

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

Case No: 26857/2021

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/NO
- (2) OF INTEREST TO OTHER JUDGES: YES/NO
- (3) REVISED

In the application between:

PETRUS MOSENEKE SEBEELA

Plaintiff

and

MONROE FLOWERS AND VERMAAK INC.

First Defendant

KAREN VERMAAK

Second Defendant

STEPHEN DESMOND FLOWERS

Third Defendant

JUDGMENT

NHARMURAVATE AJ,

Professional Negligence: Legal practitioners failing to lodge an RAF claim timeously which led to the matter prescribing. Court to determine if defendants were

professionally negligent - if the plaintiff would have succeeded on the merits had his claim been lodged timeously with the road accident fund. Case pleaded not met by the plaintiff-dismissal of action.

Introduction

[1] The Plaintiff instituted an action against the Defendants for professional negligence in that they failed to lodge his claim with the Road Accident Fund timeously leading to prescription of the matter.

[2] There are two issues which in my opinion this court has to evaluate that is, whether the Defendants were negligent in executing their mandate as instructed by the Plaintiff. Secondly, whether the Plaintiff would have succeeded with his claim against the Road Accident Fund regard being had to the merits of his claim. The Plaintiff bears the onus to prove the two determinations and has to succeed in both.

[3] The Plaintiff presented his case by leading his evidence which was supported by three factual witnesses Mr. Lawrence Chisango and Ms Wendy Chisango (*"the Chisangos"*) and Mr. Mpho Motaung (*"Mr. Motaung"*). In rebuttal the Defendants called two nursing sisters who admitted the Plaintiff respectively at the Olivedale Clinic, the Netcare Garden City hospital and Miss Thandi Mbewe (*"Ms Mbewe"*) the legal practitioner who was handling the matter within the Defendants office at the time.

EVIDENCE OF THE PLAINTIFF

Mr P .M SEEBELA

[4] The Plaintiff's evidence can be summarized in the following manner that on the 16th of December 2017 they had a social. He was drinking the night before and went to sleep early as he had a stomach ache. On the 17th of December 2017 he woke up early around 5:30 in the morning. He went to his fridge took two sips of his beer which he had consumed the previous night but could not finish. It tasted funny, he then disposed of it. He proceeded to his motor vehicle a white Toyota corolla with

registration number [...] as he was on his way to the filling station. Whilst outside he met Mr. Lawrence Chisango and inquired if he did not need anything at the shops since he was on his way there. This was a norm, if one person was leaving he would inquire with others if they did not need a lift mainly due to the way they parked in the yard which was in a single row.

[5] Mr. Lawrence Chisango then agreed that indeed he needed to buy a few items he then woke his daughter up Miss Wendy Chisango who at the time needed to buy airtime. They all left and upon their arrival at the filling station, they did what they needed to do. Thereafter he left to drop the Chisango's at their place of residence. So that he could proceed to his appointment(around Roodeport)which he had with the Mechanic who was to service his motor vehicle at 7:00 that morning.

[6] He testified that it had rained the previous night and there was sand on the road. Just before they could reach the stop street whilst approaching the curve on South Africa drive Rd they were then met with an accident. The Plaintiff heard a loud bang on the rear of the Toyota. However, he did not see anything that rear ended him but he did see a white motor vehicle passing on his right-hand side. He was not sure if indeed this was the white motor vehicle which rear ended him as he only heard the sound. The collision caused the Plaintiff to hit the pavement and he tried to control the Toyota back into the road in that process he then lost control of the Toyota and it fell into the ditch.

[7] As a result, the Plaintiff sustained serious bodily injuries inclusive of the Chisango's. The Plaintiff also confirmed driving at the speed of 40-60 kph. He was thereafter taken to Olivedale hospital and subsequently the Netcare Garden City. Thereafter, he was admitted for 10 days and was only able to resume his work on the 29th of January 2018. He thereafter received some advice from his cousin to lodge a claim with the Road Accident Fund by finding a set of attorneys firm to assist him.

[8] Around the 16th of March 2018 he consulted with the Defendants in lieu of them assisting him to lodge his claim with the Road Accident Fund (the "RAF"). He consulted with Ms. Thandi Mbewe and thereafter left the relevant documentation

which did not include the accident report as he did not have it he only had the number. He recalls meeting with the Defendants at least four times in lieu of making progress with the lodgment of his claim to the RAF. He thereafter received a call in January 2020 from the Defendants who wanted to know if he was able to establish the details of the unidentified driver's motor vehicle to which he answered in the negative.

[9] Subsequent to this telephonic conversation he was informed that his matter had prescribed. He was confused as he was told it would take 2years to get the ball rolling. He was advised by the Defendants through Miss Thandi Mbewe to seek another set of legal representatives as they would know how to assist him further.

EVIDENCE BY MR LAWRENCE CHISANGO

[10] Mr. Chisango testified that they had been drinking the previous night as they had a braai which started around 4:30 to 17:00. He had seen the Plaintiff drink 1 and 1/2 "*dumpie*" he also noted that the Plaintiff could not drink more as he was sick with a tummy ache. The Plaintiff left early round about 7:00PM to sleep as he was not feeling well. Thereafter they went to sleep around about 10:00PM. He testified that it was very rare for them to have a gathering or a social as they had done that evening. He also testified that he was not friends with the Plaintiff he just knew him as a guy who lived in the same yard as he did.

