

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

CASE NO: 42843/2021

(1) REPORTABLE: YES/ **NO**

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

(3) REVISED: YES/ **NO**

DATE: 22 October 2024

SIGNATURE:

In the matter between:

NAIDOO: CLINTON

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGEMENT

KEYSER AJ

[1] This is an application for default judgment. The Plaintiff issued summons on the 7th of September 2021. The Summons and particulars of claim were served on the Defendant on the 8th of September 2021. The Defendant has failed to defend the action.

[2] The matter was first called on the 23rd of September 2024. Adv. AE Smit appeared for the Plaintiff. Ms Mahlangu appeared for the Defendant even though no notice of intention to defend was delivered by the Defendant. The court was requested to stand the matter down until Thursday 26 September 2024, as parties were engaging in settlement discussions. The court was

further advised that should settlement discussions fail, the Plaintiff intends to proceed with the matter based on the documents uploaded to Case Lines. I ordered that oral evidence be heard in the matter in respect of the merits portion of the claim should the matter not settle between the parties.

[3] On the 26th of September 2024 the matter was recalled, and I was informed that the parties were unable to reach a settlement. The Plaintiff sought to proceed with oral evidence in respect of the merits and further sought to proceed on the quantum based on the expert reports filed by the Plaintiff. The Plaintiff brought an application in terms of Rule 38(2). Various affidavits of the experts were uploaded to Case-Lines in which the experts confirmed the truth and correctness of their reports.

[4] Rule 33(4) of the Uniform Rules of Court provides as follows:

“If, in any pending action, it appears to the court *mero motu* that there is a question of law or fact which may conveniently be decided either before any evidence is led or separately from any other question, the court may make an order directing the disposal of such question in such manner as it may deem fit and may order that all further proceedings be stayed until such question has been disposed of, and the court shall on the application of any party make such order unless it appears that the questions cannot conveniently be decided separately.”

[5] I proceeded to order a separation of merits and quantum as I deemed it convenient for the issue of merits to be decided separately.

[6] Ms Mahlangu from the State Attorney’s office attended the proceedings. At no stage did Ms Mahlangu attempt to enter an appearance to defend or participate in the proceedings in court. It appeared that she was only attending for observation purposes.

[7] Before dealing with the testimony of the witness Mr Trevor Kristwell, I set out below a short chronology of relevant events leading up to this application:

[7.1] The Plaintiff was allegedly involved in a motor vehicle accident on 20 July 2019 at approximately 22H30 on Great North Road in the Benoni District.

[7.2] The Plaintiff was the driver of a motor vehicle bearing registration letters and numbers M[...] 0[...] G[...] when allegedly an unknown vehicle (hereinafter referred to as the “insured vehicle”) driven by an unknown person (hereinafter referred to as the “insured driver”) drove into the path of travel of the Plaintiff.

[7.3] The Plaintiff alleges in his particulars of claim that the sole cause of the collision was due to the negligent driving of the insured driver as he was negligent in one or more of the following respects:

“ 5.1 He failed to keep a proper lookout;

5.2 He drove at an excessive speed under the given circumstances;

5.3 He failed to keep the insured vehicle under proper control;

5.4 He failed to apply the brakes of the insured vehicle timeously, alternatively, sufficiently, further alternatively at all;

5.5 He failed to pay any, alternatively any adequate regard to the rights and presence of other road users, more particularly the motor vehicle being driven by the Plaintiff;

5.6 He failed to exhibit the requisite degree of skill represented of a reasonable driver in the circumstances;

5.7 He allowed his vehicle to constitute a danger to other road users;

- 5.8 He failed to warn other road users of the presence of his vehicle upon the roadway and the fact that such vehicle constituted a danger;
- 5.9 He failed to avoid a collision when by the exercise of reasonable care, he could and should have done so;
- 5.10 He drove into the path of travel of the motor vehicle being driven by the Plaintiff.”

