

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

CASE NO:

21612/2005

NOT REPORTABLE

DATE: 29/1/2008

In the matter between:

MOJIKI, TLABUTLE WILHEMINA

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

MAVUNDLA J.,

[1] On the 29 September 2002 a collision occurred along the Pinaarsriver and Settlers road, between a truck with registration number MXK 404 GP, herein after referred to as the insured motor vehicle and driven by Mr. Nomendala Natal, herein after referred to as the insured driver, and motor vehicle with registration number MXD 958 GP, which was there and then driven by Mr. Simon Archie Mojiki, herein after referred to as the deceased.

[2] The deceased, who died as the result of the injuries he sustained in the aforesaid accident, was during his lifetime married to the plaintiff. Out of the said marriage, there are two minor children, namely Thato Judith

Mojiki, born 9 November 1992, and Kgaugelo Bridget Mojiki, born on 6 May 1998. The plaintiff, in her personal capacity and her representative capacity as the natural mother and guardian of the aforesaid minor children, is claiming from the defendant, as the statutory insurer in terms of the Road Accident Fund Act 56 of 1996, damages for loss of support she and the minor children suffered as the result of the death of the deceased occasioned by the injuries he sustained in the aforesaid accident. The initial amount claimed was R529 413, 00. However, actuarial calculations have since been made the correctness of which has since been conceded by the defendant. What remains in so far as the quantum is concerned, is whether the deceased would have maintained the minor children until the age 21 or age 18 had it not been for his demise as the result of the accident. Merits remain in dispute.

[4] It is alleged that the collision was occasioned by the negligence of the insured driver, who was negligent in various respects, inter alia:

“5.3.1 He failed to keep a proper look out;

5.3.2 He drove at an excessive speed in the circumstances;

5.3.3 He failed to keep the vehicle he was driving under proper control;

5.3.4 He failed to apply the brakes of his vehicle timeously; adequately or at all;

5.3.5 He failed to avoid the collision when by the exercise of due and reasonable care he could and should have done so;

5.3.6 He entered the road at an inopportune time.”

5.4 He drove a motor vehicle that was in an unroadworthy condition;

- 5.5 He failed to switch on the lights of the motor vehicle driven by him, under circumstances where he could and should have done so;
- 5.6 He brought the motor vehicle driven by him to a standstill at the time and place when and where it was inopportune and unsafe to do so;
- 5.7 He failed to take the rights of other road users into consideration under circumstances where he could and should have done so.”

[5] The defendant does not deny that the collision occurred on 29 September 2002. The defendant in regard to the plaintiff's paragraph 5 of the particulars of claim, pleaded as follows:

“5.1 The allegations contained in this paragraph are denied as if specifically traversed;

5.2 The defendant further pleads that the collision was not caused by the as the result of negligence on the part of the insured driver as alleged or at all, but solely through the negligent conduct of the deceased;

5.3 Alternatively and in the event it is found ...that the insured driver was negligent (which is still denied) then in that event the Defendant pleads that such negligence did not in any way contribute to the said collision, which was caused by the sole negligence of the deceased who was negligent in one or more of the following respects:

[6] What requires to be decided, in regard to the merits, is whether the insured driver was causally negligent. For the plaintiff to succeed, she needs to prove only 1% negligence on the part of the insured driver of the insured motor vehicle, namely the truck¹. In the matter of Bata Shoe Co.

¹ Odendaal v Road Accident Fund 2002 (3) SA 70 at 75 para D-F where the Court said:

“The law

Before dealing with the evidence, it is necessary to set out certain aspects of the law in relation to the issues in this matter.

(a) The plaintiffs 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) Thus 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

Ltd (South Africa) v Moss² it is stated that I need to look at the version of the insured driver as well to determine whether he was not also contributory negligent.

[7] The parties have by agreement handed in exhibit A, which is a bundle of photographs, some of which, namely photographs 1—12, were taken by inspector Simon Abram Rigaard, who also took measurements at the scene of the accident. Some of the pictures he took them during the day, namely photos 1 and 2, while photos 3 to 12 were taken on the very night of the accident.

[8] It is common cause that the insured truck was stationery in the middle of the road and that it was left unattended to at the time of the collision. It is also common cause that there were no street lights and it was dark in the vicinity of the accident³. It is also common cause that the truck stopped in

the Road Accident Fund Act, for the full amount of the damages suffered by each of the plaintiffs.

(c) The fact that the deceased may have been negligent and may even have had the 'last opportunity' of avoiding a collision would not exonerate the defendant from liability if Dlamini was causally negligent.

(d) Cooper Motor Law 1st ed vol 2 at 141 and cases cited therein suggests that, to determine damages claimed, the *conditio sine qua non* test is applied. This term embraces 'all things which have so far contributed to the result that without them it would not have occurred. . . . Accordingly, the test for factual causation is whether but for the defendant's conduct the alleged harm would not have occurred.' ..."

2 1977 (4) SA 16 (W) at 20 H etc; see also Brown v Santam Insurance co Ltd and Another 1979 (4) SA 370 at 372F

3 This can be gleaned from photos 4, 5, 6, 8, 9, 10, 11 and 12 on exhibit A. Vide also para 15 re evidence of Inspector Simon Abram Rigaard.

the middle of the road⁴, contrary to the testimony of the insured driver that the left wheels of the truck were outside of the road. It is common cause that the truck stopped shortly after the pressure pipes regulating the braking system of the truck had broken. It is also common cause that the motor vehicle of deceased impacted the truck at the back, more particularly at the left edge of the back of the truck⁵. Photo 10 shows the relevant truck from the rear, stationary in the middle of its lane. The chevron as well as the illuminating belt just below the chevron is clearly visible, as the result of the flash light from the camera.

- [9] Photo 1 and 2 show a tarred road with two lanes separated by an unbroken median lane. Each lane carries vehicular traffic in opposite direction. There is a broken lane on the left of the unbroken median lane, as one is looking into the photo. There is a yellow lane on the left of the left lane. On the left of this yellow lane there is a portion of the tarred road. On the left lane there are cones, marking certain points. A description of these points is to be found at page 9 of exhibit A. These cones are identified with letters B,C,D E and F.

- [10] At page 9 of exhibit A is the description of the relevant points. Point A is

⁴ This is clear from photos 10, 11 and 12 which are to be found at pages 7 and 8 of exhibit A. These show that the truck is fully occupying the left lane.

⁵ This is visible from photos 5 and 10, which show the lower portion of the left back of the truck inwardly indented, particularly more inwardly towards the tip of the left corner of the truck.

the direction in which motor vehicle MXD 958 GP was travelling. It is common cause that both involved motor vehicles were travelling in the direction of Pienaarsriver, from the direction of the NI highway off ramp that is the vehicles were (from east to west. Point B shows the outside wheel mark of motor vehicle MXD 958 GP; Point C shows the alleged point of impact. This point of impact is more towards the left yellow lane but inside the left traffic lane. Point D shows where motor vehicle MXD 958 GP came to a halt after the accident. Photo 5 shows motor vehicle MXD 958 GP stationery, with its front wheels being on the left of the yellow lane, and facing towards the road almost at right angle, with the rest of its body being at the gravel verge of the road.

