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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
(MPUMALANGA DIVISION, MBOMBELA)**

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

02/01/2021

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SIGNATURE

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DATE

CASE NO: 2733/2029

In the matter between:

FIKILE MILICEWNT MAKAMO

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

J U D G M E N T

MASHILE J:

- [1] This is a delictual damages action emanating from personal injuries sustained by the Plaintiff during a motor vehicle collision on 3 March 2013 at or near Buffelsspruit Bridge, Buffelspruit Trust, Mpumalanga Province along the R570 Road. The Plaintiff instituted this claim for delictual damages in her personal capacity against the Defendant. She claims damages under various heads. These are for past and future medical expenses, past and future Loss of earnings and general Damages.
- [2] The Plaintiff was a passenger in motor vehicle with registration letters and number [...] (“the insured vehicle”) driven by Mr. Khethukuthula Panuel Shongwe (“the insured driver”). The insured motor vehicle collided with motor vehicle with registration letters and number [...] against which the Plaintiff seeks no damages.
- [3] The insured driver is alleged to have lost control and became involved in a collision in the process of which the Plaintiff suffered bodily injuries. The Plaintiff alleges that the loss of control of the vehicle was as a result of the negligent driving of the insured driver. The case was set down for the hearing of both merits and quantum.
- [4] Against that backdrop, it will be appropriate to attend to the issue of liability first. Thereafter and depending on the outcome to that question then turn to consider quantum under the various heads. Prior to doing so, however, it will be instructive to refer to the relevant portions of the particulars of claim that are meant to found this claim. Those parts are paragraphs 5, 6 and 7, which read as follows:

“On or about the 3rd day of March 2013 at or near Buffelspruit bridge along the R570 Road, Mpumalanga Province wherein the Plaintiff was a passenger in a motor vehicle to wit a Toyota Conquest bearing registration number and letters [...] which was driven by a Constance Shongwe, and the said motor vehicle was

involved in an accident along the R570 Road at or near Buffelspruit bridge, Mpumalanga Province. [SIC]

[5] The accident happened after the driver of a motor vehicle with registration letters and numbers [...] (insured vehicle) lost control of the vehicle.

[6] The aforesaid accident was caused solely as a result of the negligence of the driver of the insured vehicle who was negligent in one or more of the following respects:

6.1 She failed to keep a proper lookout;

6.2 She drove the insured vehicle in a wanton manner endangering the safety of other road users, especially the Plaintiff;

6.3 She travels at an excessive speed; [SIC]

6.4 She encroached in the oncoming traffic lane's line of travel;

6.5 She failed to keep the insured vehicle under proper control;

6.6 She failed to apply brakes timeously alternatively at all;

6.7 She failed to warn other road users of her approach;

6.8 She failed to ensure that the insured vehicle was in a proper roadworthy condition;

6.9 She failed to exercise the special duty of care required of motorists who ought to be aware of the presence of other road users in the vicinity;

6.10 She failed to avoid the collision when, by exercise of reasonable care, she could and should have done so.”

- [7] The Plaintiff called several witnesses to demonstrate that the collision occurred as a result of the insured driver’s negligent driving. She too testified on her own behalf.

EVIDENCE ON MERITS

- [8] The Plaintiff’s testimony does not sway her case either way. That is because she alleges to have been asleep when it happened. She recalled that she was a backseat passenger, her mother, Constance Shongwe, occupied the front passenger seat, her brother, the insured driver, was behind the wheel while her sister, Eva Shongwe, was sitting with her at the back. She relies entirely on the evidence of her fellow passengers on how the collision occurred.
- [9] The evidence of the insured driver was that he was driving from Malelane into the direction of Schoemansdall. He testified that when he was at the Buffelspruit Bridge, he noticed a Toyota Conquest approaching from the opposite direction. The Toyota Conquest being motor vehicle with registration letters and number [...] was driving on the lane of oncoming traffic.
- [10] He told the court that he flickered his head lamps to alert the driver of the [...] motor vehicle that he was on the lane of oncoming traffic. The oncoming motor vehicle would still not move back to its correct side of the road. As the two motor vehicles reduced the space between them, the insured driver hooted. The approaching motor vehicle stubbornly remained on the lane of oncoming vehicles.
- [11] Noting that a head-on collision was likely to ensue, the insured driver swerved to the right-hand side of the road. At that critical stage, the driver of [...] Motor

vehicle, also swerved to his left-hand side resulting in the two motor vehicles colliding on the right-hand side of the insured driver.

- [12] Constance Shongwe's testimony largely corroborates that of the insured driver. She confirms that she was in the company of her children, the Plaintiff, the insured driver, and Evah Shongwe. They were conveyed in the insured vehicle driven by the insured driver from Malalane driving towards their home in Schoemansdaal.

