

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

Case No. 08/9454

Date:03/12/2009

In the matter between:

ELIZABETH MATLADI KHOZA

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

MEYER, J.

[1] The plaintiff in her personal capacity and in her representative capacity as mother and natural guardian of Angel Khoza instituted separate actions under case numbers 08/9459 and 08/9454 against the defendant. The plaintiff is the widow of the late Mr. Dennis Mzamani Khoza, who died on 31 May 2007 as a result of the motor vehicle collision in issue. The deceased was the natural father of Angel Khoza, who was born on 23 February 2004. The plaintiff, in her personal capacity, claims compensation from the defendant for the loss that she has suffered through being deprived of the support that she was entitled to receive from her husband and she also claims medical and related expenditure. In her representative capacity she claims compensation from the defendant for the loss of support that Angel has suffered as a result of the death of Angel's father.

[2] At the commencement of the trial an order was made consolidating the separate actions. An order was also made that the question of the defendant's liability towards the plaintiff and Angel Khoza be determined first and that the question of the *quantum* of damages be stayed and postponed *sine die*. By the end of the trial the only issue remaining between the parties on the question of liability was whether the collision in issue was caused by the negligence of the driver of an unidentified taxi ('the taxi').

[3] The plaintiff, Ms. Elizabeth Khoza, testified. Ms. Veronica Mehlape and Mr. Norman Khoza were also called as witnesses for the plaintiff. The defendant called no witnesses. I consider the plaintiff, Ms. Mehlape, and Mr. Khoza to be credible witnesses and their evidence reliable and probable. They corroborate each other on many of the material aspects. Inconsistencies between their respective accounts are such that are to be expected in the circumstances. The plaintiff and Mr. Khoza were confronted under cross-examination with certain inconsistencies between previous statements made by them and their evidence in court. Such inconsistencies are, in my view, adequately explained by them and are essentially ascribed to language issues and the failure of those who took their statements to have read them back and explained their contents to them in their own languages.

[4] It is undisputed that the collision occurred on 31 May 2007 at around 4:00 pm on the R101 national road in the vicinity of Bela Bela ('the road'). It is a tarred road with two lanes for traffic travelling in opposite directions. The

one is for traffic travelling in a northerly direction towards Limpopo ('the left lane') and the other is for traffic travelling in a southerly direction towards Pretoria ('the right lane'). There is a yellow line on both outer sides of the road and the tarmac ends approximately 30 centimetres beyond that. At the time of the collision the road was abutted on either side by an expanse of uneven ground which was covered with burnt grass. In the immediate vicinity where the point of collision (impact) occurred, there is a ditch or drain on each side of the road with a concrete storm water pipe running underneath the road (exhibit 'A'). Each drain is demarcated by two short poles facing in northerly and southerly directions respectively and having red and white chevron plates attached to them.

[5] The undisputed evidence is further that the collision occurred between a maroon Nissan motor vehicle with registration letters and number RCJ 031 GP ('the Nissan'), which was travelling in the left lane prior to the collision, and a green Ford motor vehicle with registration letters and number KJB 404 GP ('the Ford'), which was travelling in the right lane prior to and at the time of the collision. Mr. Norman Khoza was the driver of the Nissan. His father was seated next to him. The deceased, Angel Khoza, and the plaintiff were seated at the back. Ms. Veronica Mehlahe was a passenger in the Ford.

[6] It emerges from the evidence of the plaintiff, of Ms. Mehlahe, and of Mr. Khoza that the Nissan was travelling in the left lane. A large truck approached the Nissan in the right lane. The Ford was travelling immediately behind it. The taxi was travelling behind the Ford. Mr. Khoza testified that he

did not notice the Ford behind the truck. This, in my view, is quite understandable since the truck was a long one and the Ford was following it closely. The plaintiff described the truck as one similar to the trucks that are used for the delivery of petrol. Mr. Khoza described it as a long truck comprising a mechanical horse, a trailer, and a small trailer. Ms. Mehlape testified that the following distance between the Ford and the truck was such that the Ford would have had to reduce speed if the taxi attempted to fit in between the rear of the truck and the front of the Ford.

[7] The taxi imprudently went over from the right lane in which it was travelling behind the Ford into the left lane of the oncoming Nissan and it continued in overtaking the Ford and the truck. The Nissan was travelling in the opposite direction to the taxi, which was then on its wrong side of the road. Mr. Khoza testified that he noticed the taxi for the first time when it was a short distance away from reaching the rear end of the truck and when the Nissan approached the front end of the truck.