- [11] Still on photo 5, the rear left hand side of the truck is also visible. The damage on truck is at the left lower bottom of the rear end of the truck. Motor vehicle MXD 958 GP is damaged in front. The front bumper is broken almost towards the quarter thereof, where the right bulbar ends or starts. The bonnet lead is having a V shaped upwards flipping bend, which starts from where the right bulbar ends, and running towards the windscreen, with its left side flipped wide open from the front. The front right side is pushed more backwards than the left side. From these damages that I have just pointed out, its rest position, the conclusion one can draw is that motor vehicle MXD 958 GP impacted with its left front

side on the left rear end of the stationery truck. The greater front part of the vehicle was not impeded by the truck. The right front part of this motor vehicle was impeded as the result of impacting on the stationery truck, thus resulting on the deceleration of its right side, while its left side retained its pre-collision momentum. In my view, the disproportionate speeds on the sides of the motor vehicle resulted in the section with lower speed, which is the right side, being pulled by the relative high speed side, which was the left side and thus causing the motor vehicle to spin from the right side towards the left and bringing it to halt at right angle with its original path of travel, as it can be seen on photo 4.

[12] Point E shows the point where the truck came to a stop after the accident. Point F shows the outside tyre marks of the truck. These marks show two pairs of tyre marks. This is consistent with photo 4 which shows a pair of rear right wheels, needless to say that there would be on the left also a pair of wheels.

[13] From photo 1 it can be observed inter alia, brake marks identified with a letter B, which are 19,1 meter long, and marks are curving from right to left, with the left mark ending just outside the yellow lane. Left of the yellow lane there is still some sizeable portion of the tarred road ending on the gravel. The aforesaid observation is consistent with the evidence of

Mrs Hermina Mabitoa who testified on behalf of the plaintiff. She had testified, inter alia, that the driver of the Stallion motor vehicle (with registration number MXD 958 GP), tried to avoid the stationary truck, by braking and swerving to the left but it was too late and the Stallion collided with the truck.

[14] The witnesses called for the plaintiff were inspector Rigaard, Mr. Hlophela Morris Mololo, Mrs Hermina Mabitoa, plaintiff herself Mrs Tlabutle Whilhelmina Mojiki. For the defendant were Mr. Maphodisa Mnganye and the insured driver himself, Mr Nomendala Natal Dube and Mr. Nel,

[15] **Inspector Rigaard's** evidence is briefly that he was summoned to the scene of the accident where he took photos 3 to 12, as well s measurements. It was dark around the scene of the accident. Under cross examination he conceded that both the chevron and the illuminating belt at the back of the truck are clearly visible. He stated that the illumination seen on the photos is occasioned by the flash light of his camera. He did not see nor was he shown any triangular warning sign on the road. Under cross examination he conceded that he did not walk a distance of about 45 meters away from the scene of the accident towards the direction of the N1 highway bridge. This concession was made in the context of it having been put to him that according to the insured drive Mr. Dube, he

had placed three triangular warning signs, 5 meters apart from each other with the furthest being 45 metres away from the scene of the accident.

[16] The inspector under cross examination said that on photo 2 letter B shows a stationery truck, letter C shows the point of impact. Letter F shows the truck's left two (wheel's) brake marks and the right rear two wheel's) brake marks. He does not know how these brake marks came about. The points he marked were from his own observation. On photo 12 is reflected a bridge, which would be the N1 high way. The scene of the accident is between the police station and the off ramp. It could be about 100 meters from the off-ramp to the police station. The distance between the scene of the accident and the bridge could be about 700 meters. On page 13 there is a yellow lane. About 100 meters further down there is the police station sign post.. The police station is on the right opposite the police sign post. In the vicinity of the police sign post there is a 60 kmp sign post. On photo 10 is shown the truck with its chevron. He says that he was standing about 10 meters from the truck when he took. He concedes that the chevron seems to be new and it was clean. He repeated that the illumination on the photos he took at night is from his flash light. Page 10 shows the end of the off-ramp. He concedes that the truck could have pulled off to its left at the end of the off ramp. He further concedes that the truck could have hit the police sign post if it had pulled off the road at the point where the accident occurred. He did not go as far as the bridge when he was at the scene of the accident. He did not go as far as the bridge the following day nor did he go into the field around the scene of the accident the following day. He did not check for the triangular warning sign. He says that the speed limit around the scene of the accident is about 60 kmp. He does not know how the truck left the scene of the accident. He was not shown any broken pipe on the truck.

[17] Although he was extensively cross examined, I found Inspector Rigaard to be a reliable witness. He gave concession where it was necessary. On the overall, he gave his evidence in a cogent and satisfactory manner. He was however emphatic that he was not shown any warning sign by the insured driver.

[18] The following witnesses were passengers in the motor vehicle driven by the late Mr. Simon Archie Mojiki, namely Mr. Hlophela M Molobo, Mrs Mrs. Hermina Mabitoa. From their evidence, it can be safely accepted that they had attended a wedding at Marapyane. They went to Marapyane in the morning and spent the whole day at the wedding. They were on their way home when the accident occurred. There was another motor vehicle that was also from the wedding, that was coming behind them although not necessarily directly and immediately behind them. This motor vehicle came to the scene after the collision had occurred. The passengers in the latter motor vehicle helped them out of the wrecked Stallion they were travelling in. At the wedding there was liquor and cold drinks consumed.

[19] The second witness called was **Mr. Hlophela Morris Mololo**. He testified that he is an Afrikaans teacher of 18 years. He knew the deceased, Mr Mojiki. warning sign at all. He says that he saw that the truck was stationary when the driver of their motor vehicle swerved trying to avoid the truck. Their driver also applied brakes and swerved trying to get out of the road. He swerved to the left side. He persist that there was no warning sign. He says that it was dark and he did not see any hazard light. He did not see any chevron before the collision. After the collision another motor vehicle that was also from the wedding, travelling behind them came to the scene and the people in that motor vehicle broke the window of their

motor vehicle and took them out thereof. He was taken out of the stallion and put on the side of the road. He saw the driver slumped over the steering wheel. He did not know as to whether he was still alive or not. He was not talking. He saw the driver of the truck coming from other direction. He says that they were 7 in the motor vehicle, including the driver. He later learnt that the driver died. He says that there were no police on the side of the road just before the accident. The police came later. He cannot recall after how long the police came. He was shaking after the accident. He was injured. He had bruises on the forehead He was taken into an ambulance and taken to Jubilee hospital. He was treated overnight. He did not make a statement to the police because they never came to him although he had given them his address and requested that they should come to take his statement. He reiterates that it was dark in the vicinity of the accident. He estimates the speed at which their motor vehicle was travelling to have been between 70 and 80 kmh. He confirms that their motor vehicle is the one reflected in photo 6. He is unable to recognize the truck on photo 10.

[20] He was extensively cross examined. He conceded under cross examination that there were no seats at the back of their motor vehicle. He says that the wife of the deceased was in the other motor vehicle that was also coming from the wedding but coming from behind. He does not

know why she had been in the other motor vehicle. He says further that he himself did not have liquor on that day. The only time he saw the deceased taking liquor was in the morning at about 10 am, where he collected them and before they left for the wedding at Marapyane. The wedding started at 3 p.m. He never saw the deceased drunk.

