

REPUBLIC OF SOUTH AFRICA



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

Case No: 76428/2013

Reportable: No
Of interest to other Judges: No
Revised: No



SIGNATURE

Date:

In the matter between:

MLANGENI, ZODWA EVELINE

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

JUDGEMENT

MOOKI J

- 1 The plaintiff was injured whilst a passenger in a taxi on 8 April 2010. She seeks relief against the Road Accident Fund on the basis that her injury came about from the driving of a motor vehicle. The plaintiff is required to demonstrate that she was injured because of negligence by the insured driver. She was injured as detailed below.
- 2 She was one of two passengers who was seated at the front of the taxi. The driver was the third person. The plaintiff was seated between the driver and a fellow passenger. The taxi was travelling on the N17 between Johannesburg and Embalenhle, in the direction of Secunda when there was a sudden shattering of the windscreen, followed by an object striking the plaintiff on her left upper arm area.
- 3 The orthopaedic specialist who later examined the plaintiff stated that the injury was a fracture of the proximal humerus involving the shoulder joint. The plaintiff was also diagnosed with neurapraxia of the axillary nerve and damage to the axillary vein.
- 4 It was later established that the object that smashed the windscreen and struck the plaintiff was made of steel.
- 5 The plaintiff sought leave, which was granted, to present her case by way of affidavits, in terms of Rule 38 (2). The plaintiff engaged Mr. Konrad Lotter to reconstruct how the plaintiff might have gotten injured. Dr Lotter was also asked to address the involvement of any party who could have led to

the incident and the probable reasons for the incident. Mr. Lotter professed expertise in the reconstruction of accidents.

- 6 Mr. Lotter prepared a report based on the following information: copies of the MMF1 claim form, RAF 1 claim form, accident report, an affidavit by the plaintiff, and several photographs of the scene of the incident.
- 7 Mr. Lotter postulated 2 scenarios on how the plaintiff may have become injured. I quote the relevant section of his report in full:

3. DISCUSSION

3.1

Based on the above, it is therefore evident that there are two basic scenarios, as it relates to the driver of the minibus.

3.2 Scenario "A" – *(for the first two scenarios in the original report)*

3.2.1

Firstly the first two scenarios indicate the object "falling off" or "coming loose" from an approaching vehicle. In these scenarios, it can be argued that the two vehicles passing by each other needs to be relatively close to each other (or very close), for the object to penetrate the minibus mostly from directly in front. This would indicate that the driver of the minibus did not move further towards the left of his own lane while the approaching vehicle was approaching from the front. For it to occur in this manner, the minibus would need to be close to the lane divider.

3.2.2

Considering that he was close to the separation between the lanes and the fact that the normal lane is in the order of 3.6 m wide, combined with the fact that the minibus is in order of approximately 1.8 m wide, it means he would

*have been able to move nearly 1.8 m further to the left, while still being in his normal driving lane. If he had done this, it means that theoretically the object will not even penetrate the vehicle, as the position the object will move past, will now be to the right of the minibus, missing the minibus completely. This aspect is also explained through the sketch in **Annexure A**, where “to scale” it is clearly evident that if the object penetrated the vehicle indicated on the right in the lane (indicated in dotted lines) on the left-hand side, it will completely miss the vehicle on the left in the lane (solid lines).*

3.3 Scenario “B” – (for the third scenario in the original report)

3.3.1

*In this scenario, the object is thrown in the air by the leading vehicle. It however needs to be noted that any point of the circumference of a tyre always moves forward, except at the bottom of the rotation where it is in effect stationary for a fraction of a second. This is explained in **Figure 1** at the top of the next page, where the motion of any point on a wheel is indicated by the curved line. At the top of the rotation the speed is double the vehicle’s speed, while at the bottom, the speed is zero. It is however unlikely that the object can be thrown upwards at the bottom of the rotation as the presence of the wheel will prevent such an event from occurring. This means that if an object is thrown into the air, into motion will be forward. As the ejection occurs in the lower quarter of the tyre, the forward speed of the object would be in the order of half the speed of the vehicle.*

Analysis:

- 8 Mr. Visser appeared for the plaintiff. He submitted that the two scenarios posited by Mr. Lotter demonstrate that the taxi driver was at fault. I enquired from Mr. Visser about the preparation of Mr. Lotter’s report. I particularly enquired whether Mr. Lotter, in his modelling, had access to the object that struck the plaintiff and whether he was aware of both the

dimensions and mass of the object. I had put to counsel that it is not possible to model the behaviour of an object without, for example, being aware of the mass, nature, and dimensions of an object. I had also put to counsel that objects are expected to behave differently depending of those properties.

