**THE HIGH COURT OF SOUTH AFRICA**
**MPUMALANGA DIVISION, MBOMBELA MAIN SEAT**

**CASE NO: 1180 / 2018**

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

**04 April 2022** ..............................
DATE SIGNATURE

In the matter between:

**BHEKI ACE NKUNA** **PLAINTIFF**

and

**ROAD ACCIDENT FUND** **DEFENDANT**

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 10H00 on 04 April 2022.

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# JUDGMENT

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**RATSHIBVUMO J**

[1] This is a claim for general damages, medical expenses and loss of earnings totalling R8 320 000.00 by the Plaintiff, against the Road Accident Fund. The trial proceeded by way of default meaning, there was non-appearance for the Defendant. There was no separation of the quantum from the merits in terms of Rule 33(4), and therefore, the trial proceeded in respect of both the merits and the quantum.

[2] The court received evidence on behalf of the Plaintiff from various experts by means of affidavits containing reports prepared by them. These would entail Exhibit A, being an affidavit and report prepared by the Orthopaedic Surgeon, Dr. Tladi; Exhibit B, being an affidavit and a report by a clinical psychologist; Exhibit C being an affidavit and a report by the Occupational Therapist and Exhibit D, being an affidavit and a report by the Industrial Psychologist.

[3] For reasons that this judgment is handed down based on the merits of the case, I shall not reflect much of the expert evidence contained in the four exhibits referred to above as they mainly deal with the quantum. It suffices for purposes of this trial that the report by the Orthopaedic Surgeon can be summarised as follows. The Plaintiff sustained right femur fracture following a motor vehicle accident and was given surgical treatment. His fracture has united with implants that may need to be removed. The X-ray showed signs of infection. The right limb has healed with a shortening that can be managed with a shoe raise. However, provision for surgical intervention should be made. He also has massive scars that need plastic surgeon evaluation. He also has varicose veins that need vascular surgeon to nexus with the accident. His orthopaedic injuries have resulted with a WPI of more than 30%.

[4] The only *viva voce* evidence led is that of the Plaintiff. He testified that on 02 July 2014 at about 19h30, he was a driver of a motor vehicle with registration number DWM 869 MP along R40 Road. He was traveling alone driving from Kabokweni to Nelspruit at a speed of 60 km/h. The speed limit in the area was 100 km/h. The road had two lane heading the same direction as him, and two lanes going the opposite direction. He was on the left or outer lane when at that stage, his motor vehicle was hit from behind by another motor vehicle that did not stop. After being hit from behind, he lost control of his motor vehicle and it rolled several times to the left side of the road. He was unconscious for a while but when he regained consciousness, he was inside the ambulance but still at the scene of the accident. He was later taken to the hospital where he was admitted for three months.

[5] When he was discharged, he went to report the accident with the police only to find that the Accident Report was already registered. He was also made aware by the police that the accident was reported as a single motor vehicle accident. He was therefore not the person who gave the information about the accident to the police officers who completed the Accident Report. As a result, he disputed that the cell phone number given as his in the Accident Report was his. The address provided therein was however his work address and the names given were his. At the time of the accident he worked as a store manager for Store City. No evidence about his income was led.

[6] This evidence concluded case for the Plaintiff.

[7] Plaintiff's Counsel addressed the court asking for the award as claimed as the Road Accident Fund was liable. He submitted that the injuries were direct result of negligent driving by the insured driver whose details were unknown.

[8] This case has striking resemblances of case no. 3214/2019 between Monate and the RAF, whose judgment is also handed down today. The same legal representatives are also involved in that matter. This should explain the similarities in the judgment.

