REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 13659/2022

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO

DATE SIGNATURE

In the matter between:

Ghuman Khumalo Plaintiff

and

Road Accident Fund Defendant

JUDGMENT

Kgomongwe, AJ:

Introduction

[1] This is a single unidentified motor vehicle accident action proceedings. The central question is whether the court is entitled to accept the evidence of the

plaintiff despite his failure to meet the statutory requirement[1] upon which his claim on liability is founded.

[2] The plaintiff's failure to meet this statutory requirement has not been challenged by the defendant in its plea. This was so because during the lodgment of the plaintiff's claim in March 2021, the plaintiff furnished the defendant with a document purported, *inter alia*, to be his affidavit explaining what transpired on the day in which the cause of action allegedly arose.

[3] Based on the above at the time, the defendant acted under the impression that the plaintiff had furnished the statutory required affidavit. It emerged during hearing in court that this was false. The plaintiff did not depose to any affidavit describing the events of the day in which the cause of action allegedly arose, at least from what was before the Road Accident Fund (when the claim was lodged) and certainly from what was before Court (on the discovered bundle).

[4] It was the plaintiff's evidence that the purported "affidavit" before Court was not his despite same containing his full names, identity number, sex, residential address, and employment status. This means in effect, there is no affidavit.

Recent practice

[5] Before dealing in detail with the actual events of the accident, I find it apposite to first deal with what I consider to be a misnomer usually perpetuated by the Road Accident Fund in the default judgment application courts. I go to town on this.

[6] The Road Accident Fund is one of the biggest litigators in our courts. That being the case, the courts had to find ways to dispose of these matters effectively and fairly.

[7] Whilst there can be acceptance that a lot of claims that are lodged with the Road Accident Fund (the Fund) are not afforded the attention they deserve, well, obviously sometimes because of the overload of work and capacity, the

[1] *The affidavit required in terms of the provisions of Section 19(f) of the Road Accident Fund Act 56 of 1996.*

truth is that they mostly end up in courts. It is the courts which then put finality to these claims, sometimes by way of default.

[8] In recent years the Fund appears to have taken a position not to actively partake in the litigation proceedings like previously. Most of these claims then end up in the default judgment application courts. It seems to be a waste of time, money, and resources to have these pre-trial court procedures i.e., application to compel discovery, pre-trial conference and striking off the defence because in most instances the Fund is indifferent. They hardly show up despite their knowledge about such court processes taking place. I do not know how they propose to be saving costs because in all these applications the applicants ask for costs, and they are mostly granted.

[9] However, these court-sanctioned pre-trial procedures are vital to ensure fairness and justice even to the most indifferent of parties. In most instances, the indifferent party normally rocks up when the litigation party is almost at its tail end, and this is during the default judgement application phase. The present matter and many others that I had to deal with during this week were exactly those that I refer to above.

[10] In the present matter, the plaintiff underwent all the court-sanctioned pre-trial procedures. The last one was before Wilson AJ (as he then was) on 18 August 2022 in which the Learned Judge authorised the plaintiff to approach the default judgment court.

[11] Reading from CaseLines, it is clear that the Fund's personnel (official and legal representative) were invited to the present proceedings as far back as 19 July 2022. After the order of 18 August 2022 authorising the plaintiff to approach the default judgment court, it appears that nothing happened on the part of the Fund. They did nothing. Fast forward, almost 12 months (one year later) later when the matter served before me by way of default[2], the Fund rocked up. They were represented by Mr. Madasele from the office of the State Attorney.

[2] *On 2 August 2023.*

[12] They came clad with a hastily prepared plea[3]. It was uploaded a day before the hearing day together with proof of service. On the day of hearing, Mr. Mthembu, on behalf of the plaintiff, stood up to call the matter. He was immediately followed by Mr. Madasele. I asked Mr. Madasele if he was properly before court to which he responded in the affirmative. This was a surprise to me because the matter came before me as a default judgment application. I expected a solo litigation dance from the plaintiff. It was not to be.

