HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 48868/2021

(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.
DATE: 3 MAY 2024

SIGNATURE

In the matter between:

ABDI AHMED JAFAR Applicant

and

ROAD ACCIDENT FUND Respondent

Summary: *Negligence – contributory negligence – insured driver not the principal cause of the accident – A 90%/10% apportionment ordered against the plaintiff.*

Damages – loss of business due to absence of plaintiff during treatment and recovery, no loss of ability to oversee business – residual oversight capabilities retained – future loss capable of

being mitigated by capital injection into business – future loss thereby reduced.

ORDER

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1. The defendant is declared to be 10% liable for the plaintiff's proven damages.

2. The defendant is ordered to pay the plaintiff the sum of R 94 790.40 in respect of the plaintiff's claim for loss of earnings, payable within 180 days of this order.

3. Should payment not be made within 180 days from date of this order, the capital shall from then on bear interest at the prescribed rate of interest.

4. The defendant is ordered to pay the plaintiff's taxed or agreed costs on the High Court scale within 14 days from date of taxation or agreement and from 12 April 2024 such costs shall be on scale A as provided for in Rule 67A.

5. The defendant is ordered to forthwith furnish the plaintiff with an undertaking as contemplated in section 17(4) of the Road Accident Fund Act for the payment of 10% of the costs incurred as a result of injuries suffered in respect of the motor vehicle accident which had occurred on 25 January 2018.

6. The issue of general damages is postponed sine die.

J U D G M E N T

This matter has been heard in open court and is otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically and the date of handing down the judgment is 3 May 2024.

DAVIS, J

Introduction

[1] This is one of the very rare instances where an action against the Road Accident Fund (the RAF) was actually not only properly defended, but where a very triable issue on the merits proceeded to trial with the countervailing evidence of the insured driver being led by the RAF.

[2] Although no witnesses testified on behalf of the RAF in respect of the issue of quantum, cross-examination of the plaintiff eroded the factual assumptions on which the initial actuarial calculations had been made. No separation of issues had been ordered. The issues regarding the merits and the extent of damages appear from the judgment below.

The Plaintiff's case

[3] The plaintiff's case, summarized from his own evidence and that of experts he had consulted, is as follows: he was, at the date of the motor vehicle accident in question, a 46 year old businessman. He owned two wholesale and retail shops, a large one in Ermelo, Mpumalanga and a smaller one in Mayfair, Johannesburg, described by him as a "mini-market". He had a manager or senior employee running each shop but he himself travelled regularly between the two shops, overseeing the businesses. Occasionally he would personally assist with packing stock or doing deliveries. When doing deliveries, he would be accompanied by another employee. From the businesses he made an average nett profit of R 25 000,00 per month.

[4] On the day in question, being 25 January 2018, the plaintiff was on his way home after having attended prayers at a mosque. It was between 14h30 and 14h40 in the afternoon, but the weather was described as being "misty".

[5] The plaintiff was travelling in a Southerly direction along Church Street in Amalgam, on his way to Mayfair, Johannesburg. The accident occurred on a longish straight stretch of road between two robot-controlled intersections which were quite a distance apart. The road had a single lane of traffic in each direction, separated by a solid centre line.

[6] The plaintiff, who was alone in his silver Kia Optima, was driving at a normal speed when he observed the insured driver, not only approaching him from the front, but being overtaking other oncoming traffic and coming into the plaintiff's lane. The plaintiff swerved to his left, but an accident was unavoidable and the insured driver's vehicle collided with the plaintiff's vehicle on the driver's side at the driver's door. The plaintiff estimated that the insured

driver had been speeding and testified that there was nothing the plaintiff could have done to avoid the accident.

[7] The plaintiff was either briefly unconscious or otherwise merely confused as a result of the impact and had to be assisted out of the driver's door by emergency personnel and was taken to hospital by ambulance from the accident scene. He thereafter spent two months in hospital.

