



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

Case no: **1912/2020**

In the matter between:

GANYANI PHANUEL CHAUKE

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

CORAM: DAFFUE J

HEARD ON: 25 JANUARY 2022

DELIVERED ON: 09 MARCH 2022

This judgment was handed down electronically by circulation to the parties' representatives by email, and release to SAFLII. The date and time for hand-down is deemed to be 16:30 on 09 March 2022.

I INTRODUCTION

- [1] A motor vehicle veered partly off the N6 national road between Reddersburg and Bloemfontein where after the vehicle was steered back onto the tarmac by the driver in which process he lost control, causing the vehicle to veer off to the right hand side of the road and overturn. The vehicle became stationary on the farm land next to the road.
- [2] The main issue to be adjudicated at the end of the trial is whether the aforesaid manoeuvre was a direct consequence of the negligence, even recklessness, of

an unidentified driver of an unidentified motor vehicle who allegedly tried to overtake a heavy vehicle at an inopportune moment.

- [3] It will be kept in mind in this judgment that the Road Accident Fund Act¹ (the Act) represents social legislation aimed at the widest possible protection and compensation against loss and damages for the negligent driving of a motor vehicle.²

II THE PARTIES

- [4] The plaintiff is Mr Ganyani Phanuel Chauke a major male attorney employed as a State Attorney in Bloemfontein. The plaintiff has been represented before me by Adv HE De La Rey, instructed by Honey Attorneys.
- [5] The defendant is the Road Accident Fund, represented in the proceedings before me by Mrs Bornman of the office of the State Attorney, Bloemfontein.

III SEPARATION OF ISSUES IN TERMS OF RULE 33(4)

- [6] The parties agreed during their pre-trial conference to the separation of merits and *quantum* on the basis that the disputed allegations in paragraphs 1, 3, 4, 5, 6 and 11 of the particulars of claim, read with the corresponding paragraphs of the plea, be adjudicated at the hearing and for *quantum* to stand over for later adjudication if required.

IV ISSUES IN DISPUTE TO BE ADJUDICATED

- [7] Subsequent to the agreement entered into between the parties pertaining to separation of issues, the defendant admitted the following:

- 7.1 the defendant's citation;
- 7.2 the plaintiff's citation and *locus standi*; and

¹ 56 of 1996

² *Bezuidenhout v Road Accident Fund* 2003 (6) SA 61 (SCA) at para 7 and cases therein cited pertaining to the Act's predecessor

7.3 the plaintiff's statutory compliance with s 24, read with s 19 of the Act.

[8] Consequently, the following issues are still in dispute regarding the merits:

8.1 The particulars of the motor vehicle accident; and

8.2 The cause of the motor vehicle accident with "particular reference to the insured driver's sole negligence and plaintiff's averred contributory negligence".³

Although no formal order was made to separate issues as agreed upon, there cannot be any dispute what I have to adjudicate. *Quantum* stands over.

V THE PLAINTIFF'S PLEADED CASE AND THE DEFENCES

[9] The plaintiff pleaded his case on the merits in paragraphs 3 to 6 of the particulars of claim. Paragraphs 3, 4 and 5 read as follows:⁴

"3.

3.1 On or about 14 January 2018 at approximately **06h10** and on the N6 road between Reddersburg and Bloemfontein near Tierpoort, Free State Province, within the jurisdiction of the above Honourable Court, a motor vehicle incident occurred involving the following motor vehicles:

3.1.1 An unidentified vehicle with unidentified registration letters- and numbers (hereinafter referred to as "the insured vehicle"), at the time driven by an unidentified driver (hereinafter referred to as "the insured driver") and

3.1.2 A black BMW 320d with registration letters and numbers FWY 984 FS, at the time driven by the plaintiff.

4.

The abovementioned road traffic incident occurred when the insured driver overtook a heavy vehicle at an inopportune moment and entered the plaintiff's lane of travel causing the plaintiff to swerve to his left in an attempt to avoid a head-on collision, resulting in the plaintiff losing control over his vehicle and eventually rolling his vehicle.

5.

