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

CASE NO: 2022/12792

DELETE WHICHEVER IS NOT APPLICABLE

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

30 October 2024 P Uys (AJ)

DATE SIGNATURE

In the matter between:

OWOYALE, ADEKUNLE GANIYU

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

Summary:

Evidence – Single witness. Credibility, probability, reliability and sufficiency of evidence. The onus of proof is only discharged on objective, credible and reliable evidence. Effect of material internal contradictions and absence of probabilities.

JUDGMENT

UYS AJ:

Order'

[1] Having considered the evidence and heard counsel for both parties, it is ordered that:

1.1. Default judgment is dismissed with costs.

[2] The reasons for the order follow.

Introduction

[3] The defendant was served with the summons in the action on 4 April 2022 and did not enter an appearance to defend. This action served on the civil trial default judgment roll on 30 September 2024

[4] The following affidavits were submitted to support default judgment:

- 4.1. Plaintiff's founding affidavit for default judgment, dated 17 May 2024. (CaseLines 014-14)
- 4.2. Plaintiff's statutory affidavit deposed to in terms of section 19(f) of the Road Accident Fund Act, dated 14 February 2020. (CaseLines 017A-24)
- 4.3. A confirmatory affidavit by the plaintiff's attorney, dated 24 June 2024. (CaseLines 014-61)
- 4.4. Expert affidavits supporting the filed expert reports of the following experts :
 - 4.4.1. Orthopaedic Surgeon; (CaseLines 007-161,352)
 - 4.4.2. Psychiatrist; (CaseLines 007-172,361)
 - 4.4.3. Urologist; (CaseLines 007-189,388)
 - 4.4.4. Clinical Psychologist; (CaseLines 007-377)
 - 4.4.5. Industrial Psychologist; (CaseLines 007-202,399)
 - 4.4.6. Occupational Therapist; (CaseLines 007-430)
 - 4.4.7. Actuary. (CaseLines 007-423)

[5] Having considered the affidavits, I directed the plaintiff's attorney and counsel to¹ :

- 5.1. Consider the sufficiency and probative value of the proffered facts on:
 - 5.1.1. Causal negligence of the insured driver;
 - 5.1.2. Historic and prospective income derived from successful deliveries and client gratuities;
 - 5.1.3. Future promotional prospects,(promotion within 5 years to a semiskilled position) ;
 - 5.1.4. Factual post-collision employment prospects and income;
- 5.2. Supplement the evidence, insofar as it may be necessary.

[6] The matter stood down until 2 October 2024 when the trial continued through video conferencing on the Microsoft Teams platform.

[7] Counsel for the parties agreed that:

- 7.1. The determination of the quantum of general damages (if any) should be separated from the balance of the issues and postponed for later determination.
- 7.2. The nature and extent of the collision-related injuries and the causal link between the injuries and the patrimonial loss are well supported through the affidavit of the plaintiff and the expert reports.
- 7.3. The following issues required determination and could conveniently be heard simultaneously:
 - 7.3.1. *"The Causal Negligence Inquiry"*:
 - 7.3.1.1. Whether the causal negligence of an unidentified insured driver caused/contributed to the incident which occurred on 26 August 2019 along the Kromdraai Road, Rustenburg involving the plaintiff while driving a motorcycle with registration number K[...] ;
 - 7.3.1.2. The apportionment of causal negligence, if any;
 - 7.3.2. *"The Causal Damages Inquiry"*:

¹ CaseLines -Widely shared notes 23 and 24 September 2024.

7.3.2.1. The plaintiff's factual and quantified income but for and having regard to the injuries and the sequelae thereof;

7.3.3. *"The Quantum Determination"*:

7.3.3.1. The plaintiff's consequent damages for past and future loss of earnings and earning capacity, if any.

[8] The supporting affidavits were not supplemented and instead, the plaintiff was called to give evidence.

[9] The plaintiff commenced his evidence in English, however, the second question posed by the plaintiff's counsel to the plaintiff confused the plaintiff as if he did not fully understand the question and required an explanation.

[10] The court then proposed that the evidence continue in open court on 4 October 2024 and that the use of an Aruba interpreter (the mother tongue of the plaintiff) be considered.