[8] A claim was lodged with the Defendant on the Plaintiff’s behalf by his attorneys of record on 6 November 2019 encompassing inter alia the following documents:

[8.1] An RAF 1 claim form and medical report form completed by Dr A Shahzad dated 4 October 2019;

[8.2] A copy of the Identity document of the Plaintiff;

[8.3] An accident report form completed by Constable K Jacobs dated 20 July 2019 at 23H30 and stamped on 25 July 2019 by the Ekurhuleni Metropolitan Police. Attached to the Accident Report form was a handwritten affidavit of Trevor Kristell dated 2 September 2019;

[8.4] A typed affidavit of Trevor Kristell dated 18 October 2019;

[8.5] An Affidavit of the Plaintiff which is undated. The affidavit was signed but not commissioned. The affidavit indicated that the Plaintiff has no recollection of how the collision occurred.

[8.6] Glynwood Hospital records;

[8.7] Consent form of the Plaintiff;

[8.8] The Power of Attorney.

[9] I note that at the time of the hearing of the matter an affidavit of the Plaintiff was included in the trial bundle which was signed and commissioned on 12 September 2024. In the affidavit the Plaintiff stated that he has no recollection of how the collision occurred. The Plaintiff's application in terms of Rule 38(2) included an affidavit of the Plaintiff which is dated 11 September 2024, and which was stamped at the Benoni SAPS on 12 September 2024. In this affidavit the Plaintiff stated that the contents of the affidavit fell within his personal knowledge and are both true and correct unless otherwise stated. The following was stated in the affidavit:

- "8. On the 20th of July 2019 at approximately 22H30 on the Great North Road, Benoni, Johannesburg, the Plaintiff was the driver of a motor vehicle bearing registration number M[...] O[...] G[...], which was involved in a motor vehicle collision with a white bakkie motor vehicle being driven by an unknown driver. (hereinafter referred to as "the insured driver")
9. The Plaintiff was travelling along Great North Road towards Benoni, when the white bakkie with an unknown registration number came from the opposite side of the road along the curve into the lane of travel of the Plaintiff.
10. The Plaintiff swerved to avoid the collision and lost control of his vehicle."

[10] At the commencement of the matter counsel indicated that she will be calling one witness, Mr Trevor Kriswell who was a passenger in the Plaintiff's vehicle at the time of the collision.

[11] The witness, Mr Trevor Kristwell was led by counsel. The witness testified in English to the following:

- [11.1] On 20 July 2019 the witness was a passenger in the vehicle driven by the Plaintiff. The witness and the Plaintiff are long-time friends.
- [11.2] Video footage was shown to the witness, and he confirmed that he was the person who shot the video footage of the road on which the collision occurred and further that it is his voice that can be heard on the video footage. The video footage was uploaded to CaseLines and formed part of the Plaintiff's trial bundle and will be dealt with later in my judgment in more detail.
- [11.3] The stretch of road depicted in the video footage is similar to when the collision occurred, and nothing has changed on the stretch of road since the accident.
- [11.4] A google map of the road was presented to the witness and he confirmed that the map depicts the road where the collision occurred. The witness confirmed that they were travelling from Kei/ Hospital Road to Webb/ Cloudy Road. I note that Hospital Road becomes Kei Road and Webb becomes Cloudy Road. Both these roads intersect with Great North Road.
- [11.5] The witness proceeded to illustrate on the video footage the alleged point of impact between the Plaintiff's vehicle and the pavement. The witness indicated that the pavement was damaged by the impact and pointed to a damaged curb stone which the witness indicated as the point of impact. The witness's indication was between a lamp post and a tree behind the Brandwag School grounds. A signage board situated on the school grounds can be seen as a landmark on the video footage and is

positioned directly behind the area indicated by the witness as the point of impact. The witness estimated that the distance between the lamp post and the damaged curb stone to be between 1 to 1.5 meters.

[11.6] The witness stated that a mutual friend of the witness and the Plaintiff had arrived from Dubai and was residing in Brentwood Park. The Plaintiff and the witness went to visit this mutual friend; however, they did not spend much time at the residence of the mutual friend as their mutual friend was ill. The witness assumed their mutual friend was suffering from jet lag. The witness estimated that they visited the residence in Brentwood Park for approximately 20 minutes. The Plaintiff and the witness left the residence in Brentwood Park after 22h00.

