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**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG**

CASE NO: RAF 313/2015

In the matter between:

MAHLAKU SARAH MPSHE

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

DATE OF HEARING

: 12 JUNE 2017

DATE OF JUDGMENT

: 29 JUNE 2017

COUNSEL FOR THE APPLICANT

: ADV. MAPHLELA

COUNSEL FOR THE RESPONDENT

: ADV. MONNAHELA

JUDGMENT

HENDRICKS J

Introduction

[1] On the 17th day of May 2015 at approximately 17H30 Mr. Asiel Lucky Mpshe (“the deceased”) was the driver of a motor vehicle (“a van”) on the Madinyane public road when a collision occurred. He died as a result of the accident. Mrs. Mahlaku Sarah Mpshe (“the plaintiff”), the widow of the deceased instituted an action for damages against the Road Accident Fund (RAF) (“the defendant”), in her personal capacity as well as in her representative capacity on behalf of her two minor children. It was agreed between counsel that the eldest child has become of age and that the plaintiff can no longer represent him. It is alleged that the accident was caused as a result of the negligent driving of the insured driver. Liability is disputed by the defendant. The merits and quantum were separated and the trial on merits proceeded on 12th June 2017.

[2] The plaintiff presented *viva voce* evidence. Mr. Freddy Maduma testified that on the day of the incident, he was offered a lift by the deceased who was driving a van without a canopy. There were many people on the back of the van and inside the cab of the said van. He was seated at the back of the van in the left far-end corner away from the cab. He was facing to the lane bearing oncoming traffic. They

were travelling from Jehrico to Lethlabile on the Madinyane public road.

- [3] Whilst so travelling, the deceased put on the indicator of the van and was in the process of overtaking two motor vehicles which were driving in front of his van, when all of a sudden the driver of the motor vehicle immediately in front of him (the insured driver) also overtook the motor vehicle in front of it without indicating. Both their van and the motor vehicle of the insured driver drove parallel to each other in the lane of oncoming traffic. The road consists of a single carriage lane with one lane each in opposite directions. The result was that all three motor vehicles were driving at one stage parallel to each other in the same direction.
- [4] The motor vehicle who was initially in front, slowed down. By so doing, it created an opportunity for the insured driver to overtake. The deceased was still driving on the right hand side of the road towards it's edge. There were potholes through which the deceased drove and which caused him to lose control over his van, which then overturned. Some of the occupants were injured and the deceased passed on. According to him, the accident was caused by the insured driver who overtook without indicating as well as the potholes in the road.

- [5] He was confronted about a statement which he made to a police officer after his discharge from hospital. The statement is dated 06th July 2015. According to him, the statement was not read back to him by the police officer who wrote it. The statement was however discovered by the plaintiff as a document in her possession. The contents of the statement which was attested to under oath reads as follows:

“Freddy Mabuma 47 years of age residing at house [...], Jericho employed at Alrote East Rand; South African Leathers SA Company with telephone no 060 783 6798 state under oath as follows:

“On Sunday 2015/05/17 at about 17:00 I was a passenger in a vehicle driving by one Mr. Mpshe. I was seated at the back of the said car which is a bakkie without a canopy.

We were travelling on the main road from Jericho direction towards Maboloka direction. While travelling the driver M. Mpshe indicated to overtake the car which was traveling in front of us which suddenly overtake the car in front of it forcing the car to travel parallel with that car on the same lane.

The car which was in front of us both slowed down, they allow both cars to pass and the one which was parallel with us manage to utilise the space and drove back to the left hand side while our driver Mr. Mpshe panic and lost control of the vehicle. It swerved from one direction to the other and started to throw us out. I was the first one to be thrown out of the back of that bakkie and I fell on

the ground near the tarmac road. I was injured on the waist on the right hand as well as on the head and the left hand.

When the dust has subsided I noticed that our vehicle is lying on its side on the left hand side of the passenger door facing the direction where we came from.

All of us who were seated at the back of the bakkie we were thrown out of the bakkie when it fell on its side and we sustained some injuries.

While there we were taken by an ambulance which came to the scene and took me to Brits hospital where I was treated and discharged immediately.

This is all I can state.”

[6] During cross-examination the witness admitted that it is his signature that appears on the statement. He was adamant that he appended his signature on the statement without it been read to him and without him reading it. Of significance however is the fact that he made the statement on 06 July 2015, sometime after the accident. He was approached by the attorney acting on behalf of the Plaintiff asking him to make this statement.

