

SOUTH AFRICA / JUDGMENT

Mudau v Road Accident Fund (278/2022)

[2024] ZAGPJHC 553 (11 June 2024)

[2024] ZAGPJHC 553**COURT**

South Gauteng High Court, Johannesburg

BEFORE

Nharmuravate

CASE / FILE NUMBER

278/2022

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Policy**HIGH COURT OF SOUTH****AFRICA,****GAUTENG****DIVISION,JOHANNESBURG****REPORTABLE:**

YES/NO

OF

INTEREST TO OTHER JUDGES: YES/NO

REVISED

11.06.2024

Case No.: 278/2022

In

the matter between:

RATSHILINGUA

MUDAU

Plaintiff

And

ROAD

ACCIDENT FUND

Defendant

JUDGMENT

NHARMURAVATE AJ:

Motor vehicle accident - passengers conveyed at the back of a bakkie - overtaking towards oncoming traffic - duty to keep a proper look-out

- hearsay evidence - dismissal of action.

INTRODUCTION

- [1] This is an action instituted for a damages claim against the Road Accident Fund by the Plaintiff Mr. Ratshalingua Mudau, an adult male of 25 years of age, who was involved in a motor vehicle accident on 16 January 2021 that resulted in him sustaining severe injuries and had him spend 28 days in hospital
- [2] The parties initially agreed to proceed by way of merits only, in that regard a separation of merits and quantum was then sought in line with rule 33(4) of the Uniform Rules of Court. This was granted with the issue of quantum postponed sine die. In light hereof, the Plaintiff bears the onus to prove the negligence on the part of the insured driver for the Defendant's liability to be established.
- [3] The matter proceeded for a hearing over a period of two days. The Plaintiff led evidence which was supported by Mr. Magavha. The Defendant led evidence of Mr. Mulaudzi who at the time was an independent eyewitness.

THE PLAINTIFF'S CASE

Mudau's Evidence

- [4] Ratshalingua Mudau testified that on 16 January 2021 he was a driver of a white Toyota bakkie D40 registration number CH3[...]. He was visiting his friend, and he went pass a spaza shop where he was requested by a group of guys to assist by transporting them to a soccer tournament at Ha-begwa. They were worried that they would lose out on the money they had paid as part and parcel of competing in the tournament. At first he did not agree but later on agreed. He noticed that it was late and raining at the time. He waited for the rain to subside. After the rain subsided he proceeded to transport the team as per the request.
- [5] He recalled that at the front seat he was with the coach who was sitting as his passenger and at the back of the bakkie he had approximately 15 passengers. He did not have a PDP (Professional Driving Permit) at the time, but he had registered for one and was waiting to be issued one. He went pass the filling station where he picked up one team member. He thereafter made a second stop at the Dairy spaza shop to buy "cold drink." While there he picked up three more teammates. He did not see the three embarking, he only heard about this from the passengers at the back.

[6] They then went on their way to the soccer tournament. Along the way they met a Yaris which was travelling very slowly. He then looked to his right-hand mirror and decided to overtake. After that, he looked to his left-hand mirror. He then went back to his lane about 50-80 metres. He was met with a Quantum which had just overtaken a truck. It suddenly came in front of him, he then tried to swerve to avoid a head-on collision. This resulted in him losing control of his bakkie causing it to roll, which ended up with

some fatalities and the rest of the passengers injured including himself.

[7] He informed this court that the road he was travelling on, that is Gaba and Tshaulu was a two-way road with traffic moving in the opposite direction on each side. This meant that in order for him to overtake he had to overtake onto the oncoming traffic.

[8] Whilst at the hospital he was visited by two police officials who were not allowed to speak to him as it was during the covid period. The very same police officials also visited his home looking for him. When he was discharged he was under pressure to go to the police station to report himself and the accident. This he did and had to write a statement under pressure as he could not remember anything pertaining to the accident. Later on, he was able to recall from being told by the passengers that were at the back of the bakkie who saw how the accident occurred. That is how he was able to detail the section 19F (exhibit B) affidavit.

