

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 7658A/2008

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

In the matter between:

NHLANHLA VINCENT DLAMINI

Plaintiff

and

ROAD ACCIDENT FUND

First Defendant

E A JADWAT & COMPANY

Second Defendant

ESSOP AHMED JADWAT

Third Defendant

***Delivered:** This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date and for hand-down is deemed to be 20 March 2024.*

Summary: A civil action against an attorney for professional negligence. The plaintiff alleges that he mandated the law firm to institute a claim against the Road Accident Fund (RAF) following his alleged involvement in a “hit and run”

accident. The law firm disputed the mandate and contended that some unqualified officials (its employees) took instructions and processed the claim outside the knowledge of the sole practitioner in the law firm. It being a claim where the insured driver was not identified, in terms of the RAF Regulations, the claim ought to have been lodged with the RAF within two years of the accident. The claim was submitted to the RAF outside the prescribed two years' period. The RAF repudiated the claim on the basis that it had become prescribed in law.

The defendants raised, in the main, a special plea of issue estoppel and contended that this Court had already decided the issue that the claim had not become prescribed in law. Over and above disputing the mandate, the law firm disputed that the claim was valid in law since only one vehicle was involved in the accident and no other vehicle. The plaintiff alleged and testified that he collided with a trailer that was towed by a bakkie. The plaintiff is a single witness to this event. His evidence ought to be approached with caution. The plaintiff failed to present any other corroboratory testimony other than his *ipse dixit*. The plaintiff failed to take all reasonable steps to establish the owner or driver of the motor vehicle, contrary to the Regulations.

The Court is satisfied that the claim has, on the objective evidence, become prescribed in law. The issue estoppel special plea is not upheld. Further, the Court is satisfied that the law firm was indeed mandated by the plaintiff and the claim prescribed in their hands. The plaintiff bore the onus to prove that he had a valid claim against the RAF – the accident was caused by the wrongful driving of a motor vehicle and that he took all reasonable steps to identify the owner or driver. This Court is not satisfied that the plaintiff had a valid claim against the RAF. Having failed to discharge his onus, the plaintiff must fail. Held: (1) The plaintiff's action is dismissed. Held: (2) The plaintiff must pay the costs of the action.

JUDGMENT

MOSHOANA, J

Introduction

- [1] These are action proceedings, in terms of which the plaintiff instituted an action against the law firm A E Jadwat & Company and its sole owner Mr. Essop Ahmed Jadwat. For the sake of convenience, the law firm and its owner shall collectively and interchangeably be referred to as Jadwat. At the commencement of the action, the Road Accident Fund (RAF) was cited as a defendant. In due course, the action against the RAF was withdrawn. What remained for adjudication was the action against Jadwat for professional negligence.
- [2] The plaintiff alleged that Jadwat negligently allowed his valid claim against the RAF to become prescribed and unenforceable in law. In defending the action, Jadwat raised three main defences. The first of which is in a form of a special plea of issue estoppel. In terms of this defence, Jadwat contends that the issue of prescription of the claim was dealt with and the plaintiff is thus estopped from contending that his claim had become prescribed in law and unenforceable in the hands of Jadwat.
- [3] The second defence is that the plaintiff did not mandate Jadwat. In this regard, Jadwat contends that the plaintiff instructed the late employee of Jadwat, one Mr Msibi, instead of the law firm. The third defence is that the plaintiff did not have a valid claim against the RAF, since the accident involved only one vehicle of which he was the driver.

Pertinent background facts and evidence

- [4] On or about 21 April 2003, the plaintiff, Mr. Nhlanhla Vincent Dlamini (Dlamini), was driving a Fiat Uno motor vehicle from his home in Dundee heading towards his place of work in Johannesburg. At around 17h00 and on the R23 road between Volksrust and Perdekop, Dlamini was involved in an accident and was seriously injured. He was airlifted and or transported to a hospital. He remained

in the Newcastle hospital until 17 June 2003, when he was discharged. He, however, continued with treatment for the injuries sustained in the accident as an outpatient. After some weeks of being discharged, he enlisted the services of Jadwat and mandated them to lodge a RAF claim on his behalf. Some three years later, he was informed that his claim against the RAF had become prescribed and unenforceable in law. Thereafter, he instructed his attorneys of record to institute an action against Jadwat for professional negligence.

