

In the KwaZulu-Natal High Court, Durban

Republic of South Africa

Case No : 10885/09

In the matter between :

Nomvula Maria Motsikelane

First Plaintiff

Nomvula Maria Motsikelane  
acting on behalf of and in her capacity  
as mother and natural guardian of the minor child,  
S M M

Second Plaintiff

and

Road Accident Fund

Defendant

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Judgment

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Lopes J

[1] The plaintiff in this matter sues both in her personal capacity and in her capacity as the mother and natural guardian of her minor son S for damages allegedly sustained when he was involved in a motor vehicle collision on the 22<sup>nd</sup> March 2007.

[2] It was agreed by the parties that the only issue I was to decide at the

hearing was whether S was a passenger in the motor vehicle bearing registration mark NJ 33226 at the time of the collision. I accordingly made an order to that effect in terms of Rule 33(4) of the Uniform Rules of this Court.

[3] Five witnesses testified on behalf of the plaintiff. The relevant parts of their evidence may be summarised as follows :-

- a) the plaintiff testified that on the morning of the 22<sup>nd</sup> March 2007 one Mr Mavundla arrived at her home to fetch her daughter L, who was eight years old at the time, and S, who was four years old. Mr Mavundla was to transport L to her school and S to the creche he attended;
- b) they went off in a white Isuzu bakkie bearing registration mark NJ 33226 driven by Mr Mavundla. The arrangement in terms of which he transported the children to school was that the plaintiff paid him R125 for each of her two children at the end of each month. The agreement had been in existence for several months;
- c) when Mr Mavundla returned L to her home in the afternoon, the plaintiff noticed that his vehicle was damaged on the right hand side. He told her that he had had an accident at the Senzo store. He also said that only one of the children in his motor vehicle had been injured. L informed the plaintiff that the injured child was S. At that stage Mr Mavundla drove off without speaking to the plaintiff. She said that he appeared to be angry;
- d) when S returned home the plaintiff noticed that he had a swelling on

his forehead. S also complained of a headache. At the time when S's father arrived home some time later the plaintiff was searching for the clinic card because she had been told by nurses at the clinic that she was not to bring the children there without their card. S's father was of the view that that was irrelevant and took S off to the clinic;

- e) the next witness for the plaintiff was Celekhuthula Miathen Mnyandu, the father of S. Although he lived with the plaintiff, he was not married to her. When he arrived home on the 22<sup>nd</sup> March 2007 he was told that S had been injured in a motor vehicle accident. He immediately carried S on his back and walked for approximately 15 minutes to the local clinic. He had not seen the children leave for school that day because he left for work earlier than they did. He knew Mr Mavundla as the person who transported the children to school. He confirmed that when he had arrived home the plaintiff had been worried about not having the necessary clinic card for S. At the clinic he was told to take S for further medical attention because the clinic did not have a scanner. He did so at some later stage. He had seen that S had a swelling on his forehead;
- f) Monica Nxumalo testified that on the day in question she was emerging from the front door of her home carrying a bucket in order to get water. She observed Mr Mavundla's motor vehicle approaching from some distance, and as it arrived at the corner on which her house is situated, another vehicle travelling at great speed, collided with the

back of Mr Mavundla's motor vehicle. When the collision took place she ran back into the house believing that Mr Mavundla's motor vehicle would crash into her house. She had a small child in the house and had chosen to run back into the house in order to protect the child. After hearing the crash, she emerged again from her front door and saw that Mr Mavundla's motor vehicle had crashed into a concrete fence forming part of Senzo's store, which adjoined her property. The other motor vehicle had crashed into an electric pole;

- g) at that stage there were children in both the motor vehicles who were crying aloud. She also cried and was in a state of shock. Neighbours arrived and in due course the South African Police were phoned and arrived at the scene. At that stage children were crying and milling around in her yard and she was unable to tell which children had come from which motor vehicle. Some people who arrived at the scene demanded that the children be taken to the clinic to be examined. People assisted Mr Mavundla in extricating his motor vehicle from the concrete wall and he drove off. At that stage the police had already left;
- h) in cross-examination Mrs Nxumalo said that she was unsure of the time when the collision occurred save that she believed it to be between 7 and 8 am. When she emerged from the house, Mr Mavundla was already outside his motor vehicle. There were children crying in both motor vehicles. She knew Mr Mavundla and the fact that

he carried children to and from school;