EVIDENCE BY MR. MAGAVHA

[9] Mr. Magavha confirmed that they had requested the Plaintiff to transport them to the match as they had been disappointed by the person who had promised to transport them. He was a passenger at the back of the bakkie on that date and he confirmed that there were +/- 13 passengers on the bakkie. Along the way they picked up four people totaling 17. He also confirmed that they met up with a black motor vehicle which he could not remember the model. The motor vehicle was driving slowly, and they decided to overtake it. While doing so, approximately 50-80 metres in the process of overtaking, they were met with a Quantum which had overtaken a truck. The Plaintiff tried to avoid the Quantum by swerving to his left which then caused him to lose balance and lose control of the bakkie. As a result, the bakkie rolled over, injuring many passengers, including him. He then spent a day in hospital.

THE DEFENDANT'S CASE

Evidence By Mr. Mulaudzi

[10] Mr. Mulaudzi in summary gave evidence that he was a bystander on 16 January 2021 which was around covid times. The road that he was standing next to is along Gaba and Tshaulu. He testified that he saw a Yaris that was driving at approximately 20 kilometers

per hour. The Yaris was followed by a white Toyota bakkie. All the vehicles were driving towards the Eastern side. Subsequently, the bakkie overtook the Yaris and proceeded a bit. However, it met up with a Quantum and a truck which were travelling on their correct lane. When the Plaintiff tried to avoid the Quantum, it led to it losing control and rolling.

[11] On the second day, he gave evidence to the effect that the Plaintiff overtook the Yaris and completed the maneuver of overtaking. The Quantum which was overtaking the truck got into the Plaintiff's lane of travel. The Plaintiff in his attempt to avoid a head-on collision swerved on the side which caused him to lose control and roll. Mr. Mulaudzi also testified that he was the one who reported the accident at the police station as the nearest police station was one kilometer away. He also left his details as reflected in the Accident Report.

[12] He also confirmed writing the statement with the South African Police Services (SAPS) on 19 January 2021 after he had been called by the police to do so. In this statement he deposed that the bakkie overtook the Yaris and in that process it lost control and

rolled. He also testified that he was dizzy hence he could not recall the truck and the quantum on the date he wrote the statement.

ANALYSIS

OF THE MATTER

Duress

[13] The Plaintiff made various statements regarding the police officers putting him under pressure or duress to make a statement. However, the Plaintiff's Counsel read the entire statement to him, and he confirmed every single line as being information that was indeed coming from him. The pressure or the duress that is alleged by the Plaintiff was therefore not proven.

[14] In terms of the National Road Traffic Act 93 of 1996 the Plaintiff as the driver who was involved in the accident at the time had a duty to report the accident and also compile a statement within 24 hours.[1] Likewise, the members of the SAPS in terms of the law are to investigate accidents which resulted in severe injuries and fatalities like the incident in this case. The Plaintiff's Counsel Mr. Matshidza was asked if indeed there was duress under such circumstances and in light of the fact that this was not pleaded in the particulars of claim, he conceded that there was no duress. In my opinion the fact that the police officials visited the Plaintiff twice (once being at the hospital and for the second time at his home) does not amount to duress. The police officials were merely performing their duties in line with the charge of culpable homicide.

There was no factual basis laid by the Plaintiff to prove duress during his evidence. Therefore, there was no duress showing that he was put under in drafting his statement on 18 February 2021.

Overloading

[15] The police docket was admitted in their entirety as exhibit A. The parties both referred to the Accident Report through leading evidence and under cross-examination. The Accident Report alleged that they were +/- 27 passengers in the bakkie. This was denied by the Plaintiff under cross-examination, which was quite perplexing simply because it was never his evidence at any point that

he engaged in the exercise of counting the soccer team members as they embarked on his bakkie.

[16] During the Plaintiff's evidence in chief, he testified that he had 15 passengers at the back of the bakkie, where and how he got to this number is not clear. Peculiarly, when he was cross-examined on this issue based on the statement written by him with the SAPS he tried to align with the statement that he had +/- 13 passengers. Even this number is not clarified in the police statement if indeed he counted the passengers or how he arrived at such a sum. In my opinion, the absence of evidence that he counted all the passengers by head simply means his evidence cannot be trusted. This is a fabrication of the events to evade what was reported on the Accident Report and what was investigated by the police, which was a thorough investigation which proved that there were 27 passengers as they were named fully, and their cell numbers provided. Unfortunately, the officials were not called to give evidence to this fact.

