

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 41802/2019

- (1) REPORTABLE: Yes / No
(2) OF INTEREST TO OTHER JUDGES: Yes / No
(3) REVISED: Yes / No

Date: 13 March 2023

eduplessis
WJ du Plessis

In the matter between:

MOSES MOLANTWA DLAMINI

PLAINTIFF

and

ROAD ACCIDENT FUND

FIRST DEFENDANT

JUDGMENT

DU PLESSIS AJ

- [1] This is a claim for damages arising from the bodily injuries the plaintiff sustained during a motor vehicle accident on 1 September 2017. The accident happened on the R511 road close to Brits, when the plaintiff, the driver of a truck, collided with an Isuzu vehicle driven by the insured driver.

Background

- [2] The claim was lodged 13 November 2018, with summons served on 20 June 2019. Initially, the defendant, represented by Maponya Inc, delivered a plea on 19 July 2019, denying the plaintiff's version.
- [3] At the first pre-trial conference held on 4 December 2019, the defendant raised a version that the plaintiff drove into the insured driver's travel lane. The matter was certified trial ready on 28 July 2020. A practice note was prepared, but the defendant failed to sign it. The State Attorney substituted Maponya Inc on behalf of the defendant on 19 July 2022, who failed to attend further pre-trial conferences until January 2023.
- [4] On 30 January 2023, more or less three weeks before trial, the defendant distanced themselves from the previously recorded version, stating that they would consult with the injured driver. However, the pre-trial minutes (that were only signed the morning of the trial), explaining that the defendant would rely on the plaintiff's version as in its SAPS report.
- [5] The matter came before this court on 10 February 2023 with argument scheduled for 17 February 2023, which had to be postponed at the last minute at the request of the defendant.
- [6] After the hearing, I requested both counsels to file heads of argument. Counsel for the plaintiff obliged timeously, and I am indebted to him for the timely filing of his heads of argument. The defendant did not file any heads of argument timeously due to a family emergency that was only communicated the day before argument was scheduled. While the court can show understanding for family emergencies, the defendant was aware of the emergency three days before the due date for the filing of the heads of argument. The defendant, on the date that was scheduled for argument, requested the matter to stand down for them to file the heads of argument, to which I reluctantly agreed. Nevertheless, the defendant subsequently filed their heads of argument ("statement for the defendant"), to which the plaintiff replied, enabling a finalisation of this matter.

- [7] At the trial, the focus was on merits as there was agreement on the quantum. The plaintiff witness testified that he was driving a heavy-duty truck with two trailers transporting chrome. He was driving on the R511 between Thabazimbi and Brits in the direction of Brits on a two-way lane with a narrow shoulder. It was around 17:00. The road was tarred and in good, dry condition. The weather was overcast, but the visibility was good.
- [8] He was driving 80 km/h as he was driving a truck, well within the speed limit of 120km/h. As he drove, he saw an Isuzu bakkie coming from the front. The vehicle was driving in the middle of the road – with the wheel over the middle line. He testified that the driver was on his phone and only lifted his head when he was very close.
- [9] The plaintiff further testified that he hooted and flickered his lights. The vehicle behind the Isuzu was also hooting. As the Isuzu approached, the plaintiff swerved slightly to the left to avoid the collision. He stated that if he did not swerve out, the person in the Isuzu bakkie would have died. With the swerving, the left wheel of the truck went onto the gravel, causing the truck to fall over due to the heavy load on the trailer. At this stage he lost consciousness and only woke up in the ambulance on the way to the hospital.
- [10] He did not speak to the police at the scene, he was not there when the accident report was compiled. He only made an affidavit about the collision a few weeks later, on his employer's request.
- [11] This affidavit was deposed to before the South African Police Service on 24 October 2017, where the plaintiff swapped the sequence of the Fiat and the Isuzu around. He testified that the reason for this confusion is that he was still "dizzy" from the accident and the medication.
- [12] Under cross-examination, extensive questions were asked about the plaintiff's medication and when he used it. Counsel for the defendant stated that the SAPS affidavit and section 19(f) statement differs fundamentally. The plaintiff explained that he was not feeling well when making the SAPS statement, and his only mistake was to confuse the Isuzu and the Fiat. He re-iterated what he testified during examination in chief, namely that it was first the Isuzu, then the Fiat. He stated that he did not read the