[11] He testified that he was a front seat passenger. He took the lift to buy bread and eggs. He woke his daughter up so they could go to the shops as she needed airtime. It was a norm for anyone leaving the yard to ask if others did not need anything at the shops due mostly to the manner they were parking which was in a straight row. On that day his car was parked in so he could not drive out. The Plaintiff's vehicle was the last car in so it was easy for it to get out.

[12] He confirmed that when they got to the garage he bought the bread and eggs and he recalled the Plaintiff having an issue with his card he thereafter gave him the R200 to fill petrol. He also recalled that it had rained the previous night and there was sand on the road. They left the garage heading towards Germany drive, driving

along South Africa drive before they could reach the curve something impacted the Toyota behind and he did not see it, he just heard the noise. This caused the Toyota to be propelled forward and he saw the Plaintiff fighting with the steering trying to control the car, unfortunately he could not control it .They subsequently fell into the ditch.

[13] He thereafter took a lift to their place of residence as it was very close so that he could report the incident. He found Mr. Motaung and reported to him what had happened and they went back together to the scene of accident. As a result of this accident he sustained an injury on his forehead and he was taken to Charlotte Maxheke hospital.

EVIDENCE BY MS WENDY CHISANGO

[14] Ms. Wendy Chisango is a daughter to Mr. Lawrence Chisango who was 18years of age at the time of the accident. She testified that they had a social the previous night they were drinking and braaiing with few other friends. She did not notice how much the Plaintiff had consumed in relation to alcohol. She also confirmed that the Plaintiff left early to go and sleep as he was not feeling well.

[15] She recalled her father waking her up around 6-7 early in the morning to ask her if she needed anything at the shops to which she replied that she needed airtime. She knew her father very well that if she did not accompany him, he would not come back with the airtime. She also confirmed that the cars parked in a single row in the yard the only easily accessible vehicle was that of the Plaintiff at the time. She confirmed being a backseat passenger upon reaching the filling station they bought bread and eggs and the airtime she needed.

[16] On their way back, as they were approaching the curve before they reached the stop street. She heard a loud bang at the rear of the Toyota towards the left which hit them with force causing her to be pushed forward. However, she did not see what rear ended them. The loud noise resulted in the car leaping forward which caused the Toyota to lose control and fall into the ditch. She could not recall hearing the Plaintiff or her father making a note of another motor vehicle which could have

possibly rear ended them passing them. She noted that the Plaintiff panicked and lost control of the motor vehicle.

[17] She also confirmed that the previous night it had rained and there was sand on the road. She confirmed not being certain as to what caused the impact all she recalled was the loud noise as a result of being hit with force. She also testified that she was presented with a statement to sign by the Plaintiffs legal representatives. She confirmed not going to the police station to sign same.

EVIDENCE OF MR MPHO MOTAUNG

[18] Mr. Mpho Motaung confirmed that he had organised the party/social gathering and this was not something that he did often. He testified that he was a non-alcoholic consumer and he saw the Plaintiff drinking that night. He confirmed that he drank 1 1/2 “*dumpie*” and recalls seeing him with a six pack of something which looked green. He also confirmed that the Plaintiff was not feeling well and he retired early due to being ill. He also recalled that it had rained the previous night and there was sand on the road.

[19] On the 17th of December 2017 he heard a loud bang which was a knock at the gate it was Mr. Lawrence Chisango with an injury on his forehead bleeding. Mr. Chisango informed him that they were involved in the accident. He thereafter took his motor vehicle out as it was easily accessible as they used to park in two rows that is two cars in each row so there were two cars which were in front and one of the two cars which were on the 2nd row which was the last row in the yard was his motor vehicle.

[20] He thereafter quickly drove out he called the necessary assistance that is the ambulance and the towing truck that would assist in towing the Toyota out of the ditch. He also confirmed taking all the photographs(same day of the accident) of the Toyota damages as he had to send the photographs to the insurance and discovery.

EVIDENCE BY DR IRSIGLER

[21] Dr Irsigler confirmed interviewing and assessing the Plaintiff for the purposes of completing the RAF4 form and compiling a medico legal report based on the injuries and concerning the alleged consumption of alcohol. He testified that the Plaintiff sustained multiple injuries including a fracture of cervical spine with the blunt trauma to the face and concussion injury of the brain following ejection.

[22] He opined that the nursing evaluation report from the Garden City clinic at 9:00 AM which documented that the patient was smelling of alcohol did not mean much as clinically the Plaintiff presented a different picture. He testified that no blood tests were taken at Oliverdale clinic which would have confirmed the level of alcohol in the Plaintiff's blood. He noted that they only documented entries of decreased level of arousal. The baseline indices, including the Glasgow coma scale, the blood pressure, the pulse and general state of the arousal of the Plaintiff clearly indicated that from a clinical point of view there were no signs of even mild acute alcohol intoxication. Lastly, he concluded that there was no indication in the clinical records to suggest that the patient was behaving under the influence of alcohol.

[23] He concluded that the clinical findings of the Plaintiff on that date had no signs of him being intoxicated. The hospital records showed no sign that the Plaintiff was thoroughly tested for alcohol being present in his body or him being given treatment to treat him due to being intoxicated before medically treating him for his injuries.

