Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY

Case No:	2091/2019
Heard on:	25/08/2022
Delivered on:	13/09/2022

In the matter between:

SIYAMTHANDA VAUGHAN VOSS **PLAINTIFF**

and

ROAD ACCIDENT FUND **DEFENDANT**

JUDGMENT

MAMOSEBO J

[1] At the heart of this application is whether the defendant should be held liable to the plaintiff for damages that he suffered as a result of the collision that occurred on 22 June 2018 at approximately 23:00 in Quinn Street, Kimberley, in the Northern Cape. The plaintiff was the driver of a Nissan Almera with registration numbers CA 536221 and the driver of a white Corsa utility bakkie who is unknown and of which the registration particulars of his vehicle are also unknown.

[2] The plaintiff issued summons out of this Court on 18 September 2019. The plaintiff's version is that the collision occurred when the driver of the utility bakkie who was driving in front of his vehicle abruptly and without warning applied the **brakes of his vehicle resulting in the Corsa utility being brought to a complete halt in front of his vehicle**. Resultantly, the plaintiff's vehicle veered to the right and collided with a tree. According to the plaintiff, the collision was caused by the negligence of the other driver in one or more of the following ways:

2.1 He failed to keep a proper lookout;

2.2 He drove at a speed that was excessive having regard to the circumstances prevailing at the time of the collision;

2.3 **He failed to apply the brakes of the insured motor vehicle timeously** or at all, at a stage and/or time when he could and/or should have done so;

2.4 He failed to take evasive action or to keep the vehicle under proper control at a stage when he could and should have done so;

2.5 He failed to avoid a collision when by exercising reasonable care he could and should have done so.

[3] In his particulars of claim the plaintiff pleaded that he suffered the following serious bodily injuries as a result of the collision:

3.1 Left comminute midshaft femur fracture requiring open reduction and internal fixation;

3.2 A head and possible brain injury;

3.3 Injury to the left of the jaw;

3.4 Soft tissue injury of the left knee;

3.5 Various bruises, abrasions and cuts;

3.6 Emotional shock and trauma.

[4] The plaintiff now claims damages in the amount of R900,000.00 (Nine Hundred Thousand Rand) calculated as follows:

4.1	Past hospital, medical and other associated costs	R200,000.00
4.2	The plaintiff is entitled to an undertaking in terms of s 17(4)(1) of the Act which a defendant usually tenders as a matter of course	
4.3	Loss of income and earning capacity	R700,000.00
	TOTAL	**R900,000.00**

[5] The defendant's pleaded case is that the plaintiff was the sole cause of the collision in that:

5.1 He failed to keep a proper lookout;

5.2 He drove at an excessive speed;

5.3 He failed to apply the brakes of his motor vehicle timeously or at all, at any stage and/or time when he could and/or should have done so;

5.4 He failed to take evasive action or failed to keep the vehicle under proper control at any stage when he could and should have done so;

5.5 He failed to avoid a collision when by exercising of reasonable care he could or and should have done so;

5.6 He was intoxicated at the time of the collision;

5.7 He failed to keep a proper, safe and or adequate distance between himself and the insured vehicle.

[6] On 01 December 2021, the plaintiff represented by Mr S Greyling and the defendant represented by Ms B Rabie attended my chambers with a draft order to be made an order of Court. The parties had agreed on the apportionment of damages. I asked the following pertinent questions on aspects that caused me discomfort:

6.1 Was the plaintiff a licenced driver when the collision occurred?

6.2 Was the plaintiff unrestrained (without a fastened seatbelt) when he drove the said motor vehicle?

6.3 Since the hospital records bear an inscription that the plaintiff was intoxicated on the day of the incident and at the time of examination by the medical doctor what the effect thereof on this claim is.

[7] Consequently, the parties sought a postponement by agreement to 25 August 2022 and the plaintiff tendered costs occasioned by the postponement.

[8] On 15 August 2022, 10 days before the date of the hearing, I was handed the plaintiff's heads of argument without the Registrar's stamp but dated 12 August 2022 and served on the State Attorney on the same date. The State Attorney served and filed the defendant's heads of argument on 23 August 2022. The practice of filing directly with the Judge's registrar is deprecated, as the rules require documents to be served and filed with the office of the registrar.