[5] Owing to the onus incidence, the plaintiff delivered testimony first. The first witness to testify was Mr. Hamilton Dlamini (Hamilton). His testimony was effectively confined to the mandate given to Jadwat. In brief, his testimony was that a work colleague recommended Jadwat to him in order to assist his brother with a RAF claim. He, together with Dlamini, his brother, visited the offices of Jadwat in Newcastle. On the first visit, they were met by one Mr. Gerald Msibi who informed them that Jadwat was not available to consult with them. They returned later and indeed met with Jadwat, who then agreed to accept the mandate to prosecute the RAF claim on behalf of Dlamini. During cross-examination, he remained steadfast that Jadwat accepted the mandate of Dlamini.

[6] Dlamini himself testified that on the day of the accident, whilst driving on a straight two-way road, he observed a bakkie that was following him using his middle rear view mirror. The said bakkie began to execute an overtaking manoeuvre. As it commenced, with his right hand side mirror, he observed that the bakkie was towing a trailer. After the bakkie had passed him, the trailing trailer collided with the front portion of the vehicle he was driving. After a loud bang, which bang he could still replay in his mind, twenty years later, he lost control of the vehicle and it capsized. The next thing he found himself at the hospital. He was unconscious for a period of about a month or so having sustained, amongst others, head injuries. In due course, Hamilton took him to Jadwat.

[7] On the first occasion, they could not meet Jadwat. However, on the next occasion, they met him and he mandated him to institute a RAF claim on his behalf. Jadwat accepted the mandate. In due course, he was advised that the

RAF repudiated his claim since his claim had become prescribed and unenforceable in law. In light of that, he instructed his current attorneys of record to act against Jadwat. In the Court's view, Dlamini did not perform well during cross examination. He, without any basis, disputed the contents of documents completed on his behalf and documents containing the assertion that his vehicle was the only vehicle involved in the accident.

[8] Attorney De Jong testified regarding the issue estoppel defence. She has since been the attorney of record for Dlamini. She confirmed that the order of 19 November 2010 made by the learned Deputy Judge President Van Der Merwe was an agreed one. In the order, it was conceded by Jadwat that the claim of Dlamini against the RAF had become prescribed in law. She further testified that the findings by Fourie J that the claim had not prescribed were based on a noting¹ made in the pleadings. No *viva voce* evidence was led in order to reach such a finding. Other than insinuating that generally lawyers make bad witnesses, the assertion that the order of 2010 was made by agreement remained uncontroverted.

[9] Jadwat was the only witness in his case. In brief, his testimony is that he never received and or executed any mandate from Dlamini. Instead, two of his employees, Msibi and Khumalo, accepted the instructions of Dlamini and prosecuted his claim in his office without his knowledge and authority. When he discovered the actions of the duo, he launched an investigation and discovered a myriad of documents executed through his office. The duo disappeared without trace thereafter. This Court was far from being impressed with the quality of his testimony.

Analysis

[10] It is important to state upfront that the action against the RAF was withdrawn. The part of the pleadings aimed at making a case against the RAF has since become obsolete for this Court. Axiomatically, the question whether a proper

¹ There are various authorities which held that a party who notes an allegation in its plea, such noting amounts to an admission of the allegation.

claim was lodged against the RAF by complying with the statutory requirements is now moot and academic for this Court. Therefore, this Court will concern itself with the pleadings seeking to make out a claim for professional negligence. Where a plaintiff sues for professional negligence, such a plaintiff must prove (a) a mandate; (b) breach of that mandate; (c) that she or he had a valid and enforceable claim in law; (d) and the damages that he or she would have obtained had the valid claim in law been prosecuted without negligence. The (d) part does not feature before me as parties agreed to separate issues. Therefore, what remains in contention is the first three issues. Before this Court considers each of the elements of this claim, it shall first deal with the remaining special defences. Those relate to the issue estoppel and that the claim lodged by non-practitioners is one that is invalid.

