

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

CASE NO: 22976/15

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

Date

Signature

In the matter between:

**VAN REYNEVELD, PAUL M (N.O)
OBO MOTLHALE, MODISOATSILE GONWIL**

Plaintiff

And

ROAD ACCIDENT FUND

Defendant

JUDGMENT

**THIS JUDGEMENT HAS BEEN HANDED DOWN REMOTELY/ELECTRONICALLY
AND SHALL BE CIRCULATED TO THE PARTIES BY WAY OF E- MAIL/
UPLOADING ON CASELINES AND/OR COURT ONLINE. ITS DATE OF HAND
DOWN SHALL BE DEEMED TO BE FEBRUARY 13, 2025**

NTANGA AJ:

Introduction

[1] The plaintiff instituted an action against the Road Accident Fund (RAF) for damages suffered as a result of injuries to which he claims to have been sustained in a motor vehicle accident which occurred on 19 July 2014, along Themba Road, Kagiso, Krugersdorp. The motor vehicle accident involved a motor vehicle with registration number N[...], driven by Mr. Johan Makwala, in which the plaintiff was a pedestrian.

[2] Prior to trial proceedings, the plaintiff filed a notice in terms of Rule 38(2) and sought an order for the reports of the experts identified therein to be admitted into evidence (on affidavit) at the hearing. This application was abandoned at commencement of the proceedings as parties had agreed on separation of determination of merits and quantum.

[3] When dealing with the issue of separation of merits and quantum the court in *RAUFF v Standard Bank Properties (A Division of Standard Bank of SA Ltd) and Another*¹ stated that:

“ ...

The entitlement to seek the separation of issues was created in the Court Rules so that an alleged lacuna in the plaintiff's case or an answer to the case can be tested; or simply so that a factual issue can be determined which can give direction to the rest of the case and in particular to obviate a parcel of evidence. The purpose is to determine the fate of the plaintiff's claim (or one of the claims) without the costs and delays of full trial ... It is not proper work if the separation of issues is attended to long after the pleadings are closed”.

¹ 2002 (6) SA 693 (WLD) at para 22.1

[4] Based on the above passage as well as Uniform Rules of Court, I took no issue with parties agreeing to separation of merits and quantum. I made an order as follows:

- a. Merits are separated from quantum in terms of rule 33(4) of the Uniform Rules of Court.
- b. Determination of quantum is postponed *sine die*.

Issues for determination

[5] This court is called upon to determine (i) whether the plaintiff was involved in a motor vehicle accident; (ii) whether injuries sustained by the plaintiff were as a result of a motor vehicle accident; (iii) whether the driver of the vehicle was negligent; and (iv) whether the defendant is liable for compensation to be paid to the plaintiff.

Background

[6] In the particulars of claim, the plaintiff alleges that the accident which resulted in his injuries was caused by the negligence of the insured driver who was negligent in one or more of the following respects:

“7.1 He failed to keep a proper alternatively any lookout.

7.2 He failed to avoid a collision when by the exercise of reasonable care, he could and should have done so.

7.3 He failed to apply brakes with which the vehicle was fitted, either timeously or at all, alternatively, failed to ensure that the braking mechanism with which the vehicle was fitted, was in good and proper working order and condition.

7.4 He/she caused his/her vehicle to collide into a pedestrian.

7.5 He failed to allow sufficient or any lateral movement between his vehicle, and the Pedestrian.

7.6 He/she caused his/her vehicle to collide with a pedestrian who was standing at or near the roadway.

7.7 *He/she failed to stop at a stop sign as was required of him/her to do so.* 7.8 *He/she failed to keep a sufficient berth between his vehicle and the pedestrian”.²*

[7] In its plea, the defendant denied the plaintiff’s allegation that the collision occurred as a result of the insured driver’s negligence and pleaded in the alternative that the collision was caused by the negligence of the Plaintiff as follows:

“8.1 He failed to keep a proper look out.

8.2 He failed to note the presence of motor vehicle N[...] on the surface of the road, alternatively, to timeously note its presence.

