

SOUTH AFRICA / JUDGMENT

N.C obo Minor v Road Accident Fund (2599/2021) [2023]

ZALMPPHC 84 (14 September 2023)

[2023] ZALMPPHC 84

COURT

Limpopo High Court, Polokwane

BEFORE

Kganyago

CASE / FILE NUMBER

2599/2021

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REPUBLIC OF SOUTH
AFRICA

IN THE HIGH COURT OF
SOUTH AFRICA

LIMPOPO DIVISION,
POLOKWANE

CASE NO: 2599/2021

REPORTABLE: YES/NO

OF INTEREST TO OTHER

JUDGES: YES/NO

REVISED

In

the matter between:

N[...]
C[...] OBO MINOR
PLAINTIFF
And
ROAD
ACCIDENT FUND
DEFENDANT

JUDGEMENT

KGANYAGO J

[1] On 17th October 2020 N[...] T[...] (deceased) who was the driver of the first insured motor vehicle was involved in a motor collision with the second insured motor vehicle driven by Jane Ramahlalerwa (second insured driver). The deceased died on the scene of the accident as a result of the injuries sustained during the accident. The plaintiff has instituted an action against the defendant claiming loss of support in her personal capacity and also representative capacity as the mother of the minor child. The defendant had defended the plaintiff's action, and in its plea had pleaded that the deceased was the sole cause of the accident. In

the alternative the defendant had pleaded that in the event the driver of the second insured vehicle is found to be negligent, that negligence was not the cause of the accident, but that the accident was caused by the sole negligence of the deceased.

[2] The parties have agreed to separate merits and quantum, and to determine the issue of liability first. The plaintiff's only witness to testify was Darrel Strydom. He testified that he is a trained and experienced traffic accident analyst. He was instructed by the plaintiff's attorneys to do a reconstruction of the accident that occurred on 17th October 2020 at 14h00 along the R81 road, between Mooketsi and Maphalle, Modjadjiskloof. His conclusions were based on the sources and references.

[3] On 5th March 2022 he had visited the accident scene. There is farm house next where the accident occurred and that the road is straight. There was also a third vehicle that was involved in the accident. The collision was not a straight head-on collision, but an ankle one. Immediately prior to the accident, the deceased was driving in the lane of travel of the second insured motor vehicle overtaking another vehicle. As the deceased was returning to his correct lane, the second insured vehicle steered into the lane of travel of the deceased and a collision occurred. The impact happened on the centre line of the road. The impact occurred on the right corner of the deceased vehicle in the right centre, and there was an overlapping. The photos that he had inspected from the police docket shows that both vehicles have missed the centre mass. The force from the second insured vehicle was slightly higher than from the deceased vehicle.

[4] Before the impact it shows that the second insured vehicle was in its lane, but there was a change of direction by the second insured vehicle pointing into the direction of the deceased vehicle. He had measured the road where the accident occurred and it had 1.5 degree rise/incline from the south to north at the collision scene. The 1.5 degree rise would not have affected anybody's view.