[8] The expert reports submitted by the plaintiff were supported by affidavits, and were accepted in terms of Rule 38(2). The report from the orthopeadic surgeon indicated that the plaintiff had sustained a right acetabular fracture, which caused secondary osteoarthritis. The radiology report indicated a malunion of the fracture, leading to a prognosis of a future total hip replacement in order to restore mobility and alleviate symptoms of pain and discomfort.

[9] The plaintiff testified that he had been hospitalized for two months and spent a further two months recovering. During this time he was absent from is shops. He was initially walking with two crutches but now only with one crutch or walking stick. He has not yet gone for a hip replacement or any surgery. He had a previous accident in 2017 but has no residual symptoms from that incident. He takes medication for a pre-existing heart condition and for his kidneys and consults a doctor for his heart and kidney problems once a month.

[10] The occupational therapist consulted by the plaintiff for purposes of the action, listed his job description as related to her by him as follows; "*drive and get stock from Ermelo to Mayfair; his customer will come to get their stock and he does stock-taking; he had to assist in lifting/carry some bags of groceries to put on customers' cars/trucks. He had to do stock-taking in his shops; he had to serve customers from his store*". Post-accident the plaintiff was observed as walking with a right sided limping gait and presented with difficulty in bending

forward or to the side due to right hip pain and lower back pain. He could not do toe rise steps or knee squats. The occupational therapist opined that the plaintiff "…*is seen suited for sedentary demand type of physical occupation with reasonable accommodation*".

[11] Based on the above the industrial psychologist concluded that "… *considering his changes, Mr Ahmed remains an unequal competitor at the open labour market … thus his employability is considered restricted and compromised as a result of the impact of the accident related injuries, it is likely that he will remain unemployed, resulting on a total loss of income …*".

[12] The actuary employed by the plaintiff thereafter, with reliance on the expert opinions, calculated that the plaintiff had suffered a past loss of income of R 571 693,00 and would have earned an income of R 2 149 000,00 (after applying a 5% contingency deduction) had the accident not happened. Postulating a R 0 income now that the accident had happened, a total loss of R 2 700 693,00 was calculated and claimed.

The RAF's case

[13] The insured driver testified that the accident had not happened at all in the manner described by the plaintiff.

[14] On the day in question, the insured driver said he was also travelling in a Southerly direction along Church Street, also on his way home. After he had passed an intersection, he observed the plaintiff's car stationary on the left side of the road. It appeared to the insured driver that the person in the stationary car had not seen him approaching from behind as that person (the plaintiff) suddenly, without warning or indication, attempted to make a u-turn to his right in front and across the insured driver's direction of travel. The insured driver, who had been travelling between 50 and 60 km/h at the time, then collided at a

right angle ("T-boned") with the plaintiff on the portion of the latter's car near the "pillar" of the driver's door.

[15] After the impact, the insured driver limped across to the plaintiff and enquired through the driver's door whether he was "ok". Thereafter, family members of both drivers arrived on the scene together with emergency personnel and tow trucks. Both cars had to be removed from the scene by the tow trucks as they could no longer do so under own steam. It appears that Gauteng Metro Police was also on the scene and took the accident details from the insured driver and had prepared a sketch plan.

Evaluation: Witnesses and merits

[16] The plaintiff testified in Swahili through an interpreter. The latter did not appear to be experienced in court work and occasionally answered questions directly, rather than translate the questions and the plaintiff's own answers, particularly when the questioning traversed ground already covered. From the plaintiff's own responses to questioning, it also appeared that he understood more English than he let on. Being a business owner operating two businesses in South Africa, this is hardly surprising.

