



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)**

CASE NO: 867/2023

In the matter between:

NOMANA KALIPHA

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

RUSI J

[1] Section 17 of the Road Accident Fund Act 56 of 1996 makes provision for the Road Accident Fund's liability for loss or damage suffered by a person as a result of bodily injuries caused by or arising from the driving of a motor vehicle by any person if the injury is due to the negligent or wrongful act of the driver.

[2] On 22 February 2023, the plaintiff issued summons against the Road Accident Fund (RAF or the Fund) claiming R3 300 000.00 in damages under several heads, in respect of a 'Webber III' (ankle) injury allegedly sustained by her as a result of being

knocked down by an unknown vehicle on 26 January 2022 while walking on the road at or near Coffee Bay Junior Secondary School in Coffee Bay.

[3] RAF denied liability for the plaintiff's damages and alleged in its plea that her injury did not result from the alleged accident. In the alternative, RAF pleaded that the alleged accident was as a result of the plaintiff's sole negligence, in that she walked in the path of the unknown driver, further alternatively, that her negligence contributed to the occurrence of the alleged accident.

[4] However, on 18 June 2024, RAF's defence was struck out¹ on application by the plaintiff following its failure to comply with the plaintiff's request for discovery as envisaged in Rule 35 of the Uniform Rules of Court. Resulting from the striking out of RAF's defence, the plaintiff made an application for judgment to be entered against the defendant.

[5] The matter served before me on 04 December 2024 for hearing as an application for a default judgment. On the date of hearing, Mr *Baceni* who represented the plaintiff, requested the court to determine only the issue of the Fund's liability and separate the quantum of damages for determination at a later stage. This application was granted as envisaged in Uniform Rule 33(4).

[6] Notwithstanding the striking out of RAF's defence, the plaintiff still had to establish her entitlement to the default judgment. She gave oral evidence in support of her application, and she was the only witness. She also relied on documents that were filed with RAF at the time she lodged her claim. The bundle of these documents contained medical records from Zitulele Hospital where the plaintiff was admitted following the alleged motor vehicle accident; and those from Bedford Hospital where she was transferred for further treatment. It also contained the contents of the police docket which included the accident report form and sketch plan with the key thereto

¹ Per court order of Mjame AJ dated 18 June 2024.

which Sergeant Ngambu of the Coffee Bay South African Police Service compiled. Below I set out a summary of the plaintiff's oral evidence.

The plaintiff's evidence

[7] The plaintiff testified that on 26 January 2022 around 22h00 she was coming from her part-time employment at White Clay in Coffee Bay. While walking along the road near a bridge and as she was about to approach a curve, she heard a bang and at that same time she fell down in the middle of the road. The road was not busy; it is a two-way tar road and the only markings on it were arrows indicating the direction of the vehicles. There was no source of light where she was walking, hence it was dark. As a result of the accident, she sustained an injury to her right ankle and felt pain.

[8] She was woken up from where she fell down by Luyanda Tshemese (Luyanda) who picked her up, carried her on his back and took her to a nearby homestead of one Nomava Ndevu where she spent the night. An ambulance was phoned but no one answered the phone call. On 27 January 2022 a lady named Nombuyekezo Yatha conveyed her to Zithulele Hospital in her private vehicle. She was admitted at Zithulele Hospital and the X-ray examination that was performed revealed that she had a fracture on her right ankle. She was later transferred to Bedford Orthopaedic Hospital for further treatment.

[9] According to the sworn statement of Sergeant Ngambu, the plaintiff reported the accident at the Coffee Bay police station on 19 March 2022. Sergeant Ngambu attended the alleged accident scene. The accident report that she subsequently compiled is dated 19 March 2022. Annexed to the accident report is a sketch plan and key thereto in which the point of impact is depicted as being near the edge of the lane on the left side of the road with arrows drawn on that lane to indicate the path of the moving vehicles. The plaintiff had difficulty confirming from the sketch plan the side of the road on which she was knocked down by the unknown vehicle.

