

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**



Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case No.: 3105/2021

In the matter between: -

S[...] **M[...]** **OBO**

T[...] **M[...]**

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

CORAM: C. J. MUSI, JP

HEARD ON: 03 FEBRUARY 2023

DELIVERED ON: 30 MARCH 2023

[1] The plaintiff, the mother and guardian of a minor, instituted a claim against the Road Accident Fund (RAF) for damages sustained by the minor as a result of an incident arising from the driving of a motor vehicle by a driver insured by the RAF.

[2] In paragraph 4 of the plaintiff's particulars of claim she alleged that:

'On or about the 07th day of May 2017, and at, near or along Nthunya street, Ikgomotseng in Soutpan, Free State province, the plaintiff's minor **T[...] M[...]** was a passenger of a motor vehicle bearing registration letters and numbers [...] **FS** (the "Insured vehicle"), there and then been driven by a certain **LIBELE LUKU KOTOYI** (the "Insured driver") when she fell out of moving vehicle.'

[3] The defendant denied any knowledge of the incident. It further pleaded that should it be found that the incident occurred as alleged by the plaintiff it specifically denies that the insured driver Mr LL Kotoyi was negligent.

[4] The merits were separated from the quantum, in terms of R33(4). The plaintiff called two witnesses, the injured minor and her friend. The defendant called the insured driver.

[5] T[...] M[...] (18) testified that on 7 May 2017 three males who were selling chickens arrived at her friend, Th[...]’s parental home with a pickup (bakkie) and consumed beers there. After consuming beer, the males asked her and her friends to accompany them. They drove around the township selling chickens and at some stage they stopped at a tavern where the males bought three quarts of beer. They went back to Th[...]’s parental home. When the males were about to leave they (she and Th[...]) asked them to give them a lift to the local shops. They agreed and she and her friends (between 7 and 10 friends) climbed onto the goods compartment of the bakkie. The bakkie drove off. The driver sped and drove pass a stop sign. They signalled to the driver to stop. They did so by knocking on the back cabin window to no avail. They unsuccessfully attempted to wake one of the males who was sleeping in the goods compartment of the bakkie. There was a commotion and someone pushed her off the bakkie. She does not know who pushed her. She was injured and hospitalised.

[6] The second witness on behalf of the plaintiff, Th[...] S[...], an 18 year old matriculant, is T[...]’s friend. She confirmed that the males arrived at her

parental home in a Nissan 1400 bakkie. She further confirmed T[...]’s testimony with regard to what happened during the cause of that day. She testified that they asked the males for a lift to the shops. The vehicle drove at an extremely high speed. They signalled to the driver to stop, by knocking on the window, but he did not. There was a commotion and someone pushed T[...] off the bakkie. She (Th[...]) jumped off the bakkie. The car sped off as the males did not see what had happened. Their other friends subsequently told her that they too had jumped from the moving bakkie.

[7] Mr Lebele Luke Kotoyi testified that on 7 May 2017 he was the driver of a Nissan 1400 bakkie with registration particulars [...] FS. He transported two males from Bainsvlei to Soutpan. On their arrival at Soutpan they drove around the Township selling chickens. He did not know anyone at Soutpan but the two males knew people there. They went to a house where his two passengers consumed alcohol. He did not consume alcohol on that day. One of the men took the bakkie and left to try and sell the rest of the chickens. He took inordinately long and they sent children to go and look for him. The children found him and when he returned, they sat for twenty minutes and decided to leave.

[8] He went to the bakkie where he waited for his passengers. There were chickens and a spare wheel in the goods compartment of the bakkie. The goods compartment was covered with a canvas and he did not see any person in it. When his passengers arrived they left for Bainsvlei. In the township, he drove at an average speed of between 60 and 65km/h. They stopped at a filling station at Bloemfontein and someone called one of his passengers and informed him that they ‘let a child fall’.

[9] The RAF denied liability. The bases for holding the RAF liable are set out in s17 of the Road Accident Fund Act¹ which reads:

‘(1) The Fund or an agent shall –

¹ Road Accident Fund Act 56 of 1996.

- (a) subject to this Act, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of the owner or the driver thereof has been established;
- (b) subject to any regulation made under section 26, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of neither the owner nor the driver thereof has been established,

be obliged to compensate any person (the third party) for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself or the death of or any bodily injury to any other person, caused by or arising from the driving of a motor vehicle by any person at any place within the Republic, if the injury or death is due to the negligence or other wrongful act of the driver or of the owner of the motor vehicle or of his or her employee in the performance of the employee's duties as employee.'