[17] Alternatively, even if the Plaintiff had 13 people in the bakkie when he left the spaza shop he still picked up 4 more people. This means he had 17 passengers. This number (17) was also confirmed by Mr. Magavha and Mr. Mulaudzi. Strangely, they did not take this court into confidence nor lead evidence that they indeed counted the entire soccer team by head. Mr. Magavha's evidence was that the entire team is composed of 27 members. He qualified it by stating that it was not the entire team that was on the bakkie or available on that date. But even then he did not mention the number or the names of those who were not available on that date. Mr. Magavha's evidence on this issue was more confusing when he testified that the other members were in different provinces

mentioning Gauteng, while some teammates had already left for the tournament in their private vehicles. If indeed some team members had their private vehicles why not offer a lift to the other teammates? Why did the coach or team have to struggle to get to the tournament? In my opinion this is not probable. This amounts to evidence which is not rational and has elements of witnesses who were coached on this aspect.

[18] A bakkie is not or was never meant to convey passengers as a mode of transport.[2] It is a vehicle meant for transporting goods or cargo hence the design. What is more disturbing was the evidence led by Mr. Magavha that he was amongst the passengers holding on to the head of the bakkie while some passengers were sitting, others kneeling, while others were standing. This is a clear indication of an overloaded vehicle which was a recipe for a disaster waiting to happen.

- [19] Further, it is my opinion that the two stops made along the way to the tournament were deliberately made with the intention of picking up more passengers in an already overloaded vehicle. The evidence was that the team was already late, they had no probable reason to be making two stops except to pick up more teammates. Stopping to buy “cold drink” in my opinion is another fabrication as it was not the Plaintiff’s case that he was requested by the coach to stop for a “cold drink” or his passengers. The four passengers were part of the soccer team as conceded by Mr. Magavha. The Plaintiff did not act reasonably in loading more passengers when his bakkie was not designed for such.
- [20] Mr. Magavha also did not corroborate the Plaintiff’s evidence that the bakkie had steel barricades, his evidence was if there were barricades to hold on to, they would not have been holding on to the head of the bakkie. In this regard, Mr. Matshidza for the Plaintiff argued that the description given by the Plaintiff should be preferred as he knows his vehicle better. That may be so, but one may also argue that it was not his vehicle. Mr. Magavha and Mr. Mulaudzi’s evidence in this regard was clear that the bakkie had no barricades. Even if the bakkie had barricades, no evidence was led that it met the regulations of the National Land Transport Act 5 of 2009 (“NLTA”).
- [21] Regulation 247 of the National Land Transport Act as amended in 2017 September prescribes that:
- “No person shall operate on a public road a goods vehicle conveying persons unless that portion of the vehicle in which such persons are being conveyed is enclosed to a height of—*
- (a) at least 350 millimetres above the surface upon which such person is seated; or
 - (b) at least 900 millimetres above the surface on which such person is standing, in a manner and with a material of sufficient strength to prevent such person from falling from such vehicle when it is in motion.

Provided that no person shall be conveyed in the goods compartment together with any tools or goods, except their personal effects, unless that portion in which such persons are being conveyed is separated by means of a partition, from the portion in which such goods are being conveyed.”

- [22] In terms of the National Land Traffic Act, passengers in the back of the bakkie cannot be conveyed for a reward in the goods compartment. Conveyance is only permitted if passengers are not conveyed for a reward in a bakkie that meets the requirements. The requirements which need to be met are that passengers must be seated at least 350 mm above the surface or standing 900mm above the surface and there must be sufficient material of strength to prevent passengers from falling. It is illegal for passengers to stand, kneel or be seated in any other manner . There is no provisions which permits passengers to be kneeling. There was no the evidence led in this regard by the Plaintiff to show that its satisfied the requirements of the NLTA.

