilities, the evidence of both the plaintiff and Mixo should be accepted as probable true and accurate and the evidence of the insured driver be rejected.

DEFENDANT SUBMISSION

[19] On the 29 July 2024 the court gave directive for the parties to prepare and submit their heads of argument on or before the 16th August 2024. The plaintiff sent their heads of argument as directed but the defendant did not make any submission. The court

should proceed to adjudicate on this matter on the absence of the defendant's heads of argument.

EVALUATION OF THE EXPERTS WITNESS EVIDENCE

[20] Regarding the evaluation of credibility and reliability of expert evidence, Wallis JA (Fourie and Koen AJJA concurring) in *Pricewaterhouse Coopers Incorporated and Others v National Potatoe Co-operative Ltd and Another [2015] 2 All SA 403 (SCA)*[4] referred to *Wightman v Widdington (Successon de) 2013 QCCA 1187 CanLII)* where it was remarked thus:

"<u>Legal principles and tools to assess credibility and reliability</u>

> [326*] "Before any weight can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist"*
>
> *[327] "As long as there is some admissible evidence on which the expert's testimony is based it cannot be ignored; but it follows that the more an expert relies on facts not in evidence, the weight given to his opinion will diminish".*
>
> *[328] An opinion based on facts not in evidence has no value for the Court.*
>
> *[329] With respect to its probative value, the testimony of an expert is considered in the same manner as the testimony of an ordinary witness. The Court is not bound by the expert witness's opinion.*
>
> *[330] An expert witness's objectivity and the credibility of his opinions may be called into question, namely, where he or she:*
>
> - *accepts to perform his or her mandate in a restricted manner;*

[4] At page 441 para [98];

- *presents a product influenced as to form or content by the exigencies of litigation;*

- *shows a lack of independence or a bias;*

- *has an interest in the outcome of the litigation, either because of a relationship with the party that retained his or her services or otherwise;*

- *advocates the position of the party that retained his or her services; or*

- *selectively examines only the evidence that supports his or her conclusions or accepts to examine only the evidence provided by the party that retained his or her services."*

[21] *In Ruto Flour Mills v Adelson (1) 1958 (4) SA 235 (T)*[5] Boshoff J stated that a party seeking to introduce expert evidence must satisfy the court that the witness not only has specialist knowledge, training, skill or experience but that he/she can, on account of these attributes or qualities, assist the court in deciding the issue, that he/she is an expert for the purpose for which he/she has been called upon to express an opinion,[6] the witness does not or will not express an opinion on hypothetical facts that have no bearing on the case or which cannot be reconciled with all the other evidence in the case.[7]

[22] In the case of *Holtzhauzen v Roodt* 1997(4) SA 766 (W) at 772H-I, the first principle regarding the evidence of an expert is that such evidence must be tested against known facts because the primary factual evidence is of the greatest importance. This means that the facts upon which the expert opinion is based must be proved by admissible evidence.

[5] At 237C-D.
[6] Goliath v Fedgen Insurance Company Ltd 1994 (2) PH F 31 E at 83.
[7] S v Mkohle 1990 (1) SACR 95 (A) at 100d.

[23] In the case of *Motor Vehicle Accident Assurance Fund V Kenny* 1984 (4) SA 432 (ECD) at 436 H – 437 B the court held as follows with regard to direct evidence of eye witnesses and expert evidence:

> “An expert's view of what might probably have occurred in a collision must, in my view, give way to the assertions of the direct and credible evidence of an eyewitness. It is only where such direct evidence is so improbable that its very credibility is impugned, that an expert's opinion as to what may or may not have occurred can persuade the Court to his view.”

THE COURT FINDINGS

[24] Mixo Mhlari corroborated the version of the plaintiff that the insured motor vehicle lost control, swerved in to their lane and had a head on collision. The plaintiff and Mixo Mhlari evidence only contradicted where the plaintiff avers that she did not apply brakes but Mixo Mhlari stated that the plaintiff applied brakes before the accident. Photos which were taken at the scene of the accident show the quarter of the plaintiff’s motor vehicle front part being at the insured vehicle’s lane facing the oncoming traffic towards Polokwane and the insured driver’s motor vehicle was found at the left side of his lane facing towards Tzaneen.