[10] At the end of the plaintiff's evidence-in-chief I asked her questions in order to elucidate certain aspects of her evidence. Those related to the relevant time of impact, her path on the road and the path of the vehicles that moved thereat, inter alia. Below I set out what emerged from the plaintiff's evidence during my questioning.

[11] She was not facing the oncoming traffic when she was walking on the road, and therefore, the vehicle that knocked her down came from behind. She did not see the vehicle, nor did she see any beam of its headlamps or heard a hooter before she heard a bang. She surmised that she was knocked down by a vehicle. Before she heard a bang she was constantly looking around because she was walking alone at night. The point of impact as depicted on the sketch plan is indeed on the path of the vehicles that were approaching from behind. The reason why she walked in the path of the vehicles was that she was in a hurry, and she was alone on the road.

[12] The plaintiff further testified that it was from Luyanda that she heard that she was knocked down by a vehicle as a matter of fact. Luyanda was not with her when she fell down after hearing a bang. She estimated that he must have emerged from a pathway not far from the road. Her understanding of the rules of the road is that a pedestrian must walk on the correct side of the road. She was in her sober senses when she walked on the road and believed that the path she walked in was the correct side of the road.

[13] The medical records from Zithulele Hospital indicate that the plaintiff was admitted thereat on 27 January 2022 with the history of 'a car driving over her leg.' They also show that the diagnoses of the doctors who treated the plaintiff in both hospitals, was that she sustained a right ankle injury which required surgical intervention.

[14] The police officer who drew the accident report and deposed to a sworn statement on her visitation of the alleged accident scene; and Luyanda were not called to testify.

Submissions on behalf of the plaintiff

[15] Mr *Baceni* submitted that the plaintiff succeeded in establishing, on a balance of probabilities, that a motor vehicle accident occurred as a result of which she sustained an injury to her right ankle. It was Mr *Baceni*'s submission further that in the light of the fact there was no other object on the road which may have collided with the plaintiff, it follows that the plaintiff's injury resulted from being hit by an unknown vehicle.

[16] While he readily conceded that what is recorded in the hospital records as the history of the plaintiff's injury was a far cry from the description that she gave of how the accident took place, Mr *Baceni* submitted that this contradiction was not material as to result in the rejection of the plaintiff's version. He further submitted that the plaintiff's evidence established that the driver of the unknown vehicle that knocked her down was solely negligent. In making this submission, Mr *Baceni* took the view that if the plaintiff did not see any vehicle lights, an inference must be drawn that the insured driver was wholly negligent.

[17] It was further submitted on behalf of the plaintiff, as alternative argument, that in the event that the court finds that the accident was not due to the sole negligence of the unknown driver, but that the plaintiff contributed to its occurrence by her negligence, the appropriate degree of apportionment of liability may accordingly be applied.

The law

[18] In order to succeed in her claim, the plaintiff had to establish on a balance of probabilities that her injury arose out of the negligent driving of a motor vehicle and that there is some connection between the driving and her injury.² In the present case, the plaintiff will only succeed if she satisfies the Court on a preponderance of probabilities that her version is true and accurate and therefore acceptable. It is trite that the

² *Kemp v Santam Insurance Co Ltd* 1975(2) SA 329 (C) at 330F; *Van Wyk v Lewis* 1924 AD 438 at 444.

estimate of the credibility of a witness will be inextricably bound up with a consideration of the probabilities of the case.³

[19] Explaining what the standard of proof on a balance of probabilities entails, learned author Schwikkard states as follows:⁴

‘In civil cases the burden of proof is discharged as a matter of probability. The standard is often expressed as requiring proof on a “balance of probabilities” but that should not be understood as requiring that the probabilities should do no more than favour one party in preference to the other. What is required is that the probabilities in the case be such that, on a preponderance, it is probable that the particular state of affairs existed.’

