

REPUBLIC OF SOUTH AFRICA**SOUTH GAUTENG HIGH COURT, JOHANNESBURG****CASE NO: 43241/08****REPORTABLE**

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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DATE

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SIGNATURE

In the matter between:

DUDUZILE SIBEKO

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

MOKGOATLHENG J

- (1) The plaintiff has instituted action against the defendant for personal injury damages arising from a collision which occurred at Koma Road, Soweto on 17 November 2009. The plaintiff alleges that the sole cause of collision was due to the negligence of the driver of the motor vehicle in question.
- (2) Apart from denying negligence, the defendant pleads that the collision was unavoidable as at the time thereof and immediately prior thereto, the driver of the motor vehicle Elizabeth Mokgathe, experienced a sudden, unforeseen and uncontrollable black-out due to a health condition, which resulted in her losing control of the motor vehicle.
- (3) The defendant by asserting that the driver suffered a sudden unexpected black-out is in essence invoking the defence of automatism, the essence whereof is that at the time of the collision the driver was not in control of her faculties and consequently, could not exercise her volition.

THE FACTUAL MATRIX

- (4) The plaintiff has no recollection as to how the collision occurred, she only remembers that she was a pedestrian on a pavement when a motor vehicle collided with her and rendered her unconsciousness. She regained consciousness in hospital.
- (5) Sarah Masina the plaintiff's mother testified that she, the plaintiff and her grand daughter were pedestrians walking in a easterly direction on a

pavement in Koma Road when a motor vehicle which immediately before the collision was travelling in an easterly direction on the opposite lane, travelled across from its lane onto its incorrect and opposite lane carrying traffic travelling in a westerly direction, traversed the said lane, travelled onto the pavement and collided with them.

- (6) The defendant's counsel put it to Sarah Masina that the reason Elizabeth Mokgathe collided with the plaintiff, was because she suffered from a sudden unexpected black-out as a result of which, she temporarily lost consciousness, and after such collision with the plaintiff, she immediately regained her consciousness.
- (7) Sarah Masina disputed that before the collision Elizabeth Mokgathe experienced a diabetic induced black-out. Testifying from her own experience as a diabetic for thirty years, she stated that after the collision she approached her, and expressed her sorrow at what had happened. She in turn observed her demeanour and behaviour and noticed that she did not appear or behave like a person who had just suffered a diabetic induced black-out.
- (8) From her own personal experience she knows how a person who has suffered a diabetic induced black-out behaves. It would not have been possible for Elizabeth Mokgathe if she had just suffered a diabetic induced a black-out to immediately be able after the collision to drive the vehicle to and fro across two lanes, avoid the traffic thereon, park the vehicle and walk 27 metres to the collision scene.

THE INCIDENCE OF ONUS

- (9) Elizabeth Mokgathe conceded that Sarah Masina's description of how the collision occurred was truthful and correct. Sarah Masina's evidence and Elizabeth Mokgathe's concession that the collision occurred on the pavement on her incorrect side of the road, establishes a *prima facie* case of negligence against her as the driver of the motor vehicle.
- (10) Although the plaintiff's onus to prove her case on a preponderance of probability does not shift, the establishment of a *prima facie* case coupled with the invocation of the defence of automatism by the defendant, the material essence of which reposes within the driver's personal knowledge, places an evidential burden on the defendant to adduce and tender rebuttal evidence which negatives the *prima facie* case of negligence. See ***Arthur v Bezuidenhout and Mieny 1962 (2) SA 566 (A) 574-6 and Sardi and Others v Standard and General Insurance Co Ltd 1977 (3) SA 776 (A) at 780C-H***.
- (11) The mere assertion that the driver experienced a black-out at the time of the collision, that consequently, she was not in control of her faculties and volition, does not *per se* suffice to rebut the *prima facie* case of negligence. The defendant is enjoined in discharging the evidence onus to tender evidence either through a medical or other expert which will have sufficient cogency to raise the defence in question as a realistic issue and from which it may be shown or reasonably be inferred on all the evidence and probabilities that the driver suffered a sudden unexpected black-out

which resulted in her temporary loss of consciousness, thus rendering her *actus reus* involuntary. See ***Molefe v Mahaeng 1999 (1) SA 562 (SCA)***.