- [23] The conveyance of passengers on the Plaintiff's bakkie was unlawful, the bakkie was overloaded and he had no permit to do so. In as much as the NLTA is not being prescriptive as to the number of passengers which may be conveyed in the back of a bakkie, the regulation directs that passengers are to be seated 350 mm above surface such evidence was not led in this case. The fact that passengers were standing, sitting and kneeling is a clear sign of an overloaded vehicle.[3] The NLTA does not permit kneeling passengers let alone passengers standing against nothing or holding on to the head of the bakkie.
- [24] Further to the foregoing, even if the Plaintiff had conveyed 15 passengers, the bakkie was overloaded and it is against the law to convey passengers in that manner in. The Plaintiff did not even have a PDP at the time. In my opinion, if indeed he had one or was registered for one, he would have informed the police officials who would have captured such information as they captured his drivers licence information on his statement done on 18 February 2021. Further there was no documentary evidence produced to prove that the Plaintiff had a PDP. [4] This was yet another ploy to evade the evidence of an overloaded bakkie. The only inference that this court can draw is that at the time he had no PDP registered. In this country the ability to convey passengers (of such a number) is authorized through a PDP.
- [25] It is more probable that the bakkie had more than 17 passengers as opposed to the evidence being led by the Plaintiff and Mr. Magavha.[5] The proper test is not whether a witness is truthful or reliable in all that he says, but whether on a balance of probabilities the essential features of the story which he tells is true. The essential features of the Plaintiff's version are not true. Therefore, it is not probable that the bakkie met the standard requirements prescribed by the NLTA.

Failure To Keep A Proper Look-Out

- [26] The Plaintiff testified that before he overtook the Yaris he looked at his right-hand mirror and then he overtook the Yaris. He then looked at his left-hand mirror and went back to his left. There was no evidence of him ever looking to the horizon, scanning the oncoming traffic ahead or even looking forward towards the oncoming traffic as he was about to do a very dangerous maneuver,

which is overtaking towards oncoming traffic with an overloaded bakkie where the passengers were not even seated in line with the

regulations or strapped with seat belts.

- [27] Tritely, it is a duty of a driver of a motor vehicle that is about to overtake and pass another vehicle to keep a proper look-out and establish whether he can safely overtake. If a driver overtakes another vehicle when it is not safe to do so, the onus cannot be placed on the driver on the oncoming traffic from the opposite direction to avoid an accident. It remains the duty of the overtaking vehicle to ensure that it is safe to do so. Should it come to his attention that he will not be able to overtake without colliding with the oncoming traffic on the opposite direction he must apply the brakes and get back to his lane in which he was

originally driving on as soon as possible.[6] This is the expectation from a reasonable driver.

- [28] The Plaintiff did not keep a proper look-out. He never looked ahead to check for oncoming traffic by his own admission. He just checked the mirror on his right hand which would have only shown him vehicles coming from his rear. This was extremely reckless of him, bearing in mind the passengers at the back. Overtaking moving vehicles requires a skill, experience and practice because the other vehicles are also in motion and the situation is constantly changing. When poorly executed, overtaking can quickly turn a few seconds maneuver on the wrong side of the road into a nightmare as proven in this case.
- [29] “Overtaking in a car demands several skills, driving techniques variable conditions. These include a clear vision of the road ahead, and knowledge and understanding of other vehicles that might be affected – approaching vehicles from the front, trailing vehicles and the ones surrounding the vehicle to overtake. It requires correct perception and able application of mind over the machine. It also involves judgment of speed and distance along with the judicious use of various car accessories like the rear view and side mirrors, transmission, steering wheel, and the braking system. It also requires a good awareness of the vehicle you are driving. Threats to safe overtaking includes a lack of familiarity with the geography and the ability of the vehicle the driver is accustomed to. When the vehicle is heavily loaded with passengers and luggage this increases the risk of error in a driver’s judgement. The decision to overtake must not be taken lightly. The overtaking decision is a serious decision and the faster the traffic the more serious a decision to overtake is.”[7]
- [30] The Plaintiff took the decision to overtake recklessly without consideration for other road users let alone his passengers during a day which had been rainy. In my opinion he was clearly in a rush as the team was late due to being disappointed by the person who had promised to transport them. When a motor vehicle drives on the incorrect side of the road and collides with an approaching vehicle, it has been held that negligence can be inferred from the nature of the accident. Prima facie this is proof of negligence on the part of the Plaintiff. He simply failed to exercise a duty of care toward his passengers.[8]
- [31] There was no evidence of any impact from the Quantum. However, how far can this evidence be considered by the court under the circumstances or based on the evidence given?