[21] He says that to get to Marapyane, they had to drive through Mabopane and Hammanskraal, and that is a distance of about 1hr or more. He said that the deceased was a social drinker. He said that although he was aware that the deceased had taken liquor, he drove with him because he did not know the quantity of liquor the deceased had taken. He himself had stopped drinking some weeks before the accident. He says that i When asked as to whether he would have considered it not save to be driven home by the driver of the other motor vehicle, he says that he did not go to the wedding in his motor vehicle. He says that he knew other passengers, amongst whom was Inspector Rabbitloa, who was in the same motor vehicle he himself was travelling in and was seated in the back. He said that it was a big wedding attended by many people.

[22] Mr.Mololo further said that after passing the bridge, he only saw the truck the moment before their motor vehicle collided with it. The lights of their own motor vehicle were on, although he does not know whether they were

on bright or dim. When he saw the truck for the first time it was when their driver swerved as if running away from something. He said that he knows Mabetoa, she was in the same motor vehicle as the one he was travelling in. She was seated in front between the driver and himself. He says that the driver first swerved to the right and then to the left. He further said that he did not see any obstruction on the road nor did he see any warning sign.

[23] He was then referred to photograph number 10 and it was pointed out to him that there were no street lights and it was dark when the photo was taken. It was further put to him that on this photograph, as the result of the flash light of the camera, the rear of the truck with its chevron, the illuminating bar at the lower end of the truck below the chevron is illuminated. In response he said that he did not see these just before the accident. When the version of the truck driver that the hazards lights were on, he said that he did not see these. His attention was directed to the right middle light on the truck, as reflected on photo 10, and that the this hazard light was on, while the middle light on the left is off, He persisted that these he did not see. He says that he is certain that the lights of the their motor vehicle were on otherwise they would not have travelled up to the point of the accident. He conceded that the accident occurred very fast. He, however insists that he did not see the chevron. It was put to

him that he did not know what was going on and for this reason he did not see the chevron. He says that because things happened too fast, that would be the reason why his recollection may not be the same. When asked as to whether it is possible that he saw the chevron but because the accident occurred too fast, that might be the reason he says that he did not see the chevron. His response is that he did not see the chevron. He says that after the collision they were taken out of their motor vehicle. It was put to him whether he only saw the truck after he had been taken out of their motor vehicle. He says it was dark, he could not see in front, he only saw the truck in front of them, when their driver swerved out. He says further that when their driver was swerving, it is then that he could see that it is a truck (which their driver was trying to avoid). He then further says that it was after he had been taken out of their motor vehicle and placed on the ground that he then realised that it was a truck. Because it was dark, it is then that he could realise that it was a truck. He says that if the collision did not happen suddenly, he could have realised that it was a truck that was a truck that their driver was trying to avoid. He says that after he was taken out of their motor vehicle, he did not stand and walk around. He says that he did not see the yellow illuminator line reflected on the side of the truck on page 9. He did not see any police motor vehicle before the collision. When put to him that the reason why he did not see all these things (that have been put to him) is because he did not pay particular attention, he

says that he did not see anything. He says that he gave instructions to attorney Lepule and Partners and he does not know what happened to his claim.

[24] Under re-examination he says that the deceased did not pick him up from his (the witness') place but they met at the deceased's place which is not far from his own place. He did not go look at the deceased because he was badly injured. He says that although the deceased had consumed some liquor, he did not look like someone who was drunk nor unable to drive..

[25] The next witness called on behalf of the plaintiff was **Mrs Hermina Mabitoa**. I do not intend to summarise her evidence in detail. She confirms that she had also attended the wedding at Marapyane on the day in question. She confirms having seen the deceased on that day that he had also been to the wedding. She confirms that she too was involved in the accident in issue herein. She confirms that she was the only lady in their motor vehicle and she was seated in front. She says that she had left in a private motor vehicle with her neighbours. She was not in the same motor vehicle as the one her husband was travelling when they returned from the wedding. She confirms that she was in the same motor vehicle the previous witness, Mr Maltoa, Mr Nthite, Mr Tloltoe and the deceased

were travelling in, which is a stallion. The deceased's wife was not in the same motor vehicle but she does not know why not. She says that at the wedding people were drinking cold drinks while others drank liquor. She confirmed that there was only the front seat in the Station but not at the back. She says that the people seated at the back had some beers with them. She says that it was dark. She did not know the road they were travelling on. They passed underneath a bridge. Mololo then said to the deceased who was the driver of their motor vehicle whether he does see that truck (in front). The driver said he does but they will overtake it. She says that the truck was too close and he tried to avoid it by applying brakes and swerving, but it was too late and collided with the truck at the back on the left. The driver was unconscious and slumped over the steering wheel. His blood spattered over her as well. She too sustained injuries on her face and she was bleeding. She managed to open the door of their motor vehicle and got out of the motor vehicle. The people who were also from the wedding but travelling in another motor vehicle came and helped them out of their motor vehicle. They had to break the rear window as the back door could not open. She says that she did not see police before the accident. After the ambulance arrived, she and the other injured were taken to the hospital. They stayed for a while before the ambulance arrived. She did not see police on the scene. They were taken to Jubilee hospital. She did not see the truck.

[26] She was also cross examined. She says that at the wedding women were seated separately from men as the result she does not know who of the men had what drink or liquor. She knew the deceased and he did not look like a person who had taken liquor. The people who were seated at the back of the stallion had liquor with them. She did not know that the deceased had taken liquor that day in the morning. When the driver was asked as to whether he sees the truck they had just gone underneath the bridge and they were now nearer the truck. The driver responded by saying that he must not worry they will overtake the truck. It was pointed out to her that in her evidence in chief, she created an impression that she did not see the truck until the driver was asked as to whether he does see it. It was then suggested to her that she must have seen the truck while they were a distance away from it. She denied having seen the truck before hand. She says that she only saw it when it was a distance of about 7 to 8 meters away when Mr. Mololo started talking to the driver, who then started to swerve and also applied brakes. The estimate of 8 meters she has given, it was pointed out to her that it cannot be true because the brake marks of the motor vehicle is 18 meters as measured.. She also said that the driver of their motor vehicle tried to swerve to the left. When asked as to whether before applying brakes did the deceased the swerve to the right. She says that she cannot remember.

[27] She was referred to her statement to the police which is to be found at page 30 of bundle 2. In this statement at paragraph 3 she stated that:

“All I can remember is that we were moving towards Pienaarsriver and there was a truck in the road in front of us. The truck stood still in the road and was not moving and it was parked on the road. The truck was in the lane that the other vehicles use it was not off the road. The truck did not have any lights or hazards on.”