- i) in response to a question from the court, Mrs Nxumalo said that she did not make an assumption that there were children in Mr Mavundla's bakkie, but that she had seen them with her own eyes. She had also heard them crying inside the motor vehicle. She said that she had seen 'their little heads' in the back of Mr Mavundla's bakkie;
- j) L Ayanda Motsikelane then testified. She told the court that she was in Grade 8, the first standard in high school. In response to questions asked of her it was clear that she understood the difference between telling the truth and lying, and the consequences of lying. She said that five years ago she and her brother had gone to school in Mavundla's car and that the vehicle had been involved in a collision at Senzo's store. She told the court that Mr Mavundla's motor vehicle had collided into the concrete wall at Senzo's store, and that her brother S had been hanging on the door of the motor vehicle after the collision. It was clear from her evidence that she was referring to the rear door of the canopy which covered the back of the bakkie. A lady who was travelling with them and who sat in the rear of the vehicle to look after them, told her to cover S with the blanket and get out of the motor vehicle. They were then told to walk to school with the lady, which they did;
- k) L said that she was not injured but that her brother who had been sitting on the bench in the back of the bakkie next to her and next to

the door, had been crying after the collision. She said that after the accident her brother appeared to be hurt and had had a swelling on his forehead;

- l) in cross-examination L confirmed that the accident had happened in the morning on the way to school and that Mr Mavundla's bakkie was white in colour. She confirmed that they had been asked to walk to school after the accident and that S had walked with them. In response to the suggestion put to her that Mr Mavundla would say that there were no children in his motor vehicle at the time of the accident, she insisted that there were. They had walked to school with the woman she described as 'aunty' and had reached her school first. Thereafter S had gone on with aunty to the creche.

[4] That was the case for the plaintiff. The only witness who testified for the defendant was Pamba Israel Mavundla. His evidence may be summarised as follows :-

- a) he lived in Inanda Township and was unemployed during 2007. He was in receipt of a government pension and used his bakkie to make money. He did so by hiring himself out to transport children and staff to and from local schools. His bakkie was a white Isuzu bearing registration mark NJ 33226;
- b) Mr Mavundla stated that at approximately 8 o'clock on the morning of the 22<sup>nd</sup> March 2007 he had been the driver of his motor vehicle when

it had been involved in a collision near Senzo's shop. He stated, however, that he had just dropped the children off and was going to fetch someone else when the accident occurred. He said that he was alone in his motor vehicle at the time of the collision, but that there were children in the other motor vehicle and they had been injured. He had reported the accident to members of the South African Police who attended on the scene of the collision;

- c) Mr Mavundla denied that he had seen the plaintiff when he returned the children to her home that afternoon. He said that she had not yet returned home when he did so;
- d) Mr Mavundla told the court that his arrangement with the plaintiff was that he would fetch her children from her home and convey them to the school and creche, and return them in the afternoon. At the end of the month she would pay him. Significantly, when asked about how much he was paid, he said he only asked for enough to pay for his petrol for the month, approximately R100. When pressed that the plaintiff had said that he was paid R125 per month per child, Mr Mavundla said that he could not remember because the matter was very old;
- e) Mr Mavundla confirmed that he conveyed the children in the back of his bakkie and that they sat on fixed benches which he had built into the back of the bakkie. He confirmed that he did not have a taxi licence or a public carrier permit to transport people. He did however say that he had recently acquired a public carrier's permit. In response

to the question why he had conveyed the children when he had no licence to do so, he said that he had not done it continuously, and had only done it on special occasions. In this regard he made mention of the fact that there had been transport problems in the area and that that was why he had conveyed the children. In response to questions that he was illegally transporting the children he reiterated that he had only done it on a temporary basis. He eventually conceded that what he was doing was illegal. After the collision he had ceased to carry children to and from school until he had acquired a kombi and a public carrier permit;

- f) Mr Mavundla was shown a copy of the accident report form completed after the accident, apparently at the local police station. He testified that he had marked on the front page of that document that he was not carrying passengers at the time of the collision. The other driver had also recorded that he was not carrying passengers. Notwithstanding the mark he had made on the document, he said that he had told the South African Police members that he had been carrying passengers for reward. He said that when he had made the cross on the document he had neglected to observe where he had put it;
- g) it was also put to Mr Mavundla that the time of the accident was recorded on the face of the accident report form as being at 7 am. It was put to him that his evidence that he had fetched the children between 7.15 and 7.30 am could not be correct if the accident



happened at 7 am. His response was that he had neglected to take note of the time;

- h) Mr Mavundla confirmed in cross-examination that his insurance claim for the damage sustained to his vehicle during the collision had been rejected by the insurance company because his motor vehicle was one which was not meant to convey passengers. In response to the enquiry whether he had told the insurance company that he was not carrying passengers, as he now stated the case to be in court, he said that they had already received the accident report form from the plaintiff. He denied the evidence of Mrs Nxumalo that she had seen children in his motor vehicle. He said that it was obvious that the other motor vehicle had been transporting children illegally. He also disputed the evidence of L saying that she was lying and had she been in the car she would have been taken away by members of the South African Police.