- [5] Immediately prior to the accident the deceased was overtaking a VW polo vehicle which was driven by one Hlakisi. During the process of overtaking, the deceased vehicle bumped into Hlakisi's vehicle when trying to push Hlakisi out of the road. Hlakisi applied brakes and slowed down. The speed limit on that road is 100 km per hour. The driver of the second insured vehicle had made a wrong decision by swerving to the lane of travel of the deceased vehicle. The second insured driver in her statement has stated that she saw the deceased vehicle coming and tried to avoid it, and this confirms that the accident occurred outside the window period referred to as perception reaction time/distance. The decision of the second insured driver was not only wrong, but proved to be fatal. The reasonable thing she should have done was to slow down rapidly, and steer her vehicle to the left-side of the lane in which he was travelling and drive onto the gravel shoulder of the road. In so doing she would most probably have avoided the collision.
- [6] The deceased must have been travelling at a high speed when he overtook Hlakisi, and as he intended to return to his initial lane of travel made contact with Hlakisi's vehicle on the front right fender and continued driving forward. Hlakisi in his statement has stated that the deceased was driving in a zig-zag manner. The zig-zag driving pattern as alleged by Hlakisi could have been that the deceased had realised that he had made contact with Hlakisi's vehicle during the overtaking manoeuvre when he wanted to return to his own lane. That the deceased could have understandably demonstrated such zig-zag driving behaviour in a moment of possible disorientation and/or shock as he was steering away from Hlakisi's vehicle in an attempt to correct his manoeuvre.
- [7] The witness was cross-examined and he conceded that when he went to the accident scene he did not interview the second insured driver and Hlakisi. That the reason for not interviewing them was that he had found their version of how the accident occurred in the police docket. The witness stated that the accident occurred after the deceased had overtaken another vehicle and was quickly returning to his lane of travel.
- [8] In his opinion, the accident was caused by the overtaking manoeuvre by the deceased believing that he will return to his lane after overtaking. That the second insured vehicle should not have swerved to the opposite lane as Hlakisi was coming and the deceased would also have wanted to drive back to his original lane. When it was put to the witness that the second insured driver will testify that she had tried to swerve to the left in avoiding the collision, the witness stated that had she done so she would have come to a standstill at a different position, and maybe on the gravel on the left. That the curve on the road was far from where the accident took place. That concluded the evidence of the plaintiff on merits and she closed her case.
- [9] The defendant's first witness to testify was Hlakisi Jim Maphalle. He testified that he is employed by Greater Tzaneen Municipality as a traffic officer. On 17th October 2020 he was in the company of his sister and brother-in-law and they were coming back from attending a funeral. He was driving his polo vehicle. As he was driving he checked the mirror of his car and saw a white golf vehicle (first insured motor vehicle) overtaking him at close range. He

reduced his speed so that the first insured motor vehicle may not push him out of the road. The deceased was driving at an excessive speed. As the first insured motor vehicle was overtaking him, it bumped the fender of his vehicle on the right side and continued with its journey. He flicked the headlights about three times to the first insured motor vehicle thinking that it will stop, but it did not.

- [10] There was a bridge in front of them, and the first insured motor vehicle when it passed the bridge it was still on the right side of the road on the lane of oncoming cars. After the bridge there was a curve on the left side. They were surprised how the deceased was driving as he was driving on the lane of oncoming cars. After passing the curve, the first insured motor vehicle moved to the correct lane on the left, but touched on the gravel. Where the first insured motor vehicle touched the gravel, there were some group of people who jumped from where they were standing when they saw the first insured motor vehicle coming. He gave his brother-in-law his cell-phone to phone the traffic officers at weigh bridge to stop the first insured motor vehicle. When his brother was busy phoning the traffic officers, the first insured motor vehicle moved back to the right side of the road on the lane on oncoming cars.
- [11] Whilst the first insured motor vehicle was driving on the lane of oncoming cars another vehicle came from the opposite direction facing the first insured motor vehicle. From his observation, the driver of the vehicle that was coming from the opposite direction reduced his speed and the two vehicles were able to drive past each other. After the cross of Lomondokop the first insured motor vehicle moved back to the right side on the lane of oncoming cars. Another vehicle emerged from the opposite side, and from his observation, the oncoming vehicle reduced its speed. The first insured motor vehicle moved back to its correct lane on the left side of the road and the two vehicles were able to drive past each other. From the distance he (witness) was driving behind the deceased, they could see the deceased's vehicle clearly.
- [12] The road was now straight and they were approaching Yassim scrapyard. He told his sister and brother-in-law that he was concerned about the woman who were selling at the market as the first insured motor vehicle might knock them. They could see a curve in front of them. It was only the first insured motor vehicle that was driving in front of them at that stage, and it was still driving on the lane of oncoming cars. From the opposite direction emerged a fortuner (second insured motor vehicle). As they were watching, the first insured motor vehicle tried to move back to the left lane, and the second insured motor vehicle also swerved to the left side. That resulted in the head-on collision of both vehicles on the white centre line. During the impact, he saw the engine of the first insured motor vehicle being flung to the air coming towards their direction. He was able to swerve to the gravel side of the road, reduce the speed of his vehicle, and after passing the two vehicles that have collided, his vehicle was able to land in V and stopped. Immediately prior to the collision, he was at a distance of about 200 metres from the point of

impact.