Hearsay Evidence

- [32] During cross-examination of the Plaintiff, he was led through the statement which he made with the members of the SAPS on 18 February 2021 which relates as follows: “while I was busy driving facing eastern direction I did not see what happened next but I find myself waking up at Donald Fraser hospital.” Ms. Matiza for the Defendant inquired how the Plaintiff could detail how the accident occurred as he did during his examination-in-chief. His answer was very vague. He responded by stating that at the time he was put under pressure by the police to make a statement and could not remember how the accident occurred. Yet he failed to explain what sought of pressure was exerted on him.

- [33] Subsequent to that, Ms. Matiza for the Defendant pressed further on this issue by referring to the section 19F (exhibit B) affidavit written for the purposes of making a claim with the Defendant which was in detail. The Plaintiff conceded that he still could not remember the events of how the accident took place. It was based on what his passengers informed him. It was put to him that he was relying on hearsay evidence which is not admissible in a court of law. He reiterated that it was information he heard from his passengers who were at the back of the bakkie.
- [34] The Plaintiff did not specify which people or passengers gave him this information. It is a foundation of our law that hearsay evidence is not admissible. It can only be admissible if consideration is heard through the interest of justice in keeping with Section 3 of the Law of Evidence Amendment Act 45 of 1988 (Law of Evidence Amendment Act). The Law of Evidence Amendment Act defines hearsay evidence as: “evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence” (accentuation added). Hearsay evidence is only admissible in very limited circumstances and is presumed to be inadmissible unless proven otherwise.
- [35] Section 3 of the Law of Evidence Amendment Act on hearsay evidence, reads as follows:
- “(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless—*
- (a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;
 - (b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or
 - (c) the court, having regard to—
 - (i) the nature of the proceedings;
 - (ii) the nature of the evidence;
 - (iii) the purpose for which the evidence is tendered;
 - (iv) the probative value of the evidence;
 - (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
 - (vi) any prejudice to a party which the admission of such evidence might entail; and
 - (vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice.”
- (2) The provisions of subsection (1) shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence.”

[36] It was not his evidence that Mr. Magavha was the person who gave him such information. This is simply because Mr. Magavha's evidence would have been tested in that regard. Therefore, the evidence led by the Plaintiff as to how the accident occurred cannot be trusted or considered.

[37] Hearsay evidence may be provisionally admitted in terms of subsection (1)(b) of the Law of Evidence Amendment Act which states that "if the court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify in such proceedings: Provided that if such person does not later testify in such proceedings, the hearsay evidence shall be left out of account unless the hearsay evidence is admitted in terms of paragraph (a) of subsection (1) or is admitted by the court in terms of paragraph (e) of that subsection." [9]

[38] Although this court did analyse his evidence in this regard, hearsay evidence can only be considered if the interest of justice dictates so. This was not argued favourably, if at all by the Plaintiff's Counsel whose view was that Mr. Magavha's

evidence was also sufficient under the circumstances. He also did concede that the Plaintiff's evidence under the circumstances

was inadmissible.

[39] This then leaves this court with the evidence by Mr. Magavha who was a passenger holding on to the head of the bakkie. Although he could not remember the car which was driving in front of them, he detailed that they overtook a motor vehicle. Whilst in the

process of doing so and at about 50-80 metres, they met with the Quantum which had overtaken the truck. This caused the Plaintiff to swerve in an attempt to avoid a head-on collision which resulted in him losing balance, leading to the subsequent rolling of the bakkie.

