REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

CASE No:1422/2019

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO THE JUDGES: YES/NO

(3) REVISED: YES/NO

SIGNATURE: DIAMOND AJ

DATE: 31 Jan 2025

In the matter between:

SEKHUKHUNE KENNEDY SEKWATI **PLAINTIFF**

And

ROAD ACCIDENT FUND **DEFENDANT**

JUDGMENT

DIAMOND A J:

[1] The Plaintiff instituted a claim for loss of support, in terms of section 17(1) of Act 6 of 1996, in his personal capacity and in his capacity as a representative of a

minor child. The claim for loss of support and the loss of support claim followed upon the passing of Tshepiso Alice Maja who died in a motor vehicle collision on 24 October 2017.

[2] By agreement between the parties, the adjudication of the quantum of the claim was separated in terms of Rule 33(4), from the adjudication of the merits of the claim and the trial proceeded on the 31 of JULY 2024.

[3] The fateful collision occurred around 17:00 that afternoon on the road between Makureng and Mamaolo. This fact, as well as the following facts regarding this collision, are common cause between the parties:

- The Deceased, Tshepiso Alice Maja, was the driver of a motor vehicle, a Mazda with registration number D[...].

- The insured driver, one Mr. Tshisikule ("the Insured driver"), was the driver of the insured vehicle, a Scania Marcopolo Bus with registration number B[...].

- On that particular afternoon, the insured driver was driving the passenger bus from Makurung Village in the direction of Lebowakgomo. The insured driver had stopped next to the road on the way to Lebowakgomo to allow some passengers to leave the bus. Thereafter, he re-entered the road and started traveling towards Lebowakgomo.

- A head-on collision occurred when the vehicle driven by the deceased, who was traveling at that stage from Lebowakgomo in the direction of Makurung Village, who veered into the right-hand lane towards Makurung.

- Visibility was good, and the collision occurred on a straight stretch of the road.

- The deceased died at the scene of the collision because of injuries sustained in the collision.

[4] What this court was called upon to decide on, was articulated very accurately by the Plaintiff in the Plaintiff's Heads of *Argument: -*

> *"In casu, it is common cause that the accident occurred on the incorrect side of the deceased. The inference is that she was negligent in straying of her path of travel and resulted in the head- on collision. The question to be decided is in what way can it be said that the insured driver was negligent, and his negligence contributed in the collision, and whether the insured driver truly had no other alternative means of avoiding the accident as he said. The Plaintiff in this regard needs only prove 1% contributory negligence on the part of the insured driver."*

[5] In order to try to prove its case, the Plaintiff called only an expert witness, a certain Mr Manamela of Manamela Private Investigation. In a nutshell, Mr Manamela opined that the insured driver was negligent because he entered the road after he offloaded certain passengers, and that it did so without observing oncoming traffic and without proper care since, according to him, the bus driver saw the Mazda coming from a distance.

[6] The Plaintiff did not call any further witnesses.

[7] The question now is what weight can be attached to the testimony of the expert witness.[1]

[8] The manner in which a court should approach the testimony of an expert witness has been laid down in the authorities over the years, and that manner can very shortly be summarised as follows:[2] -

- an expert opinion should include in its report a clear indication of all facts which were *prima facie* established, either by himself or somebody else.

---

[1] I will assume for the purposes of this judgement that the expert qualified himself to be an expert witness in collision reconstruction.

[2] See DT Zeffertt and AP Paizes, *The South African Law of Evidence* (Third edition, LexisNexis 2017). P. 334 – 3524.

• Must express an opinion as to the question under discussion.

• Must give full logical and coherent reasons justifying the opinion from the prima facie established facts.

• In the end, the court must form its own opinion with regard to the question under, adjudication and must and should never (save in very exceptional, technical and complicated circumstances) uncritically accept the opinion of an expert.

[9] In my view, no weight can be attached at all to the testimony of the expert witness, for the following reasons: -

• The expert conceded, during cross-examination, and questions by the court that his entire report is based on hearsay, for instance the police report on which he relies heavily, was drafted well after the collision occurred.

• In some instances, the facts, which should at least display the character of being *prima facie*, were extracted from double hearsay evidence.

• For the most crucial opinion of the expert, *viz* that the insured driver should have observed the vehicle of the deceased, from quite a distance away, and take evasive action.

