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

Reportable:	**NO**
Of Interest to other Judges:	**NO**
Circulate to Magistrates:	**NO**

Case no: **3417/2019**

In the matter between:

AT MAKHELE Plaintiff

and

ROAD ACCIDENT FUND Defendant

CORAM: JP DAFFUE, J

HEARD ON: 17 & 18 JANUARY 2023

DELIVERED ON: 05 APRIL 2023

This judgment was handed down electronically by circulation to the parties' representatives by email, and release to SAFLII. The date and time for hand-down is deemed to be 12h00 on 05 April 2023.

ORDER

1. The defendant shall pay 100% of the plaintiff's damages to be proven or agreed upon.
2. The defendant shall pay the plaintiff's costs of the action, limited to one set of attorneys, until and including 18 January 2023, together with counsel's fees, including his fees pertaining to the drafting of his written heads of argument, and also including the reasonable costs of all medico-legal reports, the qualifying and reservation fees, if any, of the plaintiff's experts.
3. The matter is postponed to the pre-trial roll of 26 June 2023 in order for directions to be given pertaining to the trial on quantum.

JUDGMENT

INTRODUCTION

[1] This is yet again one of those defended actions against the Road Accident Fund that could just as well have been placed on the unopposed roll. It is now common cause that on 27 April 2018 at approximately 15h02 and in the area of Bloemspruit on the N8 national road between Bloemfontein and Thaba Nchu, the plaintiff, Mr Austin Tsokolo Makhele, was the driver of his motor vehicle with registration DZC 463 FS which vehicle left the road and overturned resulting in injuries sustained by the plaintiff. I underlined the word 'now' for a specific reason which will soon become clear.

THE PLEADINGS AND PRE-TRIAL PROCEDURE

[2] It is the plaintiff's case, both on the pleadings as well as in his oral evidence, that an unknown vehicle veered into his lane of traffic as a result of which the plaintiff swerved to the left to avoid a head-on collision, lost control of the vehicle as it left the road as a result of which it overturned. He sustained injuries in the process.

[3] The allegations in the plaintiff's particulars of claim pertaining to the incident and the unknown insured driver's negligence have been met in the plea with bare denials.[1] This is the case notwithstanding the fact that the Accident Report (AR) form of the South African Police Service (SAPS) and the plaintiff's explanatory affidavit accompanied his claim lodged with the defendant during the first half of 2019. In fairness to the present attorney of the defendant, the plea was drafted by its previous attorney. Insofar as the plea contains bare denials, the defendant failed to rely in the alternative on any contributory negligence on the part of the plaintiff in the event of a finding that the incident did in fact occur as alleged by the plaintiff. The defendant also did not seek any apportionment of damages in its plea.

[4] The parties' pre-trial minute dated 7 April 2022 forms part of the pleadings bundle.[2] The plaintiff indicated his readiness to proceed on trial in respect of both the merits and quantum. His expert reports had been filed by then. The defendant, on

[1] Pleadings bundle, paras 3 & 4 on pp 7, 8 & paras 3 & 4 on p 12.
[2] Pleadings bundle, pp 17 – 23.

the other hand, requested that the merits and the quantum be separated. However, on 13 June 2022 Van Zyl J declared the matter trial-ready and ordered that both merits and quantum ought to be adjudicated at the forthcoming trial. The defendant did virtually nothing to ensure that it would be ready to proceed on trial, not in respect of the merits and most certainly not in respect of quantum.

[5] At the stage when the parties held their pre-trial conference nearly a year ago, it was placed on record on behalf of the defendant that it "may call 1 - 2 witness, but reserves its rights". Clearly, at that stage the defendant's legal representative had no idea as to who would be called and what such witness or witnesses would testify about, contrary to the peremptory requirements of rule 37A(10). This is a situation that is experienced on a weekly basis in this division.

[6] In paragraph 11 of the pre-trial minute the parties considered the status of the discovered documents. They agreed that these discovered documents were what they purported to be and might be used in evidence, without any admissions as to the contents thereof. I shall return to this aspect.

[7] On receipt of the court file after being allocated the matter, I directed my secretary to write an email to both parties, which she did on 10 January 2023. I quote the contents thereof:

"Dear all

The above matter and two others have been allocated to Daffue J for 17, 18 and 20 January 2023. He instructed me to communicate with you. Please respond to the following not later than Friday, **13 January 2023 at 16h00**:

What does the RAF intend to do, bearing in mind the matter is on trial in respect of merits and quantum and no expert reports have been filed by it?