Invalid claim lodged

[11] This Court was perturbed as to why this defence was still being pursued. Despite the surprise, Mr Shepstone baldly informed the Court that the defence was still being pursued. This point is bad in law. It is Jadwat who pleaded that the claim was lodged by a non-practitioner. The objective evidence, particularly the lodgement letter, bears the names of Jadwat. When the RAF responded by repudiating the claim so lodged, it responded to Jadwat. At Jadwat, there was only one practitioner. From a barrage of correspondents, it became perspicuous to this Court that Msibi and Khumalo were part of the staff complement of Jadwat who dealt with RAF matters. Clearly, as suggested and disputed by Jadwat, Msibi and Khumalo were not running a practice within a practice. If they did, they would have personally paid for the disbursements relevant to the claim.

[12] The above notwithstanding, the RAF did not reject the claim on the basis that it was lodged by non-practitioners. It rejected the claim on the basis that it was not a claim in law anymore when it was lodged. This point is related to the mandate defence. In view of the findings on the mandate issue, this point is academic and moot. Accordingly, it is not upheld.

Issue estoppel

[13] The Supreme Court of Appeal (SCA) in *Royal Sechaba v Coote (Royal)*² confirmed that issue estoppel is nothing but a *res judicata*. It considered it to be a more relaxed form of *res judicata*. The SCA confirmed that the requisites of a valid defence of *res judicata* in Roman Dutch law were that the matter adjudicated upon must have been for the same cause, between the same parties and that the same thing must have been demanded. Jadwat contends that the issue that the claim had not become prescribed was finally determined by Fourie J. The Court in *Royal* held that in dealing with an issue estoppel, the enquiry requires an examination of the judgment as well as the pleadings. As indicated above, the relevant pleadings are those dealing with the remaining cause of action – professional negligence. It is by now trite that a Court judgment is to be interpreted like any other document, applying the principles enunciated in *Natal Joint Municipal Pension Fund v Endumeni Municipality (Endumeni)*.³ The principles in *Endumeni* received an imprimatur in the Constitutional Court judgment of *University of Johannesburg v Auckland Park Theological Seminary and Another (UJ)*.⁴

[14] In short, the principle is that language, context and purpose must be considered symbiotically in order to establish what the document interpreted means. Regard being had to context, language and purpose, the findings of Fourie J were directed to the fictional situation presented by the special plea raised by Jadwat. The findings were not directed to the question of negligence – allowing the claim to prescribe – an issue pertinent in the remaining cause of action. Admittedly, before me, in order to show negligence, an aspect related to the breach of a mandate, Dlamini must show that the claim indeed prescribed in the hands of Jadwat. At this stage of the proceedings, the issue that requires a decision is whether the mandate was breached. Failing to lodge a claim timeously is the breach, an issue not determined by Fourie J.

[15] There can be no doubt that Fourie J reached his conclusions purely on the basis of the pleadings and a submission from counsel. No evidence was led with regard to the circumstances of the alleged prescription. The finding by the

² [2014] ZASCA 85 at para 10.

³ [2012] 2 All SA 262 (SCA).

⁴ 2021 (8) BCLR 807 (CC).

learned Fourie J was made some 9 years after an order was obtained by agreement, to the effect that the claim had indeed become prescribed in law. On proper examination of the undisputed facts, the accident occurred on 21 April 2003. Dlamini was unable to identify the offending vehicle and its driver, as such, in terms of the RAF Regulations, such a claim was supposed to be lodged with the RAF, within two years of the occurrence of the accident. Thus, it was to be lodged on or before 20 April 2005. There is evidence that the claim was only lodged with the RAF on 5 December 2005. At that time, the claim had long prescribed and was unenforceable in law. When the pleadings relevant to this matter were exchanged, the stubborn fact remained that the RAF had repudiated the claim not on any other basis other than that it had become prescribed when it was lodged.

