

**IN THE HIGH COURT OF SOUTH AFRICA**  
**(TRANSVAAL PROVINCIAL DIVISION)**

**CASE NO: 35417/05**

**DATE: 25/7/2008**

**In the matter between:**

**ILSE MARIE ERNST**

**PLAINTIFF**

**And**

**ROAD ACCIDENT FUND**

**DEFENDANT**

**JUDGMENT**

**MOLOPA J**

In this action the Plaintiff has instituted an action against the Defendant for damages arising out of a motor vehicle collision which occurred on 29 October 2004 along the Polokwane-Louis Trchardt road, between a motor vehicle with registration letters and numbers JTV 535 GP (“the first insured vehicle”) driven by one Elvis Seswai Mafolo (“The First insured driver”), and a motor vehicle with registration letters and numbers DZG 123 M, driven by Ilse-Marie Ernst (“The Plaintiff”) and a motor vehicle with registration letters and numbers DRL 877 N (“The

second insured vehicle”) driven by one G Mabatha (“The second insured driver”).

When the trial commenced the parties, by agreement made application for separation of liability and damages, i.e. separation of merits and quantum, in terms of Rule 33 (4) of the Uniform Rules of the Supreme Court, which order I granted. The matter thus proceeded on the merits (liability) only, and the quantum was postponed sine die.

The evidence of the Plaintiff was that on the 29 October 2004 between 17H20 and 17H30 she was driving from Polokwane to Louis-Trichadt along the Polokwane-Louis-Trichadt road. She was at the time with her daughter who is six years 9 months old (6.9). She testified that the road had two lanes, one each to/and from Polokwane. She said that the traffic was busy; she was travelling at approximately 80 km/ph.

She testified that as she was driving she noticed from her rear view mirror a cream or white 1400 Nissan bakkie with canopy (the first insured vehicle) coming from behind at a high speed. She applied her brakes in an attempt to warn the bakkie driver from behind to slow down. The bakkie driver swerved to his left beyond the yellow (emergency) lane onto the field/gravel where he was airborne, he flung back to his right towards the road with the canopy of his bakkie being flung over. Something, either the bakkie itself or the canopy hit her Fiat Sienna motor vehicle on the left front. Photos of the Plaintiff’s damaged motor vehicle, page 20 of exhibit A was shown to the court, depicting the damage on the front left side from where the front passenger door starts to the headlamp

(including the left front tyre).

She said that the force of the collision aforesaid flung/pushed her motor vehicle into the lane of oncoming traffic as a result of which she was involved in another collision with another bakkie (the second insured vehicle) travelling in the opposite direction from Louis Trichardt to Polokwane. That thereafter she was extremely shocked, she and her daughter could not get out of their car, people around the scene of the collision helped take them out of the car.

She did not speak to the driver of the bakkie (first insured driver) she saw people from the bakkie (first insured vehicle) strewn/lying around on the ground.

Under cross examination she stated that visibility was still light (not yet dark), that she drove with her headlamps on, that she cannot recall if the lights of the first insured vehicle were on. That she always drove with her headlamps on especially when outside town. That she was wearing spectacles during the collision.

She disputed that any other maroon vehicle tried to overtake the first insured vehicle on its right as was put to her by Defendant's counsel. She said that that the first insured driver went to the left on his own, no other vehicle tried to overtake him. She maintained that the first insured vehicle was definitely behind her, approaching at a higher speed, more than the 80km/ph that she was driving.

She further disputed that the first insured vehicle lost control as a result of another bakkie colliding with it from behind in the yellow lane. She said that the 1<sup>st</sup> insured vehicle did not collide with any other bakkie, the first insured driver, on his own had gone off to the left, onto the veldt, got airborne came back towards her to the right and the either bakkie or canopy hit the left front portion of her vehicle. It was a matter of seconds.

She further testified that the first insured driver did not drive in the yellow lane, which she said is about half ( $\frac{1}{2}$ ) a lane, he just took off to the bushes/veldt and after being airborne came back towards her car and hit her on the left front. She said that she was on her way to her niece's concert which was starting at 18H00 hence she was sure that the collision occurred before 18H00.

She further stated under re-examination that when she collided with the other bakkie (second insured vehicle) travelling in the opposite direction she was now travelling at a much lower speed, the bakkie in question had also applied brakes for approximately 200m prior to the second collision; hence the impact was not hard/heavy.

The next witness for the Plaintiff was Mr Breytenbach. He testified that he was coming from Messina to Polokwane, there was a bakkie (2<sup>nd</sup> insured vehicle) a Toyota Hilux travelling in front of him. From the opposite direction (Polokwane-Louis Trichardt) there was a truck, then a car then another car which was involved in an accident (Plaintiff's vehicle) then a white Nissan bakkie (the first insured vehicle).