THE EVALUATION OF EVIDENCE

- (12) I turn now to consider whether the evidence tendered by Elizabeth Mokgathe in support of the defendant's case has sufficient material cogency to rebut the *prima facie* case of negligence. The defence of automatism proffered by the driver, the circumstances prior to and after the collision, have to be objectively examined with great circumspection to determine whether the driver's evidence has sufficient cogent material to show that her loss of volition was unavoidable.
- (13) In order to fully appreciate the materiality and cogency of the driver's conduct prior to and post facto the collision it is helpful to understand the concepts the driver's defence is predicated upon. The Concise Oxford Dictionary defines the word black-out also called *amaurosis fugax* as "*a temporary or complete loss of consciousness or failure of memory*". Butterworth's Medical Dictionary defines black-out as "*temporary loss of consciousness due to decreased blood flow to the brain and retina as a result of centrifugal acceleration in flying*". Automatism is defined in Butterworth's Medical Dictionary as "*the performance of simple or complex acts, without the individual being aware of them at the time or afterwards*".

THE DRIVER'S EVIDENCE

- (14) Elizabeth Mokgathe testified that she was familiar with Koma Road and travels frequently thereon. On that particular day she was mentally and physically in a healthy state. Earlier she had attended a funeral at Eldorado Park, thereafter she dropped a colleague at Orlando. She was driving to her home in Naledi, she turned at the traffic lights at Moroka Police Station into Koma Road, and had travelled less than a minute thereon, when she suffered a sudden unexpected uncontrollable black-out, as a consequence lost control of her vehicle, and collided with the plaintiff. She does not have any recollection as to how the collision happened. She recalls hearing a bang, subsequently she regained consciousness, although still in a confused state of mind.
- (15) She categorises her loss of consciousness as a black-out because she cannot recall how she travelled across her lane to the opposite lane and onto the pavement, nor can she recall how she collided with the plaintiff and again travelled across the opposite lane onto her initial correct lane, parked the motor vehicle, alighted therefrom and walked 27 metres back to the scene. After the collision she surmised that she had collided with something, because when she stopped her vehicle, she noticed that the windscreen was shattered.
- (16) She became aware that she had collided with something because she heard a bang, subsequent to which she regained her consciousness. She only realised that she had collided with pedestrians when she went to investigate. She does not know why she did not immediately stop after she heard the bang. It is her perception that she had a black-out, because she does not know how she drove her motor vehicle from her lane to the opposite lane. She was confused at that time, but cannot explain what the

source of her confusion was, nor why the confusion continued after the bang.

- (17) At the scene of the collision, she was hysterical and crying whilst she was talking to Sarah Masina and as a result thereof, the police accused her of being under the influence of alcohol, and took her to Baragwanath Hospital to draw her blood sample for forensic analysis. The result of the test was negative. The Forensic Report is available at Moroka Police Station.
- (18) On 18 November 2009 she sought medical assistance and consulted Dr Tlhakola who conducted blood tests to establish the cause of her black-out. Dr Tlhakola subsequently advised her that the laboratory test had established that she was suffering from a high level of diabetes. It was the first time she realised that she suffered from diabetes. She has never suffered from dizzy spells before. Before the collision nothing had alerted her to the fact that she might be a diabetic. Dr Tlhakola prescribed medication for her and subsequently referred her to a specialist Dr Charles when her condition did not improve. On the defendant's attorney's request Dr Tlhakola furnished the medical report pertaining to the forensic blood tests to the defendant's attorney.

