

IN THE HIGH COURT OF SOUTH AFRICA  
EASTERN CAPE HIGH COURT: MTHATHA

CASE NO: 139/09

Heard on: 18/09/13

Delivered on: 26/09/13

NOT REPORTABLE

In the matter between:

THENJISWA FLORA MAYEKI

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

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JUDGMENT

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NHLANGULELA J:

[1] The plaintiff, acting in a representative capacity for three minor children of one Mr Xolela Mayeki, instituted an action against the defendant

in terms of s 17 of the Road Accident Fund Act 56 of 1996 claiming payment of R236 492,00 as damages arising out of the death of Mr Mayeki in an accident which took place on 04 December 2007 at N2 National Road, Engcobo.

[2] It is alleged in the plaintiff's particulars of claim, attached to the summons, that on 04 December 2007 a motor vehicle of one Mr Xolela Mayeki, plaintiff's son, described as a Toyota Venture and registered as CCH 687 EC, collided with a motor vehicle described only as a Toyota Condor due to negligent driving of the driver of the Condor who was insured at the time by the defendant. In that collision Mr Mayeki sustained bodily injuries which resulted in his death. In paragraph 9 of the particulars of claim the following is alleged:

“9. The said collision was caused by the sole negligent of the aforementioned Condor (*sic*).

9.1 He failed to keep a proper look-out

9.2 He drove the said vehicle at a speed that was excessive in the circumstances, particularly immediately prior to the collision.

- 9.3 He failed to apply the brakes of the motor vehicle timeously, or at all when he should have (*sic*).
- 9.4 He drove the motor vehicle without due care and consideration for other road users, particularly the plaintiff.
- 9.5 He failed to exercise proper control over the vehicle in circumstances that he could and should have done so, and/or
- 9.6 He failed to avoid the collision when by exercise of reasonable care in circumstances that he could and should have done so.”

[3] The defendant denies the claim and puts the plaintiff to the proof of her allegations.

[4] In the trial that ensued only one witness was called to testify on behalf of the plaintiff. That witness is Nonkosivumile Maqungo, a woman. She told the Court that on 04 December 2007 she boarded a Toyota Venture, which came from Cofimvaba direction, driven by the deceased. She was a passenger for reward together with few others. She occupied a front seat next to the deceased. The Venture was driven towards Engcobo town, her

intended destination. All the other passengers disembarked at various points before the Venture reached eBhodini Administrative Area where the accident occurred. She was left in the venture with the deceased when she noticed that the driver of the Condor following from behind was making attempts to overtake the Venture. During that process the Venture suddenly veered out of the road and she lost consciousness. She learnt later on that the Venture capsized on the side of the road.

[5] It is alleged in paragraph 7 of the particulars of claim that the Venture capsized and overturned whilst the deceased was trying to avoid a collision with the Condor. It is further alleged in paragraph 10 that as a direct consequence of the said collision the deceased sustained multiple bodily injuries from which he died.

[6] The evidence of Ms Maqungo does not support the allegations in the particulars of claim that the accident took place due to negligent driving of the insured driver which led to the collision between the Venture and Condor. What she told the Court is that the deceased drove out of the road after the driver of the Condor had made several attempts to overtake.

[7] It was contended on behalf of the plaintiff that the deceased was forced to drive out of the road by the negligent driving on the part of the insured driver. This submission is out of touch with the evidence because an attempt to overtake without more being said cannot, directly or inferentially, amount to negligent driving. Counsel for the plaintiff conceded the fact that the particulars of claim speak of a collision and the oral evidence of the witness does not.

[8] In terms of s 17(1)(b) read with s 26 of the Road Accident Fund Act 56 of 1996 the Fund is obliged to compensate any person for loss of support as a result of injury or death of a person caused by or arising from driving if the injury or death is due to the negligence of the insured driver with regard to the manner in which he/she drove the insured vehicle. In this case the *onus* to prove negligence lay on the plaintiff. She was not able to discharge that *onus*.

[9] In the circumstances this Court cannot come to the assistance of the plaintiff, much as I appreciate the extent of prejudice the children of the deceased stand to suffer if the claim is unsuccessful. In this case I can do no better than to dismiss the plaintiff's claim with costs.

[10] In the result the following order shall issue:

**“The plaintiff’s claim is dismissed with costs.”**

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Z.M. NHLANGULELA

JUDGE OF THE HIGH COURT

Counsel for the plaintiff : Adv Poswa  
Instructed by Mancotywa Ndzabela Inc  
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