[20] And, in *Stacey v Kent*,⁵ Kroon J wrote:

‘The inquiry after the case remains whether the plaintiff has, on a balance of probabilities, discharged the onus of establishing that the collision was caused by negligence attributable to the defendant. . .’

[21] In the discussion that follows I apply these principles of the law to the facts of the plaintiff’s application for default judgment.

Analysis

[22] Despite the fact that RAF’s defence was struck out, this Court must be satisfied, on the facts presented by the plaintiff through her evidence, that on a preponderance of probabilities, (a) she suffered bodily injury; (b) arising out of the negligent driving of a motor vehicle.

³ *National Employers’ General Insurance Co Ltd v Jagers* [1984] 4 All SA 622 (E), at 624-5.

⁴ Schwikkard PJ (*et al*), *Principles of Evidence*, 4th Ed, 2016, page 627, at 32.7.

⁵ 1995 (3) SA 344 (ECD) at 352I-J.

[23] That the plaintiff sustained an ankle injury on 26 January 2022 is common cause. What must be determined is whether her injury was caused by the negligent driving of a motor vehicle.

[24] The starting point is that the plaintiff was a single witness. Section 16 of the Civil Proceedings Evidence Act 25 of 1965 provides that judgment may be given in any civil proceedings on the evidence of any single competent and credible witness. In other words, only credible evidence shall be sufficient to enable a Court to give a judgment.

[25] There is of course no rule of thumb or formula to apply in determining the credibility of a single witness. The trial court will weigh the evidence of the single witness and consider its merits and demerits, and having done so, decide whether it is trustworthy and whether it is satisfied that the truth has been told despite the shortcomings or defects or contradictions in the witness's evidence.⁶

[26] The essence of the plaintiff's testimony is that in as much as she was of sober senses when the alleged accident occurred in the sense that she had not consumed any intoxicating liquor, she did not see what happened at the crucial moment regarding her claim – i.e., how the accident took place. She could only estimate that the bang she heard, her falling down, and the injury she sustained were as a result of the unknown vehicle colliding with her.

[27] It bears emphasizing that the plaintiff's evidence must be based on facts and nothing else, and certainly not conjecture. There is no direct evidence of the accident and how the alleged accident happened. The picture portrayed by the plaintiff is that the driver of the vehicle that knocked her down did not stop after the alleged accident. At best for her, her version that she was knocked down by a car is derived from what she heard from Luyanda Tshemese. She would have conveyed this, in turn, to those attending to her at Zithulele Hospital.

⁶ *S v Sauls* 1981 (3) SA 172 (A) at 180E–G.

[28] I am asked to make a finding, from the foregoing evidence, that the accident took place; and to draw an inference of negligence on the part of the unknown driver, or to make such finding of contributory negligence as may appropriately be made against the plaintiff.

[29] As is trite, there must be positive proven facts from which such inferences can be made. If there are none, the method of inference fails and what is left is mere speculation or conjecture.⁷

[30] On the plaintiff's version, it follows that Luyanda is the one who must be taken as having possessed knowledge of facts regarding how the accident happened. His evidence was, therefore, crucial. However, no basis was laid for the admission of the evidence of which Luyanda is the source and the person on whom its probative value depends. Such evidence remains inadmissible hearsay. What therefore remains is circumstantial evidence from which it must be inferred that the plaintiff's injury arose from the alleged driving of the motor vehicle; and if so, whether the unknown driver was solely negligent.

[31] The cardinal rule of inferential reasoning is that the inference that is sought to be drawn must be consistent with all the proved facts; if it is not, then the inference cannot be drawn.⁸ The inference sought to be drawn must, furthermore, be the 'more natural, or plausible, conclusion from amongst several conceivable ones' when measured against the probabilities.⁹ As held in *Ocean Accident and Guarantee Corporation Ltd v Koch* 'plausible' in this context means 'acceptable, credible, suitable'.¹⁰

[32] In order for this Court to infer that a motor vehicle accident occurred out of which the injury of the plaintiff arose, and that the accident was caused by the sole negligence

⁷ *S v Essack & another* 1974 (1) SA 1 (A) at 16C-E, quoting with approval *Caswell v Powell Duffryn Associates Collieries Ltd* [1939] 3 All ER 722 at 733.