1) Is there a possibility of settlement, and if so, when can settlement be expected?
2) Is the RAF not prepared to make any admissions pertaining to either the merits or the quantum or both?
3) Which of the expert reports are denied, and if so, on what basis?
4) How many witnesses will be called by the parties in respect of the collision?
5) Is it expected that the matter will go on trial, and if so, arrangements may well have to be made for re-allocation of the matter to another judge.

Your urgent responses are awaited."

The plaintiff's legal representative responded, but no response was forthcoming from the defendant's legal representative.

[8] It will turn out later when I evaluate the evidence that the defendant was ill-prepared to even deal with the merits of the matter. The defendant's plea was filed in August 2019, ie more than a year after the occurrence of the incident. It is accepted that copies of the contents of the SAPS docket as well as hospital records were attached to the plaintiff's claim documents. In fact, Ms Banda obtained an admission from the plaintiff in this regard during cross-examination. No doubt, at the stage when the plea was filed, the person responsible for that (the defendant's previous attorney and not Ms Banda), did not have a clue how to draft a proper plea. If he/she was presented with witness statements of the two SAPS officers, or had the opportunity to consult with them, there would have been no denial of the incident as pleaded in paragraph 3 of the particulars of claim. If it was really the defendant's case that the plaintiff experienced a tyre burst which caused him to lose control, as allegedly observed by the one SAPS officer who completed the AR form, that would and should have been pleaded.

SEPARATION OF ISSUES

[9] On the date of the hearing Ms Banda requested a separation of issues in order for the court to adjudicate the merits only. Mr Marx objected on behalf of the plaintiff. He pointed out that all plaintiff's expert reports had been filed and although the experts were not at court, they were on standby to testify if required. In order to assist the defendant who failed to file any expert reports, I decided to grant a separation of issues in terms of rule 33(4) on the basis that paragraphs 5, 6 & 7 of the particulars of claim, read with the corresponding paragraphs in the plea, should stand over for later adjudication if required. Consequently, only the disputes contained in paragraphs 1, 2, 3, 4, 8 and 9 of the particulars of claim, read with the corresponding paragraphs of the plea, were to be adjudicated during the trial. I did this to assist the defendant who was clearly not ready to proceed on quantum and bearing in mind that public funds were at play. Prior to the leading of evidence Ms Banda placed on record that the allegations contained in paragraphs 8 and 9 of the particulars of claim were admitted and no longer in dispute. Therefore, as the plaintiff's locus standi had been admitted earlier, the only outstanding issues were those contained in paragraphs 3 and 4 of the particulars of claim, ie the incident as well as the grounds of negligence.

SUMMARY OF THE EVIDENCE AND AN EVALUATION THEREOF

The plaintiff's evidence

[10] Only one witness testified during the trial, to wit the plaintiff, Mr Makhele. He was 60 years old when the incident occurred and 64 when he testified. At the time of the incident he was employed with PACOFS at the Sand du Plessis theatre in Bloemfontein. On the morning of 27 April 2018, a public holiday, he travelled from his residence in Botshabelo to Bloemfontein. He visited various shops and/or businesses in Bloemfontein, but I must say, he was quite evasive in this regard. On his return home the incident occurred at about 15h00 the afternoon. He was alone in the vehicle. At the point where the incident occurred the road contained two lanes in a western direction, ie from Botshabelo to Bloemfontein and as the plaintiff was travelling from Bloemfontein to Botshabelo, ie west to east, the road contained only a single lane.

[11] The plaintiff testified that the road contained gravel shoulders, but it was pointed out to him by the court with reference to the photographs presented to court during his cross-examination that the road had tarred shoulders. He admitted this. He testified that a vehicle travelling in the right hand lane (the fast lane from Botshabelo towards Bloemfontein) veered off to its right hand side across the solid white line into his lane of travel. This occurred when that vehicle was about 18 metres from him (he pointed out the distance from the witness stand to the back of the court room). In order to avoid a collision, he swerved towards his left hand side. There was no time to apply his brakes and if he would have done so, there would have been a head-on collision. In the process of swerving to his left he lost control as the vehicle left the road where after it overturned. His speed at the time was 80 km/h. According to him there was nothing that he could do to avoid the incident. There was no contact between his vehicle and the oncoming vehicle. He could not identify this vehicle at all, not with reference to a registration number, or its make and/or colour. At the end of his examination-in-chief he was asked whether he was able to resume his work at PACOFS after the collision to which he respondent: “not at all”.