[9] I must emphasise at this stage that the onus to decide whether the insured driver was negligent and to what extent, rests on the plaintiff, who must show on a balance of probabilities that the insured driver was negligent and that the negligence was the cause of the collision from which he sustained the bodily injuries. There is no onus on the Defendant to prove anything. The Defendant may have an evidentiary burden to rebut a *prima facie* case established by the Plaintiff.[1]

[10] The liability of the Road Accident Fund finds its basis and application from the Road Accident Fund Act[2] which provides that the Fund shall be obliged to compensate any person (the third party) for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself or the death of or any bodily injury to any other person, caused by or arising from the driving of a motor vehicle by any person at any place within the Republic, if the injury or death is due to the negligence or other wrongful act of the driver or of the owner of the motor vehicle or of his or her employee in the performance of the employee's duties as employee: Provided that the obligation of the Fund to compensate a third party for non-pecuniary loss shall be limited to compensation for a serious injury as contemplated in subsection (1A) and shall be paid by way of a lump sum.

[11] It follows from the above that the liability of the Fund shall follow the injury sustained by the Plaintiff only if he is able to prove on a balance of

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[1] *Ninteretse v Road Accident Fund* (29586/13) [2018] ZAGPPHC 439 (2 February 2018) per Raulinga J

[2] See section 17(1) of the Road Accident Fund Act, 56 of 1996.

probabilities that the injury was caused by the negligent driving of an insured driver. The Fund's liability is excluded where the cause of the injury cannot be linked to the negligent driving of an insured driver or where the cause can be attributed to the Plaintiff alone. It is trite that the Fund would not be liable in instances where the claimant is the driver of a motor vehicle that was involved in an accident alone without the involvement of another motor vehicle in any manner as this would be indicative of sole negligence on the part of the driver or the claimant.

[12] The Plaintiff *in casu* must have been conscious of the onus on his shoulders the moment it came to his attention that the Accident Report reflects that he lost control of the motor vehicle and it rolled, without any involvement of another motor vehicle. The details of the officer who completed the Accident Report were there in the report. No efforts were done to rectify those contents if they were not reflective of what happened. There is no doubt that rectifying these would not be easy without presenting the police with evidence that proves the involvement of another car.

[13] While the task is obviously not an easy one, it should however be simple if there was indeed another motor vehicle involved. Before there could be a "correction" of Accident Report, the police would want an explanation on why he could not give this explanation on the date of the incident at the scene of the accident. Not only do the hospital records reflect that the Plaintiff was fully conscious upon admission, but his own evidence is to that effect. He testified that he regained consciousness while inside the ambulance at the scene. He concedes that the details entered in the accident report by the police, were his, in particular, his names and his employment address. No explanation is given on how these found their way into the Accident Report. The only logical way that this can happen, when the report is completed by an officer who does not

even know the Plaintiff is that the Plaintiff provided these to the police. It is however surprising that it is only this information that the Plaintiff is able to confirm but he distances himself with the part dealing with how the accident happened.

[14] Some of the steps that the Plaintiff could have walked in "rectifying" the faulty accident report could entail obtaining photographs of the motor vehicle taken soon after the accident so as to demonstrate the rear damages and/or paint of the other motor vehicle in it, if any. It appears this was not done or no such evidence was presented before me. The officer who completed the Accident Report was not called to give evidence. All these steps were also not undertaken for purposes of trial.

[15] It follows therefore that the Plaintiff failed to show on balance of probabilities that the injuries he sustained were a direct result of negligent driving by the insured driver. The court has sympathy for the Plaintiff over the injuries sustained in the accident. As Steyn J puts it, it would be inappropriate to make an order burdening the already strained Fund based on sympathy one has for the Plaintiff.[3] For reasons stated above, the claim should fail. There shall be no costs order as the action was undefended.

[16] The following order is therefore made:

[16.1] The claim is dismissed.

[16.2] No cost order is made.

[3] *Auret N.O obo Kieser v Road Accident Fund* (14206/2014) [2020] ZAWCHC 192 (28 April 2020) at para 62.

[redacted]

**TV RATSHIBVUMO**

**JUDGE OF THE HIGH COURT**

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| **FOR THE PLAINTIFF** | **: ADV. MOGAGABE** |
| **INSTRUCTED BY** | **: MACBETH ATTORNEYS MBOMBELA** |
| **FOR THE DEFENDANT** | **: NO APPEARANCE** |
| **DATE HEARD** | **: 14 FEBRUARY 2022** |
| **JUDGMENT DELIVERED** | **: 04 APRIL 2022** |