



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES / NO

DATE

10/07/2023

SIGNATURE

A handwritten signature in black ink, appearing to be "A. D. M.", is written over the signature line.

CASE NO: 2020-2948

DATE OF HEARING: 5th May 2023

In the matter between:

GWIZI "SIBANDA" ABSALOM

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

JUDGMENT

CAJEE AJ:

1. This is an application for default judgment following the striking out of the Defendant's defence by Mdalana-Mayisela J on the 14th of December 2021 for its failure to comply with court orders and rules of court aimed at ensuring that the matter was trial ready.
2. At the hearing of the matter, which was held in open court, Adv. van Wyk appeared for the Plaintiff. He applied for a separation of issues between liability and quantum and for the matter to proceed only on the issue of liability. I granted the application. I further ordered that I would require the Plaintiff to testify in the matter.
3. Mr. Mdlovu, from the Road Accident Fund unit in the office of the State Attorney represented the Defendant. He sought to intervene and cross examine the Plaintiff only on the discrepancy between the name appearing in the police accident report (OAR) and that appearing in his identity card and asylum seeker permit. I declined his request in light of the fact that the Defendant's defence had been struck out. I however allowed him to be present in court and take notes while the Plaintiff was being lead.
4. Before dealing with the testimony of the Plaintiff, I set out below a short chronology of relevant events leading up to this application:

4.1. The Plaintiff was allegedly involved in a motor vehicle accident on the 10th of April 2018 at 19h00 in the evening. He was allegedly a pedestrian at the time. The identity of the driver or make and registration number of the vehicle are unknown.

4.2. A claim was lodged with the Defendant on the Plaintiff's behalf by his attorneys of record on the 25th of June 2019 encompassing the following documents:

4.2.1. An RAF1 claim form with the completed statutory medical claim form by Dr. Izak Stephanus van der Westhuizen dated the 14th of February 2019. In it, Dr. van der Westhuizen records that the Plaintiff was in hospital from the 11th of April 2018 to the 21st of May 2018. He records that the Plaintiff suffered a dislocation fracture of the right ankle. These documents can be found at pages 008-4 to 008-15 of caselines.

4.2.2. An Accident Report Form (OAR) purportedly from the Dobsonville Police Station which appears to have been completed either on the 15th of April 2018 (15/04/2018) or the 15th of September 2018 (15/09/2018). It is difficult to make out, but appears to be closer to the latter date than the former. It also bears a stamp dated the 15th of August 2018 (15/08/2018) from the Parkview Police Station on the last page. This document appears at pages 008-17 to 008-20 of caselines. According to the section dealing with "brief description of the accident" on the form the following is recorded:

“I was crossing Bram Fischer Road and a motor vehicle came speeding and bump me. I did not clearly see the make and registration number of motor vehicle that bumped me. The motor vehicle which bumped me did not stop.”

4.2.3. Copies of the hospital records which appear at pages 008-21 to 008-34 of caselines.

4.2.4. A statutory affidavit by the Plaintiff in terms of section 19(f)(i) of the RAF Act 56 of 1996, commissioned at the Linden Police Station on the 24th of May 2018. This document appears at pages 008-36 to 008-39 of caselines. The following description of how the accident occurred is recorded as follows at page 008-37:

“I was standing on the pavement when an unknown private car knocked me down”

There is a rough sketch showing the point of impact on the side of the road well outside the road surface appearing at page 008-38 of caselines.

4.2.5. A copy of the Plaintiff's Zimbabwe identity card, which appears at page 008-40 of caselines.

4.3. Summons was issued on the 31st of January 2020 and served on the Defendant on the 3rd of February 2020.

4.4. A plea emanating from the offices of Maluleke, Msimang and Associates, the Defendant's erstwhile attorneys of record, was served on the 4th of March 2020. They subsequently withdrew as the Defendant's attorneys of record on the 17th of September 2020. All subsequent process and notices were served on the Defendant directly at its offices at No. 10 Junction Avenue, Parktown, which was reflected as the last known address of the Defendant in the Notice of Withdrawal as Attorneys of Record. It is noted from paragraph 4 of the plea that it does not contain an admission that the Plaintiff complied with the relevant provisions of the Road Accident Fund as far as the lodgement of the necessary and statutorily required documentation is concerned. This issue was thus one that the Plaintiff was still required to prove at the hearing of this matter. A copy of the plea can be found at pages 002-10 to 002-14 of caselines.

4.5. An order compelling the Defendant to comply with several requests in terms of the rules of court was granted by Windell J on the 4th of October 2021. The Defendant failed to comply and its defence was struck out on the 14th of December 2021.