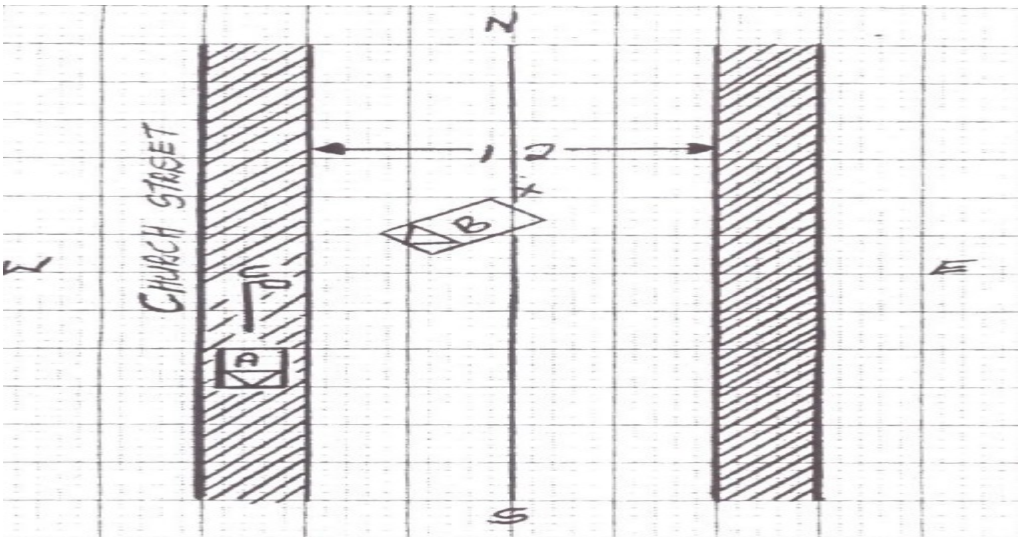
[17] Quite aside from the occasional difficulties experienced as a result of translation, the plaintiff was a poor witness. When confronted with his own section 19(f) affidavit or with the accident report, he floundered. He had not participated in the compilation of the latter and cannot therefore be criticised about the contents thereof, but his own merits affidavit is on a totally different footing. It constituted the merits basis on which action had been launched and the claim against the RAF had been lodged. In respect of the merits it reads (in full) as follows: "*On or about the 25th January 2018 I was driving on my lane when I reached the traffic light it was green. Then suddenly I saw a car coming*

straight at me it was speeding then hit my door, thereafter saw people trying to cut down my door. Thereafter I was unconscious. I also confirm that I was having a shop before the accident of which I was making +/- R25 000 per month. But I have lost my business after the accident since I could not operate it thereafter …".

[18] Of significance was the fact that nothing was said in this affidavit about the insured driver allegedly having been overtaking an oncoming vehicle. Also, apart from alleging negligence in generic terms, no such allegation had been pleaded in the plaintiff's particulars of claim. Even at a pre-trial conference held between the parties' legal practitioners and upon the plaintiff having to formulate his version of how the accident had occurred, the version was simply that is as set out in the section 19(f) affidavit, the contents of which were then quoted. In the plaintiff's explanation to the occupational therapist consulted by him and when he was assisted by his daughter for translation purposes, his version of the accident was recorded as follows: "*Mr Jafar Abdi Ahmed repeated that he was a driver, passing an intersection where the robot was green on his side. Another car came for the other road where the robot was red and it hit his car on the driver side. He lost consciousness for a brief moment. He was eventually taken out of the car and was taken to Helen Joseph hospital …*".

[19] The sketch plan drawn up by the traffic officers look like this where A is the vehicle of the insured driver and B that of the plaintiff (the direction of travel to Mayfair in a Southerly direction has been added as per the plaintiff's evidence):