EVALUATION OF EVIDENCE

- (19) Sarah Masina disputes that Elizabeth Mokgathe experienced a diabetic induced black-out. Sarah Masina is not an expert on diabetes, but her evidence regarding Elizabeth Mokgathe's demeanour and behaviour and conduct after the collision cannot be ignored. She is a thirty year chronic

diabetic, and has personally experienced black-outs. She states that such black-outs are accompanied by dizziness, disorientation and dissipation of energy. Her evidence is that Elizabeth Mokgathe's physical state and demeanour was actually the antithesis of a diabetic induced black-out state, because she was composed and in full control of her faculties when she engaged with her.

- (20) Elizabeth Mokgathe was pertinently asked by plaintiff's counsel Ms Olivier if Dr Tlhakola was going to be called as an expert witness to confirm her version that she was diagnosed as a diabetic, that medication for diabetes was prescribed for her, that when there was no substantial improvement in her condition she was referred to the Dr Charles a specialist physician who continued to administer specialist medical treatment to her. Elizabeth Mokgathe's response was that she did not know.
- (21) Startlingly the defendant's counsel and attorney did nothing to counter the plaintiff's counsel's argument that despite the two medical reports being available, and the medical experts being available no **Rule 39 (6)(a)** notices were served, neither were the medical reports made available to the plaintiff's attorney.
- (22) No evidence was tendered in court that the purported diabetic induced black-out perceived as such by Elizabeth Mokgathe, was indeed a black-out actually caused by diabetes. Dr Tlhakola's forensic laboratory blood test report was not discovered nor handed up. Dr Tlhakola was not called as an expert witness nor the specialist Dr Charles. The Moroka Police

Station forensic alcohol blood test report although available was not discovered or handed up.

- (23) It is baffling that after an educated person like Elizabeth Mokgathe, who is a teacher by profession, had taken the trouble of obtaining professional medical advice for the cause of her sudden black-out which had resulted in her losing control of her vehicle and causing the collision, that the defendant's legal representatives would not seek corroboration of her version from the medical experts who treated her, and irrationally not place that evidence before court. The omission in this regard is damning, so too is the defendant's failure to call such expert witnesses.
- (24) As a matter of probability, it is highly unlikely having regard to the fact that all these coordinated, actions and movements by the driver happened in an instantaneous and contemporaneous sequence. If in fact the driver genuinely suffered a diabetic induced black-out, she would not have been able to have driven across two lanes, collided with the plaintiff on the opposite pavement, and immediately after the collision, be in a position to again traverse two lanes, park the vehicle on the opposite pavement of the road on which she was originally travelling, alight therefrom, walk across the pavement, again traverse two lanes, avoid traffic thereon, and engage Sarah Masina.
- (25) The failure to tender material medical expert evidence is fatal to the defendant's case, more especially because of the defence that the black-out was induced by a medical condition. Having regard to the cogency and sufficiency of the rebuttal evidential material the defendant is enjoined to

tender to nullify the *prima facie* case of negligence, the court has no option but draw an adverse inference for such failure and omission.

- (26) I accordingly find that the Elizabeth Mokgathe was the sole cause of the collision in that the defendant, as a matter of probability has not shown that the driver's conduct was not due to her involuntary act because she had suffered a diabetic induced black-out whose occurrence and possibility she could not foresee.

WAS THE ROAD ACCIDENT FUND'S DEFENCE NECESSARY

- (27) There is a disquieting aspect about the manner in which the defendant's employees conducted the Road Accident Fund's defence in the litigation of this matter which raises ethical and constitutional issues.
- (28) It is common cause that the motor vehicle driven by Elizabeth Mokgathe collided with the plaintiff, her minor child and her grand mother on Koma Road on 17 November 2009, under the same factual circumstances, and that all three sustained serious injuries as a consequence of such collision.
- (29) It is common cause that all three injured parties lodged three individual claims against the Road Accident Fund utilising services of the same attorney SS Wangra and also instructed him to institute three separate personal injury actions against the Road Accident Fund arising from the said collision on their behalf.