[16] In an instance where the RAF repudiates a validly lodged claim –lodged within the two-year period, the aggrieved claimant will have, in terms of the Prescription Act,⁵ three years within which to institute an action against the RAF. Sadly, in *casu*, the repudiation was for an invalid claim. Differently put, upon lodgement, the claim was already decayed and there was no claim in law due to the two-year lodgement period. In such an instance, there is no three years' period to follow thereafter. It cannot be correct that Fourie J made a factual finding. A Court makes a factual finding when facts and not allegations are presented to it.

[17] The allegation made in the particulars of claim that prior to the institution of the action by way of summons, the claim was timeously lodged or that there was substantial compliance was factually, an incorrect one. That which was noted and taken as an admission, was an incorrect fact. The issue of timeous lodgement or substantial compliance was long resolved in the 2010 judgment. It impermissibly resurfaced later.⁶ It was no longer an issue and on the same principle of *res judicata*, which commands itself to finality, the issue was finally decided and could not be decided again. The Court became *functus officio* on the issue. Accordingly, the findings of Fourie J on an issue that was long

⁵ Act 68 of 1969 as amended.

⁶ See *Spamer v Road Accident Fund* [2018] ZAGPPHC 608.

resolved is a *brutum fulmen* on application of the *functus officio* principle. Additionally, the submission made by Geach SC was not binding on Dlamini and was incapable of changing the legal position that obtained in 2010.⁷ There can be no estoppel against the law.⁸ Accordingly, the special plea of issue estoppel must equally fail.

Was Jadwat mandated?

[18] This Court sympathises with the fact that Jadwat is of an advanced age. He no longer practices law. In most instances, his testimony was incoherent, illogical and nonsensical. However, the evidence that his firm was mandated is overwhelming before me. Dlamini and Hamilton corroborated each other on the issue of the mandate. This Court is acutely aware that Dlamini and Hamilton are consanguineous. On aspects where they corroborated each other, this Court has no reason to suspect any contrive of testimony. Contradictions between them on minor details lends credence to the fact that their testimony is not tailor-made or planned. Their testimony is supported by independent empirical evidence of the letters written and received. All these letters were written on the letterhead of Jadwat. Any person who has no knowledge of the inner workings of Jadwat has no way of knowing that the letters were written without authority as testified by Jadwat. The rule in *Foss v Harbottle*⁹ is still very much part of our law.

[19] This Court must reject, as false, the evidence that Msibi was on a frolic of his own when he prosecuted the claim as he did. Jadwat was aware and had acquiesced to this arrangement in his office, hence his office was able to carry the disbursements of Dlamini on the prosecution of the claim. Jadwat paid for the completion of the MMF1 form and for the costs of the accident report. The

⁷ *Matatiele Municipality and Others v President of the RSA and Others* 2006 (5) SA 47 (CC) and *AZAPO and Others v President of the Republic of South Africa and Others* 1996 (4) SA 671 (CC).

⁸ See *Provincial Government of the Eastern Cape and Others v Contractprops 25 (Pty) Ltd* [2001] 4 All SA 273 (A) at para 11 and *Trust Bank van Afrika Bpk v Eksteen* 1964 (3) SA 402 (A) at 411 H – 412 B.

⁹ [1843] 67 ER 189.

probabilities are overwhelming that Jadwat accepted and executed on the mandate.

[20] The fact that he may have impermissibly used his unqualified employees to prosecute the claim of Dlamini is a red herring. One of the documents enclosed in the lodgement letter was the power of attorney. In the power of attorney signed by Dlamini on 17 June 2005, Dlamini nominated and appointed Jadwat to do all that is necessary to finalise the claim for compensation. Undoubtedly, Dlamini's claim prescribed whilst in the hands of Jadwat. There is evidence that in 2004, Jadwat was busy prosecuting the claim and this is almost a year before the claim prescribed and became unenforceable in law. The irresistible conclusion to reach is that Jadwat was indeed mandated. Axiomatically, when the claim prescribed in the hands of Jadwat, there was a breach of the accepted mandate. This renders Jadwat liable for a professional negligence claim.