Direction of travel
↓



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Mayfair Direction

[20] It is clear that the court is faced with two irreconcilable differences. The objective evidence of the point of impact provided by someone not involved in the accident (a Gauteng traffic officer) indicate that the plaintiff's version initially given, namely an accident in a robot-controlled intersection with the insured driver crossing against the red light, cannot be accepted as being true. When one then moves away from the intersection–based version down Church Street as it were, to the actual point of impact, there is nothing to support the plaintiff's version. The plaintiff's version is that he had veered to his left in an attempt to allegedly avoid an oncoming vehicle. That would have placed the plaintiff on the left hand side of the lane in which he had been travelling or even off the road. The point of impact indicates that this is not what had happened. If the accident had occurred as the plaintiff testified it did, and his vehicle had been hit on its right hand side, then the overwhelming probabilities are that it would have moved even further to its left in its lane of travel. Instead, the sketch indicates the plaintiff's vehicle more than halfway across the centre line to its right. Also, had the insured driver come from the opposite direction as the plaintiff and had the accident occurred as the plaintiff had described, there is no

plausible explanation for how the insured driver's vehicle ended up facing the same Southerly direction as the plaintiff's initial direction of travel.

[21] The objective facts deducted from the post-accident position of the vehicles is much more reconcilable with the version of the insured driver: both vehicles were facing South prior to the accident, the plaintiff executed a u-turn to his right, impact occurred in the left lane of travel (albeit close to the centre line) and the plaintiff's vehicle came to a standstill less than a vehicle length beyond impact, having been struck on its driver's side. The traffic officer's key to his map estimated the distance between A-X at 1,2 paces. It is quite conceivable that from this impact the insured driver's vehicle ended up slightly ahead, on the right-hand side of the road, but still facing in a Southerly direction. What is clear also, is that the version that the robot-controlled intersection played a role in the accident, is a false version.

[22] In sharp contrast to the vague manner in which the plaintiff had testified, the insured driver was clear, concise, lucid and had testified in forthright manner. When confronted with the version that the plaintiff had to be "cut" from the vehicle, the insured driver did not deny this nor did he downplay the impact or embellish facts. My notes of his answer to the question was "*Something like that. I cannot say whether he was cut out or not. They had to assist in opening the door (which was stuck). I could not see all as I was also being attended to by the ambulance personnel, checking my leg*".

[23] What the insured driver was also clear about is that anyone coming from the opposite direction as the plaintiff would have endangered himself in attempting to overtake on that very busy stretch of road, with lots of heavy vehicles, overtaking in contravention of a solid traffic line. He was in any event on his way home, which is in the same direction as that in which the plaintiff had been travelling. The damage to the insured driver's vehicle is also more

consistent with his description of how the accident had occurred. On the plaintiff's version, the damages would have been along the right side of his vehicle and along the right front (and possibly side) of the insured driver's vehicle. There was however, no dispute between the parties that the actual damage was on the plaintiff's driver's door pillar and on the insured driver's front side of his car. This is consistent with the mechanism of the accident as described by the insured driver.

[24] The technique used by courts to resolve two irreconcilable versions has been described in *SFW Group Ltd & Another v Martell et Cie & Others*[1] and quoted with approval in *Essential Judicial Reasoning*[2] as follows:

> "*To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established facts or with his own extracurial statements or actions, (v) the probability or improbability of particulars aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events*".

[1] 2003 (1) SA 11 (SCA)
[2] B R. Southwood, *Essential Judicial Reasoning*, Lexis Nexis, at par 49

[25] Applying the above test to the present case, I find that the plaintiff was not a credible witness in respect of how the accident had occurred. He had testified in an unclear fashion, his version of how the accident had occurred as described to his attorney and the expert consulted by him differed from his version in court and that latter version cannot be reconciled with the objective indications of the positions of the two vehicles post-accident. On the other hand, the evidence of the insured driver was clear and unequivocal and fits in with the rest of the facts with the only criticism being that he, when confronted with the sketch plan, remembered the positions of the vehicles after the accident with his vehicle still being on the road surface in his correct lane of travel after the impact, but he conceded that a tow truck might have moved his vehicle. I find that this difference is not sufficient to disturb the remainder of the construction of the facts.