EVIDENCE BY MS URVASHI MAGNLAL

[24] Ms. Urvashi Maganlal the Clinical Neuropsychologist testified that the Plaintiff informed her that he was the driver of the Toyota which was in the process of turning when a vehicle that was driving at high speed collided into him. He thereafter sustained loss of consciousness with post traumatic amnesia which was estimated to be less than an hour, depressed and had a GCS of 13 / 15. There was also evidence of facial injury as well as the fractured cervical spine. She also testified that the Plaintiff had post concussive confusion which was noted from looking at the clinical indicators and sustained a traumatic head injury which was a mild traumatic head injury.

[25] Ms. Maganlal revealed that she does an extensive test where she spends almost a day with the patient as she did with the Plaintiff. She ran a neuropsychological test which revealed an overall cognition from his premorbid estimate whilst his high average premorbid estimate proof provided some cognitive protection. The score seen in this assessment showed that his higher order executive function process remained largely unaffected. The finer neuropsychological test meant that the Plaintiff was challenged in his processing speed, it was reduced and his attention difficulties which he described as memory challenges.

[26] She testified that the Plaintiff had difficulties with processing speed, simple attention, working memory, cognitive flexibility, and set shifting which were all related and were found to be poor. The Plaintiff was diagnosed with ongoing anxiety and chronic pain which meets with the DSMV diagnosis of an adjustment disorder secondary due to the accident.

[27] She also confirmed having a full interview with the Plaintiff with him firstly filling the questionnaire. Thereafter she typed the information out in her report. She also confirmed that when he presented to him he did not present the subject of some people with alcohol related disorders. She also emphasized that she asked the Plaintiff to tell her what he remembers "*not what they told you to tell me*". This was in relation to the accident she concluded that she did not look at any affidavit provided by the Plaintiff attorneys as she first prefers hearing what the patient will say so as to ascertain what he can remember.

THE DEFENDANTS EVIDENCE

EVIDENCE BY MS NTOMBEKHAYA DUBE

[28] Ms. Dube was the first witness of the Defendant she confirmed that she was a nurse at the Olivedale Clinic. She saw the Plaintiff on the 17th of December 2017 and she took the notes at 7:30 which narrated "*A 33-year-old male patient came in with stretcher brought by ambulance. Patient was involved in MVA. Patient was a driver ejected and had two passengers. Patient verbalized that he lost control. Had*

loss of consciousness on scene.” She testified that the in script that appears from the nursing notes in relation to the accident was what the treating Doctor may have informed her after doing the examination of the Plaintiff and it will also be information that she would have also received from asking the Plaintiff.

[29] She also could not remember the incident as it had happened long time ago.

EVIDENCE BY MS GLORIA BANDA

[30] Ms. Banda confirmed being the nursing sister who worked at the emergency ward at the time. She also confirmed that the information appearing on the Netcare Garden City record was recorded by her on the 17th of December 2017. She would have made a record after consultation with other Nursing sisters and the Medical practitioner who were medically treating the Plaintiff. She also confirmed that she did not smell the alcohol on the Plaintiff. This she may have been told by the emergency services personnel or the other Nursing sisters or the Medical practitioner who were involved in treating the Plaintiff on the day.

[31] She also confirmed that she did not administer any treatment and there was no treatment suggested to treat the Plaintiff from being intoxicated.

EVIDENCE OF MS MBEWE

[32] The summary of Ms. Mbeve’s evidence is that she had been an attorney since 2006 up to 2020 with the Defendant. She consulted with the Plaintiff on the 16th of March 2018. She took down notes and she also typed the initial consultation notes. The information appearing on the notes of the initial consultation would have been received from the Plaintiff inclusive of her memory and any relevant documentation in this regard the accident report. She could not recall examining the documents so that they can be lodged with the Road Accident Fund specifically the hospital record. She could also not recall receiving the hospital records

[33] Ms. Mbeve testified that the matter of the Plaintiff prescribed simply because it was diarized wrongly by the Secretary. It was diarized as an accident with an

identified motor vehicle. When the Secretary brought the matter up to her as per the diary she noticed that the matter had already prescribed. That is when she notified the Plaintiff of the prescription factor which she did after she had consulted with her Director as this was her first matter that had prescribed on her.

ANALYSIS OF THE MATTER

Professional Negligence

[34] The first issue which this court has to determine is whether the Defendants were negligent in handling the Plaintiffs matter by failing to lodge a claim with the Road Accident Fund timeously. During the closing arguments no submissions were by the parties as it was common cause that the matter prescribed under the care of the Defendants.

[35] The Defendants were not able to rebut the evidence by the Plaintiff that he consulted and signed a contract timeously with them and had given them all relevant documentation to lodge a claim on his behalf. The Defendants could not advance any probable reasons for their failure to lodge the Plaintiffs claim timeously with the Road Accident Fund except for it being diarized incorrectly by the Secretary. The Plaintiff's matter was diarized as an identified motor vehicle accident whereas it was an unidentified motor vehicle claim.

[36] In terms of the Road Accident Fund Act Section 17(1)(b) read together with Regulation 2(1)(a) a claim in respect of an unidentified owner or driver of a motor vehicle must be sent or delivered within two years from the date upon which the cause of action arose. The Defendants had two years to institute a claim from the date of the accident accordingly his claim prescribed on the 17th of December 2019.