- 9 Mr. Visser submitted that Mr. Lotter had access to photographs of the object. He also had photographs from the scene, and that Mr. Lotter relied on those for his conclusions. Counsel also submitted that it was known that the object was made of steel because the dimension of the object was recorded at the hospital when the object was extracted from the plaintiff. It was also known that the object was made of steel. Counsel, despite the plaintiff having sought leave to make her case on paper, with such leave having been granted, moved that Mr. Lotter give oral evidence. The court agreed.
- 10 Mr. Lotter confirmed his written report. He did not have the physical object when he prepared his report. He concluded that the object fell off another vehicle. He further concluded that the object would be expected to have reached a maximum height of 1.5 metres, on being displaced. He said the taxi driver would not have seen the object, given the height at which the driver sits in a minibus taxi.
- 11 Mr. Lotter told the court that he discussed the incident with Mr. Skhosana, the taxi driver, shortly before giving evidence. Mr. Skhosana confirmed to him that there was no vehicle ahead of Mr. Skhosana, and that the approaching vehicle was driving on the opposite direction (i.e. driving

towards Mr. Skhosana, from the direction opposite to that of travel by Mr. Skhosana). Mr. Skhosana told him that the other vehicle drove close to the white line as it passed his taxi. Mr. Lotter concluded that Mr. Skhosana was driving closer to the centre line, and that the object would have missed the taxi had Mr. Skhosana been to the left of the centre line.

12 Mr. Skhosana also gave evidence. He confirmed the seating arrangement at the time of the incident. He observed that it was safe to be on the road. He was travelling in the direction of Secunda, during the day. There were no cars ahead of him at the time of the incident. He observed a white bakkie travelling from the opposite direction, driving close to the barrier line. The bakkie did not cross the barrier line. He heard a loud explosion as the bakkie drove past him; whereupon a piece of iron penetrated the windscreen of his taxi, striking the plaintiff. He was driving on the middle of the road in his lane of travel at the time.

13 Counsel submitted that Mr. Skhosana was negligent, and that the plaintiff need only show 1% negligence for the Fund to be liable on the merits. It was submitted on behalf of the plaintiff that the court ought to find that the second scenario posited by Mr. Lotter applied. The first scenario did not apply because there was no car ahead of Mr. Skhosana at the time of the incident.

14 It was submitted that the second scenario applied because Mr. Skhosana did not move to his left when the bakkie “hugged” the barrier line as it drove past Mr. Skhosana’s taxi; that the object would not have penetrated the windscreen had Mr. Skhosana moved to the left. Mr. Skhosana was said

to have placed himself in a position of an emergency by not keeping a safe margin of 1.8 metres when the bakkie drove past him.

- 15 I am not persuaded that Mr. Skhosana was shown to have been negligent. He maintained that he was driving in the middle of the lane in his direction of travel. There were no impediments on the road. Mr. Skhosana gave evidence that he made the appropriate observations before he entered the road. There were no cars ahead of him. He drove on the middle of the lane in his direction of travel.
- 16 The evidence that the driver of the bakkie was “hugging” the barrier line is speculative. I am not, in any event, persuaded that Mr. Skhosana should have moved his taxi to the left side of the road when the bakkie from the opposite direction was about to drive past him. The law does not require Mr. Skhosana to have been hypervigilant. I disagree that he placed himself in a position of an emergency.
- 17 Mr. Lotter gave evidence that Mr. Skhosana would not have seen the object when the object was airborne. That is because the object, according to Mr. Lotter, would have reached a maximum height of 1.5 metres. This merits at least two comments. First, Mr. Skhosana would not have been able to avoid the object if he could not see the object. Second, Mr. Lotter’s evidence is unscientific.
- 18 The evidence is unscientific because it is not possible to model the behaviour of a projectile without basic information on the properties of such a projectile. The make-up of the object (stone, paper, wood, granite),

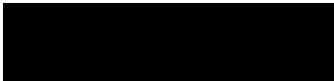
the mass of the object, and the dimensions of the object (flat, irregular shape, a sphere, etc.) do bear on how a projectile might behave.

19 Counsel for the plaintiff sought to persuade the court that there was information about the object; namely that the object was made of steel and that the dimensions of the object were recorded when the object was removed from the plaintiff. Counsel further submitted that the mass of the object could be derived from the dimensions of the object together with the known fact that the object was made of steel.

20 The submissions by counsel are unfounded. The fact is that Mr. Lotter drew conclusions without reference to the issues mentioned by counsel. Mr. Lotter's conclusions were based exclusively on documents.

21 I make the following order:

(a) The plaintiff has not shown that the insured driver was negligent in connection with the plaintiff being struck by a steel object on 8 April 2010.


OMPHEMETSE MOOKI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearance:

On behalf of the Plaintiff

L J Visser

Instructed by:

Salome le Roux Attorneys

On behalf of the Defendant

No appearance

Date of Hearing:

7 August 2024

Date of Judgement:

13 August 2024