[26] Having determined that the plaintiff had been the primary cause of the accident, the question arises whether there is room for a finding of contributory negligence on the part of the insured driver. Neither party had expressly pleaded nor relied thereon but, where the plaintiff had alleged the insured driver to have been 100% negligent, one is at liberty to determine whether he has been successful in proving a lesser percentage and whether an apportionment of liability should be determined. This is further permissible because the mechanism of the accident, the participation of both drivers therein and the degrees of negligence (or not) of the respective drivers had been fully canvassed in both evidence, cross-examination and argument.[3]

[27] Had the insured driver been negligent in any degree which contributed to the accident? The insured driver and the plaintiff both knew the road in question very well, having both travelled it often for many years. They both

[3] See also: *Shill v Milner* 1973 AD 101 at 105 and *AA Mutual Insurance Association Ltd v Nomeka* 1976 (30 SA 45 (A) and *Bata Shoe Co Ltd (SA) v Moss* 1977 (4) SA 16 (W).

knew the road to carry heavy traffic. Knowing this, the plaintiff approached a stationary vehicle standing still on the left-hand side of the road in misty conditions while not reducing speed and travelling at or close to the maximum allowable speed. The insured driver had testified that he did not expect the plaintiff to execute an inherently dangerous move at such an inopportune moment that he could not avoid the accident despite briefly attempting to brake. I do however find that to continue to drive at the same (almost maximum) speed in misty conditions without at least slowing down when approaching a stationary vehicle, constitutes a degree of negligence. Although a lower speed would not have resulted in the accident having been avoided (having regard to the plaintiff's unexpected conduct) it could conceivably have given greater opportunity to brake or could have reduced the impact. I do find however, that the degree of deviation from the conduct expected from the insured driver to be slight, so slight in fact, to constitute only a measure of 10% contributory negligence.

The quantum of damages

[28] During cross-examination of the plaintiff, he was asked by counsel for the RAF how the two business had been operated prior to the accident. The response was that they existed independently and that the plaintiff had "people" running the shops in his absence. The "managers" of the two businesses were one Ryan for the business in Ermelo while one Hussein ran the business in Mayfair.

[29] It was further established that the plaintiff was concerned with being the controlling mind of the businesses and supervising the running thereof. It was only on occasion that he helped with the packing of stock and even when he personally saw to the deliveries, he was accompanied and assisted by an employee.

[30] When questioned about why the businesses had stopped operating post-accident the plaintiff blamed dishonest employees who had looted the stock and then absconded. This was caused due to the plaintiff's absence during his hospitalisation and recuperation. When asked whether the businesses could be re-started, the plaintiff replied in the affirmative, on condition that he had money to do re-stocking and appointing new employees. When thereafter asked directly whether the plaintiff would again be able to manage, supervise and run the businesses, his answer was: "*yes, if I get trustworthy people, I can do it*" and "*If I get money, doing business, not only running the shops, I can employ someone as before, I can do it*". The plaintiff even boasted that he could run any other business such as operating an electronics shop or buying and selling of cars.

[31] Even if one accepts the plaintiff's evidence of the extent of his pre-accident income despite the fact that he says his books of account and financial statements had gone missing with the demise of the businesses (for which he had contracted a bookkeeper), his actual loss appears to have been the closure of the businesses during his absence and with the only disability to resuscitate them being a lack of capital and not any physical or mental disability. Neither the occupational therapist, nor the industrial psychologist nor, consequently, the actuary had reported on this aspect nor has any evidence been led on the value of the actual losses of stock and the like. What is clear though, is that once the businesses have been resurrected, there would not be any future loss of income. Any reduction in mobility that the plaintiff might suffer in future would also be remedied or at least be ameliorated once the plaintiff has undergone the hip replacement as recommended by the orthopeadic surgeon.