Did Dlamini nevertheless have a valid claim against the RAF?

[21] In terms of section 17(1)(b) of the Road Accident Fund Act (RAFA),¹⁰ the RAF shall be liable, subject to any regulation made under section 26, in case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of neither the owner nor the driver thereof has been established, and be obliged to compensate any person. Dlamini was unable to identify the driver nor the owner of the motor vehicle that collided with him.

[22] In order to fall under the parameters of the above section, it must be alleged and proven that (a) a motor vehicle was driven; (b) the identity of the owner or driver of that motor vehicle has not been established. To the extent that Dlamini alleges that a motor vehicle was driven, he bears the onus to prove that allegation. It does not follow that because a claimant alleges that the identity of a driver or owner was not established then a motor vehicle was driven and wrongfully for that matter. Proving that a motor vehicle was driven does not require the *ipse dixit* of the claimant. What is required is evidence. In law,

¹⁰ Act 56 of 1996 as amended.

evidence means any of the material items or assertions of fact that may be submitted to a competent tribunal as a means of ascertaining the truth of any alleged matter of fact under investigation before it.¹¹ If the *ipse dixit* was sufficient, then in all cases, including the fabricated ones, of “hit and run” the RAF will be obligated to pay.

[23] As noted above, this type of a claim is subject to the provisions of the Regulations. On 25 April 1997, the Minister of Transport empowered by section 26 of RAFA published the Regulations. In terms of regulation 2 (1) (b), in the case of any compensation or any claim for compensation referred to in section 17 (1) (b) of the Act, the Fund shall not be liable to compensate any third party unless – (b) the third party took all reasonable steps to establish the identity of the owner or the driver of the motor vehicle concerned. In dealing with similar provisions applicable to the Canadian law, the Court in *Leggett v Insurance Corp. of British Columbia (Leggett*¹²), per the learned Mr. Justice Taylor stated the following:

“As the trial judge recognized, the protection against fraudulent claims is only one of the purposes of the requirement that the claimant show inability to identify the other driver and owner as a condition of being able to claim under the section. In my view the overall purpose of the section is to limit the exposure of the corporation to claims brought by persons who, in the matter seeking to identify those responsible for accident, have done everything they reasonably could to protect what ordinarily would be their own interest, and which, by virtue of the section, become the interests of the corporation. The corporation’s exposure under the section is limited to claims brought by those who could not have ascertained the identity of the parties responsible. It does not, in my view, extend to claims by those who have chosen not to do so.

[24] This Court echoes the same sentiments echoed above. Where a claimant eschews the responsibility to take reasonable steps to identify the owner or driver, such a claimant does not have a claim against the RAF. The Supreme

¹¹ Nagel, Heinrich and Norton, Jerry. "Evidence". *Encyclopedia Britannica*, 18 Feb 2024, <https://www.britannica.com/topic/evidence-law>. Accessed 19 March 2024.

¹² 1992 CanLII 1263 (BC CA).

Court of British Columbia was also guided by *Leggett* when in *Springer v Kee*¹³ it concluded thus:

“The onus is on the plaintiff to establish that she made all reasonable efforts to establish the identity of the driver. Although each case must be decided on its own facts, the authorities indicate that the onus is not one easily displaced, even in the circumstances in which the unidentified vehicle has fled the scene. Geopel J. also notes at para 18, that the plaintiff is under a continuing obligation following an accident to use all reasonable efforts to ascertain the identity of the driver.”

In my view a proper determination of the efforts which might reasonably lead to discovering the identity of the unknown driver or owner must be made with due regard for the location where the collision occurred and the circumstances in which the collision occurred. For an example, a collision which occurs at a busy intersection of a well-populated area on a weekday 8:30 a.m., in relatively slow-moving traffic might be witnessed by many people who: recognised the car or driver in question, or noted the licence plate number...”

