

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

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

CASE NO: 24432/2018

9/9/2019

In the matter between:

**L A MOGALE obo K M M[....]**

**PLAINTIFF**

And

**THE ROAD ACCIDENT FUND**

**DEFENDANT**

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**JUDGMENT**

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**SENYATSI AJ**

- [1] The parties in this matter have agreed to separate merits and quantum at the trial of this matter. The order was issued accordingly for the separation and that the trial only focuses on the merits of the claim.
- [2] This is a loss of support claim on behalf of the minor child of the deceased. Mr Van Onselen on behalf of the Plaintiff submitted that the issue for determination is the negligence driving of the insured driver's vehicle which resulted in the death of the deceased motorcyclist.
- [3] The Defendant called the insured driver Mr Mtutuzi Fundile Xulu. He testified that the accident took place on 22 September 2017 at 21:45. He drove a motor vehicle with registration [....] which collided with a motorcycle drive by the

deceased.

- [4] Mr Xulu was travelling from Boitekong heading to Thekwane Village. It was on a Friday evening.
- [5] The road between Komana Village and Thekwane Village is tarred with a single lane. The road was straight and without hills and obstruction.
- [6] The witness was travelling from north to south. He noticed that there were two cars travelling northwards. He noted the cars through the headlights they illuminated.
- [7] When he approached to pass the first car, he saw the motor vehicle approaching behind the second car. As the road was narrow with a single lane, he realised the motorcycle was trying to overtake.
- [8] As an evasive action, he swerved to the left side of the road without leaving the tarred portion of the road. He observed that there were no trees and bridge on the side of the road.
- [9] He was not sure about the gap between the first and the second cars. He testified that before he swerved to the left on realising the motorcycle was overtaking, he applied breaks. He thought the motorcycle would move back to behind the second car. After applying brakes, he swerved slightly to the left. He did not use his hooter to warn the motorcyclist.
- [10] Mr Xulu also testified that when he saw the lights of the motorcycle for the first time, he did not do anything because he thought it was another car checking if it was safe to overtake the second car.
- [11] Under cross-examination by Mr Erasmus, Mr Xulu stated that he saw the second car when he was about to pass the first car. He estimated that he was about 20-30 meters when he saw the motorcycle.
- [12] Although the road was clear without trees and bridge, he was afraid of going to the bush as he was not used to the road. He did not travel on the road frequently and it was at night.
- [13] The motorcycle hit his car on the right driver side. The lights of his car were on.

- He stated that there was nothing he could do to avoid the collision.
- [14] The Plaintiff closed its case without calling any witnesses.
- [15] Mr Van Onselen submitted that there is more than reason for a finding of 1% negligence. He argued that although the deceased was the predominant cause of the accident, the insured driver also contributed to less than 100% negligence by not taking evasive action to avoid the accident. It was submitted he incorrectly assumed that the motorcyclist would move back behind the car he tried to overtake.
- [16] It was furthermore submitted that had he correctly applied brakes and took the steps to avoid the collision, the accident would have been avoided.
- [17] It was furthermore argued that had the insured driver taken the sufficient action to avoid the collision, he would have not have contributed to the accident.
- [18] Mr Van Onselen further argued that had the insured driver's vehicle moved to the left of the road, with no trees or bridges. He argued that there was a duty on him to take evasive action.
- [19] He argued that the insured driver was negligent and that Plaintiff was entitled to 100% damages.
- [20] Mr Erasmus argued that it was not uncommon for a car to peep outside of its lane to check if it was safe to execute the overtaking. He argued furthermore that when the insured driver noted that the motorcycle was overtaking, he applied brakes and moved to the left.
- [21] It was furthermore submitted on behalf of the Plaintiff that there was no evidence of the speed the insured driver was doing when the collision too place. He submitted that there was also no evidence to suggest that the insured driver contributed to the accident. He argued that the action should be dismissed with costs.
- [22] The evidence by the insured driver has been fully considered. It was at night when the collision took place. The insured driver, although admitting that there was no obstruction or a bridge on the side of the road, he could not veer off the road on to the gravel.
- [23] The issue that needs to be determined is whether in not moving to the gravel to avoid the collision, the insured driver was negligent and contributed to the

collision.

- [24] On analysis of the evidence it cannot be denied that the driver of the motorcycle overtook the second vehicle when it was not safe to do so.
- [25] It can also not be denied that when the insured driver realised that the motorcycle, which he mistook initially for another car, peeped through behind the second car. Mr Xulu assumed, incorrectly so, that as soon as the driver of the motorcycle realised that it was not safe to overtake, the second car, he would go back behind the second car, that did not happen.
- [26] Mr Xulu applied his brakes lightly without moving off the tarred side of the road. The motorcycle driver was already committed to overtake and collided with the insured driver.
- [27] Mr Xulu conceded that the road was straight with no obstructions, trees or bridges on the side of the road. A reasonable driver in Mr Xulu's position ought to have taken evasive action to move away from the impending collision. He also had an opportunity to warn the oncoming motorcycle by use of his hooter but failed to do so.
- [28] Although it cannot be denied that the deceased was the cause of the collision from the evidence adduced, I am of the view that the insured driver contributed to the collision that could have been possibly avoided.

### ORDER

- [29] The following order is made:
- (a) The insured driver contributed significantly to more than 1% negligence to the collision.
  - (b) The Defendant is ordered to the cost of suit.

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**M.L. SENYATSI**  
**ACTING JUDGE OF THE HIGH COURT OF**  
**SOUTH AFRICA GAUTENG DIVISION, PRETORIA**

**APPEARANCES**

<u>For The Plaintiff:</u>	Adv C Van Onselen
<u>Instructed By:</u>	Adams and Adams
<u>For The Defendant:</u>	Adv N Erasmus
<u>Instructed By:</u>	Rambevha Morobane Attorneys
<u>Date of Hearing:</u>	7 May 2019
<u>Date of Judgment:</u>	