[40] Mr. Magavha did not mention that the Plaintiff had completed the overtaking maneuver. His evidence was that whilst they were on the oncoming traffic lane 50 mm in, they met with the Quantum, and they tried to avoid it. In this instance the Quantum cannot be blamed, nor can the truck be blamed as they were on their correct lane of travel while the Plaintiff was not. It is also concerning that the version of the Quantum and the truck only comes up on November 25, 2021. Even if one looks at the particulars of claim the case made out is totally different from the case that has been advanced before this honourable court. The pleadings make no

mention of the truck and no mention of the Plaintiff overtaking a Yaris. It seems as if there was a lot of fabrication of the events.

[41] To make matters worse was the evidence given by the independent eyewitness Mr. Mulaudzi. On the first day of his testimony, he mentioned that the Quantum and the truck were in their correct lane of travel on the opposite side. It was the Plaintiff who was in an incorrect lane of travel when he met up with the Quantum. The next day he became

somewhat of a reluctant witness (attempts were made to declare him a hostile witness but later withdrawn) as he moved totally away from the evidence, he had given the previous day. On the second day of the trial his evidence was that the Plaintiff overtook the Yaris, completed the maneuver of overtaking, and went back to his correct side where he met the Quantum which was overtaking the truck.

- [42] This is in contradiction to the statement he made under oath with the members of the SAPS on 19 January 2021. This is also contrary to the information he gave the SAPS officials when they completed the Accident Report as the person who reported the incident. When Ms. Matiza for the Defendants made inquiries with him as to why his testimony differed to the statement given earlier, Mr.

Mulaudzi nonchalantly replied that he was dizzy at the time. It is concerning that a statement made two days after the incident by Mr. Mulaudzi stating that the Plaintiff was overtaking the Yaris when he lost control of the bakkie and rolled has now drastically changed. There was no mention of a Quantum or a truck. In my opinion his evidence on both days is full of contradictions and is not genuine. Mr. Mulaudzi's evidence cannot be trusted by this the court as he was also not a serious witness in court.

- [43] What remains genuine is the statement he made two days after the accident occurred which in my opinion this court can trust and consider under the circumstances. This statement was made while the information was still fresh and undiluted by outside forces. However, what is worrisome for this court is that none of the evidence led by Mr. Mulaudzi was put to the Plaintiff or Mr. Magavha

except for making reference to the colour of the Yaris and the number of passengers. Nothing else was put pertaining to the evidence which Mr. Mulaudzi was to lead at the time. In my opinion, I am constrained in considering such evidence as it will not be fair despite the fact that the Plaintiff's did not object to same.

- [44] This only leaves the evidence of Mr. Magavha, although his credibility can be questioned when it comes to the occurrence of the incident. By way of an example, how can he be trusted when he could not recall the make of the vehicle or the colour of the vehicle right in front of them? Further, Mr. Magavha did not compile any statement with the members of the SAPS on how the accident took place immediately after the accident despite the fact that he stayed only a day in hospital. Further, there was no evidence led on this issue except for this court to be informed from the bar by Mr. Matshidza for the Plaintiff that he made the statement which I cannot consider as it was not information from Mr. Magavha.

- [45] Prima facie the evidence of Magavha is the only direct evidence that can be considered by this court. Mr. Magavha testified that the accident occurred due to the Plaintiff being on the oncoming traffic lane. It was never his evidence that they looked right and overtook or otherwise. The evidence led was he overtook a motor vehicle which was driving slowly as if it was driven by a learner driver, 50-80 metres in they met a quantum which had overtaken the truck. In short, the Quantum had completed its overtaking maneuver and was on its

correct lane. It was the Plaintiff who at the time was on the incorrect side of the road. When faced with that situation he swerved to avoid a head-on collision which resulted in this accident. Had caution been taken by the Plaintiff before overtaking he would have not overtaken at that instance.

[46] Further, Ms. Matiza for the Defendants referred to the other statements compiled during cross-examination, interestingly these were all drafted on the same date, being 25 November 2021 inclusive of exhibit B. This is 10 months post the incident. Why these statements were not made earlier on is not clear as there was no evidence led to that effect. Further these statements also make no mention of a Yaris being overtaken onto the oncoming traffic lane or where the accident occurred or the truck . None of the witnesses who

attested to these affidavits except for the Plaintiff were called as witnesses in court, which does not assist the Plaintiff to prove the onus with which he is burdened.