[32] The fact that these consequences have not been fully or actuarially been calculated does not mean that a deserving plaintiff should be non-suited[4] and a court must do the best it can with the evidentiary material placed before it.[5]

[33] The injuries sustained by the plaintiff and his absence from the businesses have caused him a loss and, on the evidence presented, that translated to R 25 000 per month. The fact that he had been unable to resume the businesses to date, means that he had suffered a past loss and, in the absence of any other measure of calculation, I am prepared to accept the total of the amount calculated actuarially, that is R 571 693.00. In respect of any future loss of income, once the capital amount has been paid out and, again in the absence of any contrary indication, on the assumption that the plaintiff could therewith resurrect his businesses, there would be no future loss. I am mindful of the fact that the plaintiff has not indicated what precise amount would be needed by him for this purpose but the plaintiff did indicate that he would leave the measure of damages in the court's hands. For this purpose, one must also take into account that the RAF intends paying out the capital portion of the claim only in 180 days' time, that is six months. That results in a continued loss of R25 000.00 per month. In the absence of actuarial future postulation, inflation and capitalization to present figures, the best one can do is to simply calculate 6 x R25 000.00, which is R150 000.00.

[34] If one were further, on the most beneficial interpretation of the calculations, add a 10% contingency in respect of the residual physical impairment of the plaintiff in not being able to perform the occasional physical demands of his supervising role, such as assistance with stock packing and deliveries, calculated on the previously assessed future loss of R 2 262 106.00

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[4] *Esso Standard SA (Pty) Ltd v Katz* 1981 (1) SA 964 (A).

[5] *De klerk v Absa Bank Ltd* [2003] 1 All SA 651 (SCA) and the reference therein to *Southern Insurance Association v Bailey NO* 1984 (1) SA 98 (A) at 113F – 114E and *Hershman v Shapiro & Co* 1926 TPD 367 at 379.

(before contingencies), I calculate the total loss of earnings and earning capacity as follows:

Past loss	R 571 693.00
Loss until payment	R 150 000.00
Future contingent loss	R 226 211.00
Total	R 947 904.00

[35] Applying the apportionment referred to in par 27 above to this amount, this means that the plaintiff succeeded in proving an award of R 94 790.40 under this head of damages. There was no claim for past medical expenses and the RAF has neither accepted nor rejected the assessment of the seriousness of the plaintiff's injuries. The issue of general damages should therefore be postponed sine die.

[36] In the circumstances of this case and having regard to the marginal success and the quantum, I deem it fair that costs be assessed and awarded in terms of the recent amendments to Rules 67A, 69 and 70[6] on scale A as provided therein, but only from 12 April 2024. In the exercise of my discretion and, due to the fact that apportionment could not have been foreseen to the extent ordered, I determine that such costs shall be on a High Court scale.

Order

[37] In the premises, the following order is made:

1. The defendant is declared to be 10% liable for the plaintiff's proven damages.

[6] Promulgated with effect from 12 April 2024

2. The defendant is ordered to pay the plaintiff the sum of R 94 790.40 in respect of the plaintiff's claim for loss of earnings, payable within 180 days of this order.

3. Should payment not be made within 180 days from date of this order, the capital shall from then on bear interest at the prescribed rate of interest.

4. The defendant is ordered to pay the plaintiff's taxed or agreed costs on the High Court scale within 14 days from date of taxation or agreement and from 12 April 2024 such costs shall be on Scale A as provided for in Rule 67A.

5. The defendant is ordered to forthwith furnish the plaintiff with an undertaking as contemplated in section 17(4) of the Road Accident Fund Act for the payment of 10% of the costs incurred as a result of injuries suffered in respect of the motor vehicle accident which had occurred on 25 January 2018.

6. The issue of general damages is postponed sine die.

N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 18 and 19 April 2024

Judgment delivered: 3 May 2024

APPEARANCES:

For the Plaintiff:	Advocate M Motloung
Attorney for the Plaintiff:	MT Mokgashane Attorneys, Pretoria
For the Defendant:	Mr T Mukasi
Attorney for the Defendant:	The State Attorney, Pretoria