statement after he made it; he just gave it to his previous employer. Counsel for the defendant pointed out that the only different facts in the statement to SAPS were the sequence of events – the rest was correct. The defendant did neither put a different version, nor called any witnesses or presented any other evidence to support its case.

The law

- [13] Section 17(1) of the Road Accident Fund Act¹ sets out the requirements for liability of the RAF for claims where the identity of the owner or driver of the relevant vehicle is known. In this case, the focus was on negligence, which suffices as a form of fault in terms of section 17(1) of the Act.² It is a basic rule that the person who asserts must prove. The defendant can deny the allegations or make positive allegations aimed at refuting the plaintiff's evidence.
- [14] Case law makes it clear that there is a duty on an insured driver to keep his vehicle under control and to keep a proper lookout.³ Drivers have to act reasonably and can expect other drivers to act reasonably too. It is assumed that drivers will stay on the correct side of the road. If a driver sees another car approaching them on the wrong side, they can assume the other driver will correct their mistake.⁴ However, if a driver realises that another car is coming towards them on the wrong side, they must take action to avoid a crash. If a driver stays on the correct side of the road and is hit by a car on the wrong side, they are unlikely to be considered at fault.⁵
- [15] To establish their facts in a trial, a party must present the court with evidence, be it through witnesses or documents or other means accepted in law. Once the party presents evidence to the court, it is up to the other side to respond to the evidence presented. If the opponent does nothing, they risk losing the case. Once a *prima facie*

¹ 56 of 1996.

² Klopper *Law of collisions*, 8th ed p 93.

³ *Santam Versekeringsmaatskappy v Strydom* 1977 (4) SA 899 (A).

⁴ *Walpole v Santam Inc Co Ltd* 1973 (1) SA 357 (T).

⁵ *President Insurance v Tshabalala* 1981 (1) SA 1016 (A); *Marais v Caledonian Insurance* 1967 (4) SA 199 (E).

case has been made, it is for the other side to respond.⁶ Thus, in *R v Jacobson & Levy*⁷ Stratford JA stated that "[p]rima facie evidence, in its more usual sense, means *prima facie* proof of an issue the burden of proving which is upon the party giving that evidence. In the absence of further evidence from the other side, the prima facie proof becomes conclusive proof and the party giving it discharges his onus".

- [16] The plaintiff, in this case, had the onus of proving negligence on the part of the insured driver on a balance of probabilities.⁸ The defendant could then refute the evidence by placing a different version (even one that is mutually destructive to the version of the plaintiff) before the court. It would then be up to the court, based on the evidence presented, to decide on a balance of probabilities which version it will accept.
- [17] Onus plays a role here, too: if the probabilities were evenly balanced, the plaintiff would only succeed if he satisfies the court on a balance of probabilities that his version is true and accurate.⁹ Or put differently, in such a situation, if the court cannot decide between the evidence presented by the opposing parties and if the evidence cannot be reconciled but is mutually destructive, the plaintiff did not discharge its onus.¹⁰
- [18] The version of the plaintiff, as set out during evidence-in-chief, was subject to rigorous and often unclear cross-examination. As previously stated, the defendant's case rests on the SAPS statement. The defendant sought to argue that the SAPS statement version is correct, that the Isuzu was not the reason for the accident, and that the plaintiff collided with the Isuzu while "running away" from the Fiat. It is not clear what was meant by this. None of this was pleaded by the defendant, and the defendant did not call the driver of the Isuzu or the SAPS members who attended the scene to testify. This all leads to an adverse inference being drawn by the court as to the defendant's version.¹¹

⁶ *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 548A.

