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REPUBLIC OF SOUTH AFRICA



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

CASE NO: 122402/2023

(1) REPORTABLE: **NO**

(2) OF INTEREST TO THE JUDGES: **NO**

(3) REVISED: YES OR NO

DATE: 29/05/2025

SIGNATURE:

SHWALA ZITHULELE BETHUEL

PLAINTIFF

And

THE ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

LEBALLO,AJ

Introduction

1. The default Judgement proceedings have always been one of the procedures that our courts can be able to deal with matters in an expeditious manner and also in a least expensive manner.¹ This is one of the ways in which the basis the core basis of the Rules could be given effect to. It does not follow that while in default proceedings that the court must just rubber stamp just about any submission or evidence.

2. In Essential Judicial Reasoning,² Justice Southwood discusses that active management of a Trial to control the proceedings does not per se show impartiality, makes a statement that

"A judge is not simply a "silent umpire" A Judge is not a mere umpire to answer the questions 'How's that?' Lord Denning once said. Fairness of court proceedings requires the trier to be actively involved in the management of the trial, to control the proceedings to ensure that public and private resources are not wasted, to point out where evidence is irrelevant and to refuse to listen to irrelevant evidence. A supine approach towards litigation by judicial officers is not justifiable either..."

3. In this matter the Plaintiff was allegedly involved in a motor vehicle accident on 1 December 2018, along Bhuguza Reserve, Mahlathini, Kwa-Zulu Natal Province.

4. The Plaintiff according to the Particulars of claim *"was walking along the side of the road when a blue Volkswagen Polo bearing registration letters and Numbers N[...] driven by Mntukanyise Ernest Buthelezi, herein after referred to as the insured driver. The particulars of claim further alleges that the "The insured driver was travelling at a high speed and lost control. As a result of the losing control of the insured motor vehicle he collided with the Plaintiff".*

5. The plaintiff as a result of the alleged accident sustained injuries and instituted action against the Road Accident Fund in the amount of R2 000 000.00. The Claim was for the estimated medical expenses (S17 Undertaking), past loss of income for

¹ *Ncoweni v Bezuidenhout* 1927 CPD 331; Erasmus - Superior Court Practice 81 - Rules of Court.

² By BR Southwood (Justice Southwood) at page 13.

R200 000.00, for future Loss of earnings he claimed for the amount of R1 000 000.00 and for the non-pecuniary loss he claimed for R800 000.00.

6. The Road Accident Fund was served with the summons on the 29th of November 2023 and through the offices of the State Attorney representative they filed their notice of intention to defend on the 4th of June 2024. The Road Accident fund then failed to file their plea and they were subsequently barred on the 05 July 2024.

7. The matter was then set down for the 10 April 2025 and it came to me during the last week of recess. In the morning of the hearing Counsel for the Applicant called the matter and requested a stand down indicating that they are attempting to settle the matter and sort some few things. The matter was then stood down.

8. Counsel for the Applicant later came and called the matter and indicated that they are ready to proceed as the offer made was not acceptable. Counsel had not filled heads of argument and as directed in my practice directive, but I did not take issue with that aspect, he then indicated that there is a Rule 38(2) application but will not proceed in regards to that, but will only pursue the issue of merits and he will call the Plaintiff to testify.

9. I indicated that he may proceed to call the witness if he is ready and certain that this is how he seeks to proceed. The witness (Mr Shwala) was sworn in and his counsel began to lead questions to him pertaining to the accident.

The evidence of the plaintiff

10. In his testimony, the Plaintiff indicated that on the 1 December 2018, he was leaving from his home where there was a traditional ceremony after which he decided to leave. He indicated that the street does not have a name. However, he continued to testify that he was walking along the pavement on that road, on the right hand side facing oncoming traffic.

11. The Plaintiff continued further to indicate that from a little afar he could be able to see an accident that had occurred on the road. I enquired from him as to what could be estimated distance from where he could see that accident, he indicated that from the court room we were at (8B), it could at the end of the street, "Madiba Street" and estimate that could then be about 80m to 100m in my view. He continued to indicate that he could be able to see the accident from that distance but all of a sudden he was on the floor and woke up and did not see the vehicle that hit him.

12. I enquired from the Plaintiff if he was facing oncoming traffic, how did he not see the vehicle that collided with him? He indicated that he was on the side of the road. It had not been made clear whether the vehicle had veered off the road and collided with him where he was. I further continued to inquire from the Plaintiff what time it was, he indicated that he could not recall but the sun had just set down. Since his counsel also never enquired whether he was wearing colorful clothing and also enquired if he was wearing reflective clothing or colorful clothing. The Plaintiff indicated that he was wearing a bluish clothing.