The motor vehicle accident was caused as a result of the sole negligence of the insured driver." (emphasis added)

³ Paragraph 24 of the Rule 37 minutes on p 62 of the pleadings bundle

⁴ Pleadings bundle p 7

- [10] One of the causes of negligence specifically relied upon in the particulars of claim is the unidentified insured driver's failure to take reasonable precautions by ensuring that the road was clear of oncoming traffic before executing an overtaking manoeuvre.⁵
- [11] The defendant denied the allegations contained in paragraphs 3 and 4 of the particulars of claim and pleaded that the plaintiff was the sole cause of the accident. Alternatively, and if it is found "that a collision (sic) occurred as alleged by the plaintiff" it was denied that the unidentified driver was negligent. The usual further alternative defences in these kind of cases were pleaded, *inter alia* relying on the plaintiff's contributory negligence.⁶
- [12] It is emphasised that the plaintiff elected to plead that the incident occurred at approximately 06h10 on the N6 road near Tierpoort between Reddersburg and Bloemfontein. This information is in line with the SAPS Accident Report Form ("the AR") filed with the plaintiff's claim documents with the defendant in accordance with the plaintiff's obligation in terms of the Act.⁷ The plaintiff repeated the time of 06h10 when he sought confirmation from the defendant about the issue in dispute, which the defendant still denied.⁸

VI THE LEGISLATION AND AUTHORITIES

The Road Accident Fund regulations and authorities pertaining thereto:

- [13] In *Pithey v Road Accident Fund*⁹ the Supreme Court of Appeal considered the differences between s 17(1)(a) and 17(1)(b) and held that there is a fundamental difference between claims filed in respect of either s 17(1)(a), or s 17(1)(b) if the Act and regulation 2(3) are considered.¹⁰ A claim in terms of the latter sub-section must be filed within two years from the date of the accident which is a year shorter than in the case of identified vehicle claims.

⁵ Para 5.5 (it is incorrectly numbered and should be 6.5) on p 8 of the pleadings bundle

⁶ Paras 3 & 4 on p 38 & 39 of the pleadings bundle

⁷ Section 19(f)

⁸ Para 7.3 of the pre-trial minute on pp 57 & 58 of the pleadings bundle

⁹ 2014 (4) SA 112 (SCA)

¹⁰ *Ibid* paras 24 & 25

[14] The plaintiff's claim falls squarely within the parameters of s 17(1)(b) of the Act insofar as neither the identity of the owner of the motor vehicle, nor the driver thereof has been established. For about a decade since the promulgation of the Act, regulation 2(1)(c) of the regulations issued under the Act was accepted to be good law, although the reasonableness of the time limit in the regulation was questioned from time to time. The regulation to be read with s 17(1)(b) read as follows:

"(1) In the case of any claim for compensation referred to in s 17(1)(b) of the Act, the Fund shall not be liable to compensate any third party unless -

. . .

(c) the third party submitted, if reasonably possible, within 14 days after being in a position to do so an affidavit to the police in which particulars of the occurrence concerned were fully set out."

[15] It is unnecessary to deal with a long line of cases prior to the eventual declaration of unconstitutionality of the regulation by the Constitutional Court in *Engelbrecht v Road Accident Fund and Another*,¹¹ save to have regard to some aspects that concerned our courts over the years.

[16] Although the period of 14 days provided for in regulation 2(1)(c) was short which made compliance often impossible bearing in mind so many poor, illiterate and unsophisticated people in our country and also that injured people were still hospitalised during the particular period, the purpose of the regulation was no doubt to ensure that the relevant facts relied upon were put on record as soon as reasonably possible by injured persons and/or dependents in the case of death. During the years it became clear that neither the South African Police Service, nor the Road Accident Fund used these affidavits meaningfully during their investigations. The readers of this judgment are also reminded of the statutory situation that applied years ago in terms whereof the regulations required physical contact to have occurred between the vehicle involved in a "hit and run" case and the claimant before liability could arise. In *Road Accident Fund v Makwetlane*¹² the Supreme Court of Appeal had no difficulty to find that such a regulation would infringe the principle of legality.¹³ Although the majority

¹¹ 2007 (6) SA 96 (CC)

¹² 2005 (4) SA 51 (SCA)

¹³ *Ibid* at para 25

held that a regulation which imposes a reasonable time limit for the lodging of a claim was held not to be *ultra vires*, it went further to find that regulation 2(1)(c) was *ultra vires*.¹⁴ The latter finding was overruled by the Constitutional Court in *Engelbrecht v Road Accident Fund and Another supra*.

- [17] In *Road Accident Fund v Thugwana*¹⁵ the Supreme Court of Appeal agreed with the *dictum* of Harms JA in *Mbatha v Multilateral Motor Vehicle Accidents Fund*¹⁶ and I quote:

"In these cases the possibility of fraud is greater; it is usually impossible for the fund to find evidence to controvert the claimant's allegations; the later the claim the greater the fund's problems. . . ."