⁷ 1931 AD 466 478.

⁸ *Madyosi and Another v SA Eagle Insurance Co Ltd* 1990 (3) SA 442 (E) at 444D-F.

⁹ *Naicker v Moodely* 2011 (2) SA 502 (KZD).

¹⁰ *National Employers Mutual General Insurance Association v Gany* 1931 AD 187 199.

¹¹ *S v Teixeira* 1980 (3) SA 755 (A)

- [19] The essence of the version of the plaintiff was also not disputed (i.e. that a vehicle veered into the lane of travel, that the plaintiff was not negligent, that the plaintiff did not attempt to avoid the collision, and that the heavy truck means that it was difficult to avoid a collision). The only possible inconsistency is whether the Fiat or the Isuzu caused the accident. Counsel for the defendant argued that the evidence is contradictory, that the two versions are mutually destructive, and that the plaintiff's version should be rejected.
- [20] However, the defendant did not put up a version of the accident and did not call any witnesses or provide the court with any evidence to prove an alternative version to the plaintiff. There is thus no mutually destructive version that the court needs to consider. The plaintiff's evidence is thus the evidence that the court must assess.
- [21] Cross-examination is not restricted to only the matters covered during examination-in-chief and is given wider latitude regarding issues of credibility.¹² Nevertheless, the court must assess the witness's credibility from various factors, not just the witness's demeanour or confidence in the witness box. While a previous inconsistent statement can destroy the credibility of a witness, if a witness can explain the inconsistency, the court can accept the reasons given.¹³
- [22] The witness's credibility should also be distinguished from the probability or improbability of what they are testifying.¹⁴ In other words, an adverse finding as to credibility does not automatically lead to the exclusion of evidence or a non-consideration of the evidence. If the court rejects the testimony of a witness, it does not follow that the contrary is true. However, it does make it easier for the opposing party to prove the contrary or argue that their version is more probable.¹⁵ In the absence of a contrary version, the plaintiff's version likely stands unless it is glaringly improbable.

¹² *S v Zwane and Others* 1993 (3) SA 393 (W); Zakhele Hlophe, et al. *The Law of Evidence in South Africa* 2e. Oxford University Press Southern Africa, 2019 337.

¹³ *S v Millar* 1972 (1) SA 427 (RA).

¹⁴ Zakhele Hlophe, et al. *The Law of Evidence in South Africa* 2e. Oxford University Press Southern Africa, 2019 376.

¹⁵ *S v M* 2006 (1) SACR 135 (SCA).

Discussion

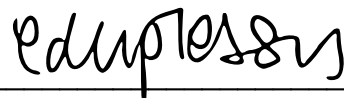
[23] While, in this case, the previous inconsistent statement raises a slight concern, I accept the reasons given by the plaintiff and his testimony as reasonably possibly true.

[24] Thus, once the plaintiff proved that the insured driver was negligent, the defendant carried the burden of proof in relation to any defence.¹⁶ When the accident happens on the wrong side of the road, it is for the defendant to explain why the insured driver was on the wrong side of the road.¹⁷ This did not happen. In the absence of an alternative version by the defendant, put before the court and proven with admissible evidence, I find that the plaintiff proved its case on a balance of probabilities.

Order

[25] I accordingly make the following order:

- i. The plaintiff's claim succeed.
- ii. The draft order, initialed and dated on delivery of this judgment, is made an order of the court.



WJ du Plessis

Acting Judge of the High Court

¹⁶ *Arthur v Bezuidenhout and Miemy* 1962 (2) SA 566 (A).

¹⁷ *Ntsala v Mutual and Federal Insurance* 1996 (2) SA 184 (T).