[37] The Defendants were negligent in executing their mandate on behalf of the Plaintiff. There was no due diligence and care exercised in handling the Plaintiff instructions resulting in same prescribing. Prescription could have been avoided had the Defendants checked the diary immediately thereafter it had been diarized by the Secretary. This evidences no proper control or supervision by the Defendants over

the Plaintiff's mandate/file. There were no reasons furnished by Ms. Mbewe why the Plaintiff's file was diarized to come up after two years which is quite a lengthy time not attending to a file. In my opinion this is a clear indication of a neglected instruction which amounts to a breach of contract signed by the parties as the Defendants did not carry out their mandate competently and reasonably.

[38] *"The attorney-client relationship is understood to be of a very special character with certain aspects peculiar to itself and attorney must be meticulous accountable he or she must serve as client faithfully and diligently and must not be found guilty of any unnecessary delay. He or she must once he or she has undertaken the client's case, not abandon it without lawful reason or excuse...."*

[39] *'An attorney is liable for the consequence of gross negligence if he or she displays a lack of reasonable skill and diligence in the performance of his or her duties in matters within his or her field of practice, expertise or knowledge.' 'An attorney's liability arises out of contract and his or her exact duty towards his or her client depends on what he or she is employed to do. In the performance of his or her duty or mandate, an attorney holds himself or herself out to his or her clients as possessing the adequate skill, knowledge and learning for the purpose of conducting all business that he or she undertakes. If, therefore, he or she causes loss or damage to his or her client owing to a want of such knowledge as he or she ought to possess, or the want of such care he or she ought to exercise, he or she is guilty of negligence giving rise to an action for damages by his or her client against him or her".¹*

[40] The Defendants owed the Plaintiff a duty of care in exercising or executing their mandate by lodging his claim timeously with the Road Accident Fund by failing to do so they were professionally negligent.²

MERITS

¹ Le Roux ad Another v Johannes G Coetzee & Seuns and Another[2023] ZACC 46

² *"Professional negligence is the failure of an attorney to act with the competence reasonably expected of ordinary members of the attorney's profession who must be meticulous,accountable.He or she must serve his clients faithfully and diligently and must not be guilty of unnecessary delays."*

[41] The second leg of the race that the Plaintiff bears onus to prove, is whether had the Defendants lodged his claim timeously with the Road Accident Fund he would have been successful on the merits which would then warrant him compensation.

The case pleaded by the Plaintiff

[42] The pleadings filed by the Plaintiff allege as follows: paragraph 10 *“whilst approaching a stop sign, the vehicle was suddenly and forcefully bumped at its rear end by an unknown motor vehicle being driven there and then by an unknown driver”*

[43] An alternative was further provided in paragraph 12 of the Plaintiffs particulars of claim *that “whilst approaching a stop sign the vehicle was suddenly and forcefully bumped by an unknown motor vehicle being driven there and then by an unknown driver. The impact of the collision caused the Plaintiff to lose control of the vehicle resulting in the vehicle overturning.”*

[44] The foundation of action proceedings are the particulars of claim. The case made out in the particulars of claim is the case that the Defendant has to meet. It is also the case that the Plaintiff bears onus to prove. In ***Trope v South African Reserve Bank and Another and Two Other*** cases the court pronounced that:⁴ *‘It is, of course, a basic of principle that the particulars of claim should be so phrased that a defendant may reasonably and fairly be required to plead thereto. This must be seen against the background of the further requirement that the object of pleadings is to enable each side to come to trial prepared to meet the case of the other and not be taken by surprise. Pleadings must therefore be lucid and logical and in an intelligible form; the cause of action or defence must appear clearly from the factual allegations made³...’*

[45] The Plaintiff and the Chisangos confirmed not seeing the unidentified motor vehicle that rear-ended them. However, all were unanimous that it must have been another motor vehicle. Mr. Shepstone counsel for the Defendant argued that it was a

³ {1993} 2 ALL SA 278 (A)

sole vehicle accident. This was put to the Plaintiff whose answer was not a confident denial even his body language changed (he flopped his shoulders and exhaled before answering).

[46] Mr. Shepstone for the Defendant further argued that the Plaintiff had failed to discharge the onus as the case pleaded was that they were “*suddenly and forcefully*” rear ended which caused them to veer off and lose control. The joint minutes of the Accident Specialist experts did not note any damages to the rear of the motor vehicle in the images provided although they agreed that some level of contact may have occurred to the rear of the vehicle. However, they denied that the impact that may have occurred from another vehicle to the rear of the Plaintiff’s vehicle was as a result of high speed or a forceful impact.

[47] Therefore, the Plaintiff did not make out the case pleaded on its particulars of claim as amended and rightfully argued by Mr. Shepstone for the Defendant. Pleadings bring about certainty in the matter, parties have to be held to their pleadings. This is in line with the values in which our constitution is founded.⁴ The case of being suddenly and forcefully bumped was dismissed by both Accident Specialist. In fact, even the Plaintiff’s Accident Specialist opinion discharged the notion of an impact from another vehicle. Additionally, it was not Mr. Motaung evidence that he found or took photos of any debris which may have belonged to the unknown vehicle immediately after the accident

[48] It is important to note that during the interview of the Plaintiff by the Accident Specialist Mr. Proctor Parcker, he did not mention his Toyota being rear ended suddenly with force at high speed. Additionally, this does not appear on the *synopsis* as captured by the expert. The only inference that this court can draw is that evidence led by the Plaintiff and the Chisangos was manufactured in this regard. The Accident Specialist is key to the Plaintiff claim he would have not left out this information deliberately had he been informed by the Plaintiff.