8.3 He failed to avoid a collision when by reasonable care and skill he could have and should have done so.

8.4 He chose to cross the road at an inopportune time and place and when it was not safe to do so.

8.5 He failed to cross at the robot control intersection or at the designated pedestrian crossing”.³

[8] The defendant further pleaded that the plaintiff was also negligent and that his negligence contributed to the collision and that any damages awarded to the plaintiff be reduced in terms of the provisions of the Apportionment of Damages Act No. 34 of 1956 (Apportionment of Damages Act).

Plaintiff’s Case

[9] The plaintiff did not testify in person as the Court was advised that due to the injuries he sustained, he suffered memory loss and was unable to recall how the accident occurred.

[10] The plaintiff called a single witness, Ms Kelebogile Moswetsi. She testified that the collision occurred in July 2014. She is staying in Kagiso at the intersection of Themba and Setlolamathe Streets and she was staying there when the collision

² Caselines 0004-5 to 0004-6.

³ Caselines 0004-17.

occurred. She testified that she was standing at the gate waiting for transport for her work shift at Steers.

[11] She described the road surface where the collision occurred as tarred, and that the municipal road reserve is not paved. At the time of the collision, she was standing at the gate which is the entrance to her house's yard. While standing at the gate waiting for her transport to work, she saw the plaintiff and Thabo coming from the other side of the house, they were walking from the bottom side of the road between two houses. She noticed that there was an argument between the plaintiff and Thabo, but she does not know what the argument was about. Thabo crossed Setlolamathe Street, and the plaintiff went back to where they came from.

[12] At the intersection of Kotlwanong and Themba Streets she saw a white bakkie crossing the intersection and it did not stop at the stop sign. The plaintiff was walking on the side of the road next to the pavement. The vehicle hit the plaintiff and did not stop. She ran fast towards the accident scene to help the plaintiff. Ms Mooki who was coming across Setlolamathe and Themba Street came and assisted her to hold the plaintiff. They took the plaintiff to the other side of the road and at that time her transport to work was already waiting for her. She described the vehicle that hit the plaintiff as a white Toyota Hilux Bakkie. This version was disputed by the defendant's witness Mr Makwala who testified that the vehicle he was driving was a white CAM Rhino Bakkie. She testified that she did not see the driver of the vehicle and registration numbers.

[13] She estimated the speed of the vehicle to be between 80 and 90 Kilometers per hour and testified that the driver was driving reckless.

[14] Under cross-examination, she testified that she does not possess a driver's license and that she has never driven a vehicle. On whether at the time of the incident there was still sunshine, or it was dark, she testified that it was in-between. On how she estimated the speed at which the vehicle was travelling, she testified that the driver was driving recklessly, he was rough on the road and did not stop at the stop sign.

[15] She testified that the vehicle hit the plaintiff on the right side between the ear and ear lobe. She did not see which part of the vehicle bumped into the plaintiff. On how she saw the exact impact of the collision on the plaintiff, she testified that when she went to assist the plaintiff, she saw that he was injured on the right-hand side.

The defendant's Case

[16] The defendant called two witnesses in its defense. The first witness, Mr Mothopeng testified that he is aware of the incident that occurred in July 2014. He was walking with the plaintiff from a shebeen (a township bar or tavern). They had a fight with other guys and the plaintiff was hit by those guys from the shebeen with a brick. They were walking on the pavement at around 19h00 in the early evening when the incident occurred. They started drinking around 17h00 to 18h00.

[17] Their fight started at the shebeen and the shebeen owner instructed them to go outside, that is when the plaintiff was hit with a brick on the head. He testified that the road they were travelling along was busy, the driver of the vehicle alleged to have hit the plaintiff, stopped at the stop sign because there were taxis. The plaintiff was down at the time the vehicle passed, and he fell between the pavement and the street. After the plaintiff fell down people started shouting saying the plaintiff was hit by a car, he tried to explain but they could not listen to him.

[18] He testified that he did not see the bakkie hitting the plaintiff or having contact with the plaintiff. He remembered the colour of the bakkie as sky-blue. He could see the bakkie clearly. Later, an ambulance arrived, and the Emergency Medical Services (EMS) officials enquired from him about what happened to his friend. He told them that he was hit by a brick. The EMS officials also asked him what happened to his foot, and he explained that he was hit with bricks and broomsticks.