5. The Plaintiff was lead by Adv. van Wyk. He testified that:

5.1. He was injured in a motor vehicle accident on the 10th of April 2018. He was a pedestrian at the time.

5.2. The accident happened at around 19h00 on the street that separates Bram Fischerville and Roodepoort. It is a two way road, with a lane meant for

travel in each direction. There were no street lights and the sun had already set. The road was straight.

5.3. He was on his way from Roodepoort to Bram Fischerville and had almost completed crossing the road with his left leg already on the pavement when he was knocked down by a red vehicle which had swerved to avoid a pothole on the road. The vehicle did not have its lights on.

5.4. He never saw the vehicle approaching as it had no lights. The vehicle that went past just prior had its lights on. There was no way for him to avoid the collision.

5.5. There was space for the insured vehicle to go past, but because it was trying to avoid a pothole, it ended up colliding with him. The pothole is still there and hasn't been repaired in all this time.

5.6. He immediately felt the impact on his right leg when he was hit by the vehicle. After hitting him, the insured driver braked as the Plaintiff's leg was still attached to the vehicle. The insured driver then reversed, apologised to the Plaintiff, and drove off leaving him lying there on the side of the road.

5.7. He called his girlfriend who came about ten minutes later and called the ambulance. The ambulance personnel, after treating him, took him to Chris Hani Baragwanath hospital.

6. The Plaintiff further testified that his name is Absalom Gwizi. He was referred to the RAF1 claim form and asked if he was present when it was completed. The Plaintiff said he was unable to read the document.

7. The Plaintiff was asked if at some point he went to report the matter to the police station. He testified that he was given a call from a number while he was in hospital to call back. When he left hospital he went to the police station where measurements of his right leg were taken. As to why police officers would want to take measurements of his injured leg is unexplained.
8. The Plaintiff confirmed that the document appearing at page 008-40 of caselines was his Zimbabwean Identity Card. His name is reflected as Absalom Gwizi thereon and his date of birth as the 4th of June 1979. He further confirmed that the document appearing at page 008-55 of caselines was his South African asylum seeker permit. According to this document his first name is reflected as Absalom and his surname as Gwizi. It further reflects his date of birth as the 4th of June 1979 and his Nationality as Zimbabwean. It allows him to study and work in South Africa as is due to expire in May 2024.
9. The Plaintiff was thereafter referred to the police accident report (OAR) appearing at page 008-17 of caselines, and asked why the name of Absalom Sibanda appeared thereon, and not Absalom Gwizi. He testified that Sibanda was his clan name, not his surname, and that his girlfriend gave these details to the hospital. The hospital records also reflect his name as Absalom Sibanda. As to how this name came to be reflected on the OAR is unexplained.

10. The Plaintiff testified that he was in hospital for about six weeks and that the internal pin placed in his right leg was still there and was uncomfortable. This would be consistent with the RAF1 statutory medical report.
11. Upon questioning by me the Plaintiff testified that:
 - 11.1. He was born in Zimbabwe on the 19th of October 1979. This is different from the details appearing on his identity card and asylum seeker permit.
 - 11.2. He came to South Africa in 2002 and has been renting the same shack in Bram Fischerville since his arrival. The rental is presently R650 per month. He stays there alone and has access to an outside toilet.
 - 11.3. He delivers hardware material for a living and averages between R1500 and R1600 per day, but not every day. He used to earn an average of R10000 per month. He used to hire a truck but couldn't remember how much he used to pay to do so.
 - 11.4. He reported the accident at Dobsonville police station some months afterwards. He told the police that the vehicle that collided into him was a red vehicle and gave the same version to the police and his attorneys that he gave in court. He denied giving them the version contained in the statutory affidavit appearing at page 008-37 of caselines.
 - 11.5. On the evening in question he was going from Roodepoort to Bram Fischerville after having purchased some paraffin.
 - 11.6. He had drunk two beers about thirty minutes before the incident.