⁴ South African Transport and Allied Workers Union and another v Garvas and others 2013 (1) SA 83 (CC) para 114 “ *Holding parties to pleadings is not pedantry. It is an integral part of the principle of legal certainty, which is an element of the rule of law, one of the values on which our Constitution is founded*”

[49] Even though both Accident Specialist agree that they cannot conclude that a vehicle cornering could very well be disturbed from its path of travel from impact by another vehicle. However, this was not the case pleaded by the Plaintiff. In my opinion for the Plaintiff to succeed on the merits of this matter he should have pleaded as such.

[50] Further the following observations have been made from the Plaintiffs expert Mr Proctor Parker in his report that :

“8.4 Notable from the outset is the less than ideal images of the Toyota, nor the ability to inspect the vehicle. The images do not allow for a comprehensive analysis of the damage to the vehicle. Damages clearly dictate impact with a rigid object, likely to be that of the concrete calvert, possible rocks and possibly concrete palisade fencing”.

In light of this paragraph the Plaintiff's expert could not identify impact from another motor vehicle although he concedes that the images were less than ideal.

[51] He continues to opine that: *“8.6.2The final position of rest of the Toyota, as to the inner side of the curve, and largely steel “in the curve” is inconsistent with such high speeds and having excited (sic)the curve due to excessive speed(CSS)”*

[52] The Defendant's expert Mr. Grobber opined that the physical evidence of the damage to the Toyota does not support the version of the Plaintiff that the incident occurred suddenly and forcefully and that the unidentified vehicle collided with him from the rear at *“high speed”*. Had the impact occurred against the rear of the tow bar *“suddenly and forcefully”* and *at high speed* from the impact of the impacting vehicle, it is probable that the tow bar would have been bent upwards. In my opinion a rear end collision has to be exactly that, it cannot be possibly a rear end collision without probable evidence supporting it. Experts need to lay a foundation for their finding as they have herein.

[53] Perhaps the version evident from Dr Irsigler report of the 23 August 2021 during their assessment of the Plaintiff (as he related that he could remember the

events up until the time of the accident) can shine some light which was captured as follows “ ***and then the car rolled and then so on this side of the road it's like a bit of a height so then the car rolled, it bumped and then it spinned around and then it fell on the roadside of the bridge, so it rolled and then after rolling it hit down facing up then it rolled again and then fell there.***”⁵

[54] Additionally, During the assessment with Ms. Maganlal held eight months down the line the 20th of April 2022 the Plaintiff was given a questionnaire to complete under the “*Self-Report*” he detailed the incident as follows that he: “***was in cosmo city around 5:00 AM went to garage to buy food. saw a car at high speed that came from rear car spinned out of control lost consciousness***”. There was no impact mentioned except that he saw a vehicle driving at high speed. It can be safely assumed that this vehicle did not dicturb him otherwise he would have said so.

[55] In my opinion, the narration of the events given by the nursing sister at Olivedale clinic alternatively Dr Irsigler or the questionnaire by Ms Magnlal is in keeping with the findings of both Accident Specialist. Interestingly, to both experts he did not mention the impact or another motor vehicle impacting him and hearing a loud bang. Let alone the mention of a sudden impact at high speed. In fact, both versions are in keeping with the Defendants argument that this was a one vehicle accident. I further note that Ms. Maganlal was told many contradicting versions. However, this court prefers the version the Plaintiff completed on the questionnaire as that is undeniably directly from him. He understood what he was writing on the questionnaire.

[56] Ms. Brammer for the Plaintiff argued that more weight and consideration should be placed on the factual witnesses evidence as opposed to the experts when it came to the issue concerning being hit forcefully at high speed. This she argued was in light of the fact that the Plaintiff and the Chisangos were inside the motor vehicle when the accident occurred. In support of her argument she relied on a

⁵ Caselines 007-160 at 1.4.3.1.1

Motor Vehicle Assurance Fund v Kenny⁶ a 1984 decision. She further highlighted the following in the judgment :

[57] *“that an expert view of what might probably have occurred in a collision must, in my view, give way to the assertions of a direct and credible evidence of an eyewitness. It is only where such direct evidence is so improbable that it is that its very credibility is impugned that an expert opinion as to what may or may not have occurred can persuade the court to his view.”*

[58] In my opinion the above judgment emphasized the fact that direct and credible evidence of what occurred during a collision carries more weight than that of an expert, except in a situation where the evidence that is presented by the witnesses is so improbable that its credibility is questioned. The court in such instances should prefer expert opinion as to what may or may have not occurred.

[59] In my opinion there are several inconsistencies presented by the Plaintiff's evidence as already discussed. Expert evidence is viewed by the courts to be objective unless the contrary is proven. There were no probable reasons advanced why this court should not prefer the evidence of the experts in this regard.⁷ The experts jointly agreed that had the Toyota been impacted with force he would have not ended in the ditch inside the curve but he would have veered on the western side that is the other side of the road. In fact, both of them did not even note any rear end impact. Therefore, the findings made by both Accident Specialist in this regard would be preferred as the direct evidence from the Plaintiff and his witnesses is improbable.