[13] Just to recap a little on this point, the plaintiff was before the default judgment court on the grounds that the Fund failed to enter an appearance to defend after having been properly served with the summons. The Fund only entered appearance to defend on the eve of hearing of the default judgment application. I pause to state that Rule 19(5) of the Uniform Rules[4] entitles a party to enter appearance to defend at any time for as long as the judgment has not been granted. That is the case in the present matter.

[14] Based on the above rule and Mr. Madasele's presence in court, I allowed the Fund to partake in the proceedings. I was however told from the bar that the Fund seeks a postponement. I asked Mr. Mthembu what the plaintiff's attitude is on that ask. I was told that the plaintiff is opposed to the postponement application. The Fund was then directed to file a substantive application for postponement which would be answered to on the very same day given the constraints of time. The parties were further directed the to file brief heads of argument on postponement. I am grateful to the parties for having complied with these directives.

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[3] *Plea spoke of a "special plea" but there was none. It was very terse.*

[4] *"(5) Notwithstanding the provisions of subrules (1) and (2) a notice of intention to defend may be delivered even after expiration of the period specified in the summons or the period specified in subrule (2), before default judgment has been granted: Provided that the plaintiff shall be entitled to costs if the notice of intention to defend was delivered after the plaintiff had lodged the application for judgment by default."*

[15] I do not propose to delve into the Fund's postponement affidavit save to state that it is a mere narration of its inefficiencies. It is unhelpful. I refused the postponement application and ordered the parties to proceed with trial.

[16] I think this point warrants a bit of attention though. The Fund makes a point in paragraph 16 of its postponement application where they say:

> *"The default trial as it stands is now fully defended and the matter should now follow the normal litigation."*

[17] One would suppose that the statement should be taken literally as is because it is that simple. One would simply understand this statement to be saying that now that the matter is fully defended, it should follow the normal litigation. I do not understand default judgment application to be otherwise. I understand the default judgment application to be normal litigation, more especially when service of process is not in issue. However, as we unpacked the statement during the postponement debate, indeed I found the statement to be very much nuanced. It was not as simple as it looked.

[18] The import of the statement was that because an appearance to defend has been noted, the matter should then be postponed in order for it to follow the litigation processes like replication, request for further particulars, exceptions, discovery notices, expert notices, and pretrial conferences and so forth. In other words that the litigation process should start afresh from the plea onwards.

[19] Upon further inquiry on this point, I was told that because the Fund has entered appearance to defend before default judgment is granted, this entitles them to automatic postponement. I asked for authority on this proposition. None was given. If anything, I was told that Rule 19(5) has in its mechanism a silent feature that once a party enters appearance to defend belatedly, such party then becomes entitled to a postponement. This is a misnomer. There is no such provision in rule 19(5). I choose to remain blind to this "silent feature".

[20] It would have been irregular, I suspect, had I granted judgment by default after an appearance to defend had been filed in terms of Rule 19(5) because I would not have been endowed with such jurisdiction.

[21] Wepener J had the following to say on this point in *Omang Trading & Logistics (Pty) Ltd & Others v Toyota Financial Services SA (Pty) Ltd*[5] —

> *"On the assumption that the applicants failed to disclose a good cause or a bona fide defence, which I make no finding on, the determination to be made is whether the judgment falls to be rescinded due to it being irregular for want of jurisdiction to grant it.*
>
> *Schoeman JA said in Travelex Limited v Maloney and Another (823/2015) [2016] ZASCA 128 27 September 2016, that such a judgment is a nullity. In paragraph 16 the Supreme Court of Appeal held:*
>
> > *"I incline to the view that if a judgment or order has been granted by a court that lacks jurisdiction, such order or judgment is a nullity, and it is not required to be set aside. However, I agree with the view expressed in Erasmus Superior Court Practice, that if the parties do not agree as to the status of the impugned judgment or order, it should be rescinded. That is the position in the instant matter where the appellant applied to have the order set aside on the premise that the court did not have jurisdiction. Therefore, the usual requirements for a rescission application in terms of the common law or Rule 42 do not apply."*
>
> *In my view it will be no different whether a court, a magistrate, a judge, or a registrar gives the order outside of its powers." (emphasis)*

[22] We are not dealing with the situation of the above kind in this present matter.