He testified that he saw the Nissan bakkie (first insured vehicle) coming at high speed, the car in front (Plaintiff's car) reducing speed. That the Nissan Bakkie (first insured vehicle) looked to be coming at high speed. The Nissan bakkie then swerved to the left side, slipped on the gravel next to the road (on the left side) causing a lot of dust. The Nissan bakkie then swerved back towards the road hitting the other vehicle (Plaintiff's vehicle) on the left side, which latter vehicle then swerved/moved to the right and collided with the Toyota Hilux bakkie (second insured vehicle) which was in front of him.

He disputed that there was any maroon vehicle which tried to overtake the Nissan bakkie (the first insured vehicle). He also disputed that another bakkie hit the Nissan bakkie from behind in the yellow lane. He further testified that after the collision in question he, went out of the road and stopped to avoid another collision.

Under cross examination he stated that the collision occurred between 17H15 and 17H30. He said that the road was busy but it was not congested to lead to bumper to bumper.

He further stated that he was driving a 2x4 double cab 2.5 red Mazda, that his vehicle was higher up hence he could see in front of him. That he was travelling the opposite direction to the truck (horse and trailer) therefore he could see the vehicles on the (his) opposite direction behind the truck (horse and trailer). He said that he saw the Nissan bakkie (first insured vehicle) travelling at quite a high speed, it could have at plus 100 km/ph, he could determine the speed since the other vehicles in

front were travelling slower than the Nissan bakkie, hence he could see that the Nissan bakkie was coming at high speed.

He said that he saw that the Nissan bakkie (first insured vehicle) swerved off the road (to the left) onto the gravel, off the yellow lane, that the yellow lane is not broad. That when the Nissan bakkie went off the road it was approximately 2-3 car lengths behind the Sienna, it swerved to the left and then came back again to the right towards the road.

He further stated that on the day in question (29/10/2004) there were three accidents on the Polokwane-Louis Trichardt road, including the one in question herein. That as he was taking the Plaintiff and her daughter to hospital, 15km and/or 10km from the scene of the accident in question they came across other accidents. In one collision a vehicle which was giving way to a medical emergency had hit a bridge; the vehicle in question was not a bakkie, in another collision one vehicle collided with another vehicle which was turning to the left, in this collision also no bakkie was involved, they were all private (sedan) vehicles.

He disputed/denied that any maroon vehicle tried to overtake the 1<sup>st</sup> insured vehicle/Nissan bakkie. He further disputed/denied that another bakkie collided with the Nissan bakkie (first insured vehicle) from behind in the yellow lane causing it to rollover as put by Defendant's counsel, and maintained that the first insured driver swerved on his own to the left onto the gravel, slipping causing lots of dust and coming back onto the road (to the right), hitting the Plaintiff's car.

He further stated that after the collision there were people presumably from the Nissan bakkie (first insured vehicle) lying around, to which he was confronted with the version of the insured driver (Mafolo) that there were only two people in the bakkie, himself and a passenger in front.

He said that after the collision people along the road stopped their vehicles to help those involved in the collision. He helped the Plaintiff and her daughter after he had spoken to the Plaintiff's husband who had requested him to take them (Plaintiff and child) to hospital in Polokwane. They did not wait for the ambulance/paramedics, he used his vehicle to ferry them to hospital.

That concluded the case for the Plaintiff.

For the Defendant the first insured driver, Elvis Seswai Mafolo testified. He testified that he is employed by the Department of Education as a teacher, he has been teaching for approximately 15 years.

He testified that on 29 October 2004 he was travelling along the Polokwane Louis-Trichardt road, he was coming from Polokwane towards Louis-Trichardt going to attend a church wedding. He said that it was between 19H00 and 20H00. That while driving on the road a certain maroon vehicle (private car) which was behind him started overtaking him, he was driving a 1400 Nissan bakkie (the first insured vehicle).

That while the alleged maroon vehicle which was allegedly overtaking him was parallel to him, there was another vehicle approaching from the opposite direction, the alleged maroon vehicle allegedly insisted to get in front of his vehicle, that he was forced to reduce speed by applying his brakes, Trying to avoid the alleged maroon vehicle he moved towards the yellow lane (emergency lane). That in the process of moving to the yellow lane another vehicle came from behind and collided with his vehicle. His vehicle started overturning; it rolled over until it came to a stand still on the road surface on the Polokwane-Louis Trichardt road facing towards the Polokwane direction.

That when the vehicle rolled over he could see, he screamed until it stopped. He screamed for people who were outside to help take them out since he thought that his vehicle might go into flames, that one person who was outside stated that the battery of the vehicle was out thereof the car would not catch fire. People then came and took them out of the vehicle, put them on the side.