- [13] She testified that when they were next to the Buffelspruit Bridge, she noticed a vehicle coming from the opposite direction. The vehicle was driving on the lane of oncoming traffic. The insured driver flickered the head lamps and hooted. She said that the motor vehicle would not move out of their path of travel. The insured driver then swerved away to avoid a head-on collision. The driver of the other vehicle too, at that moment, turned his vehicle to his left-hand side as a result of which a collision followed on the right-hand side of the road.

- [14] The above was the oral evidence that was levied before court. Other testimony presented before court consists in various documents such as, The OAR, Officer's Accident Report, comprising statements of the occupants of the insured vehicle, two warning statements of the drivers, one of the insured and the other, of the driver of [...].

- [15] The statement of the driver of [...], Mishack Khoza, supports the oral evidence presented in court by the witnesses of the Plaintiff. In brief, he states that he was driving along R570 Road into the direction of Buffelspruit Trust. He was busy changing a compact disk when he noticed that he was driving on the side of oncoming traffic and that another vehicle was coming towards him.

- [16] He turned his vehicle away towards his left-hand side, his correct side of the road, but at that moment the driver of the oncoming traffic had also taken a

decision to swerve to his right-hand side. In consequence, the two vehicles collided on the lane of motor vehicles driving into the direction of Buffelspruit and as such, against the insured driver.

- [17] On the date of hearing, it was contended on behalf of the Plaintiff that she was a passenger in one of the motor vehicles involved in the collision. As such, to succeed with her claim against the Defendant, she needed no more than demonstrating that the driver of the insured vehicle was 1% negligent. Given that attitude, the Plaintiff went ahead and lodged a claim against the vehicle in which she was a passenger. It was further argued that the witnesses corroborated each other and that the Court should find that the insured driver was 1% negligent. The Defendant presented no version as no witnesses testified on its behalf.

ISSUES

- [18] The issue that stands for determination is whether or not the Plaintiff has demonstrated, as she ought to, that the insured driver was 1% negligent in the manner in which he responded to the actions of the driver of DDR 563 MP. Furthermore, could he have reacted differently to what unfolded before him to avoid the collision? To decide these questions, I need to turn to the guiding legal principles.
- [19] Insofar as it is alleged that the insured driver was negligent, it could be instructive to refer to *S v BURGER* [1975] 4 All SA 734 (A) where Holmes JA stated the following:

“Culpa and foreseeability are tested by reference to the standard of a diligens paterfamilias (“that notional epitome of reasonable prudence”-Peri-Urban Areas Health Board v. Munarin, 1965 (3) S.A. 367 (A.D.) at p. 373F) in the position of the person whose conduct is in question. One does not expect of a diligens paterfamilias any extremes such as Solomonic wisdom, prophetic foresight, chameleonic caution, headlong haste, nervous timidity, or the trained reflexes of a racing driver. In

short, a diligens paterfamilias treads life's pathway with moderation and prudent common sense."

- [20] In the case of *Sedumemanyatela v Road Accident Fund* (**65678/2012**) (**2014**) **ZAGPPHC 445 (30 MAY 2014)** the court held that even when an approaching vehicle is on its incorrect side of the road, a driver on his correct side may assume that the former will return timeously to its correct. But this assumption does not entitle a driver on the correct side of the road to remain passive in the face of threatening danger. As soon as the danger of the collision becomes evident he is under a duty to take reasonable steps to avert one.
- [21] It is trite law that every driver bears a duty of care towards other motorists to keep proper lookout, to take reasonable steps to avoid collision. Thus, Holmes JA in *Kruger v Coetzee* **1966 (2) SA 428 (A) at 430E - F**, the issue of negligence itself involves a twofold inquiry. The first is: was the harm reasonably foreseeable? The second is: would the diligence paterfamilias take reasonable steps to guard against such occurrence and did the defendant fail to take those steps? The answer to the second inquiry is frequently expressed in terms of a duty. The foreseeability requirement is more often than not assumed and the inquiry is said to be simply whether the defendant had a duty to take one or other step, such as... perform some or other act positive act, and if so whether the failure on the part of the Defendant to do so amounted to a breach of that duty."
- [22] It is the duty of every driver to always remain alert and examine the road ahead, and to avoid a collision happening. Following in the footsteps of Kruger *supra*, the Supreme Court of Appeal in *Road Accident Fund v Grobler* (**96/06**) **ZASCA 78; (2007] SCA 78 (RSA); 2007 (6) SA 230 (SCA) (31 May 2007)**, considering facts that were substantially akin to the current held that the proper approach is not to confine the inquiry into the negligence to the conduct of the driver from the moment they became embroiled in an emergency. The inquiry must extend to cover what steps a driver took to avoid the impending emergency. If he/she had

an opportunity to take measures ahead of the emergency to avoid the accident, and he/she failed to do what a reasonable person in similar circumstances would have done, then he /or she would have been negligent.