[23] The parties were directed to proceed with trial since the Fund was now before Court. Mr Madasele seemed to take issue with this on the basis that the Fund is entitled to a postponement in terms of Rule 19(5). I have already dealt with this misnomer. His other issue was that the Road Accident Fund needs more time to investigate the claim and that should I not grant them that opportunity, they will be prejudiced. Again, this is a misnomer for reasons below.

[24] Firstly, I asked Mr Madasele if he disputes service of summons on their client to which he answered in the negative. Secondly, there is clear proof that the Fund personnel were invited to the CaseLines proceedings as far back as 19 July 2022[6]. Thirdly, Mr Madasele told me that the Fund sought to repudiate this claim in February 2022, meaning that they were aware of this matter. That the

[5] *[2022] ZAGPJHC 610 (Transcribed p4-5 of the judgment).*

Fund elected to partake in these proceedings at the tail end was exactly that, an election. Their election to suddenly partake in the proceedings is hardly a road to Damascus moment.

[25] It is clear from the above that the Fund was fully aware of this matter but elected to be indifferent about it. In my view, Rule 19(5) is more of an exception than a general rule. Mr Madasele seems to have it the other way round, hence his strongly advocated view that his meeting this Rule then entitles his client to a postponement. I disagree. If anything, the use of this Rule as a primary self-introduction to the litigation proceedings instead of Rule 19(1) is no more than an abuse of court process that should not be countenanced.

[26] Rule 19's point of departure is sub-rule (1) which provides as follows —

> *"(1) Subject to the provisions of section 27 of the Act, the defendant in every civil action shall be allowed ten days after service of summons on him within which to deliver a notice of intention to defend, either personally or through his attorney: Provided that the days between 16 December and 15 January, both inclusive, shall not be counted in the time allowed within which to deliver a notice of intention to defend."* (*emphasis*)

[27] The literal meaning of the above is that should the defendant fail to file appearance to defend within the stipulated period after service of summons, then the other party becomes entitled to apply for judgment by default.

[28] Rule 19(5) provides protection to the defaulting party only where a default judgment has not been granted. However, this is not necessarily a get out of jail ticket. The late delivery entitles the aggrieved party to "*costs if the notice of intention to defend was delivered after the plaintiff had lodged the application for judgment by default".* That there is punitive element to it suggests an exception more than general rule.

[29] On a much bigger scale though, prejudice should be a dominant factor. Much as prejudice can be ameliorated by costs, such amelioration cannot be at play in the present matter for the following reasons:

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[6] *See paragraph 11 above.*

29.1 The plaintiff's claim lodgment was properly dealt with;

29.2 The litigation phase was properly entered into by the plaintiff;

29.3 The defendant was properly invited to the litigation proceedings;

29.4 The plaintiff's desire to have his matter finalized;

29.5 The financial and administrative burden placed on the RAF by matters that are not being finalized;

29.6 The administrative traffic caused by RAF court matters;

29.7 The onerous arena that the courts are placed in by the volumes of RAF matters (amid scarce judicial resources).

[30] All these factors weighed heavily on me when the issue of costs amelioration was raised.

[31] It is not necessary to venture into a debate with the parties' counsel on possible conflict between the Uniform Rules and the Judge President's Practice Directives because there is none in this matter. No judgment by default was granted. This issue should thus not detain us any further.

[32] As I stated earlier, I refused the postponement application and directed the parties to proceed with the trial. I must state though that I discourage this because of the inherent risks. The parties may be all over the place because of absence of pretrial procedures like request for further particulars, amendments (if any) and most importantly, admissions, narrowing down of issues exchange of bundle of documents and so forth. etc. This is what happens when another party to the litigation proceedings is recalcitrant. Everyone is placed in a precarious position.

[33] The plaintiff in this matter elected to forge ahead with trial nonetheless, understandably so because history of this matter tells us that the Fund is indifferent. Absolutely nothing was done by the Fund on this claim almost 12 months after the order of Wilson AJ (as he then was). The constraints of time

were only going to be against us given that the default judgment court was designed to deal with exactly that, default judgment applications.