[25] In an instance where, the negligent driver fled the scene, Kerr J in *Morris v Doe*¹⁴ examined the steps taken by the plaintiff to ascertain the identity of the negligent driver in the days or weeks following the accident. As it shall be demonstrated later, Dlamini led no evidence of any steps he took to identify the driver or owner of the bakkie. This failure to take steps is compounded by the fact that it took Dlamini two years to report the accident. With regard to the occurrence of the accident, Dlamini is the only witness, thus the cautionary rule finds application. Mr Geach SC argued that cautionary rules only apply in criminal cases. I do not agree. Section 16 of Civil Proceedings Evidence Act¹⁵ expressly provides that the evidence must be from a credible witness.

[26] It is a rule of evidence that traditionally the evidence of a single witness should be treated with caution.¹⁶ The evidence of Dlamini must be reliable and trustworthy. The question is, is his evidence reliable or not? Dlamini bears the

¹³ 2012 BCSC 129 (CanLII)

¹⁴ 2011 BCSC 253.

¹⁵ Act 25 of 1965 as amended.

¹⁶ See *Northam Platinum Mines v Shai NO & others* (2012) 33 ILJ 942 (LC) and *Ntoro v RAF* [2023] ZAGPJHC 357 (*Ntoro*).

overall onus to prove that the RAF was indeed liable to have compensated him. On the other end of the pendulum lies the fact that Dlamini may have lost control of the vehicle whereafter it capsized and injured him. In *National Employers' General Insurance Co Ltd v Jagers (Jagers)*,¹⁷ the erudite Eksteen AJP confirmed that discharging the onus on the balance of probabilities simply means that the Court must be satisfied, on the balance of probabilities, that the plaintiff was telling the truth and his version was therefore acceptable. The fact that there is no countermanding version does not necessarily transmute the uncorroborated version to be true and acceptable.

[27] Dlamini bore the onus to show that a wrongdoer caused the damage he suffered. In other words, he must create a causal link between the damages he suffered and the actions of the wrongdoer.¹⁸ Dlamini was emphatic that the banging sound when the vehicle he was driving collided with the trailer was still indelibly edged in his mind. However, he could not tell the Court what the colour of the bakkie was. Ironically, only when the Court enquired, did he manage to describe the trailer and its size, details that are too complicated to remember twenty years later, than the mere colour of the bakkie. On his own version, which only emerged when the Court was seeking clarity, he recalls seeing the bakkie through the rear view mirror approaching at a high speed behind him. Such attention to details would, in my view, simultaneously have drawn his attention to the colour of this vehicle driven at a high speed. Hamilton visited the scene of the accident the very next day after being given a location by the police, and the only thing he could encounter was the radio of the Fiat Uno vehicle. Strangely, nothing was found related to the trailer since, on Dlamini's uncorroborated version, he collided with the trailer and not the bakkie.

[28] All the documents independently generated points to only one vehicle being involved. The only time, the version of Dlamini was recorded, was two years later when he related the event to the police official who prepared the accident report. To this, Mr Geach SC submitted that such recordal being made two years after the accident lends credence to the fact that Dlamini's version was

¹⁷ 1984 (4) SA 437 (E) at 440D-G.

¹⁸ See *Grove v The Road Accident Fund* [2011] ZASCA 55 at para 7.

not a recent fabrication. What remains curious though, for this Court, is that when he went to consult with Jadwat a month or so after being discharged from hospital, he signed a blank statutory affidavit. That affidavit does not contain a version that later found itself in the accident report. The lodgement letter of 5 December 2005 makes reference to an affidavit by the claimant. Such affidavit was not availed to this Court. This Court only wonders what its contents would have been. Such a document was easily obtainable from the RAF. As to why such an important document was not obtained and availed remains an enigma. An inference to be drawn is that the affidavit may be containing a different version. The available documents reveal how the accident report came into being. Below is the trail leading to the existence of the accident report. On 23 September 2004, the Perdekop SAPS wrote to Jadwat and stated the following:

“The above accident occurred on 21-04-2003 at approximately 17h00 on the R23 Volksrust – Perdekop road. Your client was the only car involved in the accident and no case docket was opened...”