[11.7] The witness stated that they travelled on Great North Road. Further, that the streetlights in Great North Road were not working. It however was a clear evening; the Plaintiff's vehicle's lights were switched on and visibility was good.

[11.8] The Plaintiff then approached the intersection of Kei Road and stopped his vehicle at this intersection. The Plaintiff then travelled through the intersection and continued to travel along Great North Road.

[11.9] As the Plaintiff travelled north towards the direction of Benoni Town there was a vehicle which the witness described as a bakkie (hereinafter referred to as "the insured vehicle") heading straight towards them. The witness explained that the insured vehicle was situated in front of the Plaintiff's motor vehicle and travelled in the opposite direction to the Plaintiff's motor vehicle.

- [11.10] The Plaintiff tried to avoid the insured vehicle and moved his vehicle to the right-hand lane. The insured vehicle then also proceeded to move into the Plaintiff's right-hand lane, i.e. the same lane the Plaintiff moved into. The Plaintiff then swerved his vehicle back to his left-hand lane. The insured vehicle then also swerved back into the Plaintiff's left-hand lane.
- [11.11] Due to the distance between the two vehicles the Plaintiff had to swerve his vehicle to his extreme left to avoid a head-on collision.
- [11.12] The Plaintiff's vehicle then collided with the pavement. The witness then indicated to a damaged curb stone on the video footage and noted this as the point of impact.
- [11.13] The witness confirmed that the Plaintiff's vehicle did not collide with the lamp pole but collided with the pavement after the lamp pole. The Plaintiff's vehicle then proceeded up the embankment where it collided with a palisade fence of the school situated at the top of the embankment.
- [11.14] The witness indicated that the Plaintiff's vehicle came to rest on top of the embankment and on top of the damaged palisade fence.
- [11.15] The witness confirmed that he remained conscious until both the SAPS and ER 24 paramedics arrived at the scene. The witness estimated that the SAPS and ER 24 Paramedics arrived simultaneously at the scene of the accident. The witness stated that shortly after the SAPS and ER24 Paramedics arrived he lost consciousness.

- [11.16] The witness explained that both he and the Plaintiff were injured and in shock and they therefore did not alight from the vehicle after the collision and did not speak to one another after the collision.
- [11.17] The witness stated that the Plaintiff was travelling between 82 to 83 km/h at the time of the accident. He recalls joking with the Plaintiff and asking the Plaintiff why he was travelling at that speed as the Plaintiff was not driving a BMW. The witness was questioned by counsel as to whether his reference to a BMW means that the Plaintiff was travelling too slow. The witness responded that he meant that the Plaintiff was travelling too fast.
- [11.18] The witness estimated the speed limit on the road to be 86 km/h.
- [11.19] Counsel questioned the witness as to whether the Plaintiff took any further evasive action other than the swerving of the vehicle - for example, braking the vehicle or hooting. The witness stated that the Plaintiff was focused on the oncoming insured vehicle and that the witness himself was the one pressing the hooter of the Plaintiff's vehicle.
- [11.20] The witness stated that there was nothing the Plaintiff could have done any better to avoid the collision.
- [11.21] The witness stated that he did not see the Plaintiff's damaged vehicle immediately after the accident.

The Video Footage:

[12] The video footage taken by the witness depicts the following:

- [12.1] The video starts with the witness identifying himself as Trevor Kristwell. The footage is taken from a moving vehicle as the vehicle travels on Great North Road from the intersection of Kei Road heading north towards Benoni Town and towards the accident scene.
- [12.2] As the vehicle passes the through the intersection road signs can be seen on both the left-hand and right-hand side of the road. These road signs depict a maximum speed limit of 60 km/h.
- [12.3] Approximately forty-four seconds into the video the road begins to curve to the left and the witness is heard on the video instructing his driver to slow down.
- [12.4] After this curve, Great North Road remains a straight stretch of road up until the intersection with Webb/ Cloudy Street.
- [12.5] One minute and three seconds into the video the vehicle stops, and the witness alights from the vehicle and proceeds to identify that the area seen in the footage is Brandwag School.
- [12.6] A damaged portion of pavement is identified by the witness as the area where the Plaintiff's vehicle collided with the pavement.
- [12.7] A steep embankment is seen in the video footage following a grassy pavement area and a green palisade fence is seen on top of the embankment.