She confirmed that what reflects on the statement is what she had said. She insists that when the previous witness spoke to the deceased, it was only then that she saw the truck. She denies that she saw the truck for some distance before the collision. It was put to her that for her to have made observations that she mentioned in her statement regarding the mobility of the truck in the road, she must have seen the truck much earlier, she remained quite without answering the question. When asked as to the speed their motor vehicle was travelling at, she said it was between 60 and 70 kmp. It was further pointed out to her that in her statement she said that their driver was travelling at between 78 and 80 kmp. She stated that the speed of between 78 and 80 is wrong. It was then suggested to her that she has perjured herself since both statements were made under oath. She was taken to task about the fact that she said that the truck was parked, whereas photo 9 shows that the truck is in the middle of the road. She says that the truck was in the lane they were

travelling on. She says that she did not see the chevron and the illuminating line that are reflected on photo 10. She does not know that these illuminate when a light shines on them. She does not know what Mr. Mololo saw that night. When asked that if she says that she did not see these illuminators, what is it that made her conclude that what she saw is a truck, she says that she concluded that it is a truck from the utterances that were made about the truck. She says that she cannot remember what it is that made her conclude that it was a truck. She conceded that the truck was not parked. She also conceded that the lights of their motor vehicle shone on the truck and that is what made her see the truck. She says that she does not know whether on photo 9, which shows the stallion motor vehicle, whether its lights are on. She says that Photo 5 and 6 do not show their motor vehicle's lights being on. She says that she did not see any warning sign nor anybody giving any warning. Amongst others she said that the police were not there before the accident. She did not see any blue light.

[28] Mrs **Tlabutle** **Whilhelmina Mojiki** was then called. She confirmed that she is the plaintiff in this matter and the widow of the deceased. She says that the deceased died the following day of the accident of the 29 September 2002. She says that she and the deceased got married to each other according to civil marriage during December 1998. There are

two minor children born of the marriage, who are Thabo born on 9 November 1992 and Kgaogelo born on 6 May 1998. Thato is at school doing grade 9, while Kgaogelo is doing grade 4. Both children are doing well at school. Thato wants to be a doctor, while Kgaogelo wants to be a psychologist. Her deceased husband was employed at Nashua, ER Business Unit as a driver and had a good work record.. She herself has passed grade 11 which is standard 9. She has not remarried and does not consider remarriage. She drove with the deceased in the same motor vehicle to the wedding at Marapyane. The function started round about 3. They had food and drinks. She says that the deceased and others were drinking beers. They left from Marapyane round about 8 pm. The deceased was not drunk when they left. She used the other motor vehicle while her husband used the other. She does not know the make of the vehicle in which she was travelling. They were following the other motor vehicle from the distance. She did not see what happened as she was seated at the back. When they arrived at the scene of the accident, she was asked not to get out of their motor vehicle. Save for having heard the sound of the collision, she did not witness the collision. When they stopped at the scene of the accident, the other people she was travelling with refused her to get out of the motor vehicle because they saw that it was her husband's motor vehicle that was involved in the collision. She saw the deceased slumped behind the steering wheel.

[29] From her cross-examination, it became clear that the motor vehicle she was travelling in, was following the motor vehicle of the deceaseds from a distance. They did not see the collision happening. She also stated that she does not intend to remarry. The deceased was a casual drinker. He had a secured position at his place of employment as a driver and he had been so employed for the past five years before his death. She is still occupying the same house that she lived in with the deceased. The house consists of a kitchen and a bedroom. It is situated in the yard of the deceased's mother. She confirmed that she has two children, the eldest being 14 years old. She does not know why the youngest child was getting a government grant. Her children are happy. Her parents did not go to school. Herself she has passed standard 9 which is equivalent to grade 11. Her parents were unable to get her further educated. She would like to see her children being well educated than herself. The deceased also shared the same sentiment. She anticipates that her children would be attending schooling until they are 23 years old. She does not know whether they would get bursaries. That concluded the case of the plaintiff.

[30] From the evidence of these last mentioned three witnesses, it can be accepted that the deceased had on the fatal day taken liquor. In that regard, I accept the evidence of Mr Mololo when he says that he saw the

deceased taken liquor just before their departure to the wedding. I accept Mrs. Mojiki's evidence that she saw the deceased taking liquor at the wedding. I also accept her evidence that the deceased was not drunk when they from the wedding. Mr. Diedericks referred to the fact blood samples were taken from the deceased for purposes of conducting tests of alcohol levels,⁶ and that the forensic test certificate⁷ reflects that the blood alcohol contents of the deceased was 0,20 gr per 100 ml. He quite correctly, in my view, also conceded such blood specimen was taken on the 2 October 2002, three days after the accident and that there is no expert evidence led to show any compliance with the taking of such blood samples. In the premises, it cannot be determined to what extent was the deceased afflicted by the liquor he had consumed at the relevant time of the accident, nor can it be said that his driving ability was negatively impaired by the liquor.

[31] From the evidence of Mr. Mololo and Mrs Mabitoa, as well as from the photographs taken on the night of the accident, it is clear that the surroundings of then scene of the accident was dark. There are various contradictions between the evidence of Mr. Mololo and Mrs. Mabitoa. Some of these contradictions are: whether the deceased first swerved to the right and then to the left as Mr. Mololo testified, or whether he swerved

⁶ At page 26 of the bundle of documents is the post mortem report pertaining to the deceased.

⁷ page 47 of bundle 2,

to the left only as according to the evidence of Mrs. Mabitoa, whether there was a conversation between the deceased and Mr. Mololo just before the collision. In my view the fact that there are contradictions between these witnesses it does not mean that their evidence must therefore be thrown out of the window in its entirety.

[32] That the deceased tried to avoid the accident, remains a fact borne out by the brake marks swerving from right towards left.⁸ This is also corroborated by the evidence of inspector Manganye who said that he saw the Stallion motor vehicle swerving to the left⁹. Further evidence to that effect is to be found in the location of the damages on the truck and on the Stallion motor vehicle and its subsequent rest position¹⁰.

[33] I accept the evidence of Mrs Mabitoa that there was a conversation between the deceased and Mr. Malolo. From this evidence it is clear that the deceased must have seen the truck which was in the middle of the road. From the fact that the reflecting line on the truck is visible from the light made by the camera flash light, it can be safely concluded that the lights of the Stallion motor vehicle would have caused the truck's yellow illuminators to be visible as well. The probability is that the driver, when

⁸ Vide paragraph [13] supra.

⁹ Para[37] supra

¹⁰ Vide paras [8] and [13] supra

he was alerted of the presence of the truck on the road, he must have initially thought that he was going to overtake it from the right. However, because the truck was stationary, he must have closed in on the truck much sooner than he had anticipated, and on realising the proximity of the truck, he then tried to avoid the truck by swerving to his left but it was already late and then collided with the truck at its rear. The driver, in my view was negligent in not observing the truck much earlier and also by failing to timely regulate his speed in such a manner as to be in a position to bring his motor vehicle to a halt, alternatively in safely swerving past the truck. However, as stated in the matter of *Odendaal v Road Accident Fund* supra the fact that the deceased may have been negligent and may even have had the 'last opportunity' of avoiding a collision would not exonerate the defendant from liability if Dube was causally negligent.

[34] From the reading of *Bata Shoe Co. Ltd (South Africa) v Moss*¹¹ I need not confine myself to the version of the plaintiff only, but I must also look at the version of the defendant as well, to decide whether the insured driver was also causally negligent.