[34] Now that we were in a trial, I ordered separation of issues in terms of Rule 33(4).

[35] Quantum was postponed *sine die* and we proceeded only with the issue of merits.

[36] Mr. Mthembu told me that he was going to call one witness, the plaintiff. No witness on behalf of the defendant.

The trial

[37] The plaintiff in this matter is Mr. Gouman Khumalo, an adult male born on 28 July 1987. He lives in Leandra, Lesley[7], Mpumalanga Province with his family. The plaintiff was involved in a motor vehicle collision on 25 September 2021. On this specific day, the plaintiff testified that he was travelling in the morning in his white Polo VW vehicle from Leandra to Secunda to buy cake and balloons for the graduation of his 9 years old child.

[38] Later after he finished, he drove back to Leandra using the R29 Road. It was approximately 11am. The road was uneven and was a one direction lane on each side. There were bushes on the side. It was a hot and sunny day. As he was about to approach Leandra driving at approximately 60 kilometers per hour, a vehicle approached him directly from the opposite direction at a very high speed. It was on his lane of travel. He tried avoiding a head on collision by swerving to the left.

[39] He further testified that the offending vehicle was trying to overtake three vehicles at once. He went into a state of shock before the accident because he knew then that the offending vehicle (in its attempt to overtake three vehicles) was not going to be able to make it on time to return to its correct lane.

[40] It was at that quick moment that he then lost control of his vehicle which then started rolling because it was coming off the curve. His last memory on this was

[7] *Within the Gert Sibande District Municipality.*

when he bashed his head against the roof of his vehicle. When he regained consciousness, he was at the hospital where he was told not to move because he was injured.

[41] On being asked about the accident report, the plaintiff testified that he is not aware of any accident report. He was told by his wife that he (the plaintiff) wrote a report to the Police. However, he does not remember this. He further testified that his wife told him that she told the Police that he (the plaintiff) was asleep at the time.

[42] On being asked when he found out about the accident report, the plaintiff testified that he came to find out about the accident report from his wife when she came to visit him at the hospital. His wife then suggested that they hire the services of a lawyer to assist them. The plaintiff's wife proposed hiring the services of a lawyer for the purpose of lodging a third-party compensation claim with the Fund. This was important because the plaintiff was a breadwinner in the family, so went his testimony.

[43] The plaintiff's wife further told him (while he was in hospital) that the accident report mentioned that he was asleep (at the time of the accident). The plaintiff then asked his wife to wait for him to be discharged from hospital. For some unknown reason, the plaintiff's wife was not invited to testify. This was surprising because she was very central to the events.

[44] After the plaintiff was discharged from hospital, he recovered a bit at home for a period of six months. It was during this time that he went to the Police Station in Leandra. When he got there, he requested a copy of the accident report. He was told that the accident report was at Trichardt[8]. He then went to Trichardt and could still not find the accident report. It was at that time that he decided to ask the lawyer to help him find out where the accident report was.

[45] After some time, the lawyer called the plaintiff and instructed him to go the Police Station in Leandra. When he got there, he again asked if the accident report is available to which he was told it is not. He was then advised to depose

[8] *A town on the N17 National Route in Gert Sibande District Municipality in the Mpumalanga province.*

to an affidavit. He then deposed to an affidavit and left it at the Police Station. The affidavit explained what happened on the day of the accident.

[46] On being asked comment on the accident report stating that he was sleeping at the time of the accident, the plaintiff testified that he does not know what was written there (on the accident report). During the cross-examination the plaintiff was asked about the accident having happened after he passed a curve. It was put to the plaintiff that the accident happened on the straight road and not the curve. He disagreed.

[47] The plaintiff was further cross-examined on the pictures that were discovered. On this score, he was asked if the pictures depict the area as it is currently to which he stated that the area has changed because of erection of new construction of RDP houses in 2023. On loss of consciousness after the accident, the plaintiff reiterated his earlier examination in chief answers. On his knowledge of the accident from his wife, the plaintiff reiterated his earlier examination in chief answers.