[11] On 4 October 2024:

11.1. The defendant entered a notice of appearance to defend, and Mr Ngomana (Defendant's counsel) recorded that the defendant has no witnesses and sought the right to cross-examination purely to test the credibility and veracity of the plaintiff's evidence;

11.2. Ms Smit (Plaintiff's counsel) recorded that the plaintiff secured an interpreter who speaks a divergent Aruba dialect and that the legal team will consider the position as the evidence progresses.

11.3. Very soon during the plaintiff's evidence the plaintiff responded directly in English, and the interpreter resorted to English simplification rather than Aruba interpretation. The divergent Aruba dialect posed great difficulty. This served no obvious interpretational purpose.

11.4. Ms Smit reiterated that the plaintiff could effectively consult with and instruct his legal team in English. In addition, the plaintiff signed various

formal documents drafted in English, including an employment contract², and the supporting and discovery affidavits.³

- 11.5. The evidence proceeded in English. The plaintiff actively displayed a clear command of questions and sought limited clarification on only a few questions. The explanations were clearly understood and the plaintiff answered in simple but intelligible English throughout.
- 11.6. The use of English did not impede the evidence at all and neither counsel nor the plaintiff raised any concern on the issue.

The Evidence

[12] The plaintiff gave evidence that:

- 12.1. Around dusk on 26 August 2019, on the R104 near Kroondal, Rustenburg, North-West, the plaintiff drove a delivery motorcycle while delivering pizza for his employer, Debonairs Pizza Rustenburg.
- 12.2. The motorcycle was fitted with a rear-mounted pizza delivery box and a light on the top of the box.
- 12.3. The plaintiff was wearing a motorcyclist helmet, black trousers and a white shirt.
- 12.4. While approaching a stop street the plaintiff suddenly felt an impact from behind which caused him to lose control of the motorcycle and fall.
- 12.5. The traffic and police services attended the scene.
- 12.6. A fellow employee arrived at the scene and informed the plaintiff that an unidentified vehicle collided with the motorcycle from the rear.
- 12.7. Having regard to two photos of the scene (Exhibit A (CaseLines 017A-141) and Exhibit B (CaseLines 017A-145)), the plaintiff indicated the point of impact:
 - 12.7.1. On Exhibit A: beyond the stop sign, in the lane directly next to a stationary vehicle which is visible in the photograph.
 - 12.7.2. On Exhibit B: before the stop sign, in the lane of the light delivery vehicle visible in the photograph.

² CaseLines 017A-133.

³ Signed powers of attorney, consents, mandates, termination of mandates and contingency fee agreement (Caselines 017A-150 to 152 and 159 to 169).

[13] The plaintiff further gave evidence and the supporting affidavit for default judgment (paragraph 19, CaseLines 014-49) confirms that the plaintiff:

- 13.1. Exited the schooling system in Nigeria in 1995 holding a grade 12 equivalent of education;
- 13.2. Completed a diploma in computer engineering in 2006 but has never been employed in this line of work;
- 13.3. Relocated to South Africa in 2006 and, after being employed in various informal capacities as a barber and security guard;
- 13.4. Secured employment as a delivery driver at:
 - 13.4.1. Domino's Pizza Rustenburg during 2018;
 - 13.4.2. Debonairs Pizza Rustenburg on 1 August 2019, earning R4 500.00 per month, incentives of R7.00 per successful delivery and the potential to receive client gratuities.

[14] The nature, sequelae and causal link between the injuries and the patrimonial loss is supported through the evidence of the plaintiff and the expert evidence/affidavits.

[15] The plaintiff:

- 15.1. Suffered the following collision-related injuries:
 - 15.1.1. Open Book fracture of the pelvis with resultant urethral and anal sphincter injury;
 - 15.1.2. Multiple lacerations of the groin, perineum and right lower leg.
- 15.2. Was admitted to hospital from 26 August 2019 to 18 October 2019 and subsequently to a rehabilitation hospital until 12 November 2019.
- 15.3. Convalesced until the end of 2020 while only earning negligible informal income as a barber.
- 15.4. Recommenced employment at Debonairs Pizza Rustenburg, initially as a COVID-19 protocol officer (January 2021, earning R21.69 per hour) and eventually, as a pizza cook (September 2021 earning R21.69 per hour).
- 15.5. Remains employed at Debonairs Pizza Rustenburg, working three days per week, earning: ⁴

⁴ Caselines 017A-1121 to 1150

15.5.1.	2021:	R30,280.63;
15.5.2.	2022:	R25,346.12;
15.5.3.	2023:	R42,225.95;
15.5.4.	2024 to August:	R27,911.83.