[12.8] Great North Road is a dual-carriage way with two lanes of traffic in each direction. The opposite lanes of traffic are separated by a wide and raised island which is covered by grass.

[12.9] The area is a built-up area with streetlamps on both sides of Great North Road. A tree can be seen ahead of the area where the collision occurred in the middle island separating the opposing lanes of traffic.

[12.10] The witness after pointing out the area of the accident proceeds to enter the vehicle he was travelling in earlier. The driver of this vehicle then proceeds to drive their vehicle along Great North Road to the intersection of Cloudy Road.

[13] It appeared from the footage that the vehicle in the footage travelled some distance from the intersection with Kei Road prior to the collision occurring with the pavement. The court, to gain further clarity, requested the assistance of counsel and the witness to indicate to the court with the assistance of google maps the distance from Kei Street up to the alleged point of impact. The distance was established to be 409 meters. The witness confirm that he would have estimated the distance to have been between 350 to 400 meters. The witness agreed with the measurement obtained from google maps being 409 meters.

[14] The witness estimated the distance from the alleged point of impact to Cloudy Street to be 450 to 500 meters. It was however established with assistance of google maps that the distance measured approximately 147 meters. The witness conceded that the measurements as obtained from google maps was correct.

Questions of the Court:

[15] On questioning of the court the witness confirmed the following:

[15.1] The Plaintiff and the witness have been friends for 27 years.

[15.2] Both the witness and the Plaintiff reside in Turvey Road in Benoni Town. He is from Benoni, and he is well acquainted with Great North Road.

[15.3] It would take 15 minutes to drive from Turvey Road to Bentwood Park to the residence where the mutual friend from Dubai was residing.

[15.4] The witness first noticed the insured vehicle when he pointed to the insured driver to watch out for a bend in the road up ahead. As the witness pointed to the bend he saw the insured vehicle for the first time. The witness was requested to review the video footage again and to stop the recording at the point in the road where the bend in the road can be seen. The witness continued to review the video footage but could not establish or identify in the video the bend that he was referring to. The witness indicated that the bend he was referring to was rather situated further up the road and past the intersection with Webb Road. He stated that the curve in the road he was warning the Plaintiff of is where the road curves to the right.

[15.5] The sketch contained in the accident report indicated that the road curves to the left and that the Plaintiff's vehicle was found in the road at this curve. The witness indicated that the sketch of the accident as contained in the accident report is incorrect as the accident did not occur at a curve in the road. Further, that the Plaintiff's vehicle

did not enter the roadway after the accident but came to a standstill on the top of the embankment after colliding with the palisades.

[15.6] The height of this embankment where the Plaintiff's vehicle came to rest was about 2 to 3 meters in height. The witness commented that the embankment is much higher than what it appears on the video footage.

[15.7] The witness consumed two beers on the day of the accident. He consumed one beer at his residence and one beer at the residence in Brentwood Park.

[15.8] When the Plaintiff picked up the witness at 17h30 the Plaintiff was "dead sober". After the Plaintiff picked up the witness they first proceeded to the Plaintiff's residence where the Plaintiff showered, and they had something to eat. They then proceeding to drive to Brentwood Park.

[15.9] The Plaintiff and the witness arrived at the residence in Brentwood Park at 20H00. They stayed for about 15 to 20 minutes whereafter they left to return to Turvey Road. The witness stated that if their mutual friend was not feeling ill, they would have stayed with the mutual friend at his residence and would have consumed more beers.