The court noted that the purpose of regulation 2(1)(c) was to reduce the problems mentioned by Harms JA in *Mbatha*.

- [18] In *Pithey supra* the court considered the implications of s 19(f) of the Act and more particularly the purpose thereof.¹⁷ I quote:

"[17] Second, s 19 excludes liability in the event of a failure to provide information in a particular form. Section 19(f) provides that 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; or

(ii) to furnish the Fund or such agent with copies of all statements and documents relating to the accident that gave rise to the claim concerned, within a reasonable period after having come into possession thereof —

the Fund shall not be obliged to compensate the third party in terms of s 17 for any loss or damage. The affidavit and copies of statements and the documents mentioned in s 19(f) are required to provide details of how the accident giving rise to the claim arose. It is abundantly clear that the purpose of this provision is, inter alia, to furnish the Fund with sufficient information to enable it to investigate the claim and determine whether or not it is legitimate.

"

- [18] I pause to say something about the primary purpose and objectives of the Act. It has long been recognised in judgments of this and other courts that the Act and its predecessors represent 'social legislation aimed at the widest possible protection and compensation against loss and damages for the negligent driving of a motor vehicle'. Accordingly, in interpreting the provisions of the Act, courts are enjoined to bear this factor uppermost in

¹⁴ Ibid paras 26 & 47

¹⁵ 2004 (3) SA 169 (SCA) at para 10

¹⁶ 1997 (3) SA 713 (SCA) at 718 H – I

¹⁷ *Pithey supra* at paras 17 & 18

their minds and to give effect to the laudable objectives of the Act. But, as the full court correctly pointed out, the Fund, which relies entirely on the fiscus for its funding, should be protected against illegitimate and fraudulent claims." (emphasis added and footnotes omitted)

The limits of judicial notice:

- [19] It is not appropriate for presiding officers to act on their personal knowledge of facts and "be allowed freedom to decide merely according to the secret knowledge of their own minds without regard to evidence, for that would be in the way to make all legal proceedings capricious,"¹⁸ Having said this, facts that are well-known to all reasonable persons or to a reasonable court in the specific locality may be taken judicial notice of.¹⁹ Facts that are easily ascertainable, although not generally known, may also be taken judicial notice of. The sources from which the facts are ascertainable, should however be of indisputable authority. In *Sibuyi and Others*²⁰ the court held that although a court may take judicial notice of the accuracy of almanacs, diaries and calendars regarding days and months, that does not mean that these documents are indisputably accurate as regards the phases of the moon, the setting and rising of the sun, or the state of the tides.²¹

Reaction time:

- [20] In order to establish whether it would be possible for anyone to avoid a motor vehicle collision, aspects such as the distance between approaching vehicles or the distance between an oncoming vehicle and a pedestrian as well as the reaction time of the person that tried to avoid the collision should be taken into consideration. Although it is always difficult to expect of a witness on the witness stand to estimate aspects such as time and distances, especially bearing in mind the fact that the various objects are not stationary at any given time prior to a collision, it is often worthwhile to make use of a mathematical

¹⁸ *R v Tager* 1944 AD 339 at 344-5 dealing with the presiding officer's knowledge of the ingredients of milk shakes

¹⁹ See Schwikkard and Van der Merwe, *Principles of Evidence* 4th ed at p 518 and further; and Zeffertt v Paizes, *The South African Law of Evidence* 2nd ed at p 867 and further; Schmidt and Rademeyer, *Law of Evidence*, Lexisnexis loose leaf edition pp 6-3 – 6-13 for a general overview

²⁰ 1988 (4) SA 879 (T)

²¹ *Ibid* at 881 F – G

exercise to establish probabilities. Reaction time is often regarded by accident reconstruction experts to be anything between $\frac{3}{4}$ of a second and one second.²²

Sudden emergency and contributory negligence

- [21] It is trite that, although it is the duty of every person to avoid an accident, that does not mean that he or she should be held liable for negligence where it was clearly stated that a driver confronted with a sudden emergency has a split second or a second to consider the pros and cons before he acts and surely cannot be blamed for exercising the option which resulted in a collision.²³ The Appeal Court held in *Rodrigues v SA Mutual & General Insurance Company Ltd*²⁴ that a mere error of judgment did not amount to negligence.²⁵