[48] On being asked who told his wife that he (the plaintiff) was asleep at the time of the accident, she could not mention who that person was. But this was the information from the Police Station sourced from the accident report. However, on being confronted with his earlier testimony that he could not find the accident report at both Leandra and Trichardt Police Stations, the plaintiff reiterated his earlier examination in chief answers.

[49] The plaintiff was further asked if he has ever seen the accident report in question[9], to which he answered in the affirmative. A quick comment on this: I find it surprising that the plaintiff discovered in his court documents the accident report which he alleges that he has never seen before.

[50] When he could not find the accident report at both Police Stations, the plaintiff called on his lawyer to assist him. The lawyer then sent him back to Leandra Police Station where he will meet with the investigator that he (the lawyer) sent to the Police Station to assist him (the plaintiff).

[9] *The accident report which alleged that he was asleep at the time of the accident.*

[51] The plaintiff was further asked if his lawyer did not tell him about his possession of the accident report. He could not comment on this. He reiterated his stance that it is his first time seeing it (in court).

[52] The plaintiff was also asked about the sworn statement, purportedly made by him[10]. He was quick to state that it is the first time that he sees the statement. On being probed more on this, the plaintiff testified that the affidavit that he deposed to at the Police Station did not look like the statement that is before Court. The signature that appeared on the sworn statement, purportedly signed by him, is not his. The handwriting is also not his. The affidavit that he deposed to at the Police Station was only one page and had police stamps.

[53] A further proposition was put to the plaintiff on cross examination that during the accident, he did not lose consciousness but in fact was quite conscious enough to inform the police officer that he fell asleep whilst driving. He denied this and further stated that to date he has never seen these specific police officer. On one occasion when he went to the Police Station, he was informed that this police officer was off duty.

[54] It was put to the plaintiff that there was no any other vehicle involved in this accident. If anything, it was him, and him alone, who fell asleep whilst driving. He denied this.

[55] It was further put to the plaintiff that his version about loss of consciousness and later waking up at hospital was merely engineered to mislead the court in that he realized that the statement he gave to the police officer who attended to the accident scene would damage his chances of pursuing a claim against the Fund. He denied this.

[56] Regarding the whereabouts of the affidavit that he allegedly deposed to at the Police Station, the plaintiff testified that it was left at the Police Station because the investigator was going to need it. On being probed about his earlier examination in chief testimony that the affidavit he had deposed to was left at the Police Station and the now recent reason being that the investigator was

[10] *On CaseLines 12: Experts Reports (Selabi Tracers Final) 12-123*

going to need to make use of it, the plaintiff left it at that (that it was left at the Police Station).

[57] Further cross-examination was uneventful and thus warrants no further attention. In re-examination, and the plaintiff reiterated the testimony he proffered in the cross examination that he did not depose to the affidavit that was before court. After his re-examination, Mr. Mthembu asked for leave to call the investigator to come and testify. I declined this invitation for a variety of reasons which I will deal with in the discussion on evidence.

[58] After the latter ruling, the plaintiff closed his case and with the defendant having no witness Mr. Madasele also closed the defendant's case. I asked my Registrar to request the parties afterwards to furnish me with their written submissions. None was received.

Discussion and evaluation of evidence

[59] In *National Employees General Insurance v Jagers*[11] Eksteen AJP (as he was known then) had this to say about onus of proof —

> "It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rests on the plaintiff … ."

[60] It is common cause that this is a single unidentified vehicle accident. Plaintiff bears the onus of proof.

[61] The Fund is enjoined in terms of Section 4(1)(b) to investigate and settle claims. It provides as follows —

> "4. Powers and functions of Fund: —
>
> (1) The powers and functions of the Fund shall include —
>
> the stipulation…

[11] *1984 (4) SA 437 (E) at 44D.*

the investigation and settling, subject to this Act, of claims arising from loss or damage caused by the driving of a motor vehicle whether or not the identity of the owner or the driver thereof, or the identity of both the owner and the driver thereof, has been established;" (emphasis)

[62] The Fund employed a view that the claim should be repudiated. They repudiated it. This was based on the information that was before the Fund at the time. Thus, records are important for purposes of investigations. And this is mainly to, *inter alia,* enable the Fund to —

a) Gather the hospital records;

b) Look for the insured vehicle to get information;

c) Assess liability, if any;

d) Assess the extent of liability, if liable; prevent possible fraud;

e) Enable the Fund to properly plan and budget on the amount of ascertainable claims that it has to deal with and settle asap[12]; and

f) Prevent the quality of adjudication by courts that is likely to suffer as time passes, because evidence may have become lost, witnesses may no longer be available to testify, or their recollection of events may have faded.