[7] It emerged further during cross-examination that he was able to hear the sound of the indicator of the van on which he was travelling, yet

he was unable to hear whether the deceased hooted when the insured driver also overtook. Interesting enough, he observed that when the deceased was in the process of overtaking the insured driver's motor vehicle and the motor vehicle which were driving in front of the insured driver's motor vehicle, the insured driver overtook without indicating. Being seated where he was on the back of the van facing in the direction away from the lane in which they were travelling, it is difficult to understand how he managed to see that the insured driver overtook the motor vehicle in front of him without indicating. This, despite the fact that there was nothing which caused him to observe the insured driver before the insured driver overtook the motor vehicle in front of him. Upon questioning by the court, it became apparent that the deceased did not hoot and he did not apply brakes in an attempt to avoid the accident. Instead he slowed down but it was too late.

- [8] Ms. Virginia Mafora, who was also a passenger seated on the left front passenger seat of the van driven by the deceased, also testified on behalf of the plaintiff. Like Mr. Maduma she also got a lift from the deceased who was travelling to Lethlabile. The deceased indicated and was in the process of overtaking the motor vehicle of the insured driver when the insured driver in turn also overtake the motor vehicle which was in front of the motor vehicle of the insured driver. The insured driver did not put on his indicator when he was about to overtake. This caused the deceased to move more to the right hand side (opposite side of the road towards the edge of the road). The

deceased slowed down because the road was damaged. As the deceased was trying to move back to the correct side of the road, he hit a pothole and lost control over the van, which ultimately overturned.

- [9] During cross-examination she was asked about a statement which she deposed to three (3) days after the accident. According to her, she did inform the police officer what happened and the police officer took down her statement. Like in the case of Mr. Maduma her statement was also not read back to her nor did she read it before she appended her signature on it. She did not know the deceased before the day of the accident. She only met him on that day when she hitchhiked a lift. She did not inform the police that the deceased was known by the name of Bazuka.

- [10] The contents of her statement which was attested to under oath, read thus:

“Virginia Mafora states under oath in English

I am an adult female aged 29 years residing at [...] Lethlabile. I am working at Shoprite Brits as a controller. My cell number is [...]. My home language is Tswana.

On Sunday 17/05/2015 at about 17H00 I was a passenger in a silver-grey Chevrolet bakkie and was travelling from Jericho to Lethlabile. There were a group of about twelve people at the back of the bakkie and I was sitting on the passenger seat of the bakkie.

We passed at Jericho taxi rank and while we approached Madinyane road towards Mabaloka the driver, being Bazuka tried to overtake and there were two cars driving in front of him to the same direction and there was a pothole to where he was driving and he tried to avoid that pothole by driving back and there were already two vehicles at the back of his bakkie and he lost control of the car and the car overturned to the outside of the road and we got injured. The paramedic and the police came and we received medical treatment. That's all I can state."

[11] She was confronted during cross-examination not only about the difference between her *viva voca* evidence and the contents of the statement which she deposed to, but also about the differences between her *viva voca* evidence and that of Mr. Maduma. The differences between her *viva voca* evidence and her statement are glaringly obvious. Her *viva voca* evidence and that of Mr. Maduma also differs remarkably.

[12] That concluded the evidence tendered in behalf of the plaintiff. No evidence was tendered on behalf of the defendant. It is clear that there are contradictions in the testimonies of Mr. Maduma and Ms. Mafora. Not only did they contradict each other when they testified in this Court but their respective versions are also materially different from the statements they deposed to.

[13] In **Stellenbosch Farmers' Winery Group Ltd and Another v Martell ET CIE and others** 2003 (1) SA 11 (SCA) the following is stated in paragraph [5] thereof:

“[5] ... The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and

(c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

[14] The onus is on the plaintiff to prove her case on a balance of probabilities. There are no mutually destructive versions between the plaintiff's case and the defendant's case. As already alluded to earlier on, the defendant did not present any evidence. The evidence presented by the plaintiff is contradictory in nature. Much depends on the credibility of the witnesses who testified on behalf of the plaintiff. The contradictions, not only in their *viva voce* evidence in this Court but also with regard to the respective statements which they made, are material.

[15] The case which the defendant had to meet as set out in the particulars of claim, is as follows:

"4. At all material times and in particular on the 17th day of May 2015:

4.1 the defendant was (and still is) liable to compensate persons who were/are injured during or as a result of collisions caused by the negligent driving of motor vehicles by other persons;

- 4.2 *a certain Mr Asiel Lucky Mpsha, ("the deceased") was the driver of a motor vehicle with registration letters and numbers [...] NW ("the deceased's vehicle");*
- 4.3 *there was a driver of a motor vehicle in front of the deceased's motor vehicle whose further details are unknown to the plaintiff (herein after referred to as "the first insured driver" and "first insured vehicle" respectively);*
- 4.4 *there was another driver of a motor vehicle in front of the first insured vehicle whose further details are also unknown to the plaintiff (herein after referred to as "the second insured driver and "second insured vehicle" respectively);*
- 4.5 *On or about the 17th day of May 2015 at approximately 17h30, a collision occurred on Madinyane Public Road wherein the deceased attempted an overtaking manoeuvre.*
- 4.6 *At the same time the deceased attempted the supra mentioned manoeuvre, the first insured vehicle, driven by the first insured driver swerved out of the lane attempting to overtake the second insured vehicle without any indication that he intended to do so, thereby colliding with the deceased's vehicle, causing it to overturn several times."*

