IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No: 2019/76894

1. **REPORTABLE: NO**
2. **OF INTEREST TO OTHER JUDGES: NO**
3. **REVISED**
4. **DATE:** 24/6/2024
5. **SIGNATURE:** [redacted]

In the matter between:

BOROTHO, BERNARD TSOKOLO	Applicant
and	
ROAD ACCIDENT FUND	Respondent

In re:

BOROTHO, BERNARD TSOKOLO	Plaintiff
and	
ROAD ACCIDENT FUND	Defendant

JUDGMENT – LEAVE TO APPEAL

PILLAY AJ,

INTRODUCTION:

1. The applicant is the plaintiff in action proceedings against the respondent ("**the RAF**"), in its capacity as defendant. The applicant caused the action to be instituted against the RAF for damages suffered by the applicant as a result of bodily injuries, which the applicant sustained in a motor vehicle accident, which occurred on 27 November 2016. The applicant's claim against the RAF is pursuant to the provisions of the Road Accident Fund Act, 56 of 1996 ("**the RAF Act**").

2. The RAF defended the action and after entering an appearance to defend, filed a plea.

3. On 25 February 2022 the RAF's defence was struck out by an order granted by Phooko AJ. The said order reads as follows:

> "1. The Respondent defence is hereby struck out for failing to comply with a court order dated 29 July 2021.
> 2. The Respondent's defence having been struck out; the Respondent has no right to participate in the proceedings as a result wherefore the matter will proceed on the basis of default.
> 3. The applicant is authorised to apply for default judgment against the Respondent.
> 4. The Costs of this application to be paid by the first respondent on a party and party scale."

4. Pursuant to the aforementioned order by Phooko AJ, the applicant launched an application for judgment by default against the RAF.

5. The application for default judgment was enrolled before me, on the Trial Defaults Judgment Roll on 20 June 2023. The application proceeded on the aspects of negligence and causation only. After considering the application for default judgment and the oral testimony of the applicant, I granted an order of absolution from the instance with costs. It is against this order that the applicant now seeks leave to appeal.

PARTICIPATION OF THE RAF IN THE APPLICATION FOR LEAVE TO APPEAL:

6. Before dealing with the merits of the application for leave to appeal, I take this opportunity to address the applicant's contention that the State Attorney (who had been appointed by the RAF as its legal representative) should not be allowed to file heads of argument or make submissions in the application for leave to appeal.

7. It is a well-known fact that the RAF had terminated the tenure of its panel of attorneys and presently uses the State Attorney as its legal representative in claims instituted against it, in terms of the provisions of the RAF Act. In this matter, the RAF had appointed the State Attorney as its attorney of record prior to the hearing of the application for default judgment.

8. The State Attorney did not participate in the application for default judgment.

9. Prior to the hearing of the application for leave to appeal, the State Attorney delivered Heads of Argument in the application for leave to appeal. The State Attorney also presented argument during the application for leave to appeal. I provisionally allowed the State Attorney to make submissions.

10. The applicant contends that the RAF's defence was struck by the order of Phooko AJ and together with the expression in the order that the RAF is precluded from participating in the proceedings, results in the RAF being barred from participating in any manner and in any part of the proceedings.

11. In a recent matter of **T P Ralele obo P M Makhudubela**,[1] in similar circumstances where the defendant's defence was struck, Davis J, having regard to the conflicting judgments as to whether the defendant is allowed participate in the proceedings after the defence was struck, expressed the following views:

> "[12] In my view, the conflicting views regarding the consequences of the striking of a defendant's defence can be clarified as follows: as a starting point, the "old authorities" referred to by the plaintiffs in the matters referred to above and also the present matter, all pre-date the Constitution.
>
> [13] Section 34 of the Constitution guarantees "everyone… a right to have a dispute that can be resolved by the application of law decided in a fair hearing before a court". Whilst the section guarantees the substantive right of a litigant, the Constitutional Court has confirmed that the manner in which a party may bring such a dispute before a court may be regulated, in this instance by the Superior Courts Act and the Uniform Rules. It should further follow that any application of such

[1] Case number 9117/2019, High Court Gauteng, Pretoria, 18 April 2024.

regulation should be interpreted in a manner which least interferes with or limits the exercise of the substantive right of access to courts.

[14]...

[15]...

[16]...

[17] I find that the solution to the issue of conflicting views is firstly that the old authorities, insofar as following them would lead to a denial of the defendant's Section 34 rights, should not be followed...

[18] To clarify: I find that when a defendant's defence has been struck out, a plaintiff still has to prove its entitlement to damages and the extent thereof and a defendant has the right to cross examine the plaintiff's witnesses order to interrogate their affidavits (and reports) if they have been allowed by the court in terms of Rule 38(2) on condition further that the defendant may not put a different factual version to such witnesses, lead countervailing evidence or base any argument on facts not put in evidence by the plaintiff."