[9] On 25 August 2022 the plaintiff, on this occasion assisted by Adv. C.R. Van Onselen, and the defendant, this time represented by Mr MA Mogano from the State Attorney's office, attended my chambers with a revised

draft order. From the reading of para 1 of the draft, it is clear that prior to this date, there was no application made to Court for separation of the merits and quantum in terms of Rule 33(4) of the Uniform Rules of Court. I will revert to this aspect later in the judgment. The revised draft reads:

"1. Merits (liability) and quantum are separated in terms of the provisions of Rule 33(4);

2. The quantum portion of the plaintiff's action is postponed sine die with costs in the cause;

3. The defendant is declared to be liable for 20% (TWENTY PERCENT) of the plaintiff's proven or agreed damages arising from injuries which were sustained by the plaintiff in the accident which occurred on 22 June 2018;

4. The defendant is ordered to pay the plaintiff's taxed or agreed costs with respect to the merits of the plaintiff's claim on the party and party High Court scale, subject to the discretion of [the] Taxing Master inclusive of, but not limited to:

4.1 The fees of counsel on the High Court scale, inclusive of counsel's reasonable day fee for 25 August 2022;

4.2 The costs of consultation between the plaintiff and his legal representatives to discuss the terms of the order;

4.3 The reasonable taxable accommodation and transportation costs (including Toll and E-Toll charges) incurred by or on behalf of the plaintiff in attending the court and in respect of consultations with the plaintiff's legal representatives;

4.4 The above costs shall be paid into the trust account of the plaintiff's attorneys of record, Adams & Adams, details of which are as follows[1]:

4.5 It is recorded that the plaintiff's instructing attorneys do not act on a contingency fee basis.

5. The following provisions will apply with regards to the determination of the aforementioned taxed or agreed costs:-

5.1 The plaintiff shall serve the notice of taxation on the defendant;

5.2 The plaintiff shall allow the defendant 180 (ONE HUNDRED AND EIGHTY) court days to make payment of the taxed costs from date of settlement or taxation thereof;

5.3 Should payment not be effected timeously, the plaintiff will be entitled to recover interest at the applicable interest rate on the taxed or agreed costs from the date of allocator to date of final payment.

5.4 The plaintiff shall not issue a writ prior to the expiry of the 180-day periods."

[10] Mr Van Onselen raised two issues:

10.1 The jurisdiction of a Court regarding an *inter partes* settlement of a matter; and

[1] I deem it unnecessary to include the attorney's bank details

10.2 The issues that I raised as already referred to at para 6 (above).

The Court's Jurisdiction

[11] The starting point for me is to reiterate the principle enunciated by the Constitutional Court in *Matatiele Municipality and Others v President of the RSA and others*[2] where Ngcobo J pronounced:

> *"[67] Here, we are concerned with a legal concession. It is trite that this Court is not bound by a legal concession if it considers the concession to be wrong in law. Indeed, in Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others [1996 (4) SA 671 (CC)], this Court firmly rejected the proposition that it is bound by an incorrect legal concession, holding that, 'if that concession was wrong in law [it], would have no hesitation whatsoever in rejecting it."*

[12] Mr Van Onselen pressed that unless this Court grants the order as per the draft order then a ruling on its jurisdiction is necessary. Mr Mogano submitted that his instructions are to leave it in the Court's hands.

[13] In the case of *Maswanganyi*[3] a settlement agreement was placed before Mokgohloa DJP, who was asked to make the settlement agreement an order of court, which was refused. From her reading of the file, the Judge had noted that there was no indication that the insured driver was negligent and directed that evidence be led to state how the collision occurred. The evidence of one witness was heard but was not completed. The matter was then postponed to 12 October 2016. On 07 October 2016 an application was made to call off the part heard matter, nullify the trial, declare that the *lis* between the parties to have been fully and finally settled and make the draft order an order of court.