[12] Before Ms Banda started her cross-examination, she handed in the so-called merits bundle as exhibit A, a notices bundle, marked volume 2, as exhibit B and a notices bundle, marked volume 1, as exhibit C. Mr Marx did not object, but he clearly reserved his rights. During his cross-examination the plaintiff confirmed that these documents were lodged with his claim. The plaintiff was referred to his statement to SAPS, the Accident Report (AR) form as well as the hospital records contained in exhibits B and C. He confirmed his statement and that the hospital records were indicative of the injuries allegedly sustained by him and treatment received.

[13] The plaintiff was subjected to severe cross-examination. He was on the witness stand from Tuesday the 17th to Wednesday the 18th of January. He could not explain what exactly he was doing in Bloemfontein on the day of the incident, but denied that he consumed alcohol insofar as he is a diabetic. He only drinks African beer from time to time, but nothing else.

[14] He was referred to an inscription in the hospital records that he was intoxicated, smelling of alcohol and presented with bloodshot eyes.[3] He denied that he consumed liquor that day and denied the correctness of the inscription. Mr Marx objected to the cross-examination, but I allowed it on the basis that the documents were discovered by plaintiff and the agreement of the parties in their pre-trial minute referred to earlier. In my view the defendant might have decided to call witnesses in this regard or apply for the hearsay evidence to be admitted. Therefore, it was only fair to put this version to the plaintiff to provide him an opportunity to respond. I also found it strange that the plaintiff's attorney prepared these bundles and filed them with the court beforehand, whilst the plaintiff's counsel did not refer to a single document, sketch plan or photograph contained in the bundles during the plaintiff's evidence-in-chief. Consequently, disputed aspects were not dealt with. Discovered documents are not to be presented to the trial court, save insofar as these might be presented as part of the evidential material. At that stage I was fully aware of the status of the discovered documents, ie they were what they purported to be and could be used in evidence without any admissions as to the contents thereof.

[15] The plaintiff was also referred to the sketch plan and the note contained in the AR report. This report indicated that, where the incident occurred, the road from Bloemfontein to Botshabelo contained two lanes and the road from Botshabelo to Bloemfontein one lane only. Mr Marx again objected to the cross-examination which objection was dismissed for the same reasons as indicated in the previous paragraph. The AR form and sketch plan are in direct conflict with the viva voce evidence of the plaintiff and he denied the correctness of the sketch plan. He also denied the version that his tyre had burst as stated in the AR report. After questions by myself about the area where the incident occurred, I drew a rough sketch in court which was marked exhibit D once it was admitted by the plaintiff to be a correct indication of his evidence. The plaintiff could not say whether there were any cars following him immediately before the incident, although there were other cars approaching him, but in the slow lane.

[3] Exhibit B, p 136.

[16] It was put to the witness that he did not keep a proper lookout, otherwise he would have observed the vehicle swerving across the solid white line into his lane, but he denied that. When asked about the date of his statement to SAPS, to wit 17 January 2019, he explained that he could not make a statement earlier as he was hospitalised all the time. It was put to him that he was discharged already on 24 June 2018 according to the records, but he denied this.

[17] The plaintiff testified that he never went back to the scene of the incident in order for photos to be taken and/or a sketch plan to be drawn on his instructions. Yet, he admitted that the photographs contained in Exhibit B depict the area of the incident and he was adamant about this, specifically with the big tree shown on some of those photos as his focal point. If these photos were indeed taken at the correct area, his version of the lanes on the road must be accepted as correct.

[18] The plaintiff conceded that his version in examination-in-chief that he never went back to work after the incident was not correct. He did in fact start to work again in January 2019.

[19] The plaintiff was shown another sketch plan[4]. It was put to him that this sketch plan was contrary to his version in court. He denied that it was drawn by him or on his instructions and he merely said that he knew nothing about it. He admitted that when he attended to SAPS in order to present a statement to them, a sketch plan was drawn, but he could not explain the whereabouts thereof. Fact of the matter is that no SAPS official was called to explain what was contained in the docket and what was the source thereof. There is no information about the origin of the sketch plan and/or the identity of the draftsperson.

[20] The same sketch plan appears on page 10 of Exhibit A and page 174 of Exhibit B. This was clearly drawn by an attorney or employee of an attorney as it refers to ‘client’ and ‘client’s lane’. It is similar to the one drafted by me, Exhibit D, whilst listening to the plaintiff’s evidence and confirms the plaintiff’s version about the lanes and the unknown vehicle approaching in the fast lane before crossing the solid white line.