[16] Cross-examination of the plaintiff exposed his uncertainty about the mechanism and cause of the incident. The plaintiff now stated that:

- 16.1. He did not see the insured vehicle at all;
- 16.2. The incident must have been caused by a vehicle which collided with the motorcycle as he would not have simply fallen;
- 16.3. A corroborative eyewitness is available to give evidence.

[17] On a clarifying question by the court, the plaintiff stated that the motorcycle finally came to rest on the gravel shoulder next to the road, directly in front of the visible stationary vehicle on Exhibit A.

[18] No evidence was adduced on the material damages to the motorcycle or the mechanism or momentum of the impact.

[19] No other witnesses were called.

Argument

[20] Both parties supplemented their arguments through written heads of argument.

[21] Ms Smit argued that:

- 21.1. The plaintiff continuously insisted that he was hit from behind by an unknown and unidentified vehicle;
- 21.2. The evidence was not contradictory but rather curtailed by the language barrier which confused the plaintiff;
- 21.3. The updated actuarial calculation procured by the plaintiff (Caselines 007-483) is premised upon and correctly quantifies:

- 21.3.1. The proven factual basic pre- and post-collision salary escalated subject to inflationary increases only up to age 65;
- 21.3.2. The plaintiff's speculative maximal earning potential from successful deliveries and client gratuities;
- 21.4. The proposed contingency deductions are fair and reasonable.

[22] Mr Ngomana argued that the plaintiff's evidence:

- 22.1. Is riddled with uncertainty, ambiguity, and contradiction;
- 22.2. Contradicts the statutory affidavit which states that the plaintiff has no independent recollection of the collision;
- 22.3. Is mutually contradictory indicating the point of impact on Exhibits A and B on different sides of the road and the stop sign respectively.

The onus of proof and the plaintiff's evidence

[23] Section 16 of the Civil Proceedings Evidence Act⁵, provides that:

"Judgment may be given in any civil proceedings on the evidence of any single competent and credible witness."

[24] The plaintiff bears the onus to convince the court, through credible evidence, that his version is probable.

[25] The court should weigh the evidence, consider the contents, decide whether it is trustworthy and assess whether, despite shortcomings, defects or contradictions in the testimony, the truth has been told.⁶

[26] Not all contradictions affect credibility. In *S v Mkohle*⁷, Nestadt JA held:

"Contradictions per se do not lead to the rejection of a witness's evidence. As Nicholas J, as he then was, observed in S v Oosthuizen 1982 (3) SA 571 (T) at 576B-C, they may simply be indicative of an error. And (at 576G-H) it is stated that not every error made by a witness affects his credibility; in each case, the trier of fact has to make an evaluation; taking into account such

⁵ 25 of 1965.

⁶ *S v Sauls & Others* 1981 (3) SA 172 (AD) at 180E-G.

⁷ 1990 (1) SACR 95 (A) at 98E-G.

matters as the nature of the contradictions, their number and importance, and their bearing on other parts of the witness's evidence."

[27] It was held in *Stellenbosch Farmers' Winery Group Ltd & Another v Martell et Cie & Others*⁸, that:

"[5] . . . 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 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. . . ."

⁸ 2003 (1) SA 11 (SCA) at [5].

[28] The proper test is not whether a witness is truthful or indeed reliable in all that is said, but rather whether on a balance of probabilities the essential features of the version are true.

[29] In *Road Accident Fund v Maseng*⁹, Van der Linde J, who wrote for the full bench, held that:

29.1. Consideration of probabilities exacts an analysis of the substance of the version offered.¹⁰

29.2. Probability is aided by the fact adjudicator's own experience and application of known rules of logic.¹¹

[30] The plaintiff initially pursued default judgment premised upon the supporting affidavit for default judgment and the statutory affidavit only.¹²

[31] The supporting affidavit contains:

31.1. No factual version from the plaintiff himself on the causal negligence issue;

31.2. Averments in the third person;

31.3. A version of an alleged eyewitness.

[32] The affidavit states that:

“5.1 On 26 August 2019 between 18h30 and 19h00 along the R104 Road at or near Kroondal, Rustenburg, the applicant was the driver of a motorcycle with a registration number K[...]