[29] An impression was created that an accident report was compiled and sent to the Municipality of Lekwa. After the toing and froing, it turned out that no accident report was compiled but an accident register was made. The accident register only reflects the white Uno and no other vehicle. Nevertheless, on 17 March 2005, Jadwat wrote to the SAPS Perdekop and stated the following:

“Please advise us whether you need our client to make a statement at your police station as to how the accident happened in order for us to proceed with a third party claim and/or complete a new OAR accident report.”

[30] This letter sets the tone as to why a statement at the police station was required. Subsequently, on 17 April 2005, Jadwat recorded the following:

“We refer to a telephonic conversation with your Commissioner and our Mr Msibi when it was agreed that client should call at your station and compile a new OAR and his statement.”

[31] It is clear at this stage that whatever statement was to be given by Dlamini, was to be one that would enable him to proceed with a third party claim. In other words, if Dlamini were to state that his vehicle was the only one involved in the

accident as recorded by the police in 2004, he would not be able to proceed with the third party claim. In my view, it is for that reason that the accident report recorded the following in relation to the brief description of the accident:

“According to the driver he was driving from Dundee to Joburg. On my way between Volksrust & Perdekop the Bakkie with a trailer overtook my car and collide (sic) with the trailer my car lost control and it overturned and I got injuries on my head as well as my left leg.”

[32] The above narration was provided on 20 April 2005. In addition, the police inspector inserted a sketch which depicts only one vehicle. Inspector Moloi did not testify before me to explain the sketch which appears to contradict the version narrated to him by Dlamini. Upon enquiry, Mr Geach SC informed the Court, only in argument, that a subpoena was issued to the police and was not reacted to¹⁹. The evidence of Moloi was crucial to clear the apparent contradiction between the sketch drawn by him and the recordal of Dlamini’s version of the accident. Additionally, the official who entered information in the accident register would have shared light as to whether other witnesses who may have witnessed the accident were found at the scene.

[33] The recordal in the letter of 23 September 2004 does not aver that only one car was encountered at the scene. The officer of the law positively records that only one car was involved in the accident. This is certainly a statement of fact. As to why that police officer was not called to clarify issues for the Court, remains a mystery. Curiously, the accident report does not vaguely suggest that vehicle ‘B’ was either a truck or a trailer. *Ex facie*, the report there was only vehicle ‘A’ driven by Dlamini, which recordal is consistent with the 2004 letter. Surely, if there was any credibility in the version of the truck or bakkie in vehicle ‘B’, an inscription would have been made that there was a truck or a bakkie.

[34] A further contradiction arose on 5 December 2005, when the claim was lodged with the RAF. This will be eight months after the statement in the accident

¹⁹ Few days on 13 March 2024 after argument and whilst this Court was considering its judgment, subpoenas were uploaded onto CaseLines. The subpoena *duces tucem* was served onto the station commander. As to why the witnesses were not in Court, it remains a mystery

report. The MMF1 form, which was signed and initialled by Dlamini, exposes the following information:

“2 PARTICULARS OF MOTOR VEHICLE FROM THE DRIVING OF WHICH THIS CLAIM ARISES:

(i) Type of body: Truck with a trailer”

[35] In a matter of eight months, the vehicle morphed from a being bakkie and trailer to a truck and trailer. This raises questions as to whether the evidence of Dlamini is reliable and truthful with regard to the offending vehicle. When confronted about the truck issue during cross-examination, he could not provide a satisfactory explanation. This Court is not satisfied with the general tenor of the evidence of Dlamini on this crucial aspect of the presence of the offending motor vehicle. In his brief description of the accident statement made in 2005 at the police station, the offending vehicle is actually the trailer. His vehicle only made contact with a trailer and not the bakkie. Yet in the MMF1 form it does seem that the trailer and the truck collided with his vehicle. On 4 December 2007, Dlamini deposed to another affidavit. Curiously, this affidavit is dead silent about how the accident happened. All it narrates is the following:

“On 21st April 2003 I was travelling home after enjoying my Easter holiday in Durban when I was involved in a car accident between Perdekop and Volksrust in Kwazulu Natal.”