Distance travelled and speed

- [22] Most grade seven pupils will be able to calculate that an object moving at 90 km/h travels 90 km in an hour if that speed is maintained throughout the period and 180 in two hours if the same principle applies. Simultaneously, if the speed is 80 km/h, the distances travelled in one and two hours will be 80 km and 160 km respectively.
- [23] The same average learner will also be able to calculate that someone travelling at 90 km/h, travels at 25 metres per second, ie $90\,000 \text{ metres} \div 3\,600 \text{ seconds}$. There are 3 600 seconds in an hour. One may also divide the speed in kilometres per hour by 3.6 as the author of *Motor Law* preferred to do.²⁶ This means that two vehicles approaching one another from opposite directions, each travelling at 90 km/h, will reach each other from a distance of 50 metres within 1 second. Returning to reaction time of 1 second, neither driver will be able to make any attempt to avoid the collision in this example. If $\frac{3}{4}$ of a second

²² See for example the evidence of Professor Lemmer referred to and accepted in *Road Accident Fund v Grobler* 2007 (6) SA 230 (SCA) footnote 1; In *Pretorius v African Gate & Fence Works* 1939 AD 567 at 575 and *R v Goodall* 1969 (3) SA 541 (RA) at 543 A – B a reaction time of $\frac{3}{4}$ second was considered reasonable

²³ See *Cooper v Armstrong* 1939 OPD 140 at 148; *South African Railways v Symington* 1935 AD 37 at 45; *Sierborger v South African Railways and Harbours* 1961 (1) SA 498 (A) 506 D – G; and *Nisala and Others v Mutual & Federal Insurance Company Ltd* 1996 (2) SA 184 (T) 192 G – H

²⁴ 1981 (2) SA 274 (A) at 280 H – 281 A

²⁵ See also *Road Accident Fund v Grobler* 2007 (6) SA 230 (SCA) at paras 8, 9 & 12

²⁶ Cooper, *Delictual Liability in Motor Law*, vol 2, 1996 ed at p 492

reaction time is accepted, the vehicles will travel 37.5 metres before any of the drivers will react to avoid a collision.

VII EVALUATION OF THE EVIDENCE IN LIGHT OF THE AUTHORITIES

[24] The plaintiff's claim documents were properly bound, indexed and paginated by his attorneys and a copy was presented to the defendant's attorney before the start of the trial. Mrs Bornman appearing for the defendant sought leave to hand the bundle in during the trial. Mr De La Rey did not object to the handing in as such, although he had certain reservations. I accepted the bundle as Exhibit "A". Eventually only two documents from the bundle, containing 208 pages, were referred to during evidence, to wit the AR²⁷ to which is attached an affidavit of a SAPS officer, Mr Ebersohn and the plaintiff's warning statement,²⁸ as well as the plaintiff's s 19(f) affidavit.²⁹ I shall deal with this and the evidence in that regard later herein. I wish to point out that the parties agreed as follows during their pre-trial conference:

"DOCUMENTS THAT WILL BE SERVED AS EVIDENCE WITHOUT FURTHER PROOF"

The parties' record that the status of documents discovered, to the extent that they are what they purport to be, should be used in evidence."³⁰

[25] It is trite that where a litigant fails to adduce evidence about a fact in dispute such party runs the risk that his or her opponent's version might be believed and accepted.³¹ The same applies to a litigant who merely denies the opponent's allegations, but fails to place specific facts before the court to support his or her version.³²

[26] Having said this, it does not automatically mean that if no evidence is adduced to contradict a litigant's version, that version must be accepted. It depends on the probative strength of the evidence. The failure to call an available witness is only one of the factors to be taken into account in drawing an inference

²⁷ Exhibit "A", pp 15-24

²⁸ *Ibid*, pp 19 & 20 and 21 -23 respectively

²⁹ *Ibid* pp 25-27

³⁰ Para 11, pleadings bundle p 59

³¹ *Brand v Minister of Justice and Another* 1959 (4) SA 712 (A)

³² *Van Der Westhuizen NO v Kleynhans and another* 1969 (3) SA 174 (O) at 176 - 177

against the opposing party, as due regard must be had to all the circumstances of the case, including the strength of the case presented.³³

[27] The following well-known *dictum* of *Galante v Dickinson*,³⁴ which is often applied in accidents and similar cases is for obvious reasons not relevant *in casu*. I quote:

“It is not advisable to seek to lay down any general rule as to the effect that may properly be given to the failure of a party to give evidence on matters that are unquestionably within his knowledge. But it seems fair at all events to say that in an accident case where the defendant was himself the driver of the vehicle the driving of which the plaintiff alleges was negligent and caused the accident, the court is entitled, in the absence of evidence from the defendant, to select out of two alternative explanations of the cause of the accident which are more or less equally open on the evidence, that one which favours the plaintiff as opposed to the defendant.” (emphasis added)

[28] Before I deal with my evaluation of the evidence I deem it apposite to mention the following. After closing argument and during preparation of the judgment I requested the parties to indicate whether I could take judicial notice of certain aspects. The following was agreed by the plaintiff and the defendant’s legal representatives:

1. On 14 January 2018 the time of sunrise in Bloemfontein was 05h29;
2. A period of approximately half an hour prior to sunrise, ie from 05h03 to 05h29 could not be described as daylight, but as civil twilight.
3. Civil twilight is defined and described as follows:

“the period after sunset or before sunrise ending or beginning when the sun is about 6 degrees below the horizon and during which on clear days there is enough light for ordinary outdoor occupations.”³⁵

Also as follows: “Civil twilight is the brightest form of twilight. There is enough natural sunlight during this period that artificial light may not be required to carry out outdoor activities.”³⁶

These definitions were provided by the defendant’s legal practitioner, but not objected to on behalf of the plaintiff.

³³ *Ferreira v Santam Insurance Co Ltd* 1995 (3) SA 287 (SE) at 290 H - I

³⁴ 1950 (2) SA 460 (A) at 465

³⁵ <https://www.merriam-webster.com/dictionary/civil%20twilight>

³⁶ <https://www.timeanddate.com/astronomy/different-types-twilight.html>

4. Insofar as the incident occurred in the vicinity of Tierpoort, it was accepted that it occurred approximately 30 km from Bloemfontein.³⁷

[29] The plaintiff was the only witness called upon to explain what happened in the early morning of 14 January 2018 close to Tierpoort on the N6 national road between Reddersburg and Bloemfontein. It is common cause that the incident occurred approximately 30 km from Bloemfontein, that the N6 is a tarred road carrying single lane traffic in opposite directions with gravel shoulders. Insofar as the plaintiff testified that Bloemfontein and Aliwal North are approximately 215 km from each other, he was more or less correct, depending from where exactly in Aliwal North to where in Bloemfontein he was travelling. The distance between the two places is indicated as 199 km on a recognised map available in our country such as MapStudio.³⁸ It is also common cause, alternatively not seriously disputed, that the collision occurred near Tierpoort, 30 km south of Bloemfontein and thus between 170 and 185 km from Aliwal North, depending on which of the aforementioned distances are used.

[30] It is not the plaintiff's case that he was coming around a curve immediately prior to the incident or that the road was sloped. On his version he never went back to the scene of the incident. Fact of the matter is that he relied on the AR in accordance with the provisions of s 19(f) of the Act in support of his claim filed with the defendant. It should be mentioned that the plaintiff's affidavit in terms of s 19(f) of the Act is dated 24 June 2019 and although reference is made therein to the road as the N8, it is no doubt incorrect insofar as the road is indeed the N6.

[31] It is the plaintiff's case in his pleadings that the collision occurred at 06h10 although he did not say a word about this in his evidence. He testified that he left Aliwal North at approximately 04h00 or 04h05. Along the way he got lost for a while, had to stop for approximately 10 minutes at a "stop-and-go" where road works were undertaken as well as to fill up his vehicle with diesel and to buy water and snacks. If it is accepted that the stop at the filling station took another 10 minutes, the plaintiff's travel to Bloemfontein was delayed by 20

³⁷ www.timeanddate.com/sun/south-africa/bloemfontein; and www.meteogram.com/sun/south-africa/bloemfontein

³⁸ See MapStudio's Glovebox Road Atlas or visit www.mapstudio.co.za

minutes, effectively decreasing the time to reach the point of impact. It would have taken him, travelling at a speed of 90 km/h, just about two hours to arrive at the spot where the incident occurred. Logic dictates that the incident would have taken place between 06h20 and 06h25 if he maintained that speed throughout. If his average speed was 80 km/h, the time of the incident would have been after 06h30. For obvious reasons the incident could not have taken place on any of these times, unless it could be held that the AR is forgery of some sort. There is no suggestion in this regard. It also does not lie in the mouth of the plaintiff to say that the AR should be ignored completely insofar as it was not properly proven. Clearly, the time of the incident is extremely important, bearing in mind the plaintiff's repeated version that it was still dark when the incident occurred and that the lights of all three relevant vehicles were on at that stage. In fact, accepting that an opportunity to observe was also an issue, it is the plaintiff's case that it was so dark that it was not possible to provide any information about the vehicle that was allegedly in the process of overtaking the heavy vehicle. No information in respect of the make of the vehicle or its colour could be provided.