[19] A few days later the plaintiff's mother visited him and requested that he must tell police that the plaintiff was hit by a bakkie, and he declined the request. He knows the plaintiff very well as they grew up together from the same street. He also knows the plaintiff's mother for a period of twenty-six to thirty years. He told the plaintiff's mother that he would only tell the truth.

[20] The plaintiff's lawyer visited him three years after the date of the incident and requested him to attend court for the hearing of the matter. He didn't appear in court; the lawyers took him to a coffee shop. They read a statement for him stating that his leg was broken. He told them that his leg was never broken. When he told them what happened they left him at the coffee shop. He stayed there for five minutes and spoke to a lady introduced to him as Nelly in court who advised him that he would be called when he is to appear in court.

[21] He confirmed that the signature appearing in the witness affidavit appearing on Caselines as his signature.⁴ This affidavit was deposed to by Mr Mothopeng on June 5, 2017. Briefly the affidavit states the following:

“ ...

On the said day, me and my friend Bethwell (Madisoatsile Gonwill Motlhahle) we were drinking at a tavern from the morning. We were enjoying ourselves the better part of the day and smoking. In the afternoon, it should have been around 17:00 whilst I was sitting inside, I heard commotion in the tavern and found out that Bethwell was fighting. I jumped up and attended the scene where I saw a group of about 3-4 guys hitting him up with bricks and wood objects. I tried to intervene and save my friend, and the guys told me they were beating him because he owed them money. At this stage he was bleeding profusely in the head from assault.

The assault turned on me as I tried to protect him, and I was equally assaulted. But when they turned their attention to me, Bethwell escaped and ran to the direction towards home. I followed him and the guys continued chasing us and throwing bricks at us.

Right at the corner of Kutlwanong and Themba Streets, Bethwell fell, I don't remember whether he was hit by a brick or what and at this stage members of the community were out on the street watching what was happening. There

⁴ Caselines on 009-89.

was a bakkie that was coming up the street and just moved from the stop sign which was about 10-15 meters from where Bethwell was lying. At this point I was equally in pain and limping from the assault we both received.

The bakkie was stopped and somewhere along I heard people blaming the driver and accusing him that he collided with Bethwell. I tried to explain but it is always difficult and risky to try and reason with an angry mob. But I want to confirm through this statement that there was never any contact between us and the vehicle.

ER24 ambulane was called into the scene and we were both transported to Leratong Hospital. I was treated and discharged on the same day whilst Bethwell was admitted because of severe injuries he sustained. The following day a guy called Lawrence came to my house and wanted to know what happened and I told him what happened. He told me that I must not talk like that because Bethwell was hit by a car, I disagreed.

*...”*⁵

[22] Under cross-examination Mr Mothopeng disputed some of the contents of his own affidavit. For instance, he disputed that they started drinking in the morning. He also disputed that he saw members of the community as indicated in paragraph 5 of the affidavit. He also denied that he was hit with broomsticks during the fight. His evidence in Court was in contradiction with the statement that was signed at the police station.

[23] Regarding the statement on Caselines at page 0009-34, he confirmed that he signed this statement. In the foregoing statement Mr Mothopeng states the following:

“...

On the 19th of July 2014 at about 17:40 I was walking along Themba Street Kagiso I was accompanied by a friend of mine by the name of MODISAOTSIKE GONWILL MOTLHALE. His nickname is Bethwell Motlhale.

⁵ Caselines 009-84 to 009-86.

He is known by his family and friends as Bethwell Motlhale. We were on our way home. We were walking from East to West along Themba road. We crossed the 4-way stop of Themba road and KUTLUANONG Streets. Bethwell kept on walking on the tar surface very close to the kerbstone in Themba road. I switched to the rocky gravel pavement situated between the fence of a house and the kerbstone. We were walking and chatting. I did not hear or see a vehicle approaching from behind.