- [13] He alighted from his car and went to where the accident had occurred. In the first insured motor vehicle he found the driver as well as the passenger seated with their head facing down. In the second insured motor vehicle the driver who was a lady person was trapped in the vehicle and screaming for help. He also saw a passenger in the second insured motor vehicle who was lying on seat facing upward. He told them that he had already summoned the emergency people to the scene. After the impact the second insured motor vehicle was in an angle position facing right, whilst the first insured motor vehicle was just a little bit in front of the second insured motor vehicle from the northern side.
- [14] He is familiar with the road as he was working at the weigh bridge, and that route was their area. Where the first insured motor vehicle had bumped him before the accident was about 6 to 7 kilometres from the point of impact. He was instructed by the police not to move his car. He left the scene of the accident after the photographer had finished taking photos of the scene. In his view, the accident was caused by the deceased who was driving on the right side of the road facing oncoming cars. Where the accident had occurred the road is straight.
- [15] The witness was cross-examined and he stated that when he swerved to avoid the first insured motor vehicle, he did not touch the gravel, but had swerved until the yellow lane. The witness stated that there was no vehicle in front of the second insured motor vehicle to prevent it from seeing the first insured motor vehicle. The witness conceded that at the time of the impact the first insured motor vehicle was moving back to its correct lane. The witness conceded that had the second insured motor vehicle swerved to the left, the accident could have been avoided. When asked whether he saw the second insured motor vehicle reducing the speed, he responded by saying that he will not say that the second motor vehicle had reduced the speed but when the second insured driver “says bite” she saw the first insured motor vehicle close to her vehicle. The witness stated that the driver of the first insured motor vehicle was driving like somebody who was playing with his car. The witness stated that the driver of the second insured motor vehicle was driving in a zig-zag manner when he missed the pedestrians and touched the gravel, and that it was before the second insured motor vehicle emerged.
- [16] Jane Ramahlalerwa was the second witness to testify for the defendant. She testified that on 17th October 2020 she was the driver of the second insured motor vehicle. She was driving from Tzaneen towards Mamaila village in the company of her son. After passing the scrapyard she was driving on the uphill road and could not see in front of her. After passing the uphill she saw the first insured motor vehicle in front of her at a curve where she could not see in which lane that vehicle was driving. When she was at the summit she could see that the first insured motor vehicle was driving in her lane and it was coming towards her. She realised that she could not swerve her vehicle to the gravel as her vehicle was going to roll.

- [17] She started applying brakes softly because had she applied hard brakes she was going to roll, but at that stage the first insured motor vehicle was at close proximity. Unfortunately, whilst still looking at what was happening she could not see anything further, and she lost her consciousness. She regained her consciousness during November 2020 and was in the ICU at Letaba hospital. Immediately prior to the accident she was driving at about 80 kilometres per hour. The weather was normal and clear. She knows the road very well as she uses it on daily basis. When she first saw the first insured motor vehicle in front of her it was at about 200 to 300 metres and the deceased driving at an excessive speed. The deceased was driving as if he had lost control of his vehicle, and the first insured motor vehicle also looked like it was in the air as it was on the same height of second insured motor vehicle prior to the accident.
- [18] The way the first insured motor vehicle was at close proximity, had she swerved to the gravel, her vehicle was going to roll. She thought if she had to swerve to the lane on the oncoming cars, the first insured motor vehicle was also going to swerve to that lane. She just decided to wait and a collision occurred. Before the impact, the first insured motor vehicle had touched on the gravel and came back to the tarmac, and that is when the collision occurred. She does not know where each of the vehicles came to a standstill as she had lost her consciousness.
- [19] The witness was cross-examined and she conceded that the road towards Mooketsi had broken lanes and allows one to overtake. She also conceded that she was driving from the opposite direction from Mooketsi and that there was a solid lane from the direction she was coming from, and therefore it was not permissible for her to overtake. She stated that she started reducing the speed of her vehicle at the stage when she realized that the first insured motor vehicle was driving in her lane of travel. She stated that she could not swerve to the left as she was afraid that her vehicle was going to overturn, and also there was a ditch which she could have fell inside it.
- [20] The witness stated that she could not say with certainty as to which way she had swerved as she did not see that. She stated that she could not dispute the suspected point of impact as depicted on the sketch plan, and also as testified by Hlakisi. Under re-examination the witness stated that the accident was caused by the deceased who was playing on the road with his car. That concluded the evidence of the defendant and it closed its case. Both parties have submitted their closing address on the issue of liability.
- [21] For the plaintiff to succeed with her claim for loss of support, all that she needs to prove is 1% negligence on the part of the second insured motor vehicle. The standard used to determine whether a person is negligent is that of a reasonable person. In *Cape Metropolitan Council v Graham*[1] Scott JA said:

“Turning to the question of negligence, it is now well established that whether in any particular case the precautions taken to guard against foreseeable harm can be regarded as reasonable or not depends on a consideration of all the relevant circumstances and involves a value judgment which is to be made by balancing various competing considerations. These would ordinarily be

‘(a) the degree or extent of the risk created by the actor’s conduct; (b) the gravity of the possible consequences if the risk of the harm materialises; (c) the utility of the actor’s conduct; and (d) the burden of eliminating the risk of harm’.

If a reasonable person in the position of the defendant would have done no more than was actually done, there is of course, no negligence”.

[22] According to Darrel the plaintiff’s witness, the way the collision had occurred was not a straight head-on. It occurred when the deceased was returning to his lane of travel after overtaking Hlakisi whom the deceased had also bumped in the process of overtaking him. However, this version turned out not to be the correct version of how the accident occurred. Hlakisi the defendant’s witness who was the eye witness who had witnessed everything, the manner in which the deceased was driving for about 7 km prior to collision corrected Darrel. Hlakisi testified that the deceased overtook him about 7 km prior to the accident and that is when the deceased bumped him in the process of overtaking. That the zig-zag driving by the deceased occurred when the deceased nearly knocked the pedestrians, and not when he was overtaking him. Thereafter the deceased who was driving at a high speed has been driving in the right lane which is the lane of oncoming cars. Prior to the collision the deceased had escaped colliding with two oncoming cars, and his luck ended when he met the third oncoming car which is the second insured motor vehicle still driving in the lane on the oncoming cars.

[23] From the evidence of Hlakisi it is clear that the deceased prior to the collision has been negligently driving on the lane of oncoming cars by driving at an excessive speed, disregarding the rules of the road and not keeping a proper lookout. The deceased had therefore endangered his life and the lives of other road users. The question is what should the second insured driver have done faced with that situation even though she had right of way. In *Road Accident Fund v Grobler*[2] Hancke AJA said:

“A driver of a motor vehicle who is faced with an oncoming vehicle which has swerved and entered its incorrect lane of travel, and an impending collision must, as a general rule, avoid swerving to its incorrect lane as his primary course of action...It is important that each case be judged on its own merits. The cases referred to must be seen in the context of their own facts. In all cases mentioned the motorists who veered onto the incorrect side of the road had more opportunity and/or options than the respondent had”.

[24] Darrel the plaintiff’s only witness had reconstructed the accident scene, and his testimony was that of an expert witness. His testimony was based more on the evidence that he had obtained from the police docket. As an expert witness he was not supposed to be partisan, but to assist the court. In *Stock v Stock*[3] it was held that an expert witness must be made to

understand that he is there to assist the court, and if he is to be helpful, must be neutral, and that the evidence of such a witness is of little value where he, or she, is partisan, consistently asserting the cause of the party who calls him. Darrel's evidence was partisan and was asserting the cause of the plaintiff's case based on his conclusions which were one sided in favour of the plaintiff. Further Darrel does not seem to have correctly read the police docket and that led him to have come to the wrong conclusion of how the deceased was driving prior to the collision. His evidence is therefore not helpful and of little value.