[60] As per the evidence led the opinions expressed by the Plaintiff's experts are based on the information received from the Plaintiff. This was not rebutted. If the version captured was incorrect these would have been corrected before the reports were submitted to the Defendants or they would have been addendums incorporated

⁶ 1984 (4) SA 432 (ECD)

⁷ Coopers SA (Pty) Ltd v Deutsche Gasellschaft Fur 1976(3) SA 352 “ As I see it expert opinion represents his reasoned conclusion based on certain facts on data, which are either common cause, or established by his own evidence or that of some competent witness...”

to these reports. Therefore, this court can make a proper consideration based on these reports inclusive of the evidence led.

[61] This view is further fortified by the fact that the public members who came to assist, also did not see anything as per the evidence by Mr. Chisango, except to say that they heard the loud noise. It was not clarified in this instance whether the noise heard was caused by the Toyota rolling into the ditch or otherwise. Cosmo city is a residential area it is not probable that public members would not see the motor vehicle that caused the incident.

[62] One of the duties that the Plaintiff has as a driver driving on a South African Road is to keep a proper look out, no evidence was led by the Plaintiff in light of the above. Mr. Chisango led evidence that they were all just talking not “*paying attention*” when they suddenly heard a loud bang. A reasonable driver is expected from time to time to look at his review mirror and his side mirrors which was not his evidence. The Plaintiff was simply not aware of his surroundings for some reason.

[63] The liability of the Road Accident Fund is born from the Road Accident Fund Act 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.

[64] The liability of the Fund shall follow the injury sustained by the Plaintiff only if he is able to prove on a balance of 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. The RAF would not be liable 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.

The existence of a white motor vehicle

[65] The evidence of the Plaintiff was that he heard a loud bang from the rear of his motor vehicle but did not see anything. However, he was able to see a white motor vehicle passing him as he was trying to control the Toyota from rolling into the ditch. Astonishingly, the evidence of this white motor vehicle does not appear anywhere else (not in any documentary evidence submitted and none of the witnesses saw this motor vehicle). It leaves this court wondering why such an important piece of evidence was not even communicated to the Plaintiff's expert Mr. Proctor Packer the Accident Specialist and to the members of the South African Police services which may have assisted in furthering the investigation or even identifying such a motor vehicle.⁸

[66] It is common cause that the accident occurred on a Sunday morning on the 17th of December 2017. Ordinarily, in December summertime sunrise takes place early morning around 5:00 AM this is conferred by the opinion of the Defendants expert Mr. Grobler who opined that on that day sunrise was at 5:10AM. There was no evidence of any obstruction or distractions for the Chisangos to not see this motor vehicle. Even on a closer look at the accident photographs taken by Mr. Motaung specially the photographs depicting the end position of the Plaintiffs Toyota). It was indeed a bright and sunny day.

[67] A concerning factor though is that the sandy part (with the concrete broken poles) on the side of the curve looks very dry which is not in keeping with the evidence lead by the Plaintiff and his factual witnesses. They all testified that it had rained the previous night which resulted in the road having sand on it. In my opinion sand on the road is an indication of a moderate to heavy rainfall. One would then expect some evidence thereof when the accident occurred which was early morning hours.

[68] In my opinion the "*rain*" must have occurred after 10:00 PM on the 16th of December 2017. That is simply because there was no evidence from the Plaintiff that

⁸ Road Accident Fund Act section 17(1)(b)

when he went to rest around 7:00PM that night it was raining neither was it the evidence of the Chisago's that when they retired to sleep at 10:00 PM it had started to rain or it was raining. They were braaiing and drinking outside. There was no evidence that the social was undercover or evidence of the social ending because of the rain.

[69] It is therefore safe to draw an inference that the rain started after 10:00 PM. If the rain started after 10:00 PM onwards by the time the Plaintiff went to the garage at 5:30AM one would expect the ground to be evident of the rain e.g. dampness. At the very least some bending grass in the culvert or some muddy puddles on the side of the road or even mud on the body of the Toyota or on the wheels which is not the case here as it fell inside the culvert.

[70] Therefore, an inference can be drawn that it did not rain the night before. This was a fabrication of the events and over rehearsed evidence by the Plaintiff and his factual witnesses. It is not probable to remember the rain and the sand yet miss seeing a passing motor vehicle or the vehicle that caused the accident.

[71] This view is further strengthened by the fact that the Accident Specialist Mr. Proctor Parker was not informed about either the rain and the sand on the road or the vehicle that went pass the Plaintiff's motor vehicle on his right side. This raises alarm bells and leaves this court with no other conclusion in this regard but to deduce that this was a fabrication of the events to mislead the court so that it can find in favour of the Plaintiff. The inconsistencies in this regard affect the credibility of the evidence hed in this regard.

The Accident report

[72] The Plaintiffs evidence was that the accident report was compiled on the 20th of December 2017 while he was still in hospital he asked his cousin who remains nameless to compile same in the company of Mr. Lawrence Chisango. This he testified he had to do for his insurance purposes as it was a requirement. During examination in chief of the Plaintiff, he went through the exercise of rectifying "errors" on the accident report. In my opinion at least during the preparation of this trial the

Plaintiff was taken through this accident report if indeed these were genuine errors these would have been reported at the relevant police station where an affidavit would have been compiled to at least set the record straight. In the absence of such it leaves one to wonder if indeed these were errors *bona fide* or rectifications to suit the Plaintiffs case to gain favour in court.