[15.10] On High Road the Plaintiff took a wrong turn by making a right-hand turn instead of a left-hand turn which caused a delay and detour of about 10 to 15 minutes.

[16] The witness deposed to two affidavits. Both affidavits formed part of the Plaintiff's trial bundle. The first affidavit was deposed to on 2 September 2019. In this affidavit the witness stated as follows:

“On the 20th of July 2019 at approximately 22H24. Me and my friend Clinton Naidoo who was the driver of vehicle Reg No M[...] 0[...] G[...] was travelling from a friend’s home, heading towards our home, driving along Great North Road towards Benoni heading South when a white bakkie came around the curb at a high speed on the wrong side of the road in our lane. Our driver (Clinton) tried to avoid a head on collision with a pavement and collided with the fence and came back onto the road. We were transported to hospital by ambulance.”

[17] The second affidavit was deposed to on 18 October 2019. In the second affidavit the witness stated as follows:

“Prior to the collision, we were travelling along Great North Road. Whilst doing to, the insured driver who approached us from the opposite direction, veered into our lane of travel whereafter the driver of our vehicle swerved to avoid a head on collision and collided with a fence.”

[18] In *Stellenbosch Farmers' Winery Group Ltd. and Another v Martell & Cie SA and Others*¹ the court summarised the technique to resolve mutually destructive versions as follows: “The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court’s finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness’s candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of

¹ (427/01) [2002] ZASCA 98; 2003 (1) SA 11 (SCA) (6 September 2002)

particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness's reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

- [19] The two versions contained in the affidavits of the witness differ materially. The first affidavit indicates that the insured vehicle approached their vehicle from around a curve on the incorrect side of the road. The second affidavit does not mention that the insured vehicle came around a curve but merely indicates that the insured vehicle veered into their lane of travel.
- [20] Both the affidavits are inconsistent with the evidence that the witness has produced in court. In Court and for the first time the witness stated that the Plaintiff swerved his vehicle to the right whereafter the insured driver also swerved into the same lane as the Plaintiff, whereafter the Plaintiff served to his left and again the insured driver swerved into the same lane into which the Plaintiff had swerved thus causing the Plaintiff to swerve to the Plaintiff's extreme left where the Plaintiff's motor vehicle collide with the pavement and thereafter up the embankment where the Plaintiff's motor vehicle collided with the palisades of the Brandwag School.
- [21] The witness acknowledged that now in Court was the first time that he had mentioned the multiple swerving actions of both the Plaintiff's and insured drivers motor vehicles. Further that no mention was made of these actions in

his previous affidavits. When asked by the Court why he did not mention this information before and why same is not included in his affidavits, he indicated that after the accident he did not remember how the collision occurred. The witness stated that he had to return to the accident scene on multiple occasions to remember what had happened. The witness stated that he returned to the accident scene with members of his family on several occasions. He further stated that his memory of the accident had improved and returned with time.

[22] I find it highly improbable that the witness's memory of the events would improve with time. One would expect that the most vivid memories of incident would be soon after the accident occurred and with the passage of time the witness would forget smaller details related to the accident.

[23] The OAR (which will be discussed in greater detail below) indicates that the Plaintiff's vehicle was found in the road and that the collision occurred at a curve in the road. I pause to mention that the OAR was completed just over an hour after the collision occurred. The witness indicated that the Plaintiff's vehicle did not re-enter the roadway after the collision but rather remained stationary at the top of the embankment and on top of the damaged palisades.

[24] The witness indicated that the Plaintiff was "dead sober" and had only consumed one beer at the residence in Brentwood Park. I pause to mention that Lacet Laboratory blood alcohol test results were included in the trial bundle. The test results will be discussed in greater detail below. At this juncture it will suffice to mention that the testimony of the witness does not accord with the information contained in the Lacet laboratory test results as well as with the information contained in the report of Mr Ormond-Brown.

