**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

 **…1/12/2023… MPIENAAR**

 DATE SIGNATURE

 Case number: 62874/20

In the matter between:

**MSIZA M N OBO MINOR CHILDREN** Plaintiff

and

**ROAD ACCIDENT FUND** Defendant

**JUDGMENT**

*This judgment is deemed to be handed down upon uploading by the Registrar to the electronic court file.*

**PIENAAR AJ**

**Introduction**

1. The Plaintiff, Msiza Miria Nadima an adult female person who is currently

 45 years of age residing at No 446 Wolvekop Verena, Mpumalanga Province

 who sues herein in her personal capacity and in a representative capacity

 as a mother and natural guardian of the minor children.

2. At all times relevant hereto, the deceased, Skosana Shelby Kleinboy,

 a South African National, who resides in the Republic of South Africa prior

 to his death in 2019, with ID no 780810 6130 0 80 as a driver at the time of

 the said accident. [1]

3. The matter came before me on the default judgment roll on 22nd September

 2023. There was no appearance on behalf of the RAF. The trial in the matter

 proceeded only with regard to the issues relating to the merits. The issues

 relating to quantum are to be postponed sine die. After listening to brief oral

 submissions by Mr Thumbathi I reserved this judgment. Mr Thumbathi also

 filed Heads of Argument or submissions for which I am grateful.

**Onus**

4. The plaintiff has to prove on a “balance of probabilities” involvement of the

 Insured motor vehicle which was driven negligently in that a reasonable

 driver would not have driven in the same manner under the circumstances.

5. It is noted that the deceased lost control of his motor vehicle because he was

 dazzled by the shining bright lights of the Insured motor vehicle which came

 from the opposite direction as it failed to dim its lights for him.

6. What requires to be decided is whether the accident was caused by the

 negligent conduct of the insured driver or whether the plaintiff is the sole

 cause of the accident.

7. For the Plaintiff to succeed he must show that there was an insured motor

 vehicle involved and he needs to prove only 1% negligence on the part of

 such a driver.

8. In the case of *Odendaal v Road Accident Fund [3]* the court said -

 (a) The Plaintiff’s are “innocent third parties” and for them to succeed, they

 bear the *onus* of establishing on the balance of probabilities that Dlamini

 was guilty of some negligence which was causally connected to the

 collision and therefore to the damages suffered by them. No question of

 apportionment of fault or of damages arises here since there was no

 contributory negligence on their part”

 (b) That any causal negligence on the part of Dlamini, whatever the degree

 thereof in relation to the collision would render the defendant liable, as the

 insurer under the Road Accident Fund Act for the full amount of the

 damages suffered by each plaintiff.

9. It is noted that the Plaintiff amended the Particulars of Claim in terms of

 Rule 28 as follows: “On the 21st April 2019 at between Modderfontein

 Road, Bronkhorstspruit, Gauteng Province, the accident occurred between

 unknown motor vehicle bearing unknown registration letters and numbers

 there and then driven by unknown driver collided with a vehicle with

 registration letters and numbers BKN 028 GP driven by the deceased”. [2]

10. The Accident Report (AR) form has a brief description of the accident and

 also a portion of accident sketch plan and both do not indicate involvement

 of any car other than that of the Plaintiff. [4]

11. The conduct of the alleged insured driver failing to dim bright lights is a

 material fact which ought to have been in mind of the passenger when

 making statements to the police.

12. Moses Emanuel Masombuka stated that he was a front seat passenger in a

 Mazda Rustler bantam bakkie with registration number BKN 028 GP. It was

 dark and the condition of the road was wet since it did rain earlier and there’s

 no street lights. The driver was traveling at a high speed when approaching

 the curve there was an oncoming vehicle.The driver tried to avoid the

 collision and lost control of the vehicle and overturned. They were thrown out

 the bakkie and the driver was trapped inside the vehicle”

13. In application of the reasonable man test, I find that the deceased was

 driving at a high speed and could have acted in avoiding to lost control of his

 own vehicle. A driver will be negligent if the unreasonable conduct is

 generally foreseeable and he/she does not take reasonable preventative

 action to avoid a collision.

14. Yekiso J in the matter of Denissora v Heyns Helicopters [5] said “What I

 have before me, for purposes of making the required determination, is the

 uncontested evidence of Steynberg which would normally in the absence of

 any contradictory evidence, be accepted as being *prima facie* true. It does

 not, however, follow that because evidence is uncontested, therefore it is

 true. The evidence may be so impossible in the light of all other evidence

 that it cannot be accepted (*see in this regard Meyer v Kirner) (6).* The fact

 that evidence stands uncontradicted does not relieve the party from the

 obligation to discharge the onus resting on him (See Minister of Justice v

 Saernetso 1963 3 SA 530 (A) at 5340-H).

15.In civil matters the onus is discharged upon a balance of probabilities but, no

 doubt, this simplistic statement must be used with caution since, even if the

 onus-bearing party puts into his “pan of the scale of probability ” slender

 evidence, as against no counter-balance on the part of the opponent, and

 although the scale would therefore automatically go down on the side of the

 onus bearing party the court may still hold that the evidence tendered is not

 sufficiently cogent and convincing (see *Ramakulukusha v Commander, Venda*

 *National Force 1989 2 SA 813 (V) at 838H and other authorities cited therein).*

**Order:**

In the result I make the following order:

16. In the result I make the following order:

 16.1 Absolution from the instance is ordered.

 16.2 Leave is granted for the Plaintiff to proceed on his/her claim on the

 same papers duly amplified should he be so inclined.

 16.3 No order as to costs.

 MPIENAAR

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 **ACTING JUDGE OF THE GAUTENG DIVISION, PRETORIA**

Counsel for Plaintiff : Adv Thumbathi

Instructed by : Komane Attorneys

 email: happy@komanelaw.co.za

For the Defendant : No appearance

 Road Accident Fund

 Link no:

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[1] At Caselines 068 Notice of amendment

[2] At Caselines 0068 Notice of amendment

[3] Odendaal v Road Accident Fund 2002 3 SA 70 at 750 - F

[4] At Caselines 044 Index to Pleadings pg 044-46

[5] Denissora v Heyns Helicopters 2003 (4) All SA 74 (C )

[6] Meyer v Kirner 1974 4 SA 90 (W) at 930-H