• For this opinion, there is no factual basis, not even hearsay or double hearsay. It is simply an opinion dropping out of thin air.

[10] In my view, no weight can be attached to the opinion of the expert.

[11] The Plaintiff closed its case after the expert witness.

[12] Hence, the case of the Plaintiff, at that stage of the proceedings, relied entirely on the common cause facts enumerated paragraph 3 above.

[13] The Defendant thereafter applied for absolution from the instance, on the basis that, given the *lacunae* in the case for the Plaintiff, after the evidence of the expert witness, the Plaintiff did not discharge the onus to prove any negligence, not even 1%, by the insured driver.

[14] This court dismissed the application, and indicated that it will give reasons in the final judgement for the dismissal of the application at that stage of the proceedings.

[15] The Defendant thereafter proceeded to present the testimony of the insured driver. The gist of the evidence by the insured driver was consistent with the common cause facts. The crucial portion of the evidence by the insured driver is the following:-

- That after re-entering the road, and already on his way to Lebowakgomo, he was accelerating and busy changing gears to higher gears, when he all of the sudden realised that the insured driver was swerving from his right-hand side, right into his lane in which he was driving. He testified that he immediately applied the brakes, came to a standstill, and a collision occurred between his vehicle and that of the deceased.

- He testified that there was nothing more that he could do to avoid the collision: At that stage he was still carrying 72 passengers whose safety he had to take into account. He could not swerve to the left, because right next to the shoulder of the road on the left side, the road reserve drops off sharply to the left, and if the bus with the 72 passengers were to land on this road reserve, it would certainly have overturned.

- It could not swerve to the right, since such an action would bring the bus right into the lane of the oncoming traffic, creating a dangerous situation for oncoming traffic.

- The only action that he could take was to bring the vehicle to a sudden standstill. This he did do.

[16] The Defendant then closed its case.

[17] The question now is how the above evidence should be evaluated.

[18] Before proceeding with the evaluation of the evidence after the case of the Defendant I will proceed to give reasons for my order to dismiss the application for absolution of the instance.

[19] In court, and in its written Heads of Argument, the Defendant argued that there was no evidence in the case of the Plaintiff from which an inference of negligence could be drawn against the insured driver, and that this court would not be entitled to receive evidence of the Defendant curing the *lacunae* in the evidence. Should the court do so, so the Defendant argues, it would mean that the court would burden the Defendant with an onus to disprove liability.

[20] I disagree with the Defendant. In my view the approach of the Defendant conflates two issues. Firstly a party (and sometimes both parties) to proceedings may have an onus to prove its case. Both parties to proceedings, on the other hand, have a duty to adduce evidence.

[21] If a party has a duty to adduce evidence, that does not necessarily mean that such a party carries an onus in the classical sense of the word.[3]

[22] Gordon Lloyd Page & Associates v Rivera and another[4] Harms JA states the following:

> *"The test for absolution to be applied by a trial court at the end of a Plaintiff's case was formulated in Claude Neon Lights (SA) Ltd v Daniel 1976 (4) SA 403 (A) at 409G-H in these terms:*

[3] See, for a thorough discussion Zeffert ibid P. 137 -140.
[4] 2001 (1) SA 88 (SCA) P2.

“(W)hen absolution from the instance is sought at the close of Plaintiff's case, the test to be applied is not whether the evidence led by Plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the Plaintiff. (Gascoyne v Paul and Hunter 1917 TPD 170 at 173; Ruto Flour Mills (Pty) Ltd v Adelson (2) 1958 (4) SA 307 (T).)'

This implies that a Plaintiff has to make out a prima facie case - in the sense that there is evidence relating to all the elements of the claim - to survive absolution because without such evidence no court could find for the Plaintiff (Marine & Trade Insurance Co Ltd v Van der Schyff 1972 (1) SA 26 (A) at 37G-38A; Schmidt Bewysreg 4th ed at 91-2). As far as inferences from the evidence are concerned, the inference relied upon by the Plaintiff must be a reasonable one, not the only reasonable one (Schmidt at 93). The test has from time to time been formulated in different terms, especially it has been said that the court must consider whether there is "evidence upon which a reasonable man might find for the Plaintiff" (Gascoyne (loc cit)) - a test which had its origin in jury trials when the "reasonable man" was a reasonable member of the jury (Ruto Flour Mills). Such a formulation tends to cloud the issue. The court ought not to be concerned with what someone else might think; it should rather be concerned with its own judgment and not that of another "reasonable" person or court. Having said this, absolution at the end of a Plaintiff's case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises, a court should order it in the interests of justice."