13. The court was faced with a situation where it could not be able to make up what could have transpired as he said that he did not see the vehicle. I then proceeded to ask if he could have an idea where the vehicle was coming from and the Plaintiff testified that the vehicle was coming from the accident he had referred to earlier. As to how he knows that part he indicated that that it is what he was told by his sister.

14. Since the court was not satisfied with this evidence, I enquired from the Plaintiff whether he was ever told about an affidavit that is called a section 19(f) affidavit. He indicated that he did not know what it was, as his attorneys had given him a lot of documents to sign.

15. I then requested that his counsel show him a section 19(f) affidavit, which was shown to him and indicated to him that towards the end of that document, there is a signature where it is written deponent, after it was shown to him the court enquired

whether he does know the signature on that affidavit. The Plaintiff confirmed that he did know the signature and that it is his signature.

16. Just when the court was enquiring from the Plaintiff whether he knows the contents of that affidavit or what is contained in there, the Plaintiff's counsel objected and indicated that the Plaintiff already indicated that he did not know what is section 19(f) affidavit. Notwithstanding the fact that the court had indicated to him that document is a section 19(f) affidavit. Counsel for the Plaintiff continued to state, what will be the purpose of the question and then proceeded to indicate that section 19(f) affidavit is a technical document for the witness.

17. The conduct of the counsel was startling, in that he first objects to the court that the court should not enquire from the witness about the section 19(f) affidavit. This document is one of the first documents that is required when one prosecutes their claim against the Road Accident Fund. Secondly the document was discovered by the Plaintiff's attorneys and formed part of the default proceeding. Thirdly, the proceedings were at the default stage, wherein the court was provided with the matters to go through via case-lines prior to the hearing.

18. Thus, if the court would have questions, the court would be entitled to ask any question that is related to the matter. The conduct of objecting to the court asking about the section 19 (f) affidavit is unheard of, also because this is one of the documents required in the initial stages of lodging the claim. At some stage it was uncertain what the Plaintiff's counsel was seeking to achieve in objecting to the Honourable Court, it was as if the Counsel was expecting the court to be a "*Silent Empire*"

19. When it was further explained to the witness what Section 19(f) documents are by the court and that whether it was explained to the Plaintiff the content of Section 19(f) affidavit when he appended his signature? Counsel then objected to the interpreter indicating that the interpreter does not explain properly.

20. After a long debate I reverted back to the testimony the Plaintiff gave during examination in chief. and for clarity I wanted to verify if he was actually on the side of

the pavement facing oncoming, the plaintiff response was that *"there were no vehicles driving past, in front of him and that the vehicle in question came from the accident point to his direction"*.

21. I enquired further that since the Plaintiff indicated that the vehicle came from the accident site, and he was facing oncoming traffic how did he see that the vehicle was coming from the accident site, since he had indicated he does not know what happened? The Plaintiff indicated that he was informed by those who were at the accident scene and that there were many vehicles there.

22. During examination in chief there had not been a point where the Plaintiff indicated that the vehicle that collided with him veered out of the road to collide with him on the pavement. So I proceeded to enquire from him that the court is seized with an OAR report, and whether he had at some stage explained his version to the Police and that I just wanted to verify since in the OAR the indication is that the accident occurred in the middle of the road, and I know that there is no one to be called pertaining to the OAR and that I cannot just ignore that issue that was glaring on the OAR.

23. The Plaintiff confirmed that he did speak to the Police who came to his home while recovering. I then explained to him that since they came, they wrote on the OAR and I enquired whether he agrees or disagrees with the fact that they wrote that the accident occurred in the middle of the road.

24. I enquired if the accident did not occur in the middle of the road as it is stated and that it occurred outside. He answered and said "I was on the side but there was a lot of vehicles in the vicinity". This was not a satisfactory answer, since he had previously indicated that there were no vehicles passing by, and then I enquired whether he by implication meant the vehicle veered out of the road? He said that is what happened. This aspect could not be taken further since the police were also not called.

25. Emanating from my questions, the Plaintiff's counsel only asked one question, the question was relating to his eyesight whether the Plaintiff wore spectacles and the Plaintiff confirmed that his eyesight was perfect.

Analysis of the evidence

26. The Plaintiff's counsel then closed its case. He commenced by stating that the evidence that we have is that of the Plaintiff and that there is not contradictory evidence. The version of the Plaintiff succinctly, is that on the 1 December 2018 in Ulundi, Kwa Zulu Natal, where there was a (ritual) function. After the function he decided to walk home and he does not know the name of road but it's the main road from one between the villages and that there was an accident which had happened before. He could see the accident from afar. He was walking on the right side of that road, facing oncoming traffic and there emerged a vehicle that collided into him.