The next moment a vehicle collided with Bethwell where he was walking on the tar surface next to the kerbstone. The impact resulted that Bethwell fell on me and both of us landed on the rocky gravel pavement where I was walking next to Bethwell. I got injured on my ankle. I saw that Bethwell was seriously injured. The ambulance arrived and took us to hospital.

My aunt Agness Pulane with ID number 63...081 accompanied us to the Leratong Hospital. We told them at the hospital that we had been knocked down by a bakkie.

...

On the 5th of September 2014 at about 08h45 Colonel Kruger informed me that the driver of the bakkie said that we were fighting in the street, and we were drunk. We were not drunk, and we did not fight at all.

On the 29th of August 2014 at about 10h00 I accompanied Colonel Kruger and Mr Lawrence Setompeke to the scene of the accident. At the scene I pointed out certain points to Colonel Kruger. He took photos of the points I pointed out to him.

Lawrence Setompeke also pointed out certain points to him, and Colonel Kruger compiled a sketch plan and key to sketch plan. He also took measurements of the points we pointed out to him”.⁶

⁶ Caselines 0009-30 to 0009-34.

[24] Mr Mothopeng denied the allegation that he was also hit by the vehicle together with the plaintiff. He re-iterated his earlier statement that they were hit by bricks. He testified that the statements were not written by him. He indicated that when statements were drawn, he spoke in Setswana. He testified that the contents of the statement as appears on page 81⁷ that was not drawn by him and that its contents were not written by him. He denied the statement on page 30 and stated that it was not written by him and that it is not signed at all.⁸

[25] The next witness called by the defendant is Mr John Makwala who testified that on the day of the incident he was doing maintenance in his house. He loaded the rubble in his bakkie to dump it at a nearby dumping site. He travelled along Themba Street and crossed the intersection between Themba Street and Kutluanong Street. He stopped at the stop sign because there is a tavern nearby to keep a proper look out as the area is busy. Immediately after passing the intersection, he was stopped by a group of community members who alerted him that there was someone who fell from the back of his vehicle. His response was that he had no passengers in his vehicle, he was driving alone. He reversed his vehicle to the scene, they called an ambulance, he went to the police station where he found a police lady who had written a statement, and he signed it. At the scene of the incident the other guys told him that the incident had nothing to do with him, they were fighting from a shebeen. He went to the police station to cover himself from being accused of colliding with the plaintiff. Some of the items from his vehicle like a shovel were missing. He denied the allegation that his vehicle bumped into the plaintiff.

[26] Mr Makwala denied the allegation that his vehicle hit the plaintiff and drove off. He also denied the allegation that he was driving fast and stated that he could not drive fast in a township whilst there were many people around. Mr Makwala further testified that even before the police took his statement they knew what happened. Police took measurements in the scene and there was no scratch in his car. In the statement that is in the police docket Mr Makwala stated the following:

⁷ Caselines 0009-81.

⁸ Caselines 0009-30.

“On Saturday 2014-07-19 at about 17:50 I was driving my car Rhino bakkie white in colour along Themba drive with registration number ZBW 571 GP, when I approached cnr Kutluanong Street and Themba I noticed people on my left side and they were stopping me, then I immediately stopped.

I did the U-turn and I stopped and parked my car next to those people who were trying to stop me, thereafter they told me that I bumped the two unknown black males that were next to my bakkie. I started interviewing them they said other two black males were busy fighting then they bumped my car and fell on the street. Then I went to those people who were lying there to check on them. I noticed that they were drunk. My surprise is that I did not hear any sound of bumping something and also my car is not damaged.

The paramedic arrived at the scene from treatment and also the ambulance arrived at the scene and took the victims to Leratong Hospital for treatment. Then I proceeded to Kagiso Police Station...”.⁹

Legal Framework and Evaluation of evidence

[27] Section 17(1) of the Road Accident Fund Act (RAF Act) provides that:

“Liability of Fund and agents. – (1) The Fund or an agent shall –

...

Be obliged to compensate any person (the third party) for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself or the death of or any bodily injury to any other person, caused by or arising from the driving of a motor vehicle by any person at any place within the Republic, if the injury or death is due to the negligence or other wrongful act of the driver or of the owner of the motor vehicle or of his or her employee in the performance of the employee’s duties as employee: Provided that the obligation of the Fund to compensate a third party for non-pecuniary loss shall

⁹ Caselines 009-58.

be limited to compensation for a serious injury as contemplated in subsection (1A) and shall be paid by way of a lump sum.

