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**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG**

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

.....  
DATE SIGNATURE

**Case no: 42547/2013**

In the matter between:

**Sally De Bruyn**

**Plaintiff**

And

**Road Accident Fund**

**Defendant**

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**JUDGMENT**

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**KATHREE-SETILOANE J:**

[1] This is a dependents claim in which the plaintiff claims damages on behalf of her minor child Xavier Poalses for the loss of support which he suffered as a result the death of the plaintiff's husband and minor child's father, Anthony Werner Poalses ("the deceased) as a result of a motor collision between a scooter with registration number [B.....] GP driven by the deceased and a motor vehicle with registration

number [F.....] MP driven by X S Dashe (“the insured driver”) on the R59 Vereeniging R 42 off-ramp on 30 August 2012.

[2] This matter proceeded on the issue of both liability and quantum. In respect of quantum, however, there is an agreement that if the plaintiff succeeds in proving that the collision occurred due to the negligence of the insured driver, then the plaintiff would be entitled to damages in the amount of R352 050.00

[3] Turning then to the question of liability, the central issue is whether the collision was caused due to the negligence of the insured driver as set out in paragraph 5 of the plaintiff’s particulars of claim. The defendant denies that the collision occurred due the negligence of the insured. Since this is a dependant’s claim, the plaintiff is only required to prove that the insured driver was 1% negligent.

[4] Mrs Christina Pietersen and Sergeant Mothobi Mokwoena testified on behalf of the plaintiff and the insured driver testified on behalf of the defendant.

[5] Ms Pietersen testified that on 30 August 2012 at approximately 8h45 she and her mother-in-law were driving behind the scooter driven by the deceased on the road to Van der Bijl Park. She saw a white Nissan bakkie , in which the insured driver was seated, standing in the emergency lane with its hazards on, and within seconds she saw the scooter driven by the deceased collide into the Nissan bakkie. .

[6] Ms Pietersen described the R59 as having two lanes plus the emergency lane. Immediately before the collision she was travelling in the left lane. The first time she saw the scooter it was travelling in the right lane in parallel with her vehicle. There was a small truck travelling in front of the motor-cycle, but the scooter seemed to be in a hurry and moved into the left lane, and in front of Ms Pietersen’s vehicle. Within seconds he collided into the rear of the stationary Nissan bakkie in the emergency lane. Ms Pietersen said that there was a grassy area adjacent to the emergency lane where the Nissan bakkie was stationary, that was wide enough for the Nissan bakkie to pull over onto. When asked in evidence in chief if there was anything that prevented the Nissan bakkie from pulling over onto the grassy area and stopping there, she said that there was nothing that prevented it from doing so.

Ms Pietersen concluded her testimony by saying that there was nothing that the driver of the scooter could have done to avoid the collision.

[7] Sergeant Mothobi Mokwoena took the photographs at the scene of the collision. These photographs were admitted into evidence. He described the area adjacent to the emergency lane, where the Nissan bakkie stopped, as an area covered with grass, sand and bits of gravel. He said that the grass area was wide enough for a vehicle to pull-over onto it, and that there was nothing in that area that would have prevented the Nissan bakkie from pulling off the road and stopping there. The defendant elected not to cross examine Ms Pietersen and Sergeant Mokwoena. Their testimony, therefore, stands uncontroverted.

[8] The insured driver testified that while driving on the R59 to a meeting at the Lethabo Power Station in Vereeniging he realised he was lost, so he took the R43 off-ramp, and after travelling for a few metres stopped in the emergency lane to make a call, on his cell phone, to get directions to the meeting venue. Before stopping in the emergency lane he put on his hazards and his headlights. There was no vehicle behind him when he stopped in the emergency lane. As he dialled a number on his cell phone he heard a crashing sound coming from the rear of the vehicle, and the vehicle shook. When he got out of the vehicle to investigate, he saw the deceased body on the road and the scooter lying close by. The insured driver conceded under cross examination that he could have pulled over and stopped on the grassy patch adjacent to where he had stopped his vehicle, but when asked why he had not done so, he said that it was “unsafe because he didn’t know what was out there”.

[9] It is apparent from Ms Pietersen’s testimony that the deceased driver was in a hurry and moved rapidly from the right lane into the left lane immediately in front of her car. It is conceded on behalf of the plaintiff that in his haste he may have negligently contributed to the collision by driving too fast and not keeping a proper lookout when he attempted to overtake the vehicle in front of him by moving from the left lane into the emergency lane. However, it is clear that if the Nissan bakkie was not parked in the emergency lane, the collision would not have occurred. and the

deceased would not have sustained the injuries which resulted in his death. The emergency lane on a motor way is designated for use by motorists faced with an emergency. Thus our courts have repeatedly stated that:

‘ A motorist that is stationary in the emergency lane ought reasonably to foresee that the vehicle may constitute a danger or obstruction to other possible users of the emergency lane. Guarding against the harm would require reasonable steps to be taken to ensure that other motorists were alerted to the hazard represented by the stationary vehicle, for example by the use of reflective triangles and hazard lights.’<sup>1</sup>

[10] The insured driver stopped his vehicle in the emergency lane in order to make a call on his cell phone for the purposes of getting directions to his meeting. This, in my view, did not constitute an emergency, and the insured driver should not have stopped in the emergency lane for this purpose. Although it is not disputed that he took some precautionary measures to guard against any harm to other motorists by putting on his hazard lights and checking to see that there were no vehicles travelling behind him before he stopped in the emergency lane, these measures were not reasonable in the circumstances. He was required, in addition, to place warning triangles at an appropriate distance from the stationary vehicle, and stand outside the vehicle with a flag to warn oncoming motorists of the danger/obstruction ahead.

[11] Moreover, the evidence reveals that there was more than enough space in the grassy patch immediately adjacent to the emergency lane for him to stop his vehicle, and make a cell phone call. When asked why he did not stop the vehicle in the grassy patch, he said that “it was unsafe because he didn’t know what was out there”. It is clear from the objective photographic evidence and eye-witness testimony that this patch of ground was not at all unsafe or hazardous as it was covered by grass, sand and gravel. The insured driver’s fears were accordingly completely unjustified. The inconvenience of having a punctured tyre in my view does not outweigh the harm that stopping in the emergency lane, without taking sufficient precautionary measures to warn oncoming motorists, could cause to other

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<sup>11</sup> *Road Accident Fund v Odendaal* 2004 (1) SA 585 (WLD) para 15; *Masenga v Road Accident Fund* (44331/2013) [2015] ZAGPJHC 40 para 15.

motorists confronted with a real emergency.

[12] The insured driver, in my view, did not act as the reasonable person should have in similar circumstances. A reasonable person in the insured drivers position would have foreseen the possibility of harming other road users when stopping/or obstructing the emergency lane on a busy motor way with passing cars, and should have pulled onto the grassy patch or continued travelling until he found someplace else safe to stop. I am accordingly of the view that the insured driver should reasonably, in all the circumstances, have foreseen the possibility of a collision with the scooter and his failure to have done so constitutes negligent conduct.

[13] In the result, I find that the plaintiff has discharged the onus of proving on a balance of probabilities that the insured driver was negligent and is liable for all the proven damages suffered by plaintiff arising from the collision on 30 August 2012 between the insured vehicle and the scooter, which the deceased rode.

[14] In the circumstances I make the following order:

1. The Defendant shall be liable for all agreed or proven damages suffered by the Plaintiff arising from the collision on 30 August 2012;
2. Defendant shall pay the capital amount of R352 050,00 in respect of the Plaintiff's claim.
3. The amount of R352 050,00 shall be payable on or before 30 October 2015 by means of direct fund transfer into the trust bank account of the Plaintiff's attorneys; Mills & Groeneweld Trust Cheque Account, Absa Bank, Vereeniging, Account nr. 4....., Branch code: 6....., reference: A van Zyl.
4. No interest will be payable except in the event of default of payment before/on the above mentioned date in which case interest will payable at

the rate of 9% calculated on the capital amount from 1 August 2015.

5. The Defendant shall pay the Plaintiff's taxed or agreed party and party costs including 19 June 2015 as well as 3 August 2015 on the High Court scale which party and party costs include, but are not limited to:

- 5.1. The reasonable cost in respect of the consultation, assessment and preparation of the medico legal expert reports, the radiological reports, the addendum medico legal reports and the actuarial reports of:

- 5.1.1. Dr J Rossi;

- 5.1.2. Mrs L van Rooyen;

- 5.1.3. Munro Forensic Actuaries.

- 5.2. The Plaintiff's traveling costs to and from all medico legal appointments;

- 5.3. Consultations when detailed instructions were given due to the complexities of the matter;

- 5.4. Costs of counsel, inclusive of counsel's consultations with experts and appearance fees on 19 June 2015 as well as 3 August 2015;

- 5.5. Any costs attendant upon the obtaining of payment of the amount referred to in paragraph 1 supra, as well as any interest thereon;

6. Payment of costs is subject to the following conditions:

- 6.1. The Plaintiff shall, in the event that costs are not agreed, serve the notice of taxation on the Defendant's attorney of record; and

- 6.2. The Plaintiff shall allow the Defendant 14 court days to make payment of the taxed costs.

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**F KATHREE-SETILOANE  
JUDGE OF THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG**

**Counsel for the Plaintiff: Advocate Smit**

**Instructed by: Mills and Groenewald**

**Counsel for the Defendant: Advocate Magashule**

**Instructed by: Mazuko Nxusani Inc**

**Date of Hearing: 3 August 2015**

**Date of Judgement: 18 September 2015**