[25] Hlakisi even though he was called by the defendant, was neutral in giving his testimony. He gave his evidence in a clear and credible manner without been partisan to the defendant who had called him as a witness. His evidence corroborate the evidence of the second insured driver. According to Hlakisi and the second insured driver, the deceased was driving like someone who was playing on the road with his car. Hlakisi testified that according to his observation, when the second insured driver said "bite" she saw the second insured motor vehicle driving on her lane of travel. This corroborate the second insured driver version that even though she saw the first insured motor vehicle for the first time at a distance of about 200 to 300 metres, at that stage she could not tell in which lane the deceased was travelling in, but was only able to do so when they were at a close range. That has therefore created a sudden emergency for the second insured driver. That is when the second insured driver swerved to the right in trying to avoid the collision, but it was too late for that, and the collision occurred on the centre line.

[26] The question is whether the plaintiff acted reasonably by swerving to the right instead of the left as a general rule. In *Road Accident Fund v Grobler* above at paragraph 11 and 12 the following was said:

"[11] The question is whether the respondent acted reasonably in the circumstances. In South African Railways v Symington 1935 AD 37 Wessels CJ stated (at 45)

'Where men have to make up their minds how to act in a second or in a fraction of a second, one may think this cause better whilst the another may prefer that. It is undoubtedly the duty of every person to avoid an accident, but if he acts reasonably, even if a by a justifiable error of judgment he does not choose the very best course to avoid the accident as the events afterwards show, then he is not on that account to be held liable.

[12] When a person is confronted with a sudden emergency not out of his own doing, it is, in my view, wrong to examine meticulously the options taken by him to avoid the accident, in the light of after-acquired knowledge, and to hold that because he took the wrong option, he was negligent. The test is whether the conduct of the respondent fell short of what a reasonable person would have done in the circumstances."

[27] The second insured driver was faced with a situation in which she did not expect to meet a vehicle which was consistently driving in her lane of travel as if it was travelling in its correct lane. The first insured motor vehicle which was travelling in the incorrect lane was also coming at high speed. By the time she realizes that indeed the deceased was travelling

in the incorrect lane was at close range, and she had to take a decision in a split of seconds whilst the deceased was fast approaching her. Since the deceased was not overtaking any vehicle, logically it will be difficult to determine what was his reasons for driving in the lane of oncoming cars and not returning to his correct lane even though he was fast approaching an oncoming car.

- [28] It would have been different had the deceased been overtaking another vehicle even at close range as logic will tell that the deceased will return to his original lane after overtaking. In that situation it would have been risky for the second insured driver to have swerved to the right. Whilst the deceased was driving at a high speed, he was driving as if he was playing with his vehicle which will also confuse the oncoming vehicles to which direction they might swerve as one will not know which way will be the better option to swerve. Whatever decision is taken must be made in split of seconds. Everyone regards his/her life as more important than the life of the next person, and one will think about himself/herself first, and that is normal. In my view, it cannot be said that the second insured driver had taken a wrong decision by swerving to the right instead of the left, or that he had acted less negligently. On the right the only vehicle that was oncoming was that of Hlakisi which was still about 200 metres away. By swerving to the right the second insured motor vehicle was not endangering the life of Hlakisi and the occupants of his vehicle. (See *Sierborger v South African Railways and Harbours*[4]).
- [29] Taking into consideration that the deceased was not overtaking any vehicle prior to the collision and had not changed lanes only when he approaches the second insured motor vehicle, any reasonable person in the position of the second insured driver would have swerved to the right since Hlakisi was still at a distance of about 200 metres giving way for the deceased to pass. The plaintiff has therefore failed to prove any negligence on the part of the second insured driver. The deceased was 100% to blame for the accident. The plaintiff did not plead any contributory negligence. Even if the plaintiff had pleaded contributory negligence, the evidence presented does not prove contributory negligence on the part of second insured driver.

[30] In the result the following order is made:

30.1 The plaintiff's claim is dismissed with costs

JUDGE OF THE HIGH COURT OF SOUTH AFRICA,

APPEARANCES: Counsel for the plaintiff : Adv Sibara SR Instructed by : SK Mabasa attorneys
Counsel for the respondent : Mafiri M Instructed by : State Attorney Polokwane Date heard : 20th July 2023 Electronically circulated on : 14th September 2023

[1] 2001

(1) SA 1197 (SCA) at para 7

[2] 2007

(6) SA 230 (SCA) at para 8

[3] 1981

(3) SA- 1280 (A) at 1296E-F

[4] 1961

(1) SA 498 (A) at 506E-H

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