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

Counsel for the applicant:	M Hugo
Instructed by:	Mbowane Attorneys
For the for respondent:	T Mkansi
Instructed by:	State Attorneys Pretoria
Date of the hearing:	2023/02/10
Date of judgment:	2023/03/13

X

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

EdnPlessis

On 10 February 2023 before the Honourable Justice Du Plessis AJ

Case Number: 41802/2019

In the action between:

MOSES MOLANTWA DLAMINI

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

LINK NO: 4555891

DRAFT ORDER

Having considered the evidence and having heard plaintiff's counsel (the defendant being in default), an order in the following terms is hereby issued:

1. The defendant is ordered and directed to compensate the plaintiff for 100% of his proven and / or agreed damages resulting from the motor vehicle collision on 1 SEPTEMBER 2017;
2. The defendant is ordered to pay to the plaintiff, in relation to his claim, the following awards:

2.1. Loss of earnings: R1,722,346.20 (one million seven hundred and twenty two thousand, three hundred and forty six Rand and twenty Cents);

2.2. General damages: R500,000 (five hundred thousand Rand).

3. The total amount payable by the defendant to the plaintiff shall deduct the award paid to the plaintiff by the Compensation Fund, in the amount of R114,768.00 (one hundred and fourteen thousand and seven hundred and sixty eight Rand), leaving the total amount payable by the defendant to the plaintiff in the sum of R2,107,578,20 (two million one hundred and seven thousand, five hundred and seventy eight Rand and twenty Cents);
4. Payment in terms of paragraph 3 here above, will be made directly to the trust account of the Plaintiff's attorneys, such payment to be made after the lapsing of a period of 180 (one hundred and eighty) days from date of service of this order, the details of such trust account which are as follows:

Holder	MBOWANE ATTORNEYS INC.
Account Number	[...]
Bank & Branch	FIRST NATIONAL BANK - HATFIELD
Code	252145
Ref	MN161/17

5. Interest *a tempore-morae* shall be calculated in accordance with the Prescribed Rate of Interest Act, Act 55 of 1975, read with section 17(3)(a) of the Road Accident Fund Act, Act 56 of 1996, from a period after one hundred and eighty days (180) days has lapsed from the date of this order, at a rate of 10,75%.

6. The defendant is ordered to furnish to the plaintiff, Identify Number 760907 6056 085, an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act, Act 56 of 1996 (as amended), for reimbursing 100% of the future accommodation of the plaintiff in a hospital or nursing home or treatment or rendering of a service to the plaintiff, or the supply of goods to the plaintiff, arising out of the injuries sustained by the plaintiff in the motor vehicle collision on 1 September 2017, after such costs have been incurred and upon proof thereof;

7. The defendant is ordered to pay the plaintiff's agreed or taxed costs as between party and party on a High Court scale, subject to the discretion of the taxing master:
 - 7.1. Counsel's fees;
 - 7.2. The cost of indexed bundles prepared by the Plaintiff;
 - 7.3. The reasonable taxable qualifying, reservation and preparation fees of the Plaintiff's expert witnesses, as well as the costs of all the reports and/or addendum reports and/or joint minutes of whom notice was given, or whose reports are in the possession of the Defendant and/or the Defendant's attorneys, including the costs of obtaining the reports of the expert witnesses served on the Defendant or in its possession, including any special investigations, traveling fees incurred by and/or on behalf of the Plaintiff to obtain the reports concerned, and attendance of any expert witness's consultation(s) and/or investigation(s), if any.
 - 7.4. The costs in respect of obtaining documents and lodging of the Plaintiff's claim;
 - 7.5. The reasonable costs for preparation for trial;

7.6. The trial costs of 30 August 2021, which are costs in cause;

7.7. Costs of the interpreter.

8. The plaintiff shall, in the event that the costs are not agreed, serve the Notice of Taxation on the Defendant's Attorneys of Record.

9. The Plaintiff shall allow the Defendant one hundred and eighty (180) days to make payment of the taxed costs.

BY ORDER:

REGISTRAR