[36] This Court would have expected, in the above affidavit, at the bare minimum, an assertion that a trailer and my car collided with each other. The above assertion lends credence to the contention that he alone was involved in a car accident. There is no evidence that Dlamini ever returned or attempted to return to the scene of the accident to try and find witnesses who may have witnessed the accident. No evidence was led as to whether the road where the accident happened is in the built up area, where, given the time of the alleged accident, people could have witnessed the accident. On the version of Dlamini, he was airlifted from the scene. Surely somebody must have summoned the airlift. That person could have given some useful evidence. The identity of that person must have been easy to ascertain from the ambulance driver or the airlifter.

[37] The material damages to the Fiat Uno were not presented to corroborate, at the very least, the front portion collide. As pointed out, the accident register that was completed by the Perdekop police refers to one car being involved hence no accident report was completed. To this, Mr Geach SC, in argument, only speculated that the reason for that entry is that when the police arrived at the scene, there was only one vehicle and the other one disappeared from the scene. Given the loudness of the bang as dramatized by Dlamini, the trailer or portions thereof could have been found on the scene. Some debris of the trailer would have remained and this would have alerted the police who visited the scene that it was not only the Fiat Uno involved.

[38] Taken together with the neutral documentary evidence, the version by Dlamini that he collided with the trailer is not satisfactory, reliable and truthful. Regard being had to the conspectus and the totality of the evidence, this Court is not satisfied that Dlamini discharged his onus on the issue of the liability of the RAF to have compensated him. To steal from the words of the erudite Stratford JA in *Ex Parte the Minister of Justice In Re Rex v Jacobson & Levy*,²⁰ there is no *prima facie* proof other than the *ipse dixit* of Dlamini that there was another vehicle involved. Having failed to establish this fact, the plaintiff did not have a valid claim against the RAF. The issue of *prima facie* proof becoming conclusive proof was properly explained by the SCA in *S v Boesak*.²¹ The Court said:

“[47] Of course, a *prima facie* inference does not necessarily mean that, if no rebuttal is forthcoming the onus would have been satisfied. But one of the main and acknowledged instances where it can be said that a *prima facie* case becomes conclusive in the absence of rebuttal is where it lies exclusively within the power of the other party to show what the true facts were and he or she fails to give an acceptable explanation...”

[39] This Court is not satisfied that Dlamini is a credible witness upon whose evidence to give a judgment. His testimony is not conclusive and is lacking in material respects as discussed above. There is no *prima facie* case made by

²⁰ 1931 AD 466.

²¹ 2000 (1) SACR 633 (SCA).

Dlamini that indeed there was another vehicle involved other than his own vehicle. Having not attempted to take a single step towards identifying the driver or owner, is a clear indication that there was no other vehicle involved. Undoubtedly, as argued by Mr Shepstone, this involvement of another vehicle is a fabrication to have enabled Dlamini to lodge a RAF claim. On the conspectus and totality of the testimony before me, this other vehicle magically arose two years after the accident in the circumstances where regulation 2 (1) (c) requires a party to submit an affidavit within 14 days of the accident. Admittedly in 14 days he was still in a comma, but many fourteen days passed after 17 June 2003 when he was discharged, yet he chose to report after two years of the accident. For all the above reasons, I am constrained to make the following order:

Order

1. The plaintiff's action is dismissed.
2. The plaintiff is to pay the costs of the action.

**GN MOSHOANA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

APPEARANCES:

For the Plaintiff:

Mr B P Geach SC and A Jansen

Instructed by:

Schutte De Jong Inc, Pretoria

For the Defendants:

Mr R S Shepstone

Instructed by:

Eversheds Sutherland SA Inc Johannesburg

Date of the hearing:

11-13 March 2024

Date of judgment:

20 March 2024