[25] The timeline provided by the witness is improbable. He first stated in response to counsel's questioning that they left the residence in Brentwood Park at 22H00 (see paragraph [11.6] above). He later testified that they arrived at the residence in Brentwood Park at 20H00 as indicated in paragraph [15.9]

above. He further testified that they remained at the residence in Brentwood Park for 15 to 20 minutes whereafter they left to return home. The witness further indicated that it was a 15 minute drive from the Brentwood Park residence to the residence of the Plaintiff, as indicated in paragraph [15.10] above. The accident occurred at approximately 22H24 as per the affidavit of the witness dated 2 September 2019.

If I were to accept that the Plaintiff and the witness left the residence in Brentwood Park at 20H00 and then mistakably took a detour which caused an additional time delay of 10 to 15 minutes, it would allow for a total travel time of 25 to 30 minutes from the Brentwood Park residence to the Plaintiff's residence in Benoni. The timeline presented by the witness leaves approximately 2 hours unaccounted for.

[26] If I was to accept the witness's version presented in Court, this would mean that the insured driver was travelling in the incorrect lane along a straight stretch of Great North Road. It would be improbable that the Plaintiff and the witness only became aware of the insured vehicle when he pointed to an upcoming curve in the road as the road is straight and there is nothing that would have impeded the Plaintiff's view of the road ahead if the Plaintiff was keeping a proper lookout.

[27] The witness indicated that he pressed the hooter of the vehicle whilst the Plaintiff was swerving to avoid a head on collision. Such an action from a passenger would interfere with the driving of the vehicle and impede the driver's ability to turn the steering wheel during swerving actions.

Affidavits of the Plaintiff:

[28] As mentioned in paragraph [9] above, the Plaintiff's stated in his affidavit deposed to on 12 September 2024 that he has no recollection of how the collision occurred. The Plaintiff's affidavit in support of the Rule 38(2) application however presents a version of how the collision occurred. It was stated that the Plaintiff was travelling along Great North Road towards Benoni,

when the white bakkie with an unknown registration number came from the opposite side of the road along the curve into the lane of travel of the Plaintiff. The Plaintiff swerved to avoid the collision and lost control of his vehicle. The two affidavits of the Plaintiff are contradictory. The Plaintiff was not called to give oral evidence and as such the court has no explanation as to why there is such a material contradiction in the versions contained in the Plaintiff's affidavits.

- [29] As mentioned in paragraph [8.5] above, the Plaintiff's affidavit which formed part of the documents submitted to the Defendant at lodgement of the Plaintiff's claim was signed but not commissioned. A case could be made of non-compliance with section 19(f)(i) of the act.

The Accident Report (OAR):

- [30] The following was recorded in the accident report form:

- [30.1] The OAR was completed by Constable K Jacobs on 20 July 2019 at 23H30 and stamped on 25 July 2019 by the Ekurhuleni Metropolitan Police.
- [30.2] The accident occurred along Great North Road between Hospital Road and Webb Street at 22H24 on 20 July 2019.
- [30.3] The Plaintiff was recorded as the driver of a white Opel Corsa with registration letters and numbers M[...] 0[...] G[...].
- [30.4] The accident occurred at a curve in the road.
- [30.5] The description of the accident was recorded as follows:
"Driver A allege he was travelling on Great North Road as he came around the curve in the far-right lane a white

vehicle was travelling facing oncoming traffic in vehicle A's lane so vehicle A swerved out to avoid a collision. As a result vehicle A lost control of his vehicle went off the road and collide with a fence and come back onto the road. The other vehicle drove off."

[30.6] The accident report was completed on 20 July 2019 at 23h30 and reflects an official stamp of Ekurhuleni Metropolitan Police dated 25 July 2019.

[31] The witness testified that he did not speak to the SAPS at the scene of the collision. The version contained in the accident report purports to be the statement of the Plaintiff to the SAPS officer. The affidavits of the Plaintiff are silent as to whether the description contained in the accident report was given to SAPS by the Plaintiff.

[32] The OAR formed part of the documentation the Plaintiff submitted to the Defendant which documentation would in essence enable the Defendant to investigate a "hit and run" claim and would have formed an important part of the Plaintiff's required compliance in terms of Regulations promulgated in terms of Section 26 of the RAF act. Therefore, the existence and the information contained cannot be merely overlooked by the court due to Constable K Jacobs not being called by the Plaintiff to testify.