12. I agree with the findings of Davis J. The striking of the defence is exactly that, it removes the defence, but does not evict the defendant from the proceedings. Further, a distinguishing feature in this matter is that the RAF did not participate in the default judgment trial. The State Attorney, on behalf of the RAF, only presented argument on established facts at the application for leave to appeal. Consequently, the participation of the RAF in the application for leave to appeal is allowed.

THE GROUNDS FOR LEAVE TO APPEAL:

13. The applicant has raised a number of grounds in his application for leave to appeal. These grounds may be condensed as follows:

13.1. The court erred in not finding that the plaintiff's version as contained in the plaintiff's affidavit deposed in terms of Section 19(f) of the RAF Act and as expressed during oral evidence was the only version as to the occurrence of the accident before court and should have been accepted without question.

13.2. The court erred in not finding that the defendant did not challenge the credibility and reliability of the plaintiff as a witness.

13.3. The court erred in concluding that a head-on collision that occurred, when there was no evidence to support this fact.

13.4. The court erred in finding that the only issue in dispute was contributory negligence because the RAF had made an offer of settlement, prior to the hearing matter.

13.5. The court should have found that the statement that the insured driver as contained in the police docket was hearsay even though it was discovered and attached to the plaintiff's application for default judgment.

The credibility and reliability of the applicant and the evidence tendered by the applicant.

14. I note that the applicant does not take issue with the finding that the applicant's version as to how the accident occurred was so improbable that the applicant did not discharge the onus of proof resting upon him. I also note that insofar as the applicant's improbable version indicates a lack of credibility and reliability, the applicant has also not challenged same. The applicant merely states that the Court erred in not finding that the RAF did not challenge the applicant's credibility and reliability. The determination of the applicant's credibility and reliability falls within the purview of the Court. Further, the RAF did not participate in the proceedings and consequently could not challenge the applicant's credibility and reliability. The applicant contends that the RAF's preclusion from participating in the proceedings was correct. The applicant, and this ground of appeal, now seeks to approbate and reprobate. Notwithstanding, as I stated previously, it is for the Court to decide on the credibility and reliability of a witness.

The offer of settlement made by the RAF.

15. The offer of settlement made by the RAF was made without prejudice. The said offer remains *inter partes* and in accordance with Rule 34(10) shall not be disclosed to the Court or referred to prior to judgment.

16. Consequently, the offer made by the RAF to the applicant cannot be considered in determining the issues before court and whether the applicant has discharged the onus of proof resting upon him in addressing these issues. The suggestion that because the RAF had made a without prejudice offer to the applicant means that the applicant did not have to prove the occurrence of the accident and causal negligence on the part of the insured driver, is without merit.

The remaining grounds for leave to appeal.

17. The Consolidated Practice Directive prescribes that matters where default judgment is sought against the RAF because the RAF has not entered an appearance to defend or has been barred from pleading or the RAF's defence has been struck, will be heard in the Default Judgment Trial Court. At the hearing in this court, the applicant for default judgment is required to present all the evidence necessary, either on affidavit and/or by oral evidence, to prove his case.

18. The applicant applied for default judgment and in doing so filed an affidavit containing all the evidence, which the applicant sought to place before Court, to discharge the onus resting upon him and justify the order he sought. In this affidavit the applicant placed into evidence the police docket containing the applicant's statement to South African Police Services, the accident report, photographs depicting the damage to applicant's motor vehicle, a statement by the driver of the other motor vehicle involved in the accident in question and statements by the passengers in the latter mentioned motor vehicle. The applicant placed the aforesaid into evidence in the following manner:

"6 This is a driver's claim. In support of the merits portion I attach as annexure… a copy of OAR, content of the docket Photos depicting Plaintiff's damaged motor vehicle and Plaintiff's section 19(f) affidavit wherein the places before the Honourable Court, under oath, his evidence/version of how the accident occurred."

19. Consequently, the applicant tendered into evidence, photographs of his motor vehicle, which contradict his testimony as to the damage to his motor vehicle and the manner in which the accident occurred. The applicant also tendered into evidence an opposing version as to how the accident occurred, which version is consistent with the damage to the applicant's motor vehicle.

20. The applicant contends that the documents referred to in the previous paragraph are hearsay evidence. In support of this contention, the applicant relies upon the matter of **Chauke v RAF**[2] and the cases cited therein. These cases are distinguishable from the present case. In the cases relied upon by the applicant, the documents which were declared to be hearsay evidence were only discovered and not tendered into evidence as real evidence, as the applicant did in this case by attaching same to his founding affidavit and relying upon same "in support of the merits portion".

