

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)

Case Nr: CA&R 120/2007

Case Heard: 15/09/2008

Date delivered: 19/09/2008

In the matter between:

T O Nomvete

APPELLANT

and

Road Accident Fund

RESPONDENT

Coram: Lacock J et Olivier J

JUDGMENT

Olivier J:

1. The appellant, mr T O Nomvete, instituted an action against the respondent, the Road Accident Fund, in the magistrate's court, Colesberg. The appellant claims damages on the ground that he had sustained injuries when he was hit by a motor vehicle driven by the insured driver, mr Freek Afrika.
2. After a separation of issues was ordered, the trial proceeded on the merits only. At the conclusion of the appellant's case, and after having heard the evidence of the appellant and of mrs F Andreas, the magistrate granted the respondent an order of

absolution from the instance and ordered the appellant to pay the costs on a party and party scale.

3. The grounds of appeal are basically:

3.1. that the magistrate applied the wrong test in considering and ordering absolution from the instance; and

3.2. that the magistrate in any event erred in coming to the conclusion that the contradictions and discrepancies in the evidence of the appellant and Mrs. Andreas were so material as to justify such an order.

4. In his *ex tempore* judgment the magistrate correctly stated the test to be applied in such applications as entailing a decision “*whether there is evidence upon which a Court applying its mind reasonably to such evidence could or might have not should or ought to find for the Plaintiff*” (see also **Superior Court Practice**, Erasmus, B1-292 and **De Klerk v ABSA Bank Ltd and Others** 2003 (4) SA 315 (SCA)).

5. The magistrate’s remark (in his reasons in terms of magistrate’s court rule 51(1)) that “*Die hof het bevind dat eiser nie sy eis op ’n oorwig van waarskynlikhede bewys het nie die eiser en sy getuie se getuienis is as ongeloofwaardig verwerp*”, and references in his judgement to the impression made by the appellant as a witness and to contradictions in the evidence, create the impression that the magistrate nevertheless may not have properly appreciated the test to be applied.

6. The magistrate was of the view that the contradictions (between the evidence and the statements of the witnesses) regarding the date on which the incident had occurred was "*a major contradiction*".
7. I disagree. It was not in dispute that an incident had occurred where the appellant had fallen on or over bricks and that he had sustained injuries in the process. What was in dispute was the question regarding what had caused the appellant to fall. The appellant's version was that he had been hit by the vehicle negligently driven by mr Afrika, while the latter's version was that he had brought the vehicle to a standstill without colliding with the appellant and that the appellant had then fallen over the bricks when he (Afrika) pointed his finger at the appellant.
8. The issue was therefore not when the appellant had fallen, but rather what had caused the appellant to fall.
9. The same applies to the discrepancies regarding the period for which the appellant had been hospitalised, when the appellant had reported the incident to the police and the direction from which the vehicle had approached the appellant.
10. Although these discrepancies and contradictions might at the conclusion of the case, after the respondent has presented its evidence or closed its case, assume a different perspective and importance, they were not in my view of such a nature as to warrant the conclusion that the appellant's version was inherently unacceptable or palpably false (see **Atlantic Continental Assurance Co of South Africa v Vermaak**

1973 (2) SA 525 (E) at 527C-D, and **Superior Court Practice, supra**, B1-292 to 293).

11. It follows that I am of the view that the magistrate should have dismissed the application for absolution.
12. There is no reason why the costs of this appeal should not follow the event. The fact that the respondent chose not to oppose the appeal is not a sufficient reason to leave the appellant to carry its own costs. The respondent had applied for the orders which are to be set aside and it never abandoned the judgment of the magistrate.
13. The following orders are therefore made:
 1. **The appeal succeeds and the magistrate's orders granting absolution from the instance and ordering the appellant to pay the costs on a party and party scale are set aside and substituted with the following order:**
"The application for absolution from the instance is dismissed."
 2. **The matter is remitted to the magistrate's court, Colesberg, for further trial.**
 3. **The respondent is ordered to pay the costs of the appeal.**

C J OLIVIER
JUDGE
NORTHERN CAPE DIVISION

I agree:

H J LACOCK
JUDGE
NORTHERN CAPE DIVISION

For the Appellant:	Adv S Grobler
Instructed by:	Du Toit Bomela, KIMBERLEY