[33] Although I am unable to determine the veracity of the contents of the OAR, I am able to deduce from the oral evidence presented in court and the documentation presented to the RAF at lodgement, that the information provided to the RAF to investigate the claim and the evidence presented in court are contradictory.

Hospital Records:

[34] I included the following directive which formed part of the court roll which was published: "Counsel, or the Attorney(s) appearing in Court must, in

accordance with the duty of full disclosure required for default judgment, make sure that the Court is appraised of any adverse facts, or aspects that might induce the Court not to grant Judgment by Default.”

- [35] Hospital records formed part of the trial bundle uploaded to CaseLines by the Plaintiff’s representatives described as Nursing notes² included the following notes:

“The ER24 paramedics came back, handed over the patient, the verbalised that they extracted the patient from the driver sit to a stretcher with – the laceration on the forehead to the head, head blocks were on, on a stretche-board. They also verbalised that on scene he was talking, but not making sense because he was under the influence of alcohol,”

- [36] Lancet Laboratories Pathology results were included in the hospital records³. The Lab results indicated that the Plaintiff’s blood alcohol level was tested. The blood sample indicated that the S-Ethanol tested at a level of 0.3% grams of alcohol per 100 millilitres of blood. The interpretation of the results as summarized in the lab results indicated that a percentage higher than 0.25% grams of alcohol per 100 millilitres of blood indicates critical. I note that the legal limit is 0.05 grams of alcohol per 100 millilitres of blood. The lab results indicate that the Plaintiff’s blood alcohol level far exceeded the legal limit.

- [37] The Plaintiff was examined by Digby Ormond-Brown, a Clinical Neuropsychologist, at the instance of the Plaintiff’s representatives. Mr Ormond Brown noted the following in his report:

“6.2 There was evidence of confusion and amnesia in the immediate aftermath of the accident:

6.2.1 Blood test showed that he was extremely intoxicated.

² CaseLines 18A-111

³ CaseLines 18 A-109

6.2.2. *The paramedics reported he was talking at the scene but was not making sense.*

6.2.2.1 *They attributed his confusion to being intoxicated but, in principle, it is possible that brain injury also played a role.*

6.2.3 *The nursing staff considered him to be “very restless and demanding” on 25 July 2019.*

6.2.4 *His last memories before the accident concern seeing a paint can standing in a pothole in the road. He recalls seeing a vehicle approaching from the opposite direction but does not recall the collision.*

6.2.5 *His first memories after the accident are of coming to his senses while still at the scene of the accident about 30 minutes later. He can remember a paramedic telling him not to move his neck or he would be paralysed.”*

[38] A confirmatory affidavit was uploaded to CaseLines in which Mr Ormond-Brown confirmed the truth and correctness of the contents of his report under oath. Considering the Laboratory records and the report of Mr Ormond- Brown I have no reason to not accept that the Plaintiff was highly intoxicated at the time of the collision.

[39] In the unreported case of *Ngubeni MF v RAF*⁴ the appellant admitted on the day of trial that his blood alcohol level was 0.23%, however he denied that he was intoxicated as he “felt normal” notwithstanding his blood alcohol level which was five times above the legal limit. In the matter Prof Gert Saayman, a medical doctor specialising in a field of medicine which deals primarily with injury and toxicology, testified. The following was noted:

“ [26] Prof Gert Saayman testified on the effect of alcohol on the ability of a person to safely operate a motor vehicle. He testified that with a BAC of 0.23% at the time of the collision the Appellant would have had to imbibe approximately 16 tots of liquor (whiskey, brandy etc). Relying on the work of a