He further testified that he sustained injuries; he broke/fractured his right arm in the accident.

He testified that there was some pending case against him relating to the collision he was involved in on 29 October 2004, that some documents came to him where someone stated that he bumped against his car.

He testified that besides the vehicle that allegedly hit him from



behind he never came into contact with any other vehicle that he remained conscious all the time hence he could see at all times. He said that he would be surprised if he were to be told that he collided with another vehicle because he was not in a hurry, he never overtook illegally on his left side therefore that would be impossible.

He further testified that he was not certain if there were other accidents besides the one he was involved in. He said that he had made a claim to the Defendant and he had already been compensated/paid.

Under cross examination he stated that he never lost consciousness, he saw everything. That after the collision he did not see other vehicles involved in the collision, that he does not know if the collision occurred which he possibly did not see. That he does not believe that a collision possibly occurred nearer his car because he never saw it.

He further stated that he never told his legal team that another collision/two other vehicles collided in his immediate vicinity because he did not know about that. That if he had seen other collisions in his vicinity he would have told his legal team.

He said that he did not tell anyone that two other vehicles collided next to him. That he was asked if two other vehicles collided near him but did not say if any other vehicles collided before him because he did not see any other vehicles that collided.

He stated that he was present when the police arrived, that he spoke to the police and that he gave his details to the police but that his details were given to the police not on the day of the collision.

He stated that there were only two people in front in his vehicle. And that at the back of his vehicle there were four people. He said that his counsel said that there were only two people in his vehicle (to the Plaintiff and Breytenbach) because counsel did not ask him how many people were at the back of his vehicle.

He confirmed that the particulars in Exhibit A on page 5 of the Accident Report form on Section B were his particulars that these details were given to the police by himself but not at the scene of the collision. He could not dispute the particulars of the Toyota Hi-lux (second insured vehicle) which was also involved in the collision, part A thereof and the particulars of the Plaintiff, part C thereof. On a question why the police would take particulars of the other vehicles (parts A and C) if there was no other collision he stated that he cannot remember about it, that he does not know why the police would take such particulars. He stated that he does not know if all were involved in the same collision as him.

He further disputed some of the particulars of the passengers which would have allegedly been in his vehicle stating that he does not know why the police put wrong details of passengers. He disputed that he was carrying six passengers, and stated that the police might be lying.

He further stated that the collision in which he was involved

occurred between 19H00 and 20H00, that it was already dusk. He further stated that he cannot dispute that the collision occurred between 17H00 and 17H30 as stated by the Plaintiff and Breytenbarch since it had been some time that the accident had occurred, stating that he was just estimating the time that he is not sure of the time therefore he cannot dispute that the collision occurred between 17H00 and 17H30. He said that it was already dark when the collision occurred.

Asked if he saw the truck in front before the collision he stated that if he remembered correctly he had past the truck about 20 k/m away. He stated that immediately prior to the alleged maroon vehicle coming to him there were lots of vehicles in front and behind him, that he was not sure what vehicle was immediately in front of him, that he does not know if the vehicles in front of him were following a truck. He stated that he cannot dispute that the two vehicles in front of him were following a truck because he does not know what they were following. He stated that he did see vehicles in front of him but he cannot say what vehicles they were because of darkness.

He stated that the passenger who was in front with him one Sebei Sebei, who was a church delegate has past away. He further stated that he still does see some of the people who were at the back of his bakkie, that he knows them and he knows where to find them, stating that these people were never called to come and testify and he does not know if they would confirm his version.

The first insured driver further stated that he does not remember what the

make of his bakkie was, it was old, it was in proper working order and that he does not remember when the last service on the vehicle was done.

He said that he did not see the vehicle which hit from behind in the emergency lane before it hit him, that he never saw it prior to it hitting him, that the vehicle in question was going faster than him and that it hit him hard to the extent that he lost control, that there was a loud bang. He stated that he does not know what happened to the vehicle which hit him from behind, that it might be so that the vehicle in question would have been damaged a lot and would have been at the scene, that he did not see the vehicle at the scene of the accident and he does not know if any one saw the vehicle in question.

He stated that when the vehicle in question hit him from behind his vehicle rolled over in the tar back to front, that his vehicle never went to the gravel, and that he would not know why it was not put to the Plaintiff's witnesses that his vehicle never went to the gravel. That he thinks that he told his legal team that his vehicle never went to the gravel.

He stated that while rolling over he does not know what happened to the alleged maroon vehicle. He stated that he never said that he was travelling in the yellow lane. He said that the yellow lane was big enough to accommodate a car, that his car was partially in his lane and he never touched the vehicle in front of him. He stated that when his car was rolling over he could see it and he is sure that no car came into contact with his car.