[23] In my view, this is exactly the test which should be apprised in this matter. Since the Plaintiff would only rely on 1% negligence, at least one of the possible inferences in favour of the Plaintiff could be that the insured driver failed to take the necessary evasive action, and for that reason was at least 1% negligent despite the fact that the Plaintiff was overwhelmingly negligent.

[24] Hence given the fact that virtually all the elements as to how the collision occurred were common cause, there was sufficient evidence on which reasonable court *might* - and not necessarily *must* find in favour of the Plaintiff.

[25] In the context of this case, the best and probably the only person that could testify as to whether it was possible to take evasive action within the context was the insured driver.

[26] For that reason this court refused absolution of the instance to have the benefit of full evidence of the insured before court.

[27] In doing so the court did not shift the balance of proof to the Defendant.

[28] I now turn to the evidence of the insured driver.

[29] In my view two aspects of the evidence of the insured driver are important:

- Firstly, his explanation as to when and where he observed the vehicle of the deceased in front of him; and secondly

- Secondly, whether he was in a position to take evasive action, and by so doing they have avoided the accident from occurring.

[30] In my view, the explanation given by the insured driver as to when he observed the vehicle of the deceased in front of him is completely unconvincing. He was asked in court to give an indication as to the distance at which he first observed the sudden swerve of the deceased vehicle into his lane of travel. He pointed from the witness box to the edge of the bench of the legal representatives closest to him, a distance of plus - 2 m.

[31] I find it utterly unconvincing that he could observe a sudden movement of the deceased vehicle, at a 2 meter distance, while still accelerating and changing gears to higher gears, and then apply brakes to bring his bus to a standstill. All of that within the space of 2 meters. That evidence is highly improbable.

[32] In my view, the most reasonable inference to be drawn is that the insured driver failed to keep a proper lookout, since he could not give a reasonable explanation how the deceased vehicle appeared in front of him.

[33] That is of course not the end of the enquiry. The next question to be considered is whether the failure to keep a proper lookout is causally linked to the occurrence of the collision.

[34] To put it the other way round: had any reasonable person kept a proper lookout, would then it then have been possible for the insured driver to have avoid the collision by taking evasive action.

[35] The insured driver testified, and, in my view, there is nothing to suggest that the evidence of the insured driver should be rejected, nor is there any evidence to the contrary, that it could not take evasive action. It is quite reasonable that the insured driver could not swerve the bus to the left of the road, nor into the right lane of the road, against the backdrop of the explanations given above.

[36] The Plaintiff presented absolutely no evidence to the court which could assist the court to come to a conclusion such as the width of the road, the width of the round measured from shoulder to shoulder of the road, the total width of the road reserve, the nature thereof, the physical condition of the vehicles after the accident from which inferences can be drawn, breaking skid marks on the tar, etc, etc.

[37] It is also puzzling that the collision occurred at 17:00, which must be a busy time of the day, with a bus full of passengers, without any passenger or witness having observed the collision.

[38] In my view, therefore the Plaintiff did not discharge the onus on him to prove its case. There is just a complete paucity of evidence that would substantiate an inference that the insured driver was at least 1% negligent.

[39] For all of the above reasons I am of the view that the claim should be dismissed.

I consequently make the following order:

The claim of the Plaintiff is dismissed with costs.

DIAMOND AJ
Acting Judge of the High Court
Limpopo Division,
Polokwane

APPEARANCES:

HEARD ON : 31 JULY 2024.

JUDGMENT DELIVERED ON : 31 January 2025
September 202. This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down of the judgment is deemed to be **31 January 2025** at

FOR THE PLAINTIFF : M Mamarokane
INSTRUCTED BY : Marokane Attorneys, Pretoria
EMAIL:masegela@marokaneattorney.co.za
Ref: R/MVA/SEK20.

FOR THE RESPONDENT : Adv S R Sibara
INSTRUCTED BY : State Attorney, Polokwane
Email: kholofelos@raf.co.za
moshabanem@raf.co.za

ReF: Sekwati SK/z01 PLK/RAF 519/2021/SK