[35] In the matter of *Tenza v Putco Ltd*¹² the court on appeal, at page 332 D-F

¹¹ 1977 (4) SA 16 (W) at p20H-21 the Court said :

“Whichever of the explanations may be the true one, this at any rate is clear - I cannot find that the plaintiff has discharged its onus of proving that the defendant was negligent in failing to give the signal which it was his duty to give.

That, however, does not conclude the matter, because it was not enough that the defendant should have given the signal, as he said he did. When the driver of a motor vehicle wishes to turn across an adjoining carriageway at right angles to his previous line of travel, his proposed action is pregnant with danger. He is about to do something which is inherently hazardous and he is therefore fixed with certain important obligations.”

¹² 1998 (2) SA (NPD)

said that:

The test for negligence has been authoritatively stated in *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E--G:

'For the purposes of liability culpa arises if -

(a) a diligens paterfamilias in the position of the defendant -

(i) would foresee the reasonable possibility of his conduct injuring another in his personal property and causing him patrimonial loss; and

(ii) would take reasonable steps to guard against such occurrence; and
(b) the defendant failed to take such steps.'

[36] The defendant called two witnesses. The first one was Mr. Maphodisa Mnganye and the second one was the insured driver himself. Mr. Manganye testified that he is a police officer stationed at Pienaarsriver police station. He says that on the 29 September 2002 he was on duty and in uniform. He received a telephonic report from a Mrs Nel about a truck that was stationed in the middle of the road facing west. He and a crew member drove in police marked motor vehicle with a blue light. He found a truck in the middle of the road. There was no one at the truck. About 45 meters from the back of the truck, there is a triangular warning sign. He went back to the police van to make a radio report confirming the presence of the truck. He parked his van on the northern side of the road.

The blue light of his van was still on. He parked his van facing southwards with its headlights directed on the truck. As he was busy on the radio, another motor vehicle came very fast and collided with the triangular warning sign and within a short space of time it collided with the truck. He rushed to the motor vehicle. He found the driver of the panel van trapped with a passenger in front. He called for an ambulance. Shortly thereafter another motor vehicle came and stopped at the scene. He inquired from these people as to whether they know the people involved in the collision. These people from the vehicle that had just stopped there helped him to take out the victims from the panel van which had its front doors jammed. He remained at the scene until the road had been cleared. He left after the truck had been removed from the scene. He does not know how the truck was removed. He does not know Dube.

- [37] Under cross examination he confirmed that he had received a call from C & C Community Service Centre. He confirmed that the police station is adjacent to the Belle Belle Pretoria. The accident happened along the Rust DeVenter. He knows Mr. Nel as a resident of Pienaars River although he is no longer residing there. He can recall the day of the accident. Normally he records in his pocket book. He says that the person who called the police station was Gert Nel's wife. Mr. Nel has a breakdown. He says that if there is an accident they would inform Mr. Nel

since he has a breakdown tow truck. He does not receive any remuneration for that information passed to Mr Nel. The people in the towing business were allocated areas and the area in which the accident occurred fell within the area operated by Nel. He says that Nel came later and helped in placing warning signs. He helped him place cones 50 metres back from the accident. He says that he did not call Nel but there was a breakdown motor vehicle. He the further says that he called him to him to inform him of the accident. He says that inspector Ntsane was with him and she is the one who informed him of the truck on the road. He says that it was dark around the scene of the accident, nothing was visible. He says that he only saw the hazard lights as he was approaching the truck. He was from West travelling towards the East. He says that he could only see the hazards.

- [38] Under cross-examination, he stated that he has experience of 15 years in attending motor vehicle accidents. The motor vehicle accidents that he attends to average to ten in a month. This is the only training he received and regard to the treaty accident since was Julian is training as a province of the site. He says his duty at the scene of the accident is to make sure that there is no evidence lost and he must look at the injuries and the nature thereof and take particulars of the people who were involved in the accident whom he would have to summon at a later stage. He says that

the reason for putting triangular warning signs on the road is to warn other motorists that there might be a problem on the road. He stated that the reason why he is in a position to remember this particular accident is due to the fact that it was the first time an accident of this nature occurred in his presence. He says that the lights of the police van were directed from the north towards the south on the side of the truck but more towards its back. He conceded that the truck was a dangerous object on the road. He says that his colleague remained in the van while he walked to the truck. He remained on the scene until 02h30 in the morning. He was present when inspector Regaard took photos on the scene although he cannot say what photos he took. He was still present when the ambulance arrived on the scene although he cannot say how many came. The first ambulance arrived between 20 and 30 minutes after the collision. He cannot recall speaking to any person. He says that when the Stallion drove into the rear of the truck he was still in his van, communicating over the radio with inspector Long at the charge office informing him that he needs a breakdown to come tow the truck from the road. He says that on his arrival he parked his van and went to the truck to check whether there was anyone there. He then went back to his police van and while he was busy talking over the radio it is then that the stallion arrived. He says that when he saw the stallion for the first time it was under the N1 highway bridge, about 200 to 300 metres away from the scene of the accident and it was

travelling at a high speed. He estimates its speed to have been at between 100 and 130 kmp. The reason for this estimate is because he is travelling every day. He says that the stallion did not reduce speed and the accident happened very quickly. He says that before they commenced placing warning signs at the back, there was already a triangular warning sign which he saw after rounding the truck. This triangular warning sign was placed in the middle of the road, about 45 meters at back of the truck. He is not sure whether it had reflectors. It was about 30 cm in height. He is unable to state whether it was a closed one or not because he did not look at all. After the accident he together with his colleague got out of the van and walked to the scene. They opened the doors of the stallion and inquired as to whether there was anyone injured. Other people got out of the motor vehicle. Some of these people used side doors to get out of the van. The driver was trapped on the steering wheel and he could not get out. One person was helped out of the van. He cannot recall whether all of the people got out of the motor vehicle. He cannot recall whether they opened the rear door to let the people out. He says that if he had broken the rear window of the motor vehicle he would have remembered. He saw the driver at the scene of the accident although he cannot remember after how long the second motor vehicle has arrived did he see him. He says one person who was at the back of the motor vehicle died on the scene of the accident. The driver of the motor vehicle was still breathing.

[39] He was referred to page 38 of exhibit A. He confirmed that it was his statement which he had prepared in his own hand writing on the morning of the accident. In the said statement he had said, inter alia, that they found the truck standing on the road on R128 Rust De Winter Road about 200-300 m from the Pienaarsriver bridge facing west. He and insp. Ntjane stood there with the blue lights on. There was a triangle on the ground about 45 metres from the truck. A Toyota stallion Condor came from the east to the direction west at a high speed, passed the triangle and went straight in the back of the truck. He tried to apply brakes but it was too late and collided with the truck at the back on the left hand side.

He was further referred to page 38A of exhibit A, which is a further affidavit he made. In this affidavit he says that he was standing on the truck before the accident happened. On that particular day the truck's hazard lights were on and the motorist could see it clearly from far.