12. When I asked about an entry in the hospital records appearing at page 008-25 of caselines reflecting that he was intoxicated, the Plaintiff testified that he would not be able to argue with that, as his breath was tested before he was taken for X-rays.
13. Apart from the anomalies appearing on the police accident report (OAR) regarding the date it was completed, how the Plaintiff's clan name of Sibanda instead of his surname of Gwizi came to be on it, and why it bore a stamp from a police station other than the one where the accident was reported, it contains a version at odds with what the Plaintiff testified to in court or that appearing in the statutory affidavit. Nowhere therein is there a mention of the car that collided into the Plaintiff as being red in colour, nor that it swerved to avoid a pothole, nor that it was driving with its lights off, nor that the driver stopped and apologised before driving away. If it was completed on the 15th of April 2018, this would have happened at a time when the Plaintiff was still in hospital. If it was done on the 15th of September 2018, it begs the question as to why this was done so long after the statutory affidavit in terms of section 19(f)(i) was commissioned, or why it bears a stamp of the 15th of August 2018 (15/08/2018) from the Parkview police station when the document emanates from the Dobsonville police station.
14. The version given in the statutory affidavit is completely at odds with the version in the police accident report and with the version given in court. In addition, the Plaintiff by his own admission was under the influence of alcohol at the time. A case may be made out that there was non-compliance with the provisions of

section 19(f)(i)¹ of the RAF Act 56 of 1996. See in this regard the case of Nonxago v Multilateral Motor Vehicle Accidents Fund², which dealt with the similarly worded provisions of article 48(f)(i)³ of the Schedule to Act 93 of 1989, which was the predecessor of section 19(f)(i).

15. In Nonxago supra, the last sentence of paragraph [34] of the judgment reads as follows:

“The position is thus that the plaintiff’s attorney wittingly and deliberately submitted affidavits to the defendant that were false in material respects. To countenance such conduct would be to negate the purpose of article 48(f)(i). The comments made earlier concerning an affidavit being a solemn document which could be accepted as being reliable, i.e., as being true in the sense of being honest, come into play. The two documents do not

¹ The section reads as follows:

The Fund or an agent shall not be obliged to compensate any person in terms of section 17 f or any loss or damage-

- (f) if the third party refuses or fails-
 - (i) to submit to the Fund or such agent, together with his or her claim form as prescribed or within a reasonable period thereafter and if he or she is in a position to do so, an affidavit in which particulars of the accident that gave rise to the claim concerned are fully set out;

² [2005] 4 All SA 567 (SE)

³ The article read as follows:

“The MMF or an appointed agent, as the case may be, shall not be obliged to compensate any person in terms of Chapter XII for any loss or damage –

- (f) if the claimant refuses or fails –
 - (i) to submit to the MMF, or the appointed agent, together with his claim form, as prescribed by the Board, or within a reasonable period thereafter and if he is in a position to do so, an affidavit in which particulars of the accident that gave rise to the claim are fully set out;

satisfy these requirements. In my judgment, where the shortcomings in the affidavit concerned false statements of material facts and where such statements were wittingly and deliberately included therein, the calculated effect of which was the misleading of the defendant and the perpetration of a fraud on it, there can be no suggestion of proper or substantial compliance with the provisions of article 48(f)(i).”

16. In the present case if the version contained in the statutory affidavit is true the Plaintiff’s testimony in court is false and vice versa. They cannot both be true, although both may be false. If the version in the statutory affidavit is false, either the Plaintiff or his attorney or both conspired to submit an affidavit that is false in material respects. If so, the requirements of section 19(i)(f) have not been complied with and the Plaintiff’s case stands to be dismissed. If the version given in court is false, then it has to be rejected in which case the Plaintiff has not discharged the onus resting on him.

17. Adv. van Wyk argued that an apportionment should be applied in light of all the contradictions between the statutory affidavit, the version appearing in the police report, the version testified to in court and the fact that the Plaintiff, on his own version was drunk at the time of the accident. However, before a court can do so, a finding needs to be made as to which of these versions, or aspects thereof, reflect the probability of what happened on the evening in question. Unfortunately no such finding can be made on the evidence before court.

18. Adv. van Wyk further argued that an adverse inference of negligence against the insured driver should be drawn from the fact that he drove away after the collision. This again presupposes that the Plaintiff should be believed when he says that he was knocked down by a motor vehicle. Not only am I unable to make this finding, but even if I could, the mere fact that the insured driver drove away or may not have reported the accident cannot, on the evidence before court, be used to impute negligence on his or her part.

19. In the case of *Goodenough NO v Road Accident Fund*⁴ at paragraph [15] the following was said:

“This brings me to the further fact contended for by the appellant, namely that the driver who had collided with Modise failed to stop after the collision and drove away after rendering assistance. On a proper analysis of the evidence it is apparent however that a positive finding of this 'fact' cannot be based on direct evidence, but is in turn also dependant on an inference from other facts. This latter inference is in itself not justified on the available evidence. One simply does not know what happened after the collision. It is just as possible that the driver did take Modise to the hospital. It is true that the driver did not report the matter to the police, as he should have done. Whether such failure gives rise to an inference of negligence on the part of a driver involved in a collision is, of course, dependant on all the circumstances of the particular case. Numerous other possible explanations spring to mind.