[16] According to both Mr. Maduma and Ms. Mafora there was no collision between the van driven by the deceased and the motor vehicle of the insured driver respectively. According to Mr. Maduma the deceased drove on the edge of the road on the incorrect side thereof, which was damaged and had potholes. He hit a pothole and lost control over his van. According to Ms Mafora , the deceased tried to move back to the left side of the road and in the process hit a pothole on the left side of the road which caused him to lose control over his van, which overturned. There is doubt as to which version of which witness should be believed.

[17] It was contended by Mr. Maphlela on behalf of the plaintiff that these contradictions are not material. I am holding a different view. In my view the contradictions are material and goes to the root of the matter. Mr. Maduma deposed to his statement at the request of the plaintiff's attorney much later than when Ms. Mafora deposed to her statement. Ms. Mafora's statement is totally different from her evidence in court. As so aptly pointed out by Mr. Monnahela on behalf of the defendant that when Ms. Mafora testified in this Court, she must have laboured under the impression that she must now testify in favour of the plaintiff and therefor changed her version.

[18] Mr. Maduma on the other hand was not in as advantageous position as Ms. Mafora was, who was seated in the left front passenger seat

in the cab of the van. Where Mr. Maduma was seated, he could not see what the insured driver was doing because he was facing in the opposite direction away from where the motor vehicle of the insured driver was travelling. He was also seated at the back unlike Ms. Mafora who occupied the left front passenger seat. Ms. Mafora was in a better position to observe what transpired than Mr. Maduma. However, doubt exist with regard to her testimony. She changed her version materially from what is contained in her statement so much so that no reliance can be placed on her testimony.

- [19] Mr. Maphlela submitted that the plaintiff succeeded to prove negligence against the insured driver which negligence need only be 1% in order to establish liability on the part of the defendant. He submitted that the insured driver was negligent in that he overtake the motor vehicle which was driving infront of him when it was not safe and opportune for him to do so. He did not check for oncoming cars from behind such as the deceased's motor vehicle which was in the process of overtaking him. Furthermore, he did overtake without first putting on his indicator to indicate to the deceased that he is going to overtake the motor vehicle infront of him. This behaviour of the insured driver coupled with the pothole caused the accident. In this regard, Mr. Mphalela made reference to the unreported case of **John Sesoka vs Road Accident Fund**, case no 25868/10 of the South Gauteng High Court, Johannesburg in which Mbha J stated the following:

[21] It is trite that a driver of a vehicle is entitled to assume that the driver who is overtaken will continue on his present course on the left-hand side of the road. See Beswick v Crews 1965 (2) SA 690 (AD).

[22] In terms of Regulation 298 of the National Road Traffic Act of 1996, the driver of a vehicle intending to pass any other vehicle proceeding in the same direction on a public road shall pass to the right thereof at a safe distance, and the vehicle being overtaken must move as far to the left as possible.”

[20] It is trite that the plaintiff always bears the onus of proving negligence on the part of the insured driver on a balance of probabilities. See **Arthur v Bezuidenhout and Mieny** 1962 (2) SA 566 (AD) at 576G; **Sardi and Others v Standard and General Insurance Co Ltd** 1977 (3) SA 776 (A) at 780C-H and **Madyosi and Another v SA Eagle Insurance Co Ltd** 1990 (3) SA 442 (E) at 444D-F. In deciding whether the plaintiff has succeeded in discharging this onus, the court has to view the entire evidence which was led during the trial in *toto*.

[21] The two versions as put forward by the two respective witnesses on behalf of the plaintiff are contradictory and irreconcilable with one another. No reliance can be placed on either of the two versions. There was a duty on the deceased to drive in a manner that is safe for other road users, for himself, as well as the occupants of his motor

vehicle. He was under an obligation to exercise caution when he wanted to overtake the insured driver, and could only do so when it was safe. I find that the plaintiff failed to discharge the onus resting on her on a balance of probabilities.

[22] Resultantly, I am of the view that the plaintiff's claim on the merits should be dismissed. The costs of the action should also follow the result because there is no cogent or plausible reason why it should not be awarded in favour of the successful litigant, the defendant.

Order

[23] Consequently, the following order is made.

The Plaintiff's claim is dismissed with costs.

**R D HENDRICKS
ACTING DEPUTY JUDGE PRESIDENT
NORTH WEST HIGH COURT, MAHIKENG**