- (30) It is common cause that in resisting all three actions the Road Accident Fund denied liability and pleaded that *“the collision occurred as a result of a sudden black-out induced by a physical health condition”* to the driver of the motor vehicle, Elizabeth Mokgathe.
- (31) In the course of Sarah Masina’s testimony in support of the plaintiff’s claim it was established that the Road Accident Fund, although having disingenuously tendered *“settlement in full and final payment without admission of liability and without prejudice”* to Sarah Masina, there was no apportionment of liability attributed to her. The Road Accident Fund conceded 100% liability in respect of her claim.
- (32) On 26 April 2009 Sarah Masina was fully compensated for the damages she suffered. In effect and as a matter of logic, the Road Accident Fund in settling Sarah Masina’s claim and paying her 100% for her proven damages was in essence conceding that the negligence of the driver of the motor vehicle was the sole cause of the collision, that there was no contributory negligence attributable to Sarah Masina. In any case the circumstances relating to the cause of the collision are conclusive in this regard.
- (33) I engaged the Road Accident Fund’s counsel regarding this state of affairs. He advised that he was not aware of these facts. I requested him to take instructions in order to ascertain whether it was true that the Road Accident Fund had fully conceded the merits and had conceded 100%

liability in respect of Sarah Masina's claim. The Road Accident Fund's attorney was present in court. The court adjourned to enable counsel to take instructions.

- (34) Counsel could not and did not obtain contrary instructions to the fact that the Road Accident Fund had conceded 100% liability in respect of Sarah Masina's claim. Counsel could only reiterate that the settlement was made without admission of liability. Ms Oliver the plaintiff's counsel confirmed through her instructing attorney, that indeed the Road Accident Fund had conceded 100% liability in respect of Sarah Masina's claim.
- (35) A consideration of the above undisputed facts shows that it is patent that the Road Accident Fund's defence in the present matter was spurious and unsustainable in view of its concession and admission that Elizabeth Mokgathe's driving of the motor vehicle was the sole cause of the collision, consequently, that the Road Accident Fund was 100% liable for Sarah Masina's proven damages, yet the Road Accident Fund employees having regard to the concession proffered in respect of Sarah Masina's claim instructed counsel in the present matter to persist with an untenable and unsustainable defence.
- (36) The conduct of the Road Accident Fund's employees in accepting full liability in respect of Sarah Masina's claim and by the same token denying full liability in respect of the plaintiff's claim, was not inspired or motivated by the pursuit of notions of justice, equity, and fairness. Actually the conduct of the said Road Accident Fund employees was legally untenable,

iniquitous, ethically unconscionable, legally discriminatory, and an infringement of the plaintiff's constitutional rights to fair administrative and civil action, and equality before the law as well as equal protection and benefit of the law. The Road Accident Fund's employees in persisting with this unsustainable defence were not acting in good faith nor honourably in pursuance of the objects of the **Road Accident Fund Act 56 of 1996**.

CONSTITUTIONAL AND LEGAL IMPERATIVES

- (37) In enunciating the constitutional and legal obligation of the Road Accident Fund to legitimate claimants I can do no better but cite the ratio in the head note from the judgment of ***Plasket J in Mlatsheni v Road Accident Fund 2009 (2) SA 401 (E)***

*"The Road Accident Fund is established by **Section 2 of the Road Accident Fund Act 56 of 1996**. Its object is to pay compensation 'in accordance with this Act for loss or damage wrongfully caused by the driving of motor vehicles' (s 3). It uses public funds to achieve the purposes assigned to it by the Act (s 5). Its resources and facilities are to be 'used exclusively to achieve, exercise and perform the object, powers and functions of the Fund, respectively' (s 7). From these provisions, and a reading of the Act as a whole, it is not open to doubt that the defendant is an organ of State as intended in **Section 239 of the Constitution, 1996**. That being so, it is bound by the **Bill of Rights (s 8(1) of the Constitution)** and is under an express constitutional duty to respect, protect, promote and fulfil the rights in the **Bill of Rights' (s 7(2) of the Constitution)**. This means not only that it must refrain from interfering with the fundamental rights of people but also that it is under a positive duty to act in such a way that their fundamental rights are realised. Furthermore,*

s 237 of the Constitution requires that all of its constitutional obligations 'must be performed diligently and without delay'. (Paragraphs [13]-[14] at 405F – 406A.)