---

[2] 2006 (5) SA 47 (CC) at 69 para 67

[3] Maswanganyi obo Machimane v Road Accident Fund [2019] JOL 44965 (SCA)

[14] The remarks by the Supreme Court of Appeal in *Maswanganyi*[4] are instructive:

> *"[13] Litigants do not mandate courts to decide disputes, and the language of agency or mandate is inappropriate to describe the judicial function. Nor should the jurisdiction of courts be conflated with the concept of mandate. Courts are the judicial arm of the State. They are charged, inter alia, with the determination of civil disputes that arise in the ordinary course of events. Their jurisdiction to do so is founded in Chapter 8 of the Constitution of the Republic of South Africa, 1996 ("the Constitution") and defined in various statutes and the common law. In the case of the High Court, the relevant statute is the Superior Courts Act 10 of 2013.*
> *[15] [T]he jurisdiction of the court to resolve the pleaded issues does not terminate when the parties arrive at a settlement of those issues. If it did, the court would have no power to grant an order in terms of the settlement agreement.*
> *[32] Our courts have a duty to ensure that they do not grant orders that are contra bonos mores, or that amount to an abuse of process. Section 173 of the Constitution specifically empowers the court to prevent any such abuses.*
> *[33] [A] court cannot act as a mere rubber stamp of the parties.*
> *[35] In cases involving the disbursements of public funds, judicial scrutiny may be essential.*
> *[36] When a Judge expresses concern over the terms of a settlement, the court must ensure that those concerns are addressed by the parties to prevent an abuse of process and the unjustified disbursements of public funds."*

[15] The Constitutional Court in *Eke v Parsons*[5] made these resounding remarks:

> *"[25] This in no way means that anything agreed to by the parties should be accepted by a court and made an order of court. The order can only be one that is competent and proper. A court must thus not be mechanical in its adoption of the terms of a settlement agreement."*

[16] I have already alluded to the fact that the application to separate merits and quantum was not before me or any other court. On 01 December 2021 the application was not made. The matter of separation appears in the revised settlement agreement. Rule 33(4) stipulates:

> *"If, in any pending action, it appears to the court mero motu that there is a question of law or fact which may conveniently be decided either before any evidence is led or*

[4] Ibid fn 3 at paras 13
[5] 2016 (3) SA 37 (CC) at para 25

separately from any other question, the court may make an order directing the disposal of such question in such manner as it may deem fit and may order that all further proceedings be stayed until such question has been disposed of, and the court shall on the application of any party make such order unless it appears that the questions cannot conveniently be decided separately."

[17] In *Denel (Edms) Bpk V Vorster*[6] Nugent JA made the following informative remarks:

> *"[3] Rule 33(4) of the Uniform Rules – which entitles a Court to try issues in appropriate circumstances – is aimed at facilitating the convenient and expeditious disposal of litigation. It should not be assumed that the result is always achieved by separating the issues. In many cases, once properly considered, the issues will be found to be inextricably linked, even though, at first sight, they might appear to be discrete. And even where the issues are discrete, the expeditious disposal of the litigation is often best served by ventilating all the issues at one hearing, particularly where there is more than one issue that might be readily dispositive of the matter. It is only after careful thought has been given to the anticipated course of the litigation as a whole that it will be possible properly to determine whether it is convenient to try an issue separately. But where the trial Court is satisfied that it is proper to make such an order – and, in all cases, it must be so satisfied before it does so – it is the duty of that Court to ensure that the issues to be tried are clearly circumscribed in its order so as to avoid confusion. The ambit of terms like the 'merits' and the 'quantum' is often thought by all the parties to be self-evident at the outset of a trial, but, in my experience, it is only in the simplest of cases that the initial consensus survives. Both when making rulings in terms of Rule 33(4) and when issuing its orders, a trial Court should ensure that the issues are circumscribed with clarity and precision."*

[18] Needless to say, it was imperative for me to consider the entire file. Since the issue of separation was not brought before me I did not confine my reading to the aspect of merits only. Regard being had to the authorities by the ConCourt and the SCA referred to above, it follows that the jurisdiction of this Court remains extant, as I am not bound by the settlement agreement. In the exercise of my discretion I find the agreement to be an abuse of process. In the absence of any evidence led there may therefore be unjustified disbursements of public funds.

---

[6] 2004 (4) SA 481 (SCA) at para 3

The issues raised by this Court

[19] It remains incomprehensible for counsel for the plaintiff to maintain in his submission that there is no authority to the effect that if one is not licenced to drive you are not disentitled by statute to claim. He submitted that the test should be "*are you competent to drive?*" I do not agree. If this was the case, there would not be legislation prescribing the age at which to obtain a learner and driver's licence.