[73] In addition to the above the failure to call the Cousin to testify on the “AR” does not assist the Plaintiff. The cross examination of the Plaintiff made it very clear that the Cousin must be called as a witness concerning several issues on the “AR”. Inquiries were made to the Plaintiffs’ Counsel Ms. Brammer as to why this witness was not called to give evidence on the accident report. There was no proper answer received by the court except that they did not think of calling the Cousin as a witness. The argument raised by Mr. Shepstone for the Defendant was that the Cousin was selectively excluded as he/she would not give favourable evidence which would advance the Plaintiff’s case.

[74] Observations were also made that during the process of rectification of the AR the accident sketch was not rectified meaning it must be read as it is. The accident sketch is not in keeping with the evidence of the Plaintiff. In this regard Ms. Brammer Counsel for the Plaintiff argued that the sketch should not be considered as it did not depict a curve but a straight road. A competent court cannot decide a matter fairly by looking at it in a piece meal manner. The Constitutional values implore that in exercising fairness the entire case presented must be considered by the presiding judge as opposed to picking only what may favour each sides case. That in this regard will not be exercising the discretion entrusted objectively in making a decision.

Credibility of the witnesses

The Affidavits

[75] It is imperative to discuss the credibility of the Plaintiff’s witnesses evidence starting with the Chisangos. Firstly, this court is faced with “two affidavits” dated 12 September 2022 by the Chisangos which are similar in every detail. Perhaps what is

disturbing is that Ms. Wendy Chisango admitted being presented with the affidavit to sign in the Attorneys offices. She denied taking an oath and signing same at the police station before a peace officer. Mr. Chisango also could not remember affirming same at the police station. This is conduct unbecoming of the Plaintiff's attorneys as the version which is on both affidavits not genuine as there was no evidence from the Chisango's remembering making notes before these statements were made. The Plaintiff's Attorneys obviously interfered with the evidence that was presented before this court hence the inconsistencies let alone misleading this court to rely on documents which were not of the Chisango's knowledge and not confirmed under oath.

[76] The transcribed voice note of Mr. Chisango, solidifies this courts view that the two affidavits were manipulated by the Plaintiff's legal representatives as this was the only time he was asked to relate the details of how the accident occurred being the 16th of April 2024. Otherwise both the Chisangos would have recalled making notes before being represented with the "*affidavits*". These affidavits are therefore rejected.

The Overall evidence

[77] The evidence led by the factual witnesses of the Plaintiff including the Plaintiff sounded extremely coached which then brings their credibility as witnesses into question. Coached evidence by witnesses is not allowed in our courts, witnesses can be prepared for trial but not coached as it interferes with the authenticity of the facts in the matter which have to be presented before court. All four factual witnesses when they gave evidence they opted to start from the social gathering where they were braaiing and consuming alcohol. Under bizarre circumstances they were all not friends they did not talk except for greeting each other. When the Plaintiffs witnesses where asked about the events of the 17th of December 2017, they all opted to start in the same manner and all make the same averments regarding the rain and there being sand on the street inclusive of seeing the Plaintiff drink 1 / ½ dumpie and not finishing same because he had a stomachache. This is evidence of rehearsed and coached evidence.

[78] Mr. Chisango at 5:30 in the morning decided to take a lift with the Plaintiff to buy bread and eggs with his daughter. Mr. Chisango testified that he woke his daughter up so that she could buy the airtime she needed. Upon inquiries being made as to the reasons he woke his daughter up his answer was he did not want to come back with a wrong thing. This version led was improbable. It was not made clear what was the urgency of buying bread and eggs on a Sunday morning as most certainly it was not their evidence that they were hungry or that the Chisangos were rushing elsewhere that morning be it at work or otherwise. It was also not Wendy Chisango's evidence that she did not have airtime that morning therefore she needed it urgently. This version is highly improbable that one would wake up at 5:30 to buy airtime. The explanation given for taking the lift with the Plaintiff that morning was because Mr. Chisango was parked in as they park in a single row. The Plaintiff's vehicle had been the last in so it was easier to take his vehicle. However, Mr. Motaung's evidence was that they parked in two rows with two cars in each row. This contradicts the version of the Plaintiff and the Chisangos which impacts on the credidinitly of their evidence.

[79] The evidence the Plaintiffs in my opinion was not authentic. There was a lot of fabrication of the events which was either contradicted by the accident report or the joint Accident Specialist minute. Mr. Chisango was overly dramatic by adding false information where he could for an example "he heard the Plaintiff shouting ohhh there is another white car" while he was fighting with the steering wheel (this he did using hand gectures) his evidence to some level was falsified with the intention to advance the Plaintiff case. This to the contrary was not heard by his daughter Ms. Wendy Chisango. It was also not the evidence of the Plaintiff that when he saw the white motor vehicle he shouted.