5.2 The applicant was involved in a motor vehicle collision with a motor vehicle with a registration number unknown to the applicant (herein after referred to as the ‘insured driver’) that collided with the Applicant from behind.

6.1 According to an independent witness, Mr Shadrack Maphosa, he was stationary at the entrance to the back gate at Millsell chrome mine, currently known as Samancor Western Chrome Mine.

6.2 At approximately 18h30 he noticed a White Twincab Bakkie, that was travelling straight.

⁹ 2017 JDR 0914 (GJ).

¹⁰ [11].

¹¹ [12].

¹² CaseLines 014-14.

6.3. *He saw that the bakkie collided with a Debonairs Pizza motorcycle and drove away without stopping. (The witness affidavit is uploaded to CaseLines under Section 017A – Trial Bundle 1 – Supporting Documents, subsection 0008);”*

[33] The document being referred to in paragraph 6.3. of the affidavit as “The witness affidavit” (CaseLines 017A-008):

- 33.1. Is written in script and signed;
- 33.2. Is not commissioned in terms of the relevant legislation;¹³
- 33.3. At best constitutes unsubstantiated hearsay of which the veracity and cogency cannot be tested and determined.

[34] The section 19(f)-statutory affidavit states that the plaintiff has no independent recollection of the collision¹⁴.

[35] I disagree with Ms Smit that the plaintiff’s confusion emanated from the language barrier. The plaintiff had a clear command of the English questions and explanations of questions and used simple but descriptive English during his answers.

[36] The plaintiff previously attested that he has no independent memory of the collision. The plaintiff’s viva voce evidence contradicts the essence of the section 19(f)-statutory affidavit, and no explanation was proffered on the discrepancy.

[37] The plaintiff’s version of the area of impact depicted in Exhibits A and B are mutually contradictory and destructive. The depicted points of impact in the two photos are on opposite sides of the road, stop sign and intersection respectively.

[38] Both versions can simply not be true. These contradictions are devastating to the plaintiff’s credibility and the reliability of his evidence.

¹³ Justices of Peace and Commissioners of Oaths Act, 16 of 1963, read with the Regulations governing the administering of an oath or affirmation (GN R1258 in GG3619 of 21 July 1972).

¹⁴ CaseLines 017A-24.

[39] The plaintiff admitted that he did not see the insured vehicle at all. The plaintiff stated that he merely felt an impact and explained that a vehicle must have collided with the motorcycle as he would not have simply fallen.

[40] The plaintiff's evidence remained reconstructive rather than factual and depicted that he has no independent recollection but rather relies on reconstruction and hearsay to support his version.

[41] No direct or circumstantial evidence was adduced on the material damage to the motorcycle or the momentum and direction of the impact.

[42] The evidence of the plaintiff was contradictory, reconstructed, unsubstantiated and unreliable.

[43] In the absence of corroborating evidence from the essential eyewitness and circumstantial evidence on the material damages and momentum of impact, it remains impossible to conclude on the probability of the plaintiff's version.

[44] The relief sought by the plaintiff is for default judgment in terms of Rule 31(2)(a) of the Uniform Rules of Court. This rule specifically authorises the court to make such an order as it deems fit after hearing the evidence.

[45] The granting of default judgment and the appropriate costs order involves an exercise of discretion.¹⁵

[46] I conclude that:

46.1. There is neither credible evidence nor probabilities on which a court ought to grant a default judgment in favour of the plaintiff.¹⁶

46.2. The plaintiff's burden of proof has not been discharged on the causal negligence inquiry and accordingly the two quantum enquiries do not have to be determined.

Order

¹⁵ *Sibusiso v Road Accident Fund* 2024 JDR 2023 GP at [18].

¹⁶ *Machewane v Road Accident Fund* 2005 (6) SA 72 (T).

[47] As a result, I make the following order:

47.1. Default judgment is dismissed with costs.

I hand down the judgment.

P UYS

**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG**

Signed Electronically

Delivered: This judgment was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **30 October 2024**.

For the Plaintiff:
Attorneys

Ms A Smit instructed by A Rautenbach

For the Defendant:
Attorney, Johannesburg

Mr T Ngomana instructed by State

DATE OF THE HEARING:

30 September, 2 and 4 October 2024

DATE OF JUDGMENT:

30 October 2024