[4] Exhibit B, p 186.

[21] The plaintiff agreed that he did not hoot in order to warn the oncoming vehicle and neither did he flash his lights as a warning sign. On his version and even at the speed of travelling at 80 km/h, there was no time to do that. It was also put to him that at that speed, his vehicle would not have overturned if he merely moved to the left to avoid the oncoming vehicle, but he denied this.

[22] On questions by the court the plaintiff stated that: (a) he never went back to the scene after the incident, although it is accepted that he knows the road well, having travelled it on a daily basis between his residence and Bloemfontein and in this regard it may be mentioned that it appears from his affidavit served with his claim documents that he has been employed by Pacofs in Bloemfontein since 1986[5]; (b) although the photographs on pages 175 to 185 of exhibit B depict the scene of the incident, he could not say who took the photographs as he never went to the scene with an attorney; (c) he did not provide any information of the incident to SAPS officers at the scene, but could not explain how they obtained his address and phone number to be inserted on the AR form; (d) the weather conditions were good at the time of the incident and it was not raining at all.

[23] It was finally put to the plaintiff by Ms Banda that he had a tyre burst, that he was speeding on that day and that he lost control of his vehicle; also, that no vehicle crossed the solid white line into his lane of traffic, but he denied all these statements. Quite surprisingly, Ms Banda never put it to the plaintiff that tyre marks allegedly found on the scene by the SAPS officer who filled out the AR form were indicative of a tyre burst. I accept that it would be an unethical way of cross-examination in the absence of a proper statement under oath by a witness who could vouch for the correctness of his/her observations pertaining to tyre marks and who was prepared to draw conclusions of an expert nature that the marks had been caused by the tyre(s) of the plaintiff's vehicle consequent upon a tyre burst.

[24] In re-examination the plaintiff confirmed that he was never charged for driving under the influence of liquor. He also said that he did not understand the question when it was put to him whether he returned to worked after the incident.

ANALYSIS AND EVALUATION OF THE EVIDENCE

[25] After the closure of defendant's case without leading any evidence, Mr Marx presented the court with his oral argument, but Ms Banda needed time to present argument. I directed that she should file written heads of argument by Monday, 23

[5] Exhibit A, para 6 on p 3.

January 2023 to which Mr Marx would have an opportunity to reply by Friday, 27 January 2023. I timeously received Ms Banda's heads of argument, but Mr Marx' heads of arguments were received much later than directed. However, as I was on circuit court for a whole month, I was not inconvenienced by the delay.

The viva voce evidence

Mr Marx submitted that the plaintiff was a credible witness and that if he wanted to fabricate his version, he could have given details of the oncoming vehicle that caused him to swerved to his left. He submitted further that the court should not make a negative inference about the plaintiff's inability to mention the make or colour of the oncoming vehicle. The plaintiff's version about the distance between the two vehicles when the offending vehicle came across the solid white line was an estimate. When asked by the court about the distance between the two vehicles at that point in time, the witness did not want to concede that the distance must have been much further than the 18 to 20 metres estimated by him. Bearing in mind reaction time and the distance travelled at a specific speed, the plaintiff's estimate is totally incorrect. However, I do not intend to set out any mathematical calculations, save to point out that at a speed of 80 kph a vehicle travels a distance of 22.2 metres in a second. Thus, if the approaching vehicle was travelling at the same speed, the combined distance travelled in one second would be 44.4 metres. It is generally accepted that reaction time of the average person is between three quarters of a second and one second. If the distance between the two vehicles was in excess of 44 metres, a collision might have been avoided by swerving, but surely not if the distance of 18 to 20 metres is accepted as correct. However, experience has taught us that honest witnesses more often than not make mistakes when asked to estimate distance or time, especially in the heat of the moment and/or when dealing with moving vehicles or other subjects. The plaintiff's version cannot be rejected based on the observation above.

[26] I pointed out during questions put to the plaintiff that I was not fully satisfied with each and every piece of his testimony. The version presented why he belatedly made a statement to SAPS nine months after the incident appears to be far-fetched. Also, his total unawareness as to who took the photographs and drafted the sketch plan relied upon, appears to be unbelievable at first glance. Having said this, one must consider the time lapse and the fact that the plaintiff's child and/or other relatives were informed about the incident and probably assisted with the process to obtain legal advice. The plaintiff was vague about his visit to Bloemfontein on the 27th

April 2018. He also contradicted himself as to whether he returned to his employment after the incident. Notwithstanding this and bearing in mind the absence of evidence to contradict his version, it is not possible to reject the crux of his evidence as false.

