IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO.: A70/2022

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

21 AUGUST 2023

DATE SIGNATURE

In the matter between:

JACQUES KRITZINGER **APPELLANT**

And

THE ROAD ACCIDENT FUND **RESPONDENT**

NEUKIRCHER J:

INTRODUCTION:

1] This is an appeal noted against paragraph 2 of the judgment and order handed down by Mbongwe J on 19 October 2021 as follows:

"2. *The defendant shall pay 30% of the plaintiff's proved or agreed damages."*

2] The appeal comes before us with the leave of the court a quo.

THE FACTS

3] The cause of action between the appellant and the respondent (RAF)[1] arises out of a motor vehicle collision that took place between the appellant and the insured driver on 21 March 2018. According to the appellant's s 19(f)(i)[2] affidavit *"Ek het die kruising wat Ben Swartstraat met 20ste Laan maak genader en toe ek* ***baie naby aan die kruising*** *was, het a motorvoertuig wat Noord na Suid gery het,* ***versuim om by die stopteken stil te hou nie*** *en die kruising reg voor my binne gegaan. Ek kon niks doen nie om die botsing te vermy nie en het teen die motorvoertuig se linkerkant gebots. Die* ***sig by die bepaalde kruising is van so aard dat ek nie die voertuig vroeer kon gewaar het nie. Die voertuig het teen a hoe spoed gery.*** *Die bestuurder van die voertuig was Mej Fabia Schoenmaker.* ***Haar bestuurderslisensie was uitgeruik op 2 November 2017.***" (Emphasis provided).

4] The action was defended by the RAF who also filed a plea. However, as a result of its non-compliance with an interlocutory order granted against it, its defence was struck out on 8 June 2021 by Khwinana J. The plaintiff then enrolled the matter on the Default Judgment Trial Roll. On 4 October 2021 the matter was allocated to Mbongwe J.

5] At the hearing, the merits and quantum were separated in terms of Rule 33(4) and the appellant proceeded on the issue of liability (merits) only.

6] Although the appellant was present at court, and therefore available to testify should the need arise, appellant's counsel moved for judgment based on the

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[1] The Road Accident Fund

[2] This is an affidavit submitted to the RAF in terms of s19(f)(i) of the Road Accident Fund Act no 56 of 1996 in which the particulars of the accident that gave rise to the claim are fully set out

s 19(f)(i) affidavit and the facts stated therein. This was done in terms of Rule 38(2).

7] However, it is clear from the exchange that took place between the bench and counsel, that the court had difficulty accepting the appellant's version of the collision. In fact, he differed to the extent that it is clear that his *prima facie* view was that the appellant was not only contributorily negligent in causing the accident, but that the appellant was in fact the major cause of it.

8] Appellant's counsel, on several occasions during the exchange with the court, urged the court to hear *viva voce* evidence from the appellant – but to no avail. The court simply did not entertain the numerous requests made by appellant's counsel to hear the *viva voce* evidence, its view being that to do so would permit the appellant to place a "destructive" (ie contrary) version before it.

9] At the end of the day the court a quo was of the view that the appellant was 70% negligent in the cause of the accident and granted the order set out in paragraph 1 supra.

THIS APPEAL

10] The issue before us involves the exercise of a discretion as to whether or not to award 100% of proven or agreed damages or whether or not an apportionment, in terms of s 1(1)(a) of the Apportionment of Damages Act 34 of 1956 should have been granted and, if so, to what extent. The powers of an appeal court to interfere with the exercise of a discretion is limited unless it is shown that the trial court had failed to exercise its discretion judicially or that it had been influenced by wrong principles or a misdirection on the facts[3]. In fact, in this regard, the following has been stated:

"The power of interference on appeal is limited to cases of vitiation by misdirection or irregularity, or the absence of grounds on which a court, acting

[3] *Santam Versekeringsmaatskappy Beperk v Strydom* 1977 (4) SA 899 (SCA)

reasonably, could have made the order in question. The Court of appeal cannot interfere merely on the ground that it would itself have made a different order."[4]

11] In my view, this court is duty bound to interfere with the findings of the court a quo for several reasons: firstly, where it was not satisfied with the s19(f)(i) affidavit, it should have called for the *viva voce* evidence of the appellant, and secondly because there was no evidence before it that an apportionment was appropriate. Thus, I am of the view that the test set out in **Santam** and **Blom** has been satisfied.

VIVA VOCE EVIDENCE

11] In **Pepkor Holdings Ltd v AJVH Holdings (Pty) Ltd**[5] the following was stated "...*It is axiomatic that a hearing should be fair. This lies at the heart of our system, is common sense and is enshrined in the Constitution. As the litigants, the appellants should have been given an opportunity to raise with the court any concerns they might have had in relation to the draft order. Secondly, as part of the decision making process, their legal representatives were entitled to make written or oral submissions regarding the draft order. This may have obviated the need for an appeal. The issuance of the order in the circumstances is regrettable."*(my emphasis)

12] In my view, the right to a fair hearing is enshrined in the *audi alteram partem* principle which is so trite that it requires no further analysis. As counsel has submitted, and correctly so, where the court was not satisfied with the affidavit evidence, it should have allowed the viva voce evidence as it was only after having heard all the available evidence that the court would be in a position to exercise its discretion as to whether or not liability had been proven and whether or not an apportionment was appropriate[6]. In any event, by rejecting the appellant's version as stated in the affidavit, in effect what the court did was to find the appellant an unsatisfactory witness – and this without any viva voce

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[4] *Attorney-General, Eastern Cape v Blom and Others* 1988 (4) SA 645 (A) at 670D-F
[5] 2021 (5) SA 115 (SCA) at para 14
[6] Dorfling v Coetzee 1979 (2) SA 632 (NC) at 635

evidence, without observing the appellant in the witness box, without testing his evidence against the documentary or other evidence and certainly without the defendant's version. In my view this was impermissible and the order must therefore be set aside.