[40] He conceded that where the accident occurred the speed limit is 100 kmp, and that shortly after the scene of the accident the speed limit is 60 kmp. He further conceded that towards the bridge the speed would be higher than 60 kmp and that the stallion would have been travelling within speed limit just before the collision. He says that what he meant when he said that the Stallion passed the triangle was that it drove over it. He ascribes

this misnomer to the fact that English is not his language. He conceded that there is a difference between “driving over” and “passing”. He said that he does not know what happened to the triangle. He says that it could have been flung off the road or driven over. He concedes that the triangle was important evidence and that he should have pointed it out to the photographer but he did not do so. He says that it was the duty of inspector Rigaard, the photographer, to have looked for the triangle. The reason why he did not mention or point it out to Rigaard is because the latter did not ask him to do so. He conceded that the probabilities are that if the triangle was there it was not visible. He says that although he walked about 50 meters back from the truck there was no time to place cones on the road. He says that when he walked about 45 to 50 meters from the back of the truck, he did not see the triangle. He says that after the accident he did not look for the triangle because he was concentrating on the people. He says that both himself and his colleague alighted from their van and went to the scene of the collision. His colleague remained on the scene of the accident until in the morning.

- [41] He further stated that the driver of the Stallion, within a distance of 45 meters from the truck he started applying brakes. He was keeping an eye on the stallion. He also heard the screeching of brakes. He says further that he observed the Stallion swerving to the left, although he is unable to

state how far it was from the truck when it did so because it was happening very quickly. He says that both he and Ntsane left from their van, crossed the road and went to the stallion. They opened the doors of the stallion. Its driver was still alive, although trapped. He did inquire whether there were people in the stallion and he heard some of them making noise inside it. He says that on arriving at the stallion, and after opening the doors, Ntshane became busy with warning on coming traffic with his flash light. He says that he counted 9 people on the scene. He says that he only removed one deceased person whom they placed him on the ground. He later states that all 9 people were are alive, one of whom died later. Four of these people, including the driver, they had to wait for paramedics, and while 5 of whom he helped them out of the stallion. He says that it is possible that he spoke to the driver of the truck, Mr. Dube, on his arrival on the scene of the accident because he had to get hold of him before he left the scene of the accident. When asked as to why he had to make the second affidavit, which is to be found at page 34 of bundle 2, and which is the also at page 38A, he says that it is because the investigating officer told him that that was missing in his first affidavit. He says that the recording of the accident as 09h20 in his first affidavit was a mistake; the time should be 21h20. He says that the recording in his statement "on the truck" is a grammatical error; it should have been "next to the truck". He concedes that it was important that he should have

recorded that he was next to the truck.

[42] Under re-examination he confirmed that the brake marks on photo 1 were not sharp turning but were turning gentle from right to left. He says that he does not know why the driver could not have overtaken the truck instead of trying to pass it on the left. He says that the road on which the accident happened is a busy road, although the accident happened on a Sunday. He however cannot remember whether it was busy on that particular night. He says that the collision occurred within 5 minutes that he had been to the truck. That completed this witness' evidence.

[43] Mr Dube's evidence is that he off ramped from the N1 highway and at the stop sign where the off ramp joins the Pienaarsriver-Settlers road, he turned right. The pressure of the braking system of the truck started receding as the result of a broken pipe. He then manoeuvred his truck to get out of the road. He just succeeded to have its left wheels off the tarred road when its wheels locked and the truck then stopped. He put on his hazards lights and placed three triangular warning signs at intervening space of 5 meters from each other with the furthest being 45 meters away from the truck. He did not have a no.14 spanner to unlock. He left with a certain white man to go fetch a spanner. On their return, as they were about a kilometre away from the truck they heard the collision. On arrival

at the scene they found the police vehicle with its blue light parked parallel to the truck, although the police vehicle was facing in the opposite direction towards the east.

[44] He conceded under cross examination that there was nothing that precluded him from staying behind while the white man went to fetch the spanner with which he could have then unlocked the braking system of the truck and then removed the truck from the road. He conceded that the truck in the middle of the road was a dangerous hazard to other road users. He says that the triangular warning signs had been driven over by the other motor vehicle that collided with the truck. He picked the pieces and placed these on the truck. I need mention that he did not make mention of this version in his evidence in chief.

[45] Inspector Manganye failed to point out to inspector Rigaard any warning triangular at the scene of the accident. With his experience of 15 years on attending scenes of accident and coupled with his training in ensuring that there is no evidence lost at the scene of the accident, I would have expected him to have pointed out to inspector Rigaard the warning triangular if ever same was there because it was an important piece of evidence. Assuming that such warning triangular had been driven over, at least the relevant pieces thereof would have been available to be seen

and photographed. His evidence contradicts that of Mr. Dube who says that there were three triangular signs. Mr. Dube said that he placed the broken pieces of the warning triangles in his truck, which version only came under cross examination and not in his evidence in chief. I would have expected him to have also shown these to the police on that very night of the accident. Mr. Dube said that the police van had stopped parallel to the truck, facing to the opposite direction while inspector Manganye said that his van had stopped on the left facing towards the south and diagonally to the truck with its lights shining on the truck. These discrepancies are in my view material and impact negatively on the veracity of these witnesses. I therefore find that there were no triangular warning signs placed on the road, otherwise inspector Rigaard, whom I found to be a satisfactory and credible witness, would have taken photographs thereof. A further fact that demonstrate Mr. Dube as an unreliable witness is the irrefutable evidence of photos 10 and 11 which show that the left wheels of the truck are definitely not off the tar surface, as he had testified, but on the tar surface itself. The fact that I do not believe Mr. Dube on the aspect of the triangle warning sign, does not mean that I must therefore jettison all of his evidence without much ado, vide S v Oosthuizen¹³.

¹³ 1982 (3) 571 at 577A-B where the Court said: “All that can be said is that where a witness has been shown to be deliberately lying on one point, the trier of fact may (not must) conclude that his evidence on another point cannot safely be relied upon.

The circumstances may be such that there is no room for honest mistake in regard to a particular piece of evidence: either it is true or it has been deliberately fabricated. In such a case the fact that the witness has

[46] Mr. Dube conceded that he appreciated that the truck left in the middle of the road was a hazard to other road users¹⁴. The question that arises is whether Mr.Dube was negligent in having left the truck in the middle of the road. In Kruger v Coetzee¹⁵, a matter also referred to on appeal in (Tenza v Putco Ltd 1998 (2) SA 330 (NPD) at 332 D-F the court on appeal, at page in Holmes JA said that:

“For the purposes of liability culpa arises if -

- (a) a diligens paterfamilias in the position of the defendant -
 - (i) would foresee the reasonable possibility of his conduct
injuring another in his person or property and
causing him patrimonial loss; and
 - (ii) would take reasonable steps to guard against such
occurrence; and
- (b) the defendant failed to take such steps.

This has been constantly stated by this Court for some 50 years.

Requirement (a) (ii) is sometimes overlooked. Whether a *diligens paterfamilias* in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend upon the particular circumstances of each case. No

been guilty of deliberate falsehood in other parts of his evidence is relevant to show that he may have fabricated the piece of evidence in question.”

14 In the matter of Von Weilligh v Protea Versekeringsmaatskappy BPK 1985 (4) SA 293 (C) at 298B-C the court stated that undoubtedly a position of danger arose when a truck was stationary in the middle of a busy national road carrying heavy traffic.

15 1966 (2) SA 428 [A.D.] at 430E

hard and fast basis can be laid down. Hence the futility, in general, of seeking guidance from the facts and results of other cases.”