Admissibility of hearsay evidence

[27] The documents contained in the police docket as well as the hospital records were discovered, but the contents thereof were never admitted. Therefore, the allegations contained therein cannot be accepted as evidence in the circumstances. Ms Banda tried to persuade the court in her written heads of argument that the hearsay should be allowed as admissible evidence. Although I allowed her to cross-examine the plaintiff on the documents, it was always on the basis that in the event of a dispute, the defendant would either present viva voce evidence by the authors of these documents or request that the contents thereof be allowed as part of the evidential material based on the exception to the hearsay rule. The defendant closed its case without calling any witnesses and also failed to apply for the admission of the hearsay evidence in accordance with s 3(1) of the Law of Evidence Amendment Act 45 of 1988 and/or s 34 of the Civil Proceedings Evidence Act 25 of 1965.

[28] Ms Banda relied on *S v Shaik and Others*[6], *Le Roux v Pieterse and Others*[7] and *Van Willing and another v The State*[8] in submitting that the court should allow the hearsay evidence. These judgments are totally distinguishable and even if that was not the case, the defendant failed to apply for the hearsay evidence to be admitted in accordance with s 3(1) of Act 45 of 1988. In *Shaik* the Supreme Court of Appeal extensively dealt with s 3(1) and the factors contained in s 3(1)(c). It held eventually that the incriminating fax should be admitted as evidence in the interests of justice. The court inter alia found that the cross-examination of the author of the fax would have served no other purpose than to reinforce the impression that he is dishonest and unreliable.

[29] Section 34 was considered in *Le Roux v Pieterse*. In that case the medical doctor that prepared a J88 report after having examined the complainant emigrated and it was not reasonably practicable to obtain her presence in this country. It was not in contention that she was the author of the document and the contents thereof were largely confirmed under oath by the complainant. The trial court admitted the J88. On appeal, the High Court held that the J88 was admissible under s 34(1).

[6] 2007 (1) SACR 247 (SCA) paras 170 – 178.
[7] 2013 (1) SACR 277 (ECG) paras 13 – 15.
[8] (109/2014) [2015] ZASCA 52 (27 March 2015).

[30] In *Von Willing* the Supreme Court of Appeal considered the admissibility of hearsay evidence in terms of s 3(1). It held eventually that the statements of the deceased person were correctly accepted by the trial court as admissible, inter alia insofar as they corroborated the version of an identifying witness.

[31] In regard to the submissions by Ms Banda I take into consideration the following:

a. Exhibit A contains the police docket which includes the AR form, filled out by constable Lepele, as well as a written statement by the other SAPS officer that attended the scene, W/O Talo. W/A Talo did not mention any smelling of alcohol, although he stated that he communicated with the plaintiff on the scene. He also failed to mention any tyre marks on the road. Ms Banda informally explained in chambers that one of her witnesses passed on whilst the other witness was in hospital at the time. She did not explain when this person was expected to be discharged from hospital. She also did not identify the witnesses referred to. I have not been told whether W/O Talo is the one that passed on or whether he was hospitalised at the time of the hearing. In any event, his version does not take the matter any further. The AR form completed by his colleague, constable Lepele, is dated 26 April 2018, to wit a day before the incident. There is no explanation for this mistake. Also, the allegation that a tyre had burst is nothing more than an observation by a person who did not state the facts for his opinion and who did not testify to be properly cross-examined. There is no objective evidence to corroborate his observation. The scene depicted in the sketch plan on the AR form pertaining to the lanes on the road was severely disputed by the plaintiff.
b. Although one SAPS officer apparently passed on since then, no proper explanation has been given as to why the evidence of the second officer could not be obtained. I was merely told that he was hospitalised during the trial proceedings. Nothing further was said in this regard, ie as to the nature of his condition, since when he was hospitalised and when he was expected to be discharged. There was also no application for a postponement of the trial in order to obtain the evidence of this witness.
c. The same applies to the person that made the inscription hospital records. The identity of this person is not even disclosed, but over and above that, there is no indication whether Ms Banda tried to consult with this person and if so, whether a statement was obtained from such person and/or whether this person was available to testify to confirm the correctness of his/her observations. Also, the

inscription was not only disputed, but it contradicts the version of W/O Talo who allegedly spoke to the plaintiff on the scene without mentioning anything about smelling of alcohol or blood-stained eyes.