- [32] Furthermore, and bearing in mind the evidence of the plaintiff and the calculations made earlier based on his evidence, the sun would have arisen nearly an hour before the time of the incident, to wit at 05:29. This explains why the AR refers to daylight at the time when the report was filled out. It is uncertain exactly when the AR was filled out. If the incident occurred at 06h10, or if the report of the incident was received at that time, it is impossible that the report could be signed at 06h10 as the signatory indicated next to his signature. I accept that the AR was completed after 06h10, but this does not change anything bearing in mind when the sun has arisen that morning. For a reason unknown to the court, the plaintiff who maintained that he was in severe pain (which is accepted) tried to create the impression that no police officer attended the scene before he was taken to hospital. Logic dictates that at least the officer who completed the AR must have obtained the plaintiff's personal details such as his initials and surname, identity number and home address. Information pertaining to the identity of the Government EMS employee who took plaintiff to the Pelonomi hospital as well as the registration number of the ambulance

are recorded on the AR and also the name of the person from the breakdown business and the name of that business.³⁹

- [33] I accept that people are often making use of estimates pertaining to time, distances and speed and that eyewitnesses cannot always be held to such estimates, especially when these later on appear to be improbable or in conflict with other reliable evidence or objective facts. Even honest witnesses are from time to time caught out of making innocent mistakes. *In casu*, the plaintiff never tried to rebut the version contained in paragraph 3.1 of his particulars of claim indicating that the incident occurred at approximately 06h10. On his version in court it was not daylight, but still dark, although he was not prepared to give even an estimated time of the occurrence. If the version that it was still dark is accepted, he is either seriously mistaken as to when he left Aliwal North (which had to be much earlier than 04h00), or he travelled at about 200 km/h in order to reach the Tierpoort area in the dark and thus before twilight.
- [34] What is the court's duty in regards to these estimates? Should all these just be ignored and it be accepted that it was still dark when an incident occurred as a direct consequence of an unidentified driver in an unidentified motor vehicle recklessly overtaking a heavy vehicle in the face of the plaintiff's oncoming vehicle, causing the plaintiff to execute the manoeuvre testified about, his losing control of the vehicle and the eventual overturning thereof which in turn caused severe injuries to the plaintiff? Can a court accept this version without subjecting it to proper examination and evaluation even insofar as the defendant failed to rely on any contradictory evidence in circumstances where it could not reasonably be expected of the defendant to find eyewitnesses, unlike as was the case in *Galante v Dickinson supra*?
- [35] The plaintiff is an admitted attorney. Honesty and integrity are expected of attorneys, particularly pertaining to their professional lives. Does this mean that a court should in all instances accept the mere say-so of an attorney who is a litigant in a civil suit claiming money for himself? If that is so, this court could just as well rubber-stamp the particulars of claim and issue judgment in favour

³⁹ AR in exhibit "A", p 15

of the plaintiff on the merits of the matter. Unrelated to the issue at hand, but not totally irrelevant, is regulation 7(1) of the regulations issued under s 10 of the *Justices of the Peace and Commissioners of Oaths Act*⁴⁰ which stipulates that a commissioner of oaths shall not administer an oath or affirmation relating to a matter in which he has an interest. It is trite that the commissioner of oaths shall be impartial, unbiased and entirely independent of the office where the affidavit is prepared. No doubt, an important object of the rule is to prevent an attorney from drawing up an affidavit and in doing so putting words in the mouth of the deponent and then himself taking the oath of the deponent. There is also the obvious danger that the deponent may be influenced in regard to the contents of the affidavit.⁴¹ Caney J stated in *Royal Hotel, Dundee and others v Liquor Licensing Board, Area 26 Durnacol Recreation Club v Liquor Licensing Board, Area 26*⁴² that “because it is in the attorney’s interest to bring his client’s affairs to a successful conclusion, he cannot be impartial and unbiased; if he functions as a commissioner of oaths in the matter, he is not independent.”