[63] In any normal road accident, the following basic information would be readily, if not easily accessible:

a) Full names (first and middle names and initials and surnames);

b) ID number;

c) Car registration number;

d) Address;

e) Cell-phone number and other telephone contact details;

[12] *Increasing claims means that more money is required to capacitate the Raf to deal with the claims.*

f) Insurance company details;

g) Make, model and colour of the other vehicle;

h) Date and time of the crash; and

i) Details of any eyewitnesses.

[64] This information would ordinarily reside with the South African Police Service. Most latter basic information was available to the Fund. It is clear from the facts and evidence in this matter that the Fund did not actively investigate this claim but rather relied mostly on the information from the claimant.

[65] What was before them was sufficient for them to form a conclusion then that the gleam should be repudiated. It appears from the evidence that indeed this speculative but uninvestigated view was correct. Below are the reasons why.

[66] Before Court there is accident report which appears to have been completed by one JJ Ngomana on 25 September 2021[13]. On brief description of the accident, the accident report states that —

> "The driver alleged that he was driving from Kinross Leslie Road from work. While driving he fell asleep while driving the vehicle lost control and overturned. He sustained/complaint about his neck."

[67] I pause here to mention that Section 19(f) of the RAF Act[14] which enjoins us as follows:

> ***"19. Liability excluded in certain cases.*** *The Fund or an agent shall not be obliged to compensate any person in terms of section 17 for any loss or damage-*
>
> *(f) if the third-party refuses or fails*
>
> *(i) to submit to the Fund or such agent, together with his or her claim form as prescribed or within a reasonable period thereafter and if he or she is in a position to do so, an affidavit in which particulars of the accident that gave rise to the claim concerned are fully set out; or*

[13] *On CaseLines 12: Experts Reports (Selabi Tracers Final) 12-138.*

[14] *56 of 1996.*

> *(ii) to furnish the Fund or such agent with copies of all statements and documents relating to the accident that gave rise to the claim concerned, within a reasonable period after having come into possession thereof"(emphasis)*

[68] The accident report is a document. It contains a statement relating to the accident that gave rise to the claim. That is what the law says. The accident report is hearsay though. It does not help that the author of the accident report was not invited to come and testify on what he authored. The question now is what weight the Court should attach to such hearsay evidence, more so because I have not been invited to allow this hearsay evidence in terms of the provisions of the Law of Evidence Amendment Act 45 of 1988.

[69] However, the latter legislative piece, does not enjoin me to be invited by the parties to invoke it. I am also not constrained by the *Fischer v Ramahle* Supreme Court of Appeal decision[15], most recently confirmed by the *Advertising Regulatory Board NPC and Others v Bliss Brands (Pty) Ltd*[16] because the issue of the accident report was very much vital in the proceedings. The accident report was discovered. The plaintiff was questioned on it extensively. The Fund's counsel lurched on the information given to his client by the plaintiff and questioned him extensively on it.

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[15] *Fischer and Another v Ramahlele and Others 2014 (4) SA 614 (SCA); [2014] 3 All SA 395 (SCA) para 13, footnotes omitted; affirmed by the Constitutional Court in Public Protector v South African Reserve Bank 2019 (6) SA 253 (CC) para 234.*