...”

[28] What then follows is that this Court must determine whether the plaintiff's claim falls within the parameters set out by the RAF Act, that is, whether the injuries sustained by the plaintiff were caused by a motor vehicle collision and by wrongful and negligent conduct of the driver of the insured vehicle.

[29] In *Wells and Another v Shield Insurance Co. Ltd (Wells)*¹⁰ the court stated that:

“Two pre-requisites of liability upon the part of the registered insurance company for loss or damage suffered by a third party as a result of bodily injury are thus laid down. They are (i) that the bodily injury was caused by or arose out of the driving of the insured motor vehicle; and (ii) that the bodily injury was due to the negligence or other unlaw act of the driver of the insured vehicle or the owner thereof or his servant”.

[30] In applying the principles set out in *Wells*, it appears that there must be physical contact between the injured claimant and the insured vehicle, which must be the cause of the injuries sustained by the claimant. Secondly, there must be legal blameworthy conduct of the insured driver.

[31] There are two versions placed before this Court. The plaintiff alleges that the injuries sustained were caused by a motor vehicle collision. On the other hand, the defendant alleges that the injuries were caused by being beaten with bricks and broomsticks.

[32] This Court is called upon to make an evaluation of evidence adduced before it to determine the cause of the plaintiff's injuries. Consequently, the plaintiff requests that, should the Court find that his injuries were caused by the insured vehicle, the

¹⁰ 1965 (2) SA 865 (C) at 868G-869A. See also *Makola v Road Accident Fund* [2024] ZAMPMBHC 75 (7 October 2024) and *Maatla v Road Accident Fund* [2015] ZAGPPHC 129 (6 March 2015).

defendant be held liable to compensate the plaintiff for 100% of proven damages. On the other hand, the defendant requests the Court to find that the plaintiff's injuries were caused by being beaten with bricks and broomsticks.

[33] The evidence relating to the alleged beating of the plaintiff with bricks and broomsticks was not pleaded by the defendant. In *Unit 15 Rondevoux CC t/a Done Rite Services v Makgabo*¹¹ the court stated that:

“It is trite that a party will be strictly kept to its pleadings “where any departure would cause prejudice or would prevent full enquiry” (Robinson v Randfontein Estates GM Co Ltd 1925 AD 173 at 198). However, where the evidence covers an unpleaded claim fully, “that is, where there is no reasonable ground for thinking that further examination of the facts might lead to a different conclusion, the Court is entitled to, and generally should, treat the issue as if it had been expressly and timeously raised” (Middelton v Car 1949 (2) SA 374 (A) at 385). The Supreme Court of Appeal has recently re-affirmed this approach to unpleaded issues, albeit while disallowing an unpleaded claim (see MJ K v II K [2022] ZASCA 116 (28 July 2022) at paragraphs 21 to 23)”.

[34] The rationale for keeping litigants strictly to their pleadings is to prevent them from springing surprises during trial, which may catch their opponents off-guard. Loosely spoken, this is to avoid litigation by ambush. Each litigant is entitled to know from the pleading stage which case he or she expected to answer.

[35] The plaintiff did not object to the evidence being led for the first time during trial. It may be that the plaintiff did not foresee prejudice. I therefore make no ruling on this issue.

[36] The plaintiff's evidence is based on a single witness testimony. The court is required to exercise judicial discretion regarding single witness testimony.

¹¹ [2022] ZAGPJHC 627 (1 September 2022) at para 18.

[37] When resolving factual disputes, the court is required to find where the truth lies between the two mutually destructive versions.¹² The Supreme Court of Appeal set out the principles in *Stellenbosch Farmers' Winery Group Ltd and Another v Martell & Cie SA & Others*¹³ as follows:

“ ...

The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarized 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 ... the court will then, as a final step, determine whether the party burdened with onus of proof has discharged it”.