- [36] I raised the issue of judicial notice for a specific reason insofar as I mentioned during the evidence of the plaintiff that I, as a cyclist, was fully aware of the time when the sun rises during summer in the Free State and in Bloemfontein in particular. Thousands of people travelling to work or doing outdoor exercises like jogging, cycling and/or going to the gym before work, and also reasonably well-informed people in the Bloemfontein area will know that from at least 05h00 in the middle of January there is sufficient light for ordinary outdoor activities and also that the sun rises long before 06h00. The acceptance by the parties that judicial notice could be taken of the aspects mentioned above is confirmation of my personal knowledge. The same road atlas referred to earlier shows that the N6 from Bloemfontein to the first town, Reddersburg, follows a course directly south of Bloemfontein. The effect hereof is that along this stretch of the road the sun will rise at exactly the same time as in Bloemfontein.

⁴⁰ Act 16 of 1963

⁴¹ *Radue Weir Holdings Ltd v Galleus Investments CC* 1998 (3) SA 677 (ECD) at 680E – 681G

⁴² 1966 (2) SA 661 (N) at 669H – 670A

[37] I have serious issues with the plaintiff's version and without being unnecessary critical and bearing in mind that I may repeat myself, I mention the following:

- 37.1 Although the plaintiff many times referred to words like "more or less", he was certain that he left Mpumalanga on the previous Thursday evening at approximately 18h00 to arrive in Bloemfontein after a 1000 km and 10-hour drive at approximately 06h00 on Friday morning. The relevance of this information, especially insofar as he was not asked to tender this evidence, escapes me.
- 37.2 He left Bloemfontein on Saturday afternoon to arrive in Aliwal North at approximately 16h00. It was the first time that he used this road and he made use of Google maps to find his way. This in itself is quite strange if one considers that the N6 is the main road between Bloemfontein and East London passing through *inter alia* a town like Aliwal North.
- 37.3 He and his old friend whom he knew from their working days in Gauteng socialised until approximately 23h00 that Saturday evening. They enjoyed some cold drinks and juice, but no alcohol. He woke up at about 04h00 and left his friend's house at approximately 04h05 after having "said my good-byes." He got lost and missed the filling station that he saw the previous day on his arrival. Therefore, he again made use of Google maps to find his way to the main road.
- 37.4 He eventually had his vehicle filled up with diesel and simultaneously did purchases at the convenience store. He could not say where this was which is quite extra-ordinary, bearing in mind he was using Google maps to find his way. He merely mentioned that it was whilst on route to Bloemfontein. He waited for approximately 10 minutes at a "stop-and-go" in which process he embarked from the vehicle to communicate with the person in control. He travelled at approximately 80 to 90 km/h along the way notwithstanding his BMW320d and the speed limit applicable to national roads of 120 km/h as reflected on the AR. When he was asked about this slow pace, he stated that "I might

have driven a very fast motor vehicle at that time, but I am not, it might sound like a cliché, but I am not really a speedy type of person.”

37.5 Instead of answering questions put to him by his own counsel directly, he on more than one occasion referred to other issues instead of answering the questions directly. The first example is the instruction to tell the court what happened from the Saturday before the incident. He decided to inform us that he went to his family home in December the previous year. After his long explanation, his counsel requested him again to explain what happened the Saturday afternoon and evening. Instead of answering directly, we were informed of the relationship with the friend he intended to visit and their relationship years back in Gauteng. He was again evasive pertaining to the presence of police officers at the scene of the incident. It is accepted that he was in pain, but the impression was clearly created – in fact it was his direct testimony - that his only interaction with the police in regard to the incident was when a female officer – apparently from Tierpoort - visited him at home to take his warning statement.

37.6 On his version he did not pass many vehicles before the incident. He was under the impression that he perhaps passed two vehicles. In cross-examination he specifically said that he maybe passed two vehicles, but he did not particularly remember these vehicles. He was confronted with his affidavit filed with the claim documents wherein he said the following in respect of people’s voices that he heard on the scene:

“They were passengers in a taxi on their way back to Johannesburg. I remember overtaking this taxi sometime before the motor vehicle accident occurred.”⁴³

His attempt to explain why that version is in conflict with his evidence is really futile and not impressive at all.

37.7 Although the plaintiff testified that he was aware that people stopped at the scene, that he could hear their voices and that an ambulance arrived to transport him to Pelonomi Hospital, he did not remember

⁴³ See 2nd para 6 of affidavit on p 26 of exhibit A

seeing the police. The impression was created throughout his evidence that he did not want to place the police on the scene which is contrary to the objective facts.