21. Notwithstanding the aforesaid, it is trite that the applicant bears the burden of proof, to prove his claim on the balance of probabilities[3]. In the matter of **Sardi and others v Standard and General Insurance Co Ltd**[4] the Appellate Division explained that "at the end of the case, the Court has to decide whether on all the

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[2] (A59/2022) [2023] ZAFSHC 214 (31 May 2023).
[3] **Arthur v Bezuidenhout and Mieny** 1962 (2) SA 566 (AD) at 576G; **Sardi and Others v Standard and General Insurance Co Ltd** 1977 (3) SA 776 (A) at 780C-H; **Madyosi and Another v SA Eagle Insurance Co Ltd** [1990] ZASCA 65; 1990 (3) SA 442 (AD) at 444D-F
[4] 1977 (3) SA 766 (A) at 783 C–H.

evidence and the probabilities and the inferences, the plaintiff has discharged the onus of proof on the pleadings on the preponderance of probability, just as the Court would do in any other case concerning negligence. In this final analysis, the Court does not adopt the piecemeal approach of (a), first drawing the inference of negligence from the occurrence itself, and regarding this as a prima facie case and then (b), deciding whether this has been rebutted by the defendant's explanation".

22. In the matter of **Minister of Justice v Seametso**[5] the Appellate Division said the following with regard to the approach to the evidence of the single witness, which stands uncontradicted:

> "Counsel for the appellant contended that the fact that Daniel's evidence stands uncontradicted does not relieve the plaintiff from the obligation to discharge the onus resting upon him. If thereby is meant that Daniel's evidence should not have been accepted merely because it stands uncontradicted then the contention is sound, for as was said by Innes CJ in Sittman v Kriel, 1909 T.S 538 at p 543:
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> > "It does not follow, because evidence is uncontradicted, that therefore it is true. Otherwise the Court, in cases where the defendant is in default would be bound to accept any evidence the plaintiff might tender. The story told by the person on whom the onus rests may be so improbable as not to discharge it."

23. This is the case in this particular matter, the applicant's story is so improbable that the applicant has failed to discharge the onus resting upon him.

24. The approach to the evidence of the single witness, which stands uncontradicted was adopted in the matter of **Louis v RAF**[6] where the Court, in

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[5] 1963 (3) SA 530 (A) at 534 G-H and 535 A.
[6] (23724/2018) [2022] ZAGPJHC 12 (10 January 2022) at paragraph [16].

similar circumstances, held that "the brief, cursory and insubstantial nature of the plaintiff's evidence resulted in a paucity of facts being established that may be used in support of the plaintiff's duty to discharge the onus that rests upon him regarding the negligence of the driver of the unidentified vehicle. A plaintiff is not relieved of this obligation even if he is a single witness and his evidence stands uncontradicted" and in the matter of **Bila v RAF**[7] where the Court held that "the fact that the plaintiff was a single witness and that his evidence is uncontested, does not necessarily imply that this Court must unreservedly accept his evidence."

25. Having regard to the probability of the applicant's evidence as contained in the two affidavits filed by him and his oral testimony; the likelihood of the sequence of events as described by the applicant demonstrates that it is highly improbable when logically considered. In the circumstances the applicant is not discharge the onus resting upon him.

THE REQUIREMENTS FOR LEAVE TO APPEAL:

26. The requirements, which must be met by the applicant, for leave to appeal to be granted by this Court is detailed in section 17 of the Superior Courts Act, 10 of 2013.

27. Section 17 specifies that this court may only grant leave to appeal, if this court is of the opinion that:

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[7] (RAF294/2017) [2022] ZANWHC 29 (21 June 2022) at paragraph [10].

27.1. the appeal would have a reasonable prospect of success; or

27.2. there is some compelling reason the appeal should be heard, including conflicting judgements on the matter under consideration;

27.3. the decision sought on appeal is not one that would have no practical effect;

27.4. the decision sought an appeal would lead to the just and prompt resolution of the real issues between the parties.

28. The grounds of appeal raised by the applicant indicate that the applicant relies only on the circumstance that the appeal would have a reasonable prospect of success. The Land Claims Court has held, in the matter of **The Mont Chevaux (OT2012/28) v Tina Goosen,**[8] that the wording of section 17 has raised the bar of the test and now there must be a measure of certainty that another court will differ from the court *a quo.*

29. I am of the view that another Court would not come to a different decision and make the following order:

29.1. The application for leave to appeal is refused;

29.2. The applicant is ordered to pay the costs.

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[8] Unreported, LCC case number LCC14R/2014 dated 3 November 2014. The principle in this matter has been followed in a number of other cases and in this regard, this court is referred to Erasmus, **Superior Court Practice**, Third Edition, Juta, footnote 5, page D-102.

T PILLAY
Acting Judge of the High Court
Gauteng Division, Pretoria

APPEARANCES:

For the Applicant:	Adv F Matika
Instructed by:	B Dlova Incorporated
For the Respondent:	Ms C Mothata
	State Attorney, Pretoria