[38] There were inconsistencies in Ms Moswetsi's evidence. Firstly, she testified that the collision occurred inside the road and later changed her evidence to state that the collision occurred on the side of the road. Secondly, she testified that the vehicle that collided with the plaintiff was a white Toyota bakkie. This version was disputed by the driver of the vehicle who testified that the vehicle he was driving at the time of the incident was a white CAM Rhino Bakkie. Thirdly, according to the description she gave of the direction where the plaintiff was walking, evidence indicate that the vehicle was on his left-hand side of the Plaintiff whilst she testified that it collided with him on the right-hand side ear. She could see the plaintiff's injury as she ran to assist him, and she was assisted by Ms Mooki to lift the plaintiff from where he had fallen and put him on the side of the road.

[39] Similarly, the evidence of Mr Mothopeng was inconsistent with his signed affidavit that was filed with PEJ Investors.¹⁴ However, the statement he filed with the

¹² Mhlanga v Passenger Rail Agency ZAGPJHC 147 (17 April 2020).

¹³ 2003 (1) SA 11 (SCA) at para 5.

¹⁴ Caselines 0009-32 to 0009-34.

police is consistent with his version (in Court) that the plaintiff was beaten by bricks and broomsticks.¹⁵

[40] Mr Makwala's evidence was in my view clear and satisfactory. His evidence was convincing in both evidence in-chief and under cross-examination. His evidence was consistent with the affidavit he filed with the police regarding the incident.

[41] In *National Employers' General Insurance Co Ltd v Jagers*¹⁶ the court stated that:

"It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however, the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false".

[42] The plaintiff argued that Ms Moswetsi's evidence should stand notwithstanding the inconsistencies he described as minor. What then is to be

¹⁵ Caselines 009-84 to 009-86.

¹⁶ 1984 (4) 437 (E) at 440D.

determined is whether, considering the inconsistencies, Ms Moswetsi's evidence should be accepted as reliable, probable and truthful.

[43] When considering the defendant's witnesses, Mr Mothopeng's evidence is corroborated by Mr Makwala's evidence on how the plaintiff sustained injuries. Mr Makwala's evidence is consistent from the statement he filed with the police on the date of the incident. I do not believe that he made up this statement to conceal the truth about the incident. He is clear about what happened on the day of the incident. I find his evidence to be clear and satisfactory.

Onus

[44] The plaintiff bears the onus to prove that his injuries were caused by a motor vehicle accident. Further than that, the plaintiff bears onus to prove that the driver of the vehicle was negligent, and that the accident was caused by the negligent conduct of the driver of the vehicle.

[45] When dealing with burden of proof the High Court of Namibia in *Natural Namibia Meat Producers (Pty) Ltd t/a Aranos Abattor v Ruppert Prenin t/a Meat for Africa*¹⁷ followed the decision of *Pillay v Krishna and Another*¹⁸ which stated that:

"The first principle in regard to the burden of proof is thus stated in the Corpus Juris ... If one person claims something from another in a Court of law, then he has to satisfy the Court that he is entitled to it. But there is a second principle which must always be read with it ... Where the person against whom the claim is made is not content with a mere denial of that claim, but sets up a special defense, then he is regarded quoad that defense, as being the claimant: for his defense to be upheld he must satisfy the Court that he is entitled to succeed on it ... But there is a third rule, which Voet states in the next section as follows:

¹⁷ [2015] NAHCMD 96 (17 April 2015).

¹⁸ 1946 AD 946 at 951-952.

‘He who asserts, proves and not he who denies, since a denial of a fact cannot naturally be proved provided that it is a fact that is denied, and that the denial is absolute’

...“.

[46] In *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd*¹⁹ the court stated that:

“As was pointed by Davis, A.J.A. in Pillay v Krishna and Another, 1946 at pp. 952-3, the word onus has often been used to denote, inter alia, two distinct concepts: (i) the duty which is cast on the particular litigant, in order to be successful, of finally satisfying the Court that he is entitled to succeed on his claim or defense, as the case may be, and (ii) the duty cast upon a litigant to adduce evidence in order to combat a prima facie case made by his opponent. Only the first of these concepts represents onus in its true and original sense.

...