d. The Supreme Court of Appeal authoritatively held in *Rautini v Passenger Rail Agency of South Africa*[9] as follows:

> '[11] The contents of the hospital records and medical notes constituted hearsay evidence, and it is trite that hearsay evidence is prima facie inadmissible. The discovery thereof by the appellant in terms of the rules of court does not make them admissible as evidence against the appellant, unless the documents could be admitted under one or other of the common law exceptions to the hearsay rule.
>
> [12] It is common cause that the respondent's counsel made no application for any of the hearsay evidence to be admitted in terms of s 3 of the Law of Evidence Amendment Act. In the circumstances, the full court's finding that material differences existed between the appellant's version and the medical records regarding where he fell from the train, the cause of his fall and his first lucid recollection after the fall, was erroneous. The full court's reliance on hearsay evidence in that regard amounts to a material misdirection that vitiates its ultimate finding on the outcome of the appeal that was before it.'

[32] This case is in line with the facts in *Rautini*. Not only did Ms Banda fail to apply during the trial and before the close of the plaintiff's case, or even the defendant's case, for the hearsay to be admitted, but the hearsay is disputed by the plaintiff and contradicted by other hearsay. To sum up: the defendant failed to show that (a) it is entitled to relief in terms of s 34, particularly insofar as it was not placed on record that the person or persons who made statements relevant to the case are dead or unfit to testify; and (b) in respect of s 3(1), that the court should allow the hearsay in the interests of justice after having considered the factors set out in s 3(1)(c). It would be unfair to allow it at this stage, but in any event, the probative value thereof is about zero. Therefore, even if it was at all possible at this stage, I am not prepared to consider a belated application, either in terms of s 3(1) or s 34 of the aforementioned Acts.

[33] I agree with the submission in the defendant's written heads of argument that the plaintiff, who is 64 years old, became irritated by some of the questions put to him during cross-examination. There is no reason to find that his credibility was negatively affected as a result thereof. Both Mr Marx and I allowed Ms Banda some leeway pertaining to her cross-examination which in many instances became argumentative and/or repetitive.

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[9] (Case no 853/2020) [2021] ZASCA 158 (8 November 2021) paras 7 – 18 & 21 – 24 in general and paras 11 & 12 in particular.

Contributory negligence

[34] I repeat that the defendant did not rely on contributory negligence in its plea and failed to lead any evidence in this regard. The plaintiff was subjected to cross-examination pertaining to other measures that could have been utilised to prevent the incident, such as hooting, braking and flashing of lights, but he insisted there was no time to act accordingly and that swerving to his left was the only option to avoid a collision with the oncoming vehicle. The issue of contributory negligence could not and did not arise. On the plaintiff's version which has to be accepted, he was confronted with a sudden emergency due to the negligence of the driver of the unidentified vehicle. This was sudden and unexpected. He cannot be blamed for reacting as he did. Clearly, the vehicle overturned when he left the tarred road as the veld next to the road is on a much lower level than the road surface as he testified. This is apparent from the photographs.

CONCLUSION

[35] The plaintiff was a single witness whose evidence was not wholly satisfactory in all respects. His evidence was not contradicted by any admissible evidence and notwithstanding cross-examination he did not contradict himself on the crucial issues. The defendant had more than enough time to investigate the circumstances surrounding the incident and to ensure that it was in a position to present evidence to negate the plaintiff's version. It failed to do so. I am satisfied that the plaintiff's version as to how and where the incident had occurred is the truth. He has proven his case on a balance of probabilities.

ORDER

[36] The following orders are granted:

1. The defendant shall pay 100% of the plaintiff's damages to be proven or agreed upon.
2. The defendant shall pay the plaintiff's costs of the action, limited to one set of attorneys, until and including 18 January 2023, together with counsel's fees, including his fees pertaining to the drafting of his written heads of argument, and also including the reasonable costs of all medico-legal reports, the qualifying and reservation fees, if any, of the plaintiff's experts.

3. The matter is postponed to the pre-trial roll of 26 June 2023 in order for directions to be given pertaining to the trial on quantum.

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J P DAFFUE, J

On behalf of the Plaintiff:	Adv DJ Marx dmarxlaw@icloud.com;
Instructed by:	VZLR Inc c/o Du Plooy Attorneys BLOEMFONTEIN
On behalf of the Defendant:	Ms P Banda portiab@raf.co.za;
Instructed by:	Road Accident Fund BLOEMFONTEIN