⁸ *R v Blom* 1939 AD 188 at 202-203.

⁹ *SA Post Office v Delacy and Another* 2009 (5) SA 255 (SCA) at para 35; *Cooper and Another v Merchant Trade Finance Ltd* (474/97) [1999] ZASCA 97 (1 December 1999) para 7; *Govan v Skidmore* 1952 (1) SA 732 (N) at 734C-E.

¹⁰ 1963 (4) SA 147 (A) at 159B-D.

of the driver, it must be satisfied that the facts that have been set forth by the plaintiff reflect the probability of what took place on 26 January 2022 at the time and place that she alleges she was knocked down by a vehicle. Put differently, an inference of the actual occurrence of the accident and the negligence of the unknown driver would presuppose that this Court believes the plaintiff's evidence, or that there are facts which this Court finds to be proven which support the inferences to be drawn.

[33] Even though the hospital records indicate that the plaintiff presented with a history of being in a motor vehicle accident, that history is described therein as that of 'a vehicle driving over her leg'. No evidence was adduced to elucidate how the unknown vehicle drove over the plaintiff's leg. The plaintiff's oral evidence was simply that 'she heard a bang and simultaneously fell down.' Before that, she did not see the vehicle, she heard no hooter and saw no beam of headlamps. It is unsurprising she was not able to tell the court how the alleged unknown vehicle was driven at the time of the accident. All of this is despite the fact that she had constantly been looking around as she walked along the road.

[34] The plaintiff's testimony is, to say the least, superficial, as though tailored. This is compounded by the fact that the person who, on her version, came about with information that she was hit by a car was not called to give evidence. Mr *Baceni* argued that from the fact that the plaintiff did not see any beam of headlights, the court must infer that the unknown driver was negligent. I disagree with this proposition as it is based on pure conjecture, unsupported by objective facts.

[35] On the plaintiff's own showing she did not see the vehicle that presumably hit her, nor did she make any other observation that indicated that a vehicle was approaching behind her to begin with. All that she heard was a bang which was followed by her falling down. Miraculously, after she had fallen down Luyanda emerged, woke her up, and gave her vital information to the effect that she was knocked down by a vehicle. For someone who kept looking around as she was walking alone in the night, she had difficulty explaining to the court where and at what stage Luyanda emerged.

[36] The question that follows is whether it is probable that a person who was in her sober senses while she walked on a quiet road; and who constantly kept looking around (presumably for possible hazards or threat to her being), would not see or hear the approaching vehicle (if she was indeed walking on that road). Apart from the fact that the plaintiff inexplicably walked in the path of moving or approaching vehicles, it is improbable that in those circumstances she would not have seen the vehicle that knocked her down or heard it approaching. Contrary to Mr *Baceni*'s submission that the shortcomings in the plaintiff's evidence are immaterial, they relate to the crucial aspects of her claim and are therefore material.

[37] The granting of a default judgment involves an exercise of the discretion by the court upon a consideration of the evidence adduced in support of thereof. The vague manner in which the plaintiff described the incident and the inconsistencies between her description of the accident and what is contained in the hospital records; coupled to her failure to call the person who must be assumed to have had knowledge of the accident, left this Court in the dark regarding how she sustained her ankle injury. On the evidence before me, I am unable to find that the plaintiff's injury arose from the driving of a motor vehicle.

[38] For all the foregoing reasons, I make the following order:

1. The application for default judgment is refused.

L. RUSI
JUDGE OF THE HIGH COURT

Appearances

For the plaintiff : *Adv. Z Baceni*
Instructed by : M. Ndlela Attorneys
56 Sprigg Street, Mthatha

Date heard : 04 December 2024
Date delivered : 29 May 2025