[25] The insured driver’s evidence is that the plaintiff lost control of her motor vehicle, it spun and encroached into his lane, the oncoming traffic, before colliding with the insured motor vehicle.

[26] The versions of both drivers are mutually destructive but the court is going to consider the most probable version between the two, the court will further consider other evidence such as the photos taken at the scene on the date of the accident in question, in order to come to a fair conclusion.

[27] Mr Strydom is an accident reconstruction expert, who was appointed by the plaintiff. On the 30 March 2023, Mr Strydom consulted with the plaintiff, Mixo Mhlari and Green Leaf Risimati. Mr Strydom did not consult with the insured driver and the police officer sergeant Maake who attended the scene of accident. Mr Strydom opinion was based on the version of the plaintiff and passengers in her motor vehicle. In cross examination he conceded that consulting the insured driver as an eye witness and the police officer who attended the scene of accident the same date the accident occurred would have assisted and benefitted the court. The evidence of an independent witnesses is always beneficiary to the court but in this case the evidence of the police officers who investigated the case would have significantly benefitted the court.

[28] The evidence of Mr Strydom that the insured motor vehicle had probably lost control, drove on the oncoming traffic, collided in to the left side of the plaintiff's motor vehicle by its right front side was not the evidence of neither the plaintiff nor Mixo Mhlari. In the case of *Holtzhauzen v Roodt* referred in *supra* the first principle regarding the evidence of an expert is that such evidence must be tested against known facts because the primary factual evidence is of the greatest importance. This means that the facts upon which the expert opinion is based must be proved by admissible evidence.

[29] The court finds the evidence of the plaintiff, Mixo Mhlari and Mr Strydom to be improbable after the court has considered the final resting of both motor vehicles as appears from the photos taken after the accident[8], and also consideration of the evidence by the insured driver.

[30] The court finds the evidence of the insured driver to be the most probable version after the court had an insight of the photos taken from the scene of the accident. The final resting of both motor vehicles made the court to find it probable that the point of impact was on the insured motor vehicle's lane. The court finds that the plaintiff's motor vehicle lost control as a result of wet road, encroached to the oncoming traffic and it collided head on with the insured motor vehicle which was driving on his rightful lane.

[8] Ibid.par 9, photos

[31] The court finds that the insured driver has failed to avoid the accident while he had an opportunity to do so. The insured driver indicated that he saw that the plaintiff has lost control of her motor vehicle but he could not drive to the far left because there were some curbs which he thought it may damage his tyres. The insured driver decided not to move to the far left and he could not even apply brakes. The insured driver failed to avoid the collision when by exercise of reasonable care, he could or should have done. In my view the insured driver was driving in excessive speed, even though he knew the danger of driving in a wet road which is slippery. If the insured driver was driving in a reasonable speed, he would have easily avoided the accident. Both cars were seriously damaged and passengers had severely injured, so in my view, both cars were driving at an excessive speed.

[32] The court finds that both drivers are equally to be blamed for the accident in question because they both failed to drive their motor vehicle with dure care. The drivers of both motor vehicles were equally negligent.

Cost

[33] The court has considered that the plaintiff should be awarded a reasonable cost for bringing her matter for hearing and considered that the plaintiff has succeeded to prove her case of negligence against the defendant.

[34] In the result, I make the following order;

[1] The Defendant is liable for 50% of the plaintiff's proven or agreed damages

[2] The Defendant is ordered to pay cost on party and party scale, scale B for counsel's fee.

E MASHAMBA

ACTING JUDGE OF THE HIGH COURT,

POLOKWANE, LIMPOPO DIVISION

APPEARANCES

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DATE OF HEARING:	**11th, 12th June 2024 and 29th July 2024**
HEADS OF ARGUMENT:	**16TH AUGUST 2024**
DATE OF JUDGEMENT:	**05th SEPTEMBER 2024**