



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

- | | |
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| (1) | REPORTABLE: |
| (2) | OF INTEREST TO OTHER JUDGES: |
| (3) | REVISED: |
| (4) | Signature:  Date: 29/10/23 |

CASE NO.: 56985/2020

In the matter between:

DLAMINI, SANELISIWE

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

Kumalo J

INTRODUCTION

- [1]. The Plaintiff, Ms. Sanelisiwe Dlamini, issued a claim against the Defendant, the Road Accident Fund, arising from an alleged motor vehicle accident that occurred on 1 January 2016 at or near Phakeni Street, Ladysmith.

- [2]. The Plaintiff was a passenger in the motor vehicle driven by the insured driver, Thabane Gamede, when the incident occurred. It is alleged that the insured driver refused to stop the motor vehicle when requested by the plaintiff. She then opened the door and jumped out of the motor vehicle whilst it was moving.
- [3]. As a result of the said incident, the Plaintiff sustained multiple body injuries, namely, mandible injury, right foot, right shoulder, right hand, left ankle, and knee abrasions, swollen upper and lower lips, and facial abrasions.
- [4]. Both merits and quantum issues are in dispute, and this court is required to adjudicate both. The Defendant has not yet made an election concerning the seriousness of the injuries, and as such, the general damages are to be postponed *sine die*.
- [5]. On the day of the hearing, there was no appearance on behalf of the Defendant.
- [6]. The Plaintiff made an application in terms of rule 38(2) for the admission of affidavits and reports of her experts, which application was granted. However, it is the ruling of this court that the expert report of Dr Thobejane, the neurosurgeon, is inadmissible because it is not accompanied by the expert affidavit confirming its content. The content thereof cannot be considered for this trial in the absence of the affidavit from the neurosurgeon.

- [7]. The issue for the determination of the merits is the cause of the accident, the plaintiff's degree of negligence, if any, and whether the Defendant is liable for compensation to be paid to the plaintiff.
- [8]. In terms of section 17(1) of the Road Accident Fund Act, Act 56 of 1996, the Defendant is obliged to compensate a person for loss or damage suffered because of a bodily injury caused by or arising from the driving of a motor vehicle. The Defendant's liability is conditional upon the injury having resulted from the negligence or wrongful act of the driver. This means that the Plaintiff is required to prove such negligence or wrongful act.
- [9]. The Plaintiff's counsel submitted that it is crystal clear that the insured driver was the sole cause of the collision because he failed to have any, alternatively, sufficient due regard to the rights of other road users, and more particularly, the rights of the people being conveyed in his motor vehicle.
- [10]. The facts of this matter clearly indicate that there was no collision. The Plaintiff jumped from a moving vehicle.
- [11]. Counsel submitted that the Plaintiff's action was justifiable as her life was in danger and sought to rely on the case of *R v Cawood*¹ and *Tatobaya v Road Accident Fund*².

¹ 1944 GWL 50

² 2002 JDR 0795 (TKH)

- [12]. In *R v Cawood*, the doctrine formulated was "a man who, by another's want of care, finds himself in a position of imminent danger, cannot be held guilty of negligence merely because in that emergency he does not act in the best way to avoid danger."
- [13]. In the *Totobabayo* case, Maya J, as she then was, held the Defendant liable 100% where the Plaintiff, anticipating that the truck they were riding on would roll back and career down the incline and into a deep gorge below, made a quick judgment call and jumped off the vehicle.
- [14]. The vehicle capsized as he had anticipated, but unfortunately, it crushed his leg. This case is distinguishable on its facts from the matter before this court.
- [15]. In this case, Counsel argued that the Plaintiff repeatedly requested the insured driver to stop the motor vehicle, but the driver failed to comply. It is alleged that the insured driver probably had intentions to kidnap the plaintiff and intended to commit other serious crimes like murder, rape, or human trafficking.
- [16]. However, it is not as clear as the Plaintiff's counsel suggests. As a matter of fact, it is speculation what the insured driver's intentions were. This court is told that a case docket was opened against the insured driver, who was charged with the crime of kidnapping, but was not told what the outcome thereof was.

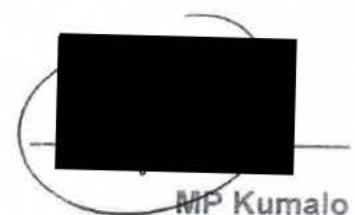
- [17]. According to the case docket statement, she was hiking with her friend, Bonisiwe Ndlovu. They both were offered a lift to their destination. There were four other men in the car who, according to the Plaintiff, were dropped off at a location in Enkuthu.
- [18]. The insured driver drove back with her and, I assume, her friend Bonisiwe. I must also accept that Bonisiwe was still in the car when the incident happened because, according to the Plaintiff, the only people dropped off were the four male individuals who were in the car when the insured driver offered a lift to the Plaintiff and Bonisiwe.
- [19]. I make the above assumption because the Plaintiff does not state where Bonisiwe was when she requested the insured driver to stop or what happened to her. The only other time Bonisiwe is mentioned is when the Plaintiff has allegedly jumped from the moving vehicle. Bonisiwe came running to her, asking if she was injured.
- [20]. I believe it would be helpful to restate a fundamental principle that applies in civil matters. In Schwikkard PJ et al³, the learned authors wrote –
“In civil cases, the burden of proof is discharged as a matter of probability. The standard is often expressed as requiring proof on a ‘balance of probabilities’, but that should not be understood as requiring that the probabilities should do no more than favour one party in preference to the other. What is required is

³ Schwikkard PJ et al *‘Principles of Evidence’*

that the probabilities in the case be such that, on a preponderance, it is probable that the particular state of affairs existed.”

- [21]. In any civil case, as in any criminal case, the onus can ordinarily be discharged by adducing credible evidence to support the case of the party on whom the onus rests.
- [22]. The evidence presented by the Plaintiff is in the form of her sworn statements contained in both her section 19(f) and the affidavit in the case docket uploaded on caselines.
- [23]. I am enjoined to evaluate the Plaintiff's evidence holistically and not in a piecemeal fashion. Plaintiff alleged that she jumped from the moving vehicle because the driver of the vehicle refused to stop the car where she wanted to alight. The conduct of the driver constituted a clear and present danger to her of a possible kidnapping, rape, and or human trafficking.
- [24]. To bolster the above assumption, reliance is placed on the fact that a kidnapping docket was opened. I hasten to add that the docket was opened in January 2016. This court is not told what happened to the criminal case opened against the driver. The matter came before the court in October /November 2024, and surely by now there would have been an outcome in that matter.

- [25]. The content of the docket uploaded to caselines also contained a statement from the insured driver. It is evident from his statement that Bonisiwe was still in the car when the Plaintiff jumped out while the vehicle was moving.
- [26]. Bonisiwe was a key witness who could have clarified to the court what had happened on that day. She, however, was not called to testify. As a matter of fact, Bonisiwe was only mentioned in the statement found in the police docket. A reading of the plaintiff's particulars of claim created an impression that the Plaintiff was alone with the insured driver when the incident happened.
- [27]. Based on all the above, and with the evidence available thus far, this Court is not satisfied that the Plaintiff discharged the onus upon her to prove her case.
- [28]. In the circumstances, the following order is made:
1. Absolution from the instance is granted.
 2. There is no order as to the costs.

A handwritten signature in black ink, which appears to be 'MP Kumalo', is written over a solid black rectangular redaction box. The signature is written in a cursive, flowing style.

Judge of the High Court, Pretoria

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines.

For the plaintiff: Adv O Mulibana

Instructed by: SJ Chuene Attorneys

For the defendant: no appearance