⁴ Gauteng local Division Appeal court Case number A5026/2017

Swedish scientist, Woodmark, he estimated that he would have had to imbibe substantially more than 20 tots of liquor in order to get to yield of 0.23% at 07H20 the equivalent of this would be 12 to 14 beers. He testified that the Appellant's BAC would have been much higher at the time of the collision which was more than two hours earlier. Many scenarios were explored with Prof Saayman by the Respondent's and the Appellant's counsel but the essence of Prof Saayman's testimony was this: it was not impossible for someone who is accustomed to drinking (as it was alleged Appellant was) with such a high BAC to still be able to steer a vehicle but the issue was whether that person could do so safely. Driving a car safely is more than just the mechanics of driving. There was overwhelming evidence internationally that a person with such a high BAC would not be able to do so safely, which included not being able to judge the situation, see the dynamics of road traffic, react appropriately, pre-empt developments or prevent developments. [27] During cross-examination counsel for the Appellant put a scenario to Mr Saayman that a high BAC ought not to lead to the inference that an intoxicated driver was the cause of the collision. In doing so he utilised an example where an intoxicated driver was standing at a traffic light and someone rear-ended him and argued that on such a scenario the inference cannot be drawn that the intoxicated driver was at fault. Prof Saayman was asked by Respondent's counsel to comment on the Appellant's own version, namely that he was not standing still but was driving at 100km/h, into a sharp bend and talking simultaneously on the phone while having a BAC of 0.23% and some cocaine in his body. Prof Saayman had this to say: "My Lord, there is a common-sense answer to that and that is that that would be irresponsible. In other words, it would further impede his ability ... and obviously the risk of accident would have been much higher."

- [40] Considering the blood alcohol laboratory results contained in the Plaintiff's trial bundle and the information contained in the report of Digby Ormond-Brown, I place no reliance on the witness's testimony that the Plaintiff was "dead sober" at the time of the accident. The Plaintiff's blood alcohol concentration tested 0.3% grams of alcohol per 100 millilitres of blood. With

such a high blood alcohol concentration the Plaintiff would not have been able to safely operate the vehicle.

[41] I also find that the Plaintiff's representatives failed to comply with the directive included in the Court roll which required full disclosure for purpose of default judgement as no mention was made of the intoxication of the Plaintiff and it was left to the court to read through a host of documentation to ascertain the facts for itself.

[42] Counsel submitted that there was no reason to doubt the version of the witness and that the evidence of the witness was the only evidence before the court.

[43] In *S v Boesak*.⁵ The Court said: "[47] Of course, a *prima facie* inference does not necessarily mean that, if no rebuttal is forthcoming the onus would have been satisfied. But one of the main and acknowledged instances where it can be said that a *prima facie* case becomes conclusive in the absence of rebuttal is where it lies exclusively within the power of the other party to show what the true facts were and he or she fails to give an acceptable explanation..."

[44] I found the witness to be an unreliable witness. There were discrepancies between his affidavits, and he presented a different version during his oral evidence. The recollection of the witness of the events that happened on the evening of the collision is questionable. The witness indicated he had no recollection of what happened, and he had to revisit the scene of the accident on several occasions to regain his memories of the collision. The witness appears to have been reconstructing events rather than recalling them from memory.

[45] In the case of *L.N and Another v Road Accident Fund*⁶ in the Pretoria High Court Davis J described the RAF as being a "perpetually recalcitrant or

⁵ [2000] ZASCA 112; 2000 (1) SACR 633 (SCA).

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

delinquent litigant". Hospital records indicated that the Plaintiff was well over the legal alcohol limit and yet the RAF failed to enter an appearance to defend. It is clearly not fulfilling its mandate of properly investigating and defending unmeritorious claims, like the present one.

[46] In the premises I find no case made by the Plaintiff and the action stands to be dismissed.

[47] I make the following order:

47.1 The Plaintiff's claim is dismissed.

KEYSER AJ

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

JOHANNESBURG

DATE HEARD: 26th SEPTEMBER 2024

DATE OF JUDGMENT: 22 October 2024

APPEARANCES:

COUNSEL FOR THE PLAINTIFF: Adv. AE Smit

INSTRUCTED BY: JOUBERT BOTHA INC

COUNSEL FOR DEFENDANT: Ms. Mahlangu