In this sense the onus can never shift from the party upon whom it originally rested. The second concept may be termed, in order to avoid confusion, the burden of adducing evidence in rebuttal (“weerleggingslas”). This may shift or be transferred in the course of the case, depending upon the measure of proof furnished by the one party or the other”.

[47] In *Monteoli v Woolworths (Pty) Ltd*²⁰ the court stated that:

“It is absolutely trite that the onus of proving negligence on a balance of probabilities rests with the plaintiff.

Sometimes, however, a plaintiff is not in a position to produce evidence on a particular aspect. Less evidence will suffice to establish a prima facie case where the matter is peculiarly in the knowledge of the defendant.

...

¹⁹ 1977 (3) SA 534 (A) at 548.

²⁰ 2000 (4) SA 735 (W) at paras 25; 27 and 29.

In such situations, the law places an evidentiary burden upon the defendant to show what steps were taken to comply with the standards to be expected. The onus nevertheless remains with the plaintiff.

[48] This Court must determine whether the plaintiff has discharged the onus of proving his case and if so, whether the evidential burden shifted to the defendant. The plaintiff relied on a single witness testimony to support his case. The Court is required to exercise judicial discretion when evaluating single witness testimony. It is trite that such testimony should be clear and satisfactory in all material respects.²¹

[49] Ms Moswetsi evidence that the driver of the insured vehicle was driving at a high speed is not sustainable. Her estimation of the speed at which the vehicle was driven is improbable, she conceded she does not have a driver's license and that she has never driven a vehicle, as to how she concluded estimating the speed is questionable and does not assist Plaintiff's case.

[50] Ms Moswetsi's evidence that Mr Makwala failed to stop at the stop sign was disputed by Mr Makwala who testified that he exercised caution around the intersection as there were many people around and stopped at the stop sign. This version was also confirmed by Mr Mothopeng. I find that the probabilities that the driver of the vehicle stopped at the stop sign favour Mr Makwala and Mr Mothopeng.

[51] No evidence was led regarding contents of the accident report, hospital records and medico legal expert reports. The police officer who compiled the accident report was not called as a witness to testify. It is not clear to me as to how the police officer obtained the information he used to compile the accident report. The description of the incident is in contrast with the statement submitted by Mr Makwala at the time that the accident report was compiled. From the evidence presented, Ms Moswetsi had already gone to work when the police arrived at the scene to take measurements and compile the accident report. The plaintiff and Mr Mothopeng were also already taken by ambulance to the hospital. The only person available was Mr Makwala, as to how the accident report was compiled with

²¹ See *S v Artman and Another* 1968 (3) SA 339 (AD) and *R v Mokoena* 1956 (3) SA 81 AD.

information different from the statement given to the police by Mr Makwala, was not explained. This Court will make a finding on the evidence led during proceedings. The Plaintiff placed more emphasis on the accident report, contents of which are disputed by the driver of the insured vehicle and Mr Mothopeng. In the absence of testimony by the police officer who compiled the accident report, I cannot find its contents reliable considering evidence presented which disputed its contents.

[52] On the evaluation of evidence adduced by the plaintiff's witness, I find Ms Moswetsi's evidence improbable because of contradictions in her evidence. The story told by Ms Moswetsi is not reliable, her observation of how the plaintiff sustained injuries is improbable. I find that the Plaintiff has failed to discharge the onus proving that the injuries he sustained were caused by the vehicle driven by Mr Makwala and that Mr Makwala was negligent in driving the vehicle.

[53] Considering the above, I find that the plaintiff has failed to adduce evidence to show that the injuries he sustained were caused by the vehicle driven by Mr Makwala and he has also failed to prove that his injuries were caused by the wrongful and negligent driving of Mr Makwala.

Order

[54] I therefore make the following order:

1. The Plaintiff's claim is dismissed with costs on a party-to-party scale.

M NTANGA
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of Hearing: 20 November 2024

Date of Judgement: 13 February 2025

Appearances

Plaintiff's Counsel: Adv Groenewald

Instructed by: Snyman Lotz Inc.

Defendant's Counsel: Ms Mhlongo

Instructed by: State Attorney