[47] Mr. Dube’s testimony that he left the truck with its left wheels outside the road is in my view a deliberate lie. When regard is had to the discrepancies between his evidence and that of Manganye, his evidence that the truck suddenly stopped must be rejected. In my view the loss of the pressure did not come abruptly. At the very moment when he saw that the pressure gauge was receding, he should have realised that if he did not immediately pull off the road, the truck would stop in the middle of the road and thus present a danger to other road users, and he should therefore have guarded against that; vide *Santam Verseekeringsmaatskappy Bpk v Swart*¹⁶. I am therefore of the view that Mr. Dube was negligent in failing to pull off the road immediately on realising that the gauge was receding very fast. There was sufficient space on the left of the road to have enabled him to complete this manoeuvre.

[48] Mr. Dube has conceded that he could have remained behind at the scene of the accident and allowed Mr. Nel to go fetch the number 14 spanner. He nonetheless decided to leave the truck unattended to. I am of the view that there was

¹⁶ 1977 (4) SA 816 (AD) at 819B-H

absolutely no reason whatsoever for him to have left the truck unattended to. Mr. Dube was appreciative of the fact that it was dark in the vicinity where the accident occurred. Mr. Dube should have therefore foreseen that the truck, notwithstanding the presence of its chevron and the illuminating belt at the rear lower section of the truck, was presenting a dangerous situation to other road users, especially those who might not see the truck on account of travelling very fast, or on account of the power nature of their head lights. I am further of the view that Mr. Dube, was negligent, firstly in failing to have pulled off the road before the truck stopped, and in having left the truck in the middle of the road, and thirdly in leaving the truck in the middle of the road unattended to and fourthly in not having ensured that other road users are forewarned of the dangerous situation caused by the presence of the truck in the middle of the road. in the middle of the road and secondly in leaving the truck unattended to and lastly in failing to take reasonable steps to warn other road users of the dangerous situation caused by the truck. I am further of the view that but for the presence of the truck in the middle of the road, the collision would most possibly not have occurred. I am further of the view that the negligence of Mr. Dube was causally related to the collision and that therefore the defendant is liable to the proven damages of the plaintiff.

[49] That brings me to the aspect of quantum. The parties agreed that the calculations made in the actuarial report of Poniso Actuarial Consultants

dated the 13 August 2007 may be used as the basis of the plaintiff's claim. There was however no agreement between the parties as to whether the deceased would have supported the minor children until the age of 18 or the age of 21 years. There was also no agreement as to what contingencies should be taken into account.

[50] In the matter of Goodall v President Insurance Co¹⁷ Margo J, as he then was, said:

“In the assessment of a proper allowance for contingencies, arbitrary considerations must inevitably play a part, for the art or science of foretelling the future, so confidently practised by ancient prophets and soothsayers, and by modern authors of a certain type of almanack, is not numbered among the qualifications for judicial office. In *De Jong v Gunther and Another A* , 1975 (4) SA 78 (W) , NICHOLAS, J., said, at p. 80, opposite the letter F:

"In a case where a plaintiff sues for his own future loss of earnings it is only contingencies which affect him personally which have to be considered. In his judgment in *Van Rensburg v President Versekeringsmaatskappy*, (W.L.D. 21.11.68), quoted in Corbett and Buchanan, *The Quantum of Damages*, vol. 2, at p. 65, LUDORF, J., referred to the fact that it has become almost customary, at any rate in this Division of the Supreme Court, for the Court to make a

¹⁷ 1978 (1) SA 389 (WLD) at 392H-393B

deduction for unforeseen circumstances of life of one-fifth. That is, it is true, a rough and ready approach, but the nature of the problem is such that one can do no better than adopt a rule of thumb of this kind."

In Van Rensburg's case the plaintiff was 25 years old, and in De Jongh's case, which was a claim by dependants for loss of support, NICHOLAS, J., adopted the figure of 20 per cent of contingencies in relation to the deceased's earning power, the deceased having been approximately 25 years of age at the time of his death. Van Rij, N.O. v Employers' Liability Assurance Corporation Ltd., 1964 (4) SA 737 (W) , but reported on this point only in Corbett and Buchanan, vol. 1 at p. 618, is another instance of 20 per cent being allowed for contingencies, the plaintiff in that case being a minor who had not yet embarked on a firm career. In the well known case of Sigournay v Gillbanks, 1960 (2) SA 552 (AD), SCHREINER, J.A., at p. 569, made provision for contingencies in an amount equal to approximately 16 per cent. The plaintiff in that case was 33 years of age, a fact which appears from the report of the case in the Appellate Division, or in the Court of first instance, or Corbett and Buchanan."

[51] In the matter of Shield Insurance Co Ltd v Booyens 1979 (3) SA 953 (AD) at 965 G the Court in regard to allowance for contingencies

affecting the deceased and his dependants and in regard to the future and the allowance to be made for the contingencies for remarriage held that "...the determination of allowance for such contingencies involves, by its very nature, a process of subjective impression or estimates rather than objective calculation, in other words, allowance on which judicial opinion may vary appreciably..."

[52] Counsel for the plaintiff have referred me to the Quantum Yearbook 2007 where the basic principles with regard to the contingencies to be taken are set out as follows:

"When assessing damages for loss of earnings or support it is usual for a deduction to be made for general contingencies for which no explicit allowance has been made in the actual calculation. The deduction is the prerogative of the Court. General contingencies cover a wide range of considerations which vary from case to case and may include: Taxation, early death, safe travel costs, loss of employment, promotion prospects, divorce etc. There are no fixed rules as regards the general contingencies.

The following guidelines can be helpful:

Sliding scale; Half a percent per year to retirement age i.e 25% for a child, 20% for a youth and 10% in middle age...

'Normal contingencies'; The Raf usually agrees to deductions of 5% for past loss and 15% for future loss, the so-called 'normal

contingencies”¹⁸

[53] The evidence of Mrs. Mojiki in respect of the progress of the children at school and her views that the deceased would have assisted their two daughters through education up to the age 23 years stands uncontradicted. She herself is born of parents who were uneducated, but managed to send her to school up to standard 9, which is grade 11. The fact that the children desire to be a doctor in the instance of one of Thato or social worker in the instance of Kgaogelo, does not necessarily mean that it is a foregone conclusion that they would reach there. This is because there are many variances in life which come to play in the path of growing of an individual. On the other hand, I must also bear in mind that the defendant did not so much refute the evidence of Mrs Mojiki in so far as how far the deceased would have assisted their daughters in schooling. I have no doubt that the plaintiff, herself coming from a background of uneducated parents, but having gone as far as grade 11, would have encouraged her husband to send their daughters to tertiary. She would have also motivated her daughters to continue with their education so long as the circumstances permitted. Since there is no scientific mirror to peep into the future, I must therefore make a bold guess, as I do, that the deceased would have sent the two children to tertiary. In doing so, I take

¹⁸ Vide also Quantum Yearbook 2008 at p100.

note of the fact that there are many variances in life, e.g. industrial strikes, retrenchments, ailments, accidents etc, which could have adversely affected the working capacity of their deceased. Whilst Mrs Mojiki opined that the deceased would have educated the children until they reached age 23, because of the contingencies I have referred to herein above I shall assume that the deceased would have provided for the education of the children until they became 21 years old.