⁴ (441/2002) [2003] ZASCA 81 (15 September 2003)

The driver could have been driving without a licence or the vehicle could have been unlicensed or the driver could have been at a place where he should not have been. Or, as suggested by Botha JA in his minority judgment in *Motor Vehicle Assurance Fund v Dubuzane* 1984 (1) SA 700 (A) 706G-H:

'A feeling of guilt coupled with a desire to escape the consequences of self-perceived culpability, is but one possible explanation of the driver's conduct amongst a host of possible explanations which are consistent with an absence of negligence on the driver's part.' “

20. In the full bench appeal decision of *Road Accident Fund v Moeti*⁵ at paragraph [15] Mynhard J in penning the unanimous judgment said the following:

“In my view the finding of DE VOS, J, that the driver of the insured vehicle was negligent, is clearly wrong. The court does not know, for instance, what damage was done to the insured vehicle, was it damaged on the side or on the front part thereof; and, consequently, whether he could have run into the side of the vehicle as it was passing; nor does the court know where on the road the accident occurred; the fact that the deceased was lying near the middle of the road does not prove that he was hit at that point, he could have been flung there as a result of the impact. The court also does not know whether the deceased tried to cross the street or

⁵ (A2115/04) [2007] ZAGPHC 10 (7 March 2007)

whether he stepped into the road in front of the approaching insured vehicle. The court does not know whether there were cars parked on the side of the road which probably shielded the deceased from the approaching driver, until he stepped into the road from behind a parked vehicle. The fact that the deceased was highly intoxicated would have caused him to behave irrationally, a matter of common knowledge; and the court does not know whether he did so behave. That could have caused him to step into the road at an inopportune moment when a collision was inevitable.

In regard to the fact that the driver did not stop after the accident, the court knows that he drove off because he was afraid of being assaulted. That is certainly an acceptable explanation and by no means proves that he had a guilty conscience. One cannot, in my view, infer from the fact that the driver did not stop after the accident, that he was negligent in causing the collision.

The present case is therefore a text book example, in my view, of the court being "utterly in the dark as to the actual circumstances under which the collision occurred" as was said by BOTHA, JA in his minority judgment in *Motor Vehicle Assurance Fund v Dubuzane* 1981 1 SA 700 (A) at 708F. See also *Mpofu v Multilateral Motor Vehicle Accident Fund* [2000] 2 All SA 238 (Tk)."

21. In the present case there may be any number of explanations consistent with the non-negligence of the insured driver for why he or she drove off or didn't report

the accident. Amongst others, being in an unfamiliar place after dark may be one such explanation.

22. In the premises, the Plaintiff's action stands to be dismissed.

23. Before concluding, I highlight once again the unsatisfactory supine attitude to litigation adopted by the RAF that lead in this case to the striking out of what was clearly a meritorious defence, at least as far as the issue of liability is concerned. In the recent case of L.N and Another v Road Accident Fund⁶ in the Pretoria High Court Davis J described the RAF as being a "perpetually recalcitrant or delinquent litigant". It is clearly not fulfilling its mandate of properly investigating and defending unmeritorious claims, like the present one.

24. This is in no way meant to be a criticism of what I am told are the seventeen odd legal practitioners belonging to the RAF unit of the State Attorney in Johannesburg. Most appear to be very conscientious and hard working. Unfortunately they appear to be totally overwhelmed by the sheer volume of matters in court that they have to deal with, and are only seeking to intervene in matters at the proverbial twelfth hour, without an adequate opportunity to investigate and prepare long after the Defendant's defences are struck out for failure to comply with court orders aimed at ensuring matters before court are trial ready by the time that they are heard. These legal practitioners are doing the

⁶ (43687/2020) [2023] ZAGPPHC 274 (20 April 2023)

work of a much larger number of RAF panel attorneys and their employees and advocates who previously dealt with these matters. The unit appears to be severely under resourced and under staffed.

25. There may be valid criticisms of the previous model of appointing panel attorneys who in turn in appropriate cases briefed advocates to deal with matters in court. I won't express an opinion on the issue. However, the current model appears to be even worse and far less effective than what it replaced.

26. I make the following order:

26.1. The Plaintiff's claim is dismissed.



CAJEE AJ
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG

APPEARANCES:

COUNSEL FOR THE PLAINTIFF:	Adv. J. van Wyk
INSTRUCTED BY:	Van Der Elst Inc
COUNSEL FOR DEFENDANT:	Mr. E. M. Mdlovu
INSTRUCTED BY:	State Attorney
DATES OF HEARING:	5 th May 2023
DATE OF JUDGMENT:	10 th July 2023