He stated that in the process of rolling the canopy of his vehicle came loose, that it flung on to the left side outside the road. He said that he does not know if thereafter it bumped something and came back and hit something, that he does not know if the canopy hit another vehicle and that he cannot dispute that the canopy might have hit another vehicle.

When put to him that the Plaintiff saw a white Nissan bakkie coming at high speed behind her that the said bakkie went to the left and lost control and either the vehicle or the canopy hit her vehicle, the first insured driver stated that the car that the Plaintiff saw behind her was not his, that he does not know in which accident the Plaintiff might have been involved.

Under re-examination he stated that while driving from Polokwane to Louis Trichardt he could see vehicles closer to him because it was dark.

On a question by the court he stated that when the maroon vehicle was parallel to him he moved to the left, that the collision happened partly in the yellow lane and that the bakkie which hit him came from behind in the yellow lane.

That concluded the evidence for the Defendant.

From all the evidence before court it is common cause that both the Plaintiff and the insured driver were involved in a collision on 29/10/2004 along the Polokwane –Louis Trichardt road, travelling from

Polokwane to Louis Trichardt.

That the first insured driver was driving a white Nissan bakkie.

That on the insured driver's own version at some stage while so travelling he swerved to his left towards the yellow lane.

That at some stage while on the left side for whatever reason he lost control of his vehicle, causing it to overturn/roll over and he came back towards his right into the lane of travel of the Plaintiff.

The above facts are consistent with the version of the Plaintiff and Breytenbach.

In his evidence the insured driver disputed that his vehicle came into contact with Plaintiff's vehicle. Later in his evidence he states that his vehicle was possibly not involved in the collision where the Plaintiff's vehicle was involved. The Accident Report Form (Exhibit A) discovered by defendant self, which was not disputed by the Defendant, specifically states that Mofolo's vehicle (the first insured vehicle) was involved in the collision in question.

Counsel for the Defendant was somehow grasping at straws wanting this court to believe that the second page (Page 5 A of Exhibit A) which was initially omitted was not part of the Accident Report Form, yet on the description of the collision, on page 9 of the Accident Report Form there is mention of the first insured vehicle's involvement in the collision

in question. If the defendant sought to dispute that the first insured vehicle was involved in the collision in question, they should have subpoenaed the police who filled in the particulars of the vehicles involved in the collision in question, which particulars include Mafolo's (first insured) vehicle.

In analysing the whole evidence, it would not make sense why the police would record in the Road Accident Report the particulars of the insured driver and that of the plaintiff and the other Toyota Hi-lux which was involved in the collision in question if the insured driver's vehicle was not involved in this collision. In all probabilities the insured driver is not telling the truth that he was not involved in the collision in question. His story about a maroon vehicle trying to overtake him and another bakkie hitting him from behind are in my view made up stories to try to exculpate himself i.e. dissociate himself from the collision in question. His version is rejected in so far as it conflicts with the Plaintiff's version.

On a proper analysis of the whole evidence before court, in my opinion Mafolo is simply not telling the truth, he was involved in the same collision with the Plaintiff, he on his own version swerved to the left towards the yellow lane, whereupon he lost control of his vehicle rolling over and coming back to the right, in my view ending up hitting the Plaintiff's vehicle causing her to move to the other lane (opposite lane) where she collided with the second insured vehicle.

On a balance of probabilities the versions of the Plaintiff and

Breyenbach set out above are more probable. Breytenbach is an impartial witness in my view, he did not know the Plaintiff until the collision.

Counsel for the Defendant even tried to confuse and/or discredit him and the Plaintiff by putting to them that there were only two people in the insured driver's vehicle, when Breytenbach and the Plaintiff had testified that a number of people from the bakkie were strewn/scattered in the street after the collision. The insured driver confirmed that there were at least five other people, besides him, in the vehicle. He however disputed that there were six passengers in his vehicle as recorded by the police in the Accident Report Form. In any event on his own version they were all in all six (6) in his bakkie.

Looking at the evidence of the first insured driver and what was put to the Plaintiff and her witness, it appears to me that the Defendant sought to create a case for absolution from the instance with the version of the insured driver, which cannot in my view hold. The first insured driver, Mafolo, was involved in the collision in question herein. I accept the versions of both the Plaintiff and Breytenbach that he was driving at a high speed in the circumstances, he failed to keep his vehicle under proper control and was negligent in that regard, which negligence in my view caused the collision in question.

In the result the Plaintiff's claim is thus upheld with costs.



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**Molopa J**

**JUDGE OF THE HIGH COURT**