Organs of State are not free to litigate as they please. The Constitution has subordinated them to what has been called 'a new regimen of openness and fair dealing with the public'. The very purpose of their existence is to further the public interest and their decisions must be aimed at doing just that. The power they exercise has been entrusted to them and they are accountable for how they fulfil their trust. It is expected of organs of State that they be have honourably – that they treat the members of the public with whom they deal with dignity, honesty, openly and fairly. This is particularly so in the case of the Road Accident Fund: It is mandated to compensate with public funds those who have suffered violations of their fundamental rights to dignity, freedom and security of the person, and bodily integrity, as a result of road accidents. (Paragraphs [16] – [17] at 406D –407A.).....

The court held that by so frustrating the legitimate claim of the plaintiff, the employee of the fund who gave the defendant's legal representative instructions to raise the spurious defence had acted in violation of the Constitution: he or she has, by unjustifiably frustrating the claim of the plaintiff, failed to 'protect, promote and fulfil' his fundamental rights to human dignity, to freedom and security of the person and to bodily integrity. This employee had also fallen short of what is expected of public administrators by s 195 of the Constitution, in that it could not be said that the irresponsible raising of a frivolous defence promoted and maintained a high standard of professional ethics or that it promoted the '(e)fficient, economic and effective use of resources".

- (38) The Road Accident Fund is expressed prohibited from discriminating unfairly in terms of **section 9(3)**, as it is statutory body, under control of the state, which has public powers and which performs functions in the public interest. The resisting of the plaintiff's claim on the basis of a defence which has been conceded in respect of Sarah Masina's claim is unfair and unreasonable because a differentiation in the treatment of these two legitimate claims does not bear a rational connection to a legitimate government purpose and is violation of **section 9(1) of the Constitution**.
See ***Harksen v Lane NO 1998 (1) SA 300 (CC)***
- (39) An organ of State is legally, ethically and constitutionally enjoined when entertaining legitimate claims to act with the utmost good faith and circumspection in fulfilling its constitutional mandate. The Road Accident Fund is obliged to equally legitimate claimants seeking compensation for legitimate claims arising from the same cause of action, predicated on the same factual basis, and attributable to the negligent driving of the same vehicle by the same driver.
- (40) Generally courts as public institutions are under severe pressure. In this particular court rolls are heavily congested, it unconscionable to further add to the congestion by initiating a profligacy of unwarranted litigation. Where the Road Accident Fund patently has no sustainable defence to legitimate claims like in the present matter, it is legally enjoined to refrain from engaging in unsustainable and disingenuous legal stratagems which unnecessarily prolong the settlement of claims as a strategy to delay the payment of legitimate claims with the consequence of building up

unnecessary costs, which conduct amounts to fruitless expenditure by the Road Accident Fund.

THE ORDER

(42) In the premises:

- (i) The defendant is ordered to compensate 100% of the plaintiff's proven damages.
- (ii) The defendant is ordered to pay the costs of the suite.
- (iii) The registrar is ordered to furnish a copy of this judgment to the Manager of the Road Accident Fund.

DATED THE 20 DAY OF MARCH 2012 AT JOHANNESBURG.

MOKGOATLHENG J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

DATE OF HEARING: 21 APRIL 2011

DATE OF JUDGMENT: 28 MARCH 2012

ON BEHALF OF THE PLAINTIFF: MS OLIVER

INSTRUCTED BY: S.S. WANGRA ATTORNEYS

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