[10] In **Wells v Shield Insurance**² it was said that:

'Two pre-requisites of liability upon the part of the registered insurance company for loss or damage suffered by a third party as a result of bodily injury are thus laid down. They are (i) that the bodily injury was caused by or arose out of the driving of the insured motor vehicle; and (ii) that the bodily injury was due to the negligence or other unlawful act of the driver of the insured vehicle or the owner thereof or his servant. The decision as to whether, in a particular case, these prerequisites have been satisfied involves two separate enquiries. Broadly speaking, the first pre-requisite is concerned basically with the physical or mechanical cause of the bodily injury, whereas the second is concerned with legally blameworthy conduct on the part of certain persons as being the cause of the bodily injury ('due to' having the same meaning as 'caused by' - *Workmen's Compensation Commissioner v S.A.N.T.A.M. Beperk*, 1949 (4) SA 732 (C) at pp. 736 - 7). Accordingly, these enquiries may follow wholly distinct lines.'³

[11] On the plaintiff's version the first pre-requisite does not pose any difficulty. A causal connection between the driving of the bakkie and the bodily injury was proved.⁴ The bodily injury was caused or arose from the driving of a motor vehicle. The controversy to be determined, on her version, is whether the

² *Wells and Another v Shield Insurance Co and Others* 1965 (2) SA 865 (C).

³ *Ibid* at 867H - 868A.

⁴ *Protea Assurance Co Ltd v Matinise* 1978 (1) SA 963 (AD) at 972C-D; *Pillay v Santam Insurance Co Ltd* 1978 (3) SA 43 (D) at 45H - 46A.

insured driver was negligent. On the defendant's version both requirements are at issue. I now turn to look at the unique facts of the matter and then consider whether the plaintiff, who bears the onus, has proved that the insured driver was negligent.

- [12] Th[...] and T[...] were 13 years old on the date of the incident. Th[...] made her statement during October 2022, approximately 5 years and 5 months after the event. In her statement, Th[...] stated that the driver was Lepelle Kotoyi. She, however, testified that she does not know a person by that name and that a certain Oupa was the driver of the bakkie. She denied mentioning the name or surname of the insured driver. She could also not explain how his name came to be mentioned in her statement. She could not say whether Oupa and the insured driver are the same person.
- [13] In her evidence-in-chief she testified that someone pushed T[...]. During cross-examination she testified that she heard after the incident, from one of 'the other children' that she was pushed. She conceded that she does not know how T[...] fell off the bakkie because she had heard afterwards. She further testified that the bakkie was driving at approximately 180 km/h in the township when T[...] was pushed and when she (Th[...]) jumped off the bakkie. She, however, sustained no serious bodily injury; she only had abrasions. None of the other children who jumped off the bakkie sustained injuries.
- [14] T[...] testified that she does not know who pushed her. During cross-examination it was put to her that according to the accident report she jumped off a moving vehicle. She insisted that she was pushed by an unknown person. T[...] testified that there was a male who was sleeping in the goods compartment of the bakkie, but Th[...] did not mention him, at all.
- [15] The insured driver testified that there was no one in the goods compartment of the bakkie as it was closed with a canvas to prevent the chickens from flying out.

[16] I am faced with two irreconcilable versions. The manner in which such factual disputes are generally resolved has been set out in **Stellenbosch Farmers' Winery v Matell**.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's 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's 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. ⁶

[17] The plaintiff tendered three different versions on how the incident happened. First, the particulars of claim state that T[...] fell out of the moving bakkie. Second, T[...] and Th[...] testified that the former was pushed off the bakkie. In the accident report it is stated that she jumped off the bakkie.

[18] There is no sensible reason why the insured driver would have refused to stop for them to alight. It highly improbable that all the other children would have

⁵ Stellenbosch Farmers' Winery Group Ltd. and Another v Martell & Cie SA and Others (427/01) [2002] ZASCA 98 (6 September 2002)

⁶ Ibid para 5.

jumped off the fast moving bakkie without any of them sustaining serious injuries. On the insured driver's version there were live chickens in the goods compartment, it would not make sense to keep the chickens in an uncovered compartment. It is obvious that some if not all of them would have flown out of the compartment, as they were not in a chicken coop.

[19] The danger of suggestions having been made to the children is also a reality in this matter. Th[...] denied mentioning the insured driver's name to the person who took her statement. Both of them testified that they were between seven and ten children on the bakkie. Th[...] initially testified as if she had seen who pushed T[...], in cross-examination she testified that she subsequently heard that she was pushed. Strangely, she does not know or enquired as to who pushed T[...]. Although it is difficult to estimate the speed at which a car is travelling, it is clear that Th[...] was exaggerating.

[20] The insured driver's version is simple and straightforward. There was no one in the compartment that he was aware of. His version is not improbable.

[21] In my view, it is probable that T[...] alone or with Th[...] clandestinely got onto the bakkie and T[...] fell off the moving bakkie. That explains why the insured driver was not aware of her or them and why they could not give a coherent account of how T[...] sustained her injuries. Regard being had to the probabilities and the fact that the plaintiff bears the onus, I cannot find on a balance of probabilities that T[...]’s injuries are due to insured driver’s negligence or other wrongful act.

[22] The claim ought to be dismissed. There is no reason why the costs should not follow the success.

[23] I accordingly make the following order:

1. The claim is dismissed with costs.

C.J. MUSI, JP

Appearances:

For the Plaintiff:

Adv. M.C. Baloyi

Instructed by Matsepes Attorneys

Bloemfontein

For the Defendant:

Ms. P. Banda

Instructed by State Attorney

Bloemfontein