THE MERITS

13] On the issue of the merits, it must be borne in mind that the defendant's version had been struck out. This in effect means that the RAF has no defence and no version before court and appellant is therefore entitled to request judgment on the merits of the matter.[7]

14] As was stated in **Ndleleni Absalom Maseko v Open Your Eyes (PTY) LTD & 2 others**[8]

"[5] The position was expressed in the following words in Herbstein and Van Winsen: The Civil Practice of Superior Court in South Africa, 4th Edition, Juta, at page 612:-

"[T] he party desiring discovery or inspection may apply to a court, which may order compliance with the rule and, failing compliance, may dismiss the claim or strike out the defence of the party in default. If the defence is struck out, the defendant cannot appear at the trial and cross –examine the Plaintiff's witnesses".

[6] The foregoing position is also supported by the following cases Legatt and Others v Forester 1925 WLD 36 and Mostert v Pienaar 1930 WLD 151 as well as Langley v Williams 1907 TH 197. In the latter case it was stated that where a defence is struck out a defendant has no right to appear or cross –examine at the trial."

15] The question is now whether there is sufficient evidence before court to grant merits in favour the appellant and, if so, is the appellant entitled to an order that the defendant pay to him 100% of his proven or agreed damages? In my view the answer must be "yes". The reason for this is the following: the uncontroverted evidence[9] was that the collision occurred in a thoroughfare where the appellant was travelling in the main street[10] and the insured driver on

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[7] City Printing Works v Maharaj 1948 (1) SA 71 (N)
[8] (2598/06) [2012] SZHC195 (13th September 2012)
[9] Being the S 19(f) affidavit as well as the video that was shown to the court of the incident
[10] Ben Swart Street

a feeder road[11] which feeds into and crosses the main road. Ben Swart Street is a two-way road with one lane in either direction – 20th Avenue is controlled by a stop street where it meets Ben Swart Street. This being so, the insured driver was obliged to stop at the stop street but did not, and consequently drove right in front of the appellant (ie he "skipped" the stop street) so causing the collision. The appellant's evidence was that there was nothing he could have done to avoid the collision as he was very close to the intersection of the two streets when the insured driver suddenly drove in front of him. He could not have swerved out to avoid the collision.

16] In **Fox v RAF**[12] Tlhapi J stated:

[11] Liability depends on the conduct of the reasonable person. The test for negligence was stated in Kruger v Coetzee 1966 (2) SA 428 (A) at 430 E-G as follows:

" For the purpose of liability culpa arises if-

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

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

(ii) Would take reasonable steps to guard against such occurrence; and

(b) The defendant failed to take such steps,

Whether a diligens paterfamilias in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend upon the particular circumstance of each case. No hard and fast basis can be laid down."

[12] It is trite that the onus then rests on the plaintiff to prove the defendant's negligence which caused the damages suffered on a balance of probabilities. In order to avoid liability the defendant must produce evidence to disprove the inference of negligence on his part, failing which he/she risks the possibility of being found to be liable for damages suffered by the plaintiff.

[13] Where the defendant had in the alternative pleaded contributory negligence and an apportionment, the defendant would have to adduce evidence to establish negligence on the part of the plaintiff on a balance of probabilities, Johnson, Daniel James v Road Accident Fund Case Number 13020/2014 GHC paragraph 17, confirming Solomon and Another v Musset and Bright Ltd 1926 AD 427 and 435."

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[11] 20th Avenue

[12] Fox v RAF (A548/16) [2018] ZAGPPHC 285 (26 April 2018)

17] In my view, where the appellant was travelling in the main thoroughfare and the insured driver was confronted by a stop street before crossing that thoroughfare, the appellant was entitled to expect that the insured driver would act reasonably and stop[13] and to place a higher burden on the appellant was a material misdirection.

18] There being no other evidence placed before court, the appellant should have succeeded a quo *in toto* on the merits.

THE ORDER

[19] In the result it is ordered that:

1. The appeal is upheld with costs.
2. Paragraph 2 of the Order of court dated 20 October 2021 is set aside and replaced with:
   "2 The defendant is liable for 100% of the plaintiff's proven or agreed damages"

B NEUKIRCHER
JUDGE OF THE HIGH COURT

I agree

C COLLIS
JUDGE OF THE HIGH COURT

[13] Rondalia Versekeringskorporasie van SA Bpk v De Beer 1976 (4) SA 707 (A)

I agree

NL TSHOMBE
ACTING JUDGE OF THE HIGH COURT

Delivered: This judgment was prepared and authored by the Judges whose names are reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 21 August 2023.

Appearances:

For appellant:	Adv Barreiro
Instructed by:	Kriek Wassenaar & Venter Attorneys
For respondent:	No appearance
Date of hearing:	3 May 2023
Date of judgment:	21 August 2023