- 37.8 When he was asked at what time does the sun rise in summer and whether it is still dark outside when he wakes up in the morning, he replied that he did not know. The reason provided for this strange answer is that he stays very close to his workplace and that it takes him about five minutes to get to town. He stated: "I normally don't wake up in the dark myself, unless there is a specific work I had to do".
- 37.9 When he was confronted with the inscriptions in the AR that it was daylight and the weather was clear when the form was filled out, he replied as follows: "I will struggle to give you a comment or to give you a comment M'Lord regarding that, because, when this accident report was committed I wasn't there and I don't even know the police officer who completed this document. So it will be difficult for me to say why did he mark daylight and why did he mark clear."
- 37.10 On the plaintiff's version he was approximately 30 metres from the heavy vehicle when he saw it for the first time. This is already strange, bearing in mind the apparently flat and straight road and whether or not it was still dark or daylight at the time is immaterial as on his version the vehicles' lights were on. He then responded to say that as he was coming closer to this heavy vehicle (closer than 30 metres), he saw another vehicle attempting to overtake the heavy vehicle. According to him "almost when I was now in front of this vehicle (the heavy vehicle), that is when the vehicle pulled as it attempted to overtake." It is only then that he veered off to the left-hand side and immediately steered the vehicle back in a state of terror onto the tarmac, where after he lost control. I have explained aspects such as reaction time and distance travelled at certain speeds and time periods above and do not intend to repeat same. If that is kept in mind, there was just not enough time for the plaintiff to react in order to avoid a collision with the approaching vehicle.

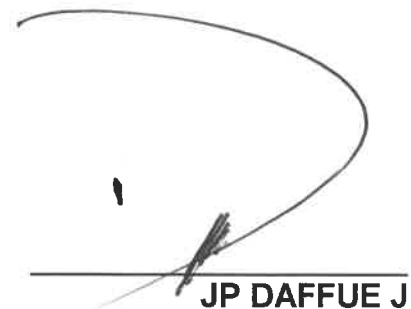
- 37.11 As shown, on the plaintiff's version he would have arrived at the scene long after the sun had arisen and long after 06h10. When asked by the court what his version was about the statement in Dr Vlok's report attached as annexure A to the particulars of claim that the collision according to him occurred at 03h00, he indicated that it could not be at 3 o'clock. No doubt, at 03h00 it would be pitch dark.
- 37.12 If one considers that the N6 in the area of the incident consists of single lanes in opposite directions, it is highly improbable that the heavy vehicle, the plaintiff's vehicle and the vehicle that was busy overtaking the heavy vehicle did not collide with each other, notwithstanding the allegation that the plaintiff partly veered off the tarmac. On his version only his vehicle's left wheels went onto the gravel shoulder.
- 37.13 I also regard it as highly improbable that the driver of the heavy vehicle, who should have noticed the plaintiff's predicament, would not stop and enquire from the plaintiff whether he was injured and to summon an ambulance and/or the police to the scene. The reasonable driver would surely look into his rear view mirror to see whether the vehicle that had to move rapidly off the tarmac in a sudden emergency managed to proceed safely or not.
- 37.14 I have reason to believe that the plaintiff adapted his version to tie in with the time of the incident mentioned in the AR. Therefore, he decided to testify that he left Aliwal North at about 04h00 whilst travelling at the slow speed of 90 km/h in a fast vehicle on a national road where the speed limit is 120 km/h in order to arrive at the scene of the incident about two hours later as the AR indicates. Unfortunately, he co-incidentally testified a few days after the fourth anniversary of the incident when it was still mid-summer. If he testified later in the year and especially during winter it might not have been recognised that it was actually daylight before 06h00. Once he committed himself to a departure time of 04h05, there was no turning back when the issue of daylight was raised. He either had to concede that he was travelling at an excessive speed in order to arrive near Tierpoort in the dark, or

suggest that no police officers were at the scene before he was taken to hospital and that they were mistaken as to the time of the incident. He elected to rely on the second option.

[38] In my view, at best for the plaintiff, his evidence cannot be accepted as probable, even in the absence of contradictory evidence. I say this with hesitation, bearing in mind the plaintiff's profession, but he made a poor impression on the witness stand and I am not prepared to accept that he presented a credible version. I therefore reject same.

VIII ORDER

[39] The plaintiff's claim is dismissed with costs,



JP DAFFUE J

On behalf of plaintiff:	Adv HE De La Rey
Instructed by:	Honey Attorneys BLOEMFONTEIN

On behalf of defendant:	Mrs Bornman
Instructed by:	Road Accident Fund BLOEMFONTEIN