[80] Ms. Wendy Chisango was a very reluctant witness in some instances she did not want to answer the question, she did not keep eye contact when answering questions, it also came into light that she is in the country illegally. She testified that she lived and worked in Pretoria. When the court inquired about her status in the country she decided to change her evidence and state that she was no longer employed and no longer had a work permit in essence she had no documents legalizing her stay in the country except for a passport. Yet this was not the evidence

she led during examination in chief. This court cannot stress the importance of citizens and those visiting the country abiding by the law. If a witness is in transgression with the law in such a manner the credibility of the evidence given cannot be trusted simply because not legalizing ones stay shows a disregard of the laws of the country he or she is in. She gave no probable reason why she was illegal in the country.

[81] On the other hand, the Plaintiff blatantly denied the version of the events which was documented by him to Ms. Maganlal without providing a proper basis. Whereas, Ms. Maginlal confirmed that this would have been information written by him on the questionnaire form, the Plaintiff read the medico legal reports filed on his behalf. He had the opportunity to call for rectification by way of addendums or otherwise if there were errors pertaining to the information he gave as opposed to what was captured. By not doing so the only reasonable inference that this court can draw is that the information captured in the reports filed is correct and was obtained from him. The experts Ms. Maganlal and Dr Isergler have no probable reason to falsify the information given by the Plaintiff this is inclusive of Sister Dube and Banda of the Defendant. The attempts which were made by the Plaintiff to deny the information captured were therefore not convincing.

[82] Importantly, the Plaintiff testified that on that Sunday morning he was taking his Toyota to be serviced around 7:00AM by the Mechanic. Yet the Mechanic was not called as a factual witness to confirm this allegation nor did he draft an affidavit confirming same. This fortifies this court view that the version led by the Plaintiff and the Chisangos concerning their trip to the filling station is unrealistic. This version of the mechanic does not seem to feature anywhere else and none of the experts were informed of this.

[83] Confusingly, the Plaintiff informed Ms. Magnlal that because of *“his sober habits that night he was preferred as a designated driver”*. This piece of information given to Ms. Maginlal suggests that the Plaintiffs were coming from elsewhere and in that place, there was drinking involved at night because only he was trusted as a driver to drive them back home or to the place of residence for his sober habits. This fortifies the view taken by this court that the probabilities of him going to the

mechanic that day is false information. Ms. Maganlal has no reason to falsefy information in her report.

[84] The Plaintiff meticulously remembers in detail how he drank one and 1/2 dumpie of beer and having a stomach ache. Surprisingly, this is also known by the Chisangos and Mr. Motaung. He also vividly remembers taking two sips of his beer and felt that it tasted funny and discarded it, this information Mr. Chisango also knew upon being asked how he knew about the two sips he mentioned that the Plaintiff said it in passing. Whereas throughout his evidence Mr. Chisango maintained that they had never spoken about the accident at all as they were never friends with the Plaintiff. Remembering that the Plaintiff drank a few beers 1, 1/2 dumpie inclusive of taking two sips of his beer in the morning is remarkable. However, when inquiries were made concerning the events which had occurred as early as 2022 the Chisangos conveniently could not remember. This is a clear sign of witnesses who are reluctant in answering questions genuinely.

[85] The credibility of the Plaintiff's evidence is also weakened by the alcohol factor in that he denied consuming alcohol to Ms. Maganlal. When he was cross examined on this issue he once again denied the manuscript that was completed by him and he unconvincingly gave an answer that he thought he was being asked about consuming alcohol now. Whereas the questionnaire which he was given clearly stated "*habits pre-incident illness alcohol*: he answered "*never drinks*". There is absolutely no way that the Plaintiff was confused by this question. This was yet another attempt to conceal the truth to gain favour from the court.

[86] The proper test is not whether a witness is truthful or indeed reliable in all that he says, but whether on a balance of probabilities the essential features of the story which he tells are true⁹ (cf *R v Kristusamy* 1945 AD 549 at 556 and H C Nicholas

⁹ President of the Republic of South Africa and Others v South African Football Union and Others 2000 (1) SA 1 (CC) para 79 p 43: 'The truthfulness or untruthfulness of a witness can rarely be determined by demeanour alone without regard to other factors including, especially, the probabilities . . . a finding based on demeanour involves interpreting behaviour or conduct of the witness while testifying.'

Credibility of Witnesses (1985) 102 SALJ 32 especially at 32 – 35). The essential features of the Plaintiff's evidence in all probabilities are not true to a large extent.

CONCLUSION

[87] I am not persuaded by the Plaintiff's evidence that he would have been successful on the merits in proving his claim against the RAF. The Joint minute of both Accident Specialists paint a clear picture that there was no rear end collision which occurred as pleaded. Therefore, the Plaintiff failed to discharge onus as it is not for the Defendants to prove the true facts of the Plaintiff's case. Tritely, costs follow the results. The matter was fairly complex and ran for 7 days it does warrant fees of Counsel for the Defendant being paid on scale C.

[88] In the circumstances the following order is made:

1. The Plaintiff's claim is dismissed.
2. The Plaintiff to pay the costs of the Defendants on a party and party scale with Counsel's fees on scale "C".

**NHARMURAVATE AJ
JUDGE OF HIGH COURT
JOHANNESBURG**

For the Plaintiff: Adv B Brammer
Instructed by: RH Lawyers incorporated

For the Defendants: Adv R Shepstone
Instructed by: Eversheds Sutherland South Africa Inc

Argument took place on 15 to 23 April 2024

Date of judgment: 3 June 2024