[47] In *JM Grove v The Road Accident Fund* the Court held as follows:

“The RAF is obliged to compensate for damages arising from bodily injury ‘caused by or arising from driving of a motor vehicle. The causal link that is required is essentially the same as the causal link that is required for Aquiline liability. There can be no question of liability if it is not proved that the wrongdoer caused the damage of the person suffering the harm. Whether the act can be identified as a cause, depends on a conclusion drawn from the available facts and the relevant probabilities. The important question is how one should determine the causal nexus namely whether one fact follows from another[10].”

[48] The liability of the Defendant shall arise only if the Plaintiff is able to prove on a balance of probabilities that the injury was caused by the negligent driving of the insured driver. The Defendant’s liability is excluded where the cause of the injury cannot be linked to the negligent driving of an insured driver or where the cause can be attributed to the Plaintiff alone. The Defendant would not be liable where the Plaintiff is the driver of a motor vehicle that was involved in an accident alone without the involvement of another motor vehicle in any manner as this would be indicative of sole negligence on the part of the driver.

CONCLUSION

[49] The Plaintiff is the author of his own misfortune which unfortunately led to a demise of four people and several serious injuries. The Plaintiff can call upon the Road Accident Fund’s liability only if he can prove that the accident was not caused solely by his own negligence. In this regard

even contributory negligence cannot be attributed to the Defendant because this is not the version supported by Mr. Magavha or the Plaintiff. Tritely the costs follow the successful party.

[50] The Plaintiff has failed to discharge the onus.

[51] I therefore make the following order:

1. The Plaintiff's action is dismissed with costs in favour of the Defendant.

NHARMUVARATE AJ

ACTING JUDGE OF THE HIGH COURT,

GAUTENG DIVISION, JOHANNESBURG

APPEARANCES: For the Plaintiff: Adv Matshidza Instructed by : Rabumbulu Lucky Attorneys For the Defendant : Ms. Matiza Instructed by : The State Attorney Johannesburg

- [1] Section 61(f) of the Act states that "if he or she has not already reported the accident to a police or traffic officer at the scene of the accident, and unless he or she is incapable of doing so by reason of injuries sustained by him or her in the accident, as soon as is reasonably practicable, and in the case where a person is killed or injured, within 24 hours after the occurrence of such accident, or in any other case on the first working day after the occurrence of such accident, report the accident to any police officer at a police station or at any office set aside by a competent authority for use by a traffic officer, and there produce his or her driving licence and furnish his or her identity number and such information as is referred to in paragraph (e)"
- [2] Regulation 250 of the National Land Transport Act states that: "No person shall convey any other person in the goods compartment of a motor vehicle for reward: Provided that the provisions of this sub-regulation shall not apply in respect of a vehicle which complies with the provisions of the NLTA."
- [3] National Land Transportation Regulation 250 prescribes that : "No person shall convey any other person in the goods compartment of a motor vehicle for reward: Provided that the provisions of this sub-regulation shall not apply in respect of a vehicle which complies with the provisions of the NLTA."
- [4] Section 50 of the Act provides as follows: "(1) No person may operate a road-based public transport service, unless he or she is the holder of an operating licence or a permit, subject to sections 47, 48 and 49, issued for the vehicle concerned in terms of this Act."
- [5] R v Kristusamy 1945 AD 549 at 556.
- [6] Klopper HB The Law of Collision in SA 8th ed p 53.
- [7] Arrive Alive : Safe Overtaking and Road Safety . See also Rex v De Swardt 1949
- (1) SA 516 (N) the court said the General rule is that a driver must drive his motor vehicle so as to avoid causing harm to others.

- [8] In *Minister of Transport v Bekker* 1975 (3) SA 128 (0) it was said that a driver before overtaking another vehicle is under a duty to satisfy himself that it is safe to do so. In this case it was further said that discharging this duty, the main concern of an overtaking driver traveling on a single carriageway is Traffic ahead proceeding in the same direction, Traffic travelling behind; Traffic stationary or along the side of the road and Traffic approaching in the opposite direction.
- [9] Section 3(3) of the Law of Evidence Amendment Act.>
- [10] [2011] ZASCA 55 (31 March 2011) at para 7

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