[8] The taxi was travelling at a high speed. Mr. Khoza testified that the Nissan was travelling at a speed of about eighty kilometres per hour. Mr. Khoza tried to warn the taxi of the Nissan's approach by sounding its hooter, but it understandably had no effect given the distance between the two oncoming vehicles. The taxi continued its course on its incorrect side of the road and it was obvious to Mr. Khoza that a head on collision between the Nissan and the taxi would ensue. Mr. Khoza testified that the only evasive action he could take in the circumstances was to leave the tarmac and move

over onto the gravel on the left side of the road. He did not lose control of the Nissan when it left the tarmac and drove onto the gravel. Mr. Khoza estimated that the drain on the side of the road was about eight metres away from the point where the Nissan left the tarmac and about 3½ metres ahead of the Nissan when he noticed it. Mr. Khoza testified that he realised that he would not be able to stop the Nissan before it collided into the drain and the evasive action that he therefore took was to turn to the right of it. The taxi and the truck had passed the Nissan in the meantime. The Nissan's front wheels struck the tarmac. The level of the tarmac was higher than the gravel surface next to the road at that point. Mr. Khoza lost control of the Nissan which then moved across the road and into the path of travel of the oncoming Ford. Despite evasive action taken by the Ford a collision occurred between the Ford and the Nissan in the right lane in which the Ford was travelling. The post collision movement of the Nissan was onto the gravel on the right side of the road and it came to a standstill at or into the drain which was on that side of the road.

[9] Adv. Mansingh, who appeared for the plaintiff, submitted that the collision between the Nissan and the Ford was caused as a result of the sole negligence of the driver of the taxi. Adv. Uys, who appeared for the defendant, submitted that the collision was caused solely as a result of the negligence of Mr. Khoza. He submitted that Mr. Khoza lost control of the Nissan due to excessive swerving to the right when he tried to avoid a collision with the drain. He further submitted that there was sufficient space between the tarmac and the drain for Mr. Khoza to pass through had he

instead driven the Nissan straight next to the tarmac on the gravel.

[10] The risk of a head on collision between the taxi and the Nissan was a very real possibility. The driver of the taxi was undeniably responsible for the emergency which he had created. That Mr. Khoza took such reasonably evasive action as he could in the circumstances by leaving or swerving the Nissan off the tarmac and onto the gravel part is undisputed. It is reasonable to infer that the Nissan moved onto the gravel at a speed of about 80 kilometres since that was the approximate speed that it was travelling at immediately before leaving the tarmac and there was no evidence that Mr. Khoza applying the brakes of the Nissan at that time.

[11] Although the precise angle at which the Nissan left the tarmac is unknown, it was heading for the drain that was about eight metres or so ahead of it at a speed of about eighty kilometres per hour and it is probable that it would have collided into the drain had some evasive action not been taken. Given the uneven and burnt grass surface on which the Nissan was travelling, Mr. Khoza's judgment that he would not be able to stop the Nissan timeously and the evasive action taken by him in swerving to the right cannot, in my view, be considered unreasonable. Although he did not lose control of the vehicle when he steered it onto the gravel, he testified that the surface was not suitable for a vehicle to drive on and that he was unable to drive properly. Ms. Mehlape also testified that the Nissan 'was moving up and down' when it was travelling on the side of the road.

[12] The Nissan was accordingly forced onto a surface of burnt grass on the side of the road where a vehicle travelling at about 80 kilometres per hour could not properly be controlled and where the Nissan's path of travelling was obstructed by a drain. I find it artificial to compartmentalise this incident. Everything happened in a matter of seconds. Ms. Mehlape testified that after the taxi had overtaken the Ford she saw the Nissan moving off the road and onto the side of the road where it travelled 'a small distance' before it moved back onto the road. She testified that 'it happened fast'. Even if it can be said that Mr. Khoza erred in over-steering the Nissan to the right as was submitted on behalf of the defendant, such error seems to me to be excusable since it was one which a reasonably careful and skilled driver might, in the 'agony' of the moment, have committed. See: *Van Staden v. May* 1940 W.L.D. 198, at p 201; *Thornton v Fisser and Another* 1928 A.D. 398, at p 412; *Kleynhans v African Guarantee and Indemnity Co. Ltd.* 1959 (2) S.A. 619 (ECD), at pp 624 – 625.

[13] The plaintiff has discharged the *onus* of proving that the collision as a result of which she was injured and as a result of which her husband and father of Angel Khoza has died, was caused by the negligence of the driver of the taxi (the unidentified insured vehicle). The conduct of the driver of the taxi was patently negligent. He or she callously disregarded the safety of the other users of the road and particularly that of the occupants of the Nissan. Even if fault should also be ascribed to Mr. Khoza, the fault of the driver of the taxi remains significant and the plaintiff has succeeded in proving the proverbial one percent causal negligence on his or her part.

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

1. The defendant is liable to pay to the plaintiff 100% of the amount of the plaintiff's proved or agreed damages.
2. The defendant is liable to pay to the plaintiff in her representative capacity 100% of the amount of Angel Khoza's proved or agreed damages.
3. The defendant is ordered to pay the plaintiff's costs of this hearing.

P.A. MEYER
JUDGE OF THE HIGH COURT

3 December 2009