> *'[I]t it is for the parties, either in the pleadings or affidavits (which serve the function of both pleadings and evidence), to set out and define the nature of the dispute, and it is for the court to adjudicate upon those issues. That is so even where the dispute involves an issue pertaining to the basic human rights guaranteed by our Constitution, for "it is impermissible for a party to rely on a constitutional complaint that was not pleaded". There are cases where the parties may expand those issues by the way in which they conduct the proceedings. There may also be instances where the court may mero motu raise a question of law that emerges fully from the evidence and is necessary for the decision of the case. That is subject to the proviso that no prejudice will be caused to any party by its being decided. Beyond that it is for the parties to identify the dispute and for the court to determine that dispute and that dispute alone.'*

[16] *[2022] ZASCA 51 (12 April 2022).*

[70] I must state as well that I find it quite disturbing that the plaintiff put before the Fund information in terms of section 19(f)[17] for purposes of allowing it to investigate the foundations of the accident only to renounce such document later in court. Most certainly it was not the Fund which brought this accident report because we all know that the Fund was careless in investigating this claim.

[71] I am not inclined to reject the accident report because, in my view, it was legitimately placed before the Fund and the latter's decision to repudiate the plaintiffs claim in the first place was informed by such report. Also, the RAF legislation enjoins the claimant to furnish such information failing which the Fund's liability would be excluded. It is in the interests of justice that the accident report be admitted into evidence.

[72] Even if I am wrong on this point, the plaintiff's claim still falls hopelessly short on yet another reason, this being, his oral evidence under oath is at odds with his documentary evidence under oath on a material issue that I deal with below.

[73] In his application for default judgment, the plaintiff states as follows regarding the accident:[18]

> *"On or about that 25th of August 2021, along our 29 Kinross Road towards Leslie, I was driving a white VW Polo with registration numbers and letters JPL 006 MP, as I was driving, an unknown insured driver, who is the sole cause of the accident, hit me with his car due to his failure to control his vehicle whilst he was busy overtaking without having a proper lookout. He drove it a high speed in a wrong lane, as a result of the aforesaid collision, I sustained severe injuries." (emphasis)*

[74] At no point during the plaintiff's oral testimony was there evidence about the unknown vehicle having "hit" the plaintiff's vehicle.

[75] I am thus constrained in relying or reconciling this material differences from the same source.

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[17] *The accident report.*

[18] *On CaseLines 12: Default judgment Application 12-4 in paragraph 8*

Conclusion

[76] The plaintiff was a very poor witness. I do not believe his narration on how the accident happened. He did not create a good impression to me. I am also alive to the fact that the plaintiff was a single witness. I had to be satisfied that the evidence of the single witness is reliable and trustworthy. I was not.

[77] On a conspectus of the totality of the evidence and taking into account the concerns raised in relation to the plaintiff's evidence in this matter, I am not satisfied that the plaintiff has discharged the onus of establishing his case in respect of liability. I was not told from the beginning that the investigator was intent on testifying. The plaintiff renounced the statement that he purportedly in the presence of one Mr Lawrence Ngobeni[19]. I did not deem it necessary to go through a self-patronizing exercise. Therefore, Plaintiff's claim cannot succeed and I propose to absolve the Fund from the instance.

[78] A quick comment on my observation in court. Mr. Mthembu on behalf of the plaintiff did everything in his effort to prosecute this action as best as he could. However, this was a trial. He was in desperate need of help. His attorney was nowhere to be found. He needed documents to refer to when leading the witness. At some point my Registrar had to borrow her own PC to the witness. This went on for two days. On the first day, the plaintiff's attorney came to court a bit late and not appropriately attired. On the second day he was still not available to assist counsel. He came late and still not appropriately dressed.

[79] I saw some other legal representatives in court with their bibs dangling or hanging loosely on their collar. Some were chatting nonchalantly inside court. This is inappropriate and should be discouraged.

Order

[80] In conclusion, I make the following order:

1. The defendant is absolved from the instance.

2. No order as to costs.

[19] *An Investigator*.

_____

M KGOMONGWE

JUDGE OF THE HIGH COURT

JOHANNESBURG

Date of Hearing:	1 and 2 August 2023
Date of Judgment:	22 November 2023
For the Plaintiff:	Adv. R Mthembu instructed by S E Dube Attorneys Inc.
For the Defendant:	Mr M Madasele instructed by State Attorneys, Johannesburg.