[20] The National Road Traffic Act[7] stipulates:

> ***"Driver of motor vehicle to be licensed***
> *12. No person shall drive a motor vehicle on a public road-*
> *(a) except under the authority and in accordance with the conditions of a licence issued to him or her in terms of this Chapter or of any document deemed to be a licence for the purposes of this Chapter; and*
> *(b) unless he or she keeps such licence or document or any other prescribed authorisation with him or her in the vehicle.*
>
> ***Licence to drive, either learner's or driving licence***
> *13. A licence authorising the driving of a motor vehicle shall be issued by a driving licence testing centre in accordance with this Chapter and shall be either-*
> *(a) a provisional licence, to be known as a learner's licence; or*
> *(b) a licence, to be known as a driving licence,*
> *and, except as otherwise provided in this Chapter, no person shall be examined or tested for the purpose of the issue to him or her of a driving licence unless he or she is the holder of a learner's licence."*

[21] The plaintiff was a minor as indicated in the cited identity number 0010205020083. Rightfully he should not have been behind the steering wheel of the motor vehicle. He does not possess a learner or driver's licence and that is common cause. Despite this, he was in the company of a friend who was a year younger than him. So it can be safely deduced that he too did not possess any learner or driver's license.

---

[7] 93 of 1996

[22] Holmes JA succinctly set out the test for liability in *Kruger v Coetzee*[8] as follows:

> *"For the purposes 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."*

[23] Mr Van Onselen has referred me to this Court's Full Bench judgment of *Trencor Services (Edms) Bpk v Loots en Andere*[9]. This case involved a collision between two vehicles in which evidence was led. The driver moved slightly over the yellow line after being blinded by the lights of oncoming traffic. A collision then occurred between his vehicle and a stationary vehicle on the side of the yellow line (the shoulder of the road). These facts are clearly distinguishable from the facts before me. The applicable principle in *Trencor* is that a driver should at all times maintain a proper lookout and regulate his/her speed in such a manner that he/she is able to stop timeously.

[24] Mr Van Onselen also invoked the unreported judgment of Mabesele J in the matter of *Prinsloo v Road Accident Fund*[10]. Counsel contended that because the plaintiff in the *Prinsloo* matter was awarded damages even though she does not possess a driver's license this Court should follow that precedent. What immediately distinguishes the *Prinsloo* case from the present is that the plaintiff testified unlike *in casu*. *Prinsloo* had been a motorcyclist for the past four years even though she did not possess a license. The driving experience of the plaintiff *in casu* is not explained.

---

[8] 1966 (2) SA 428 (A) at 430E - F
[9] 2001 (1) SA 324 (NCK)
[10] [2019] JOL 43955 (GP)

The RAF in the *Prinsloo* case elected not to call any witnesses and the decision was based on the evidence of the plaintiff.

[25] The plaintiff in this case was, according to his version, following a white Corsa utility. It abruptly stopped. He swerved the vehicle to his right and collided with a tree in an island separating the four lanes, two in each direction. The following distance between the two vehicles is important but not mentioned. It is unclear whether at the speed he claims to have been driving, 60km per hour, in the circumstances he described he would, as a reasonable driver, have been able to stop the vehicle before it collided with the tree. The accident report by the police only refers to driver A and there is no mention of driver B. Under the head "brief description of the accident", this is what is recorded:

"Driver A allege that he lost control of the vehicle and drove into a tree."

[26] Dr Bezuidenhout at the Kimberley Hospital Emergency Centre treated the plaintiff around 01:20 in the early hours of the morning. The accident occurred the previous day around 23:00 on 22 June 2018. The following are the doctor's notes found in the hospital records: *"22 June 2018 MVA driver unrestrained intoxicated"*.

[27] The cumulative effect of the shortcomings in this matter, namely, not having a driver's licence; driving on a public road at night and under the influence of liquor and unrestrained, all point towards evidence being required to be heard. It is therefore necessary for the matter to go on trial. I am not persuaded that the plaintiff is entitled to the suggested apportionment of 20/80. The *onus* is on the plaintiff to satisfy the court

that he took reasonable steps under the circumstances. Rewarding him for an apparent wrong cannot be justified.

[28] In the premises I do not accept the settlement agreement and make no order as to costs.

MAMOSEBO J
NORTHERN CAPE HIGH COURT

For the plaintiff:	Adv. C R van Onselen
Instructed by:	Adams & Adams Attorneys Stefan Greyling Inc
For the defendant:	Mr. M Mogano
Instructed by:	Office of the State Attorney