[54] Mrs Mojiki was born on 13 April 1963. At the time of the death of her husband on 29 September 2002, she was 39 years old. In the Quantum Yearbook 2008 Dr. Robert Koch at pages 98 provides a time table for remarriage deductions for age 39: 2% for Asian; 10% for coloured; and 33% for white. At page 99 he states that "For black widows subject to the influence of customary law it is appropriate to use something less than the rate for coloured widows, perhaps one half, to allow for cultural and financial impedance to remarriage. Mrs Mojiki has testified that she has no intention of re-marrying, which evidence has not been gainsaid. Besides, in African culture, a woman of her age who is already having two children stands very little chance of re-marrying. Consequently, in these circumstances I see no reason why I must make any contingency deduction for remarriage.

[55] On behalf of the defendant I have been urged to use the “Normal contingencies’ which finds favour with the RAF at 5% for past loss and 15% for future loss. On behalf of the plaintiff it is contended that the sliding scale would be an appropriate method of calculating contingencies. It is further submitted that as far as the plaintiff is concerned, the sliding scale, which requires that a contingency should be calculated at half a percent per year to retirement age (because it is a loss of support to the retirement age of the deceased), should be 11% in regard to future contingencies calculated on the basis that the deceased would have worked for another 22 years. At half percent per year, it means that the an 11% contingency would then be applicable in the case of Mrs Mojiki.

[56] In regard to the children, Thato is presently 15 years, and would have been maintained until the age of 21, as I have already found, there are only 6 years remaining for her to be maintained. The contingency to be applied is therefore 3% on future loss of support. In regard to Kgaogelo , who presently 9 years old, with 12 years remaining, a contingency of 6% will then apply in respect of her loss.

[57] In the matter of Southern Insurance Association v Bailey NO 1984¹⁹

¹⁹ (1) SA 98 (AD) at 113G-114A

Nicholas JA said that:

Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. All that the Court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss.

It has open to it two possible approaches.

One is for the Judge to make a round estimate of an amount which seems to him to be fair and reasonable. That is entirely a matter of guesswork, a blind plunge into the unknown.

The other is to try to make an assessment, by way of mathematical calculations, on the basis of assumptions resting on the evidence. The validity of this approach depends of course upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative.

It is manifest that either approach involves guesswork to a greater or lesser extent. But the Court cannot for this reason adopt a *non possumus* attitude and make no award. See *Hersman v A Shapiro & Co* 1926 TPD 367 at 379 per STRATFORD J:

"Monetary damage having been suffered, it is necessary for the Court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the Court is little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the Court is bound to award damages."

[58] In taking a blind plunge, I am inclined to accept the sliding scale as against the 'normal contingencies' preferred by the RAF. I am of the view that since the plaintiff is unemployed, the sliding scale will result

in the respective claims being slightly higher than if the “normal contingencies” scale which is preferred by the RAF. A higher compensation will, in my view, be fair and reasonable.

[59] The actuarial report of Poniso Actuarial Consultants dated the 13 August 2007 has calculated the respective losses of the plaintiff and the minor children. The calculation is not in dispute. Accordingly, as submitted, on behalf of the plaintiff the calculation of the loss, on the assumption that the children would have been supported until the age 21 and using the sliding scale, on the figures of Poniso Actuarial Consultants, the damages are computed as follows:

59.1: In respect of Plaintiff:

Past loss	R 84 429, 00	
Less 5%	<u>R 4 221, 45</u>	
	<u>R 80 207, 55</u>	= R 80 207, 55
Future loss	R279 201, 00	
Less 11%	<u>R 30 712, 11</u>	
Total future loss	<u>R248 488, 89</u>	=R248 488, 89
Total loss	A	<u>R328 696, 44</u>

59.2: In respect of Thato

Past loss	R 42 214, 00	
Less 5%	<u>R 2 110, 70</u>	
	<u>R 40 103, 30</u>	= R 40 103, 30
Future loss	R 51 058, 00	
Less 3%	<u>R 1 531, 74</u>	

Total future loss	<u>R 49 526, 26</u>	= R <u>49 526, 26</u>
Total loss	B	<u>R 89 629, 56</u>

59.3 In respect of Kgaogelo:

Past loss	R 42 214, 00
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Less 5%	<u>R 2 110, 70</u>
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<u>R 40 103, 30</u>	= R 40 103, 30
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Future loss	R 96 466, 00
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Less 6%	<u>R 5787, 96</u>
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Total future loss	<u>R 90 678, 04</u>	= R <u>90 678, 04</u>
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Total loss C	<u>R130 781, 44</u>
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Grand loss A + B + C	<u>R549 107,44</u>
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[60] With regard to costs, the plaintiff has employed the services of two

counsel, one of whom is senior. Although the amounts involved are not that much, but having regard to the question of merits, I am of the view that it cannot be said that it was a simple and straight and forward matter that it did not deserve the attention of two counsel. It must also be borne in mind that the matter is of importance to the plaintiff, since it related to the loss of support, in circumstances where the plaintiff was unemployed. The success of the matter merited the service of two counsel including a senior counsel. I am of the view that the plaintiff is entitled to the costs of this matter including those of both counsel, including senior counsel. The actuarial report of Poniso Actuarial Consultants was conceded by the defendant. The plaintiff is therefore entitled to the reasonable costs of the

aforesaid Actuaries. It has further been conceded on behalf of the defendant that the witnesses Mojiki, Riggaard, Mabetwa and Molobo were necessary witnesses and therefore the costs pertaining to these witnesses must also be borne by the defendant.

[61] In the premises the following order is made:

1. That the insured driver was causally negligent;
2. That the defendant is liable for the plaintiff's damages;
3. That the defendant is ordered to pay plaintiff:

3.1: in her personal capacity an amount of R328 696, 44;

3.2: in her representative capacity as mother and natural guardian of Thato an amount of R 89 629,56:

3.3: in her representative capacity as mother and natural guardian of Kgaogelo an amount of R130 781, 44:

4. That the defendant pays interest of the above amounts at the current statutory rate within 30 days from the date of this judgment until date of payment:

5. That defendant pays costs, including costs of counsel which shall include the costs consequent upon the employment of two counsel:

6. That defendant pays the reasonable qualifying fees of the actuaries, Poneso Actuarial Consultants;

7. That the following witnesses are declared to have been necessary witnesses:

7.1. Mrs. Tlabutle Wilhelmina Mojiki;

- 7.2. Inspector Rigaard;
7.3 Mrs. Hermina Mabetwa;
7.4 Mr. Morris Molobo.

N.M. MAVUNDLA

JUDGE OF THE HIGH COURT

HEARD ON THE: 22 AUGUST 2007
DATE OF JUDGMENT: 29 JANUARY 2008
PLAINTIFF`S ATT: MR. TLHATLHA

PLAINTIFF`S ADV: MR. PG CILLIERS

DEFENDANT`S ATT: MR. CHAUKE
DEFENDANT`S ADV: MR. P. KEMP SC
DEFENDANT`S ADV: MR. J.A DU PLESSIS