[5] That was the case for the defendant.

[6] In assessing the evidence of the various witnesses, I have no reason to reject the evidence of the plaintiff. The only area in which her evidence conflicts with that of Mr Mavundla was whether she was present when he returned with the children to her home on the day in question. She appeared to be an honest witness, and her evidence was to some extent confirmed by S's father.

[7] The most telling evidence in favour of the plaintiff was that given by L. In assessing her evidence I have done so with the necessary caution because of her age, both at the time she testified, and at the time of the collision. She gave her evidence in a clear and forthright manner, and readily made concessions where she could not remember aspects of the collision. I have no hesitation in accepting her evidence that S was with her in the motor vehicle of Mr Mavundla at the time of the collision.

[8] The evidence of L was corroborated by Mrs Nxumalo. She was a somewhat excitable witness who was clearly affected by what happened. I accept that when Mrs Nxumalo made her observations about the children being in both motor vehicles and crying, she was herself in a state of shock and clearly upset by the circumstances of the collision. She stated that she too, had been crying. In my view that does not detract from her evidence to the extent that I should disbelieve her statement that she had seen 'little heads' in the back of Mr Mavundla's motor vehicle. She was very well acquainted with Mr Mavundla and was an independent witness to the circumstances of the collision and the existence of the children in Mr Mavundla's motor vehicle.

[9] Mr Mavundla, on the other hand, was not a good witness. He was clearly acting illegally in transporting the children and was initially reluctant to concede this in his evidence. He only did so when it became clear that there was no other

avenue open to him. He was evasive in answering the questions, examples of which are :-

- (a) that he tried initially to insist that he had only carried the children on a temporary basis and on special occasions, and he said this whilst avoiding making the concession that his conduct had been illegal;
- (b) his explanation as to the incorrect recording on the accident report form of the time of the accident and the fact that he had carried no passengers;
- (c) his unwillingness to accept the version of the agreement with the plaintiff regarding the amount he was paid to transport the children. He clearly sought to minimise his unlawful conduct by saying he was only paid enough for his petrol;
- (d) his inability to explain adequately the repudiation of his insurance claim, although, in stating this I am not accepting that the claim had been repudiated on the basis that he had been carrying passengers at the time of the accident. It may well have been repudiated because he had used the vehicle to carry passengers at other stages and that his claim was invalid for that reason.

[10] On all the evidence I have no doubt that S was a passenger in the vehicle of Mr Mavundla at the time of the accident. That finding accords with the evidence of the plaintiff's witness and is, in my view, easily the more probable version of events.

[11] With regard to the question of costs, Ms *Naidoo* who appeared for the defendant, has submitted that I should reserve the question of costs for decision by the trial court because it may turn out that the quantum of damages ultimately awarded to the plaintiff falls within the jurisdiction of the magistrates' court. The scale upon which the costs of the action are to be calculated may accordingly be affected.

[12] The quantum of the plaintiff's claim as it presently stands is R965 000. The defendant has made no concessions whatsoever regarding that amount. I do not believe that it would be fair to the plaintiff were she to be kept out of her costs in circumstances where the ongoing litigation may well take several years to be finalised. In addition her ability to litigate further may be hampered by a lack of funds were I not to award costs at this stage. In all the circumstances I would exercise my discretion in favour of awarding the plaintiff the costs of the hearing on the 4<sup>th</sup> June 2012.

[13] Accordingly, and in accordance with the consent of the legal representatives of the parties I make the following order :-

1. the minor child S M M was a passenger in the motor vehicle driven by Mr Mavundla at the time of the collision on the 22<sup>nd</sup> March 2007;
2. the defendant is accordingly liable to pay to the plaintiff such damages as she may prove were sustained by her, both in her

personal capacity, and in her capacity as the mother and natural guardian of S M;

3. the action is adjourned sine die for the determination of the issue of the quantum of the plaintiff's damages;
4. the defendant is to pay the plaintiff's costs of the hearing on the 4<sup>th</sup> June 2012, on the party and party scale.

Date of hearing : 4<sup>th</sup> June 2012

Date of judgment : 7<sup>th</sup> June 2012

For the Plaintiff : Mr S Oberholzer (instructed by Johan Oberholzer & Co)

For the Defendant : Ms S Naidoo (instructed by Kuboni Incorporated)