- [23] In *Ntsala and others v Mutual and Federal Insurance Co Ltd* **1996 (2) SA 184 (T)** the court held that where it must be remembered that with a sudden confrontation of danger a driver only has a split-second or a second to consider the pros and cons before he acts and surely cannot be blamed for exercising the option which resulted in a collision.

ANALYSIS

- [24] This is the legal background against which the facts that led to the collision ought to be assessed. Right from the onset, it is important to point out that the particulars of claim are inaccurate in some parts. Firstly, the driver of the insured vehicle is referred to as MS Constance Makamu whereas her son, Khethaukuthula Panuel Makamu, was in fact the driver. Secondly, the insured driver did not lose control of the insured vehicle. Instead, he consciously swerved out of his lane to avoid what he perceived was likely to result in a head-on collision with motor vehicle [...] that was driving in the lane of oncoming traffic.
- [25] When reading the particulars of claim, one gets the impression that the collision described therein is different from the current. There is no mention of motor vehicle [...], which is the obvious offending vehicle. I say this mindful that the Plaintiff's assertion is that she needs only establish 1% negligence against the driver of the vehicle in which she was a passenger. While that is correct, it is incumbent upon the Plaintiff to give an honest account of what had transpired and not fabricate allegations that the insured driver lost control.
- [26] The witnesses differ on their description of the precise location of the collision. The insured driver states that it happened on the Buffelspruit Bridge whereas MS

Constance Shongwe claims that it was next to the Buffelspruit Bridge. The statement of the driver of motor vehicle [...] is silent on where in relation to the bridge the collision took place. Whatever the inconsistencies, it is clear that it happened at or near the Buffelspruit Bridge.

[27] The insured driver states that he noticed motor vehicle [...] driving from the opposite direction on the incorrect lane. In consequence, the insured driver flickered his head lamps. Like any reasonable driver in the position of the insured driver, he stayed on his correct side of the road hoping that the driver of motor vehicle [...] would soon rectify his mistake. The space between them narrowed at which point he hooted. Motor vehicle [...] stubbornly remained on the incorrect side of the road until it was unjustifiable to think that the driver of motor vehicle [...] would correct his mistake by swerving back to his lane.

[28] It so happened that at the moment when the insured driver decided to move to the unoccupied lane of his oncoming traffic, the driver of motor vehicle [...] also swerved back to his correct lane. As a result of this the two vehicles collided on the side of motor vehicle that were travelling against the insured driver in the process of which the Plaintiff was seriously injured.

[27] Was the insured driver negligent in the manner he reacted to what was unfolding before him? According to him the collision occurred on the bridge and I have no reason not to trust him because he was the driver. Confronted with this emergency, he had to make a decision whether to swerve to the right-hand or left-hand side of the road. If I accept, as I do, that the collision took place on the bridge as alleged by the insured driver, it would have been suicidal for him to have swerved to the left as there would have been nowhere to avoid the collision.

[29] The obvious and only election for him was to veer to the right-hand side where there was no vehicle approaching. It so happened that at that time the driver of motor vehicle [...] had resolved to correct his mistake. Any reasonable driver

faced with similar circumstances would have responded no differently from the insured driver. He had nowhere to swerve but to the right-hand side. Even if one were to place the accident before the bridge, as MS Constance Shongwe would seem to suggest, turning sharply to the left-hand side might have resulted in the insured vehicle hitting anything and probably rolling down to the bottom of the bridge with perilous and devastating consequences

[30] Even if I assume that the insured driver was wrong in the action that he took, Ntsala *supra* says that a driver who finds himself in a situation of imminent danger, not of his own doing, and reacts thereto and possibly takes the wrong option, it cannot be said that he is negligent unless it can be shown that no reasonable man would so have acted. On the facts of this case, it is inescapable to conclude that the insured driver was not negligent at all, not even a percent so. In fact, the driver of motor vehicle [...] was 100% responsible for what transpired. To hold that the insured driver was 1% negligent would be to expect 'solomonic wisdom', which Holmes JA discourages in Burger *supra*.

[31] In the result, the Plaintiff has failed to show on a balance of probabilities that the insured driver was 1% to blame for the collision that occurred. As such, I am constrained to dismiss the claim. I make the following order:

The claim is dismissed with costs.

B A MASHILE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 02 June 2021 at 10:00.

APPEARANCES:

**Counsel for the Plaintiff:
Instructed by:**

**Adv Mabaso
Bhila & Thobela Attorneys**

Counsel for the Defendant:

No appearance

Instructed by:

**Date of Hearing:
Date of Judgment:**

**1 December 2020
02 June 2021**