27. According to the version of the Plaintiff he was on the right side and facing oncoming traffic and there emerged a motor vehicle that collided with him outside the yellow lane. Upon enquiry, the Plaintiff indicated that he did not see the vehicle but it was coming from where the accident was. He further indicated that there were no vehicles that were passing him by, and he could see the accident from about our estimation 100 meters (this was done using the court room distance and Madiba Street as an estimation). Upon being further questioned whether he saw the car, he indicated that he did not see the car, but he was informed by his sister and others that the vehicle was coming from where the accident had occurred. For verification of this information, the Plaintiff and or his counsel did not call any witness to support. Thus, this aspect amounts to hearsay evidence.

28. At the hearing, the counsel of the Plaintiff did not venture to take the Plaintiff through the Section 19(f) affidavit to confirm whether the evidence that is contained in the Section 19(f) affidavit accords with the evidence that he testified about. In fact, when the court proceeded to do so, counsel for the Plaintiff objected and indicated that the document is a technical document and that the Plaintiff also had indicated that he does not know what a section 19(f) document is. Even after it was explained

to the Plaintiff what the section 19(f) affidavit is, the Plaintiff's counsel persisted that the information was not read to the Plaintiff. I indicated to him that it was counsel's obligation to do so, and he had failed in that regard.

29. The court was placed with the evidence which it was not satisfied with, firstly it seemed improbable that while the Plaintiff was walking on the right side of the road, facing oncoming traffic and testified that there were no vehicles passing him from where he could be able to see the accident, that a vehicle emerged and collided with him "outside the yellow lane". What is more improbable is that he testified later that he was told that the vehicle came from where an earlier accident had occurred. As stated, there was no one called to testify and verify this aspect. Further, in his examination in chief he indicated that he was walking to where the accident had occurred and was going to pass there.

30. There is nowhere in his examination in chief where he indicated that the said vehicle veered from the road, to collide with him, neither did his counsel ask him in that regard. This aspect came only for the first time when I was asking the Plaintiff if the vehicle veered out of the road to collide with and he then indicated there were many vehicles on the road and only then indicated that "that is what happened".

31. It is a long settled principle established as far as 1909, in the matter of *Siffman v Kriel*³ where the court stated that:

"It does not follow, because evidence is not contradicted, that therefore it is true. Otherwise the court, in cases where the defendant is in default, would be bound to accept any evidence the Plaintiff might tender. The story told by the person on whom the onus rests may be so improbable as not to discharge it"

32. In *Shenker Bros v Bester*,⁴ the court referred, with approval, to both *Siffman v Kriel* and *Katz v Bloomfield and Keith*⁵ and added:

³ 1909 TS 538 at 543.

⁴ 1952 (3) SA 664 (A) 670F-G.

⁵ 1914 T.P.D. 379.

"Similarly, the circumstance that evidence is uncontradicted is no justification for shutting one's eyes to the fact, if it be a fact, that is too vague and contradictory to serve as proof of the question in issue."

33. Similarly, in the matter of *Sigournay v Gilbanks*,⁶ Schreiner JA stated:

"The onus was on the Plaintiff and, although the defendant could have investigated the matter further by cross examination, it was necessary for the court to consider whether, to quote De Villiers JP, in *Union Market Agency Ltd v Glick and Co* 1927 OPD 285 at 288, the evidence of Mr. Forder on the point was 'sufficiently substantial, detailed, reliable and satisfactory' to prove what he deposed. Uncontradicted evidence is not necessarily acceptable evidence"

34. I understand that there are cases such as *R v Jacobson & Levy*,⁷ where Stratford JA stated that:

"Prima facie evidence in its more usual sense means a prima facie proof of an issue the burden of proving which is upon the party giving that evidence. In the absence of further evidence from the other side, the prima facie proof becomes conclusive proof and the party giving it discharges the onus.

The plaintiff in this case had the onus of proving negligence on the part of the insured driver on a balance of probabilities. The defendant could then refute the evidence by placing a different version, even one that is mutually destructive to the version of the plaintiff, before the court. It would then be up to the court, based on the evidence presented, to decide on a balance of probabilities which version it will accept."

35. *In casu* the evidence before the court could not be construed as *prima facie* proof, it is improbable that the Plaintiff could be facing oncoming traffic on the pavement, while he could see an earlier accident and with no vehicle passing by that a motor vehicle which he did not see, collides with him. Further the plaintiff's counsel did not even allow for the court to even seek clarity pertaining to the section 19(f)

⁶ 1960 (2) SA 552 (AD).

⁷ *Ex parte the Minister of Justice: In re R v Jacobson and Levy* 1931 AD 466 at 478-479.

affidavit which could have at least assisted. Upon argument, after the closing of his case, counsel made a submission that the evidence of the Plaintiff accords with that of the section 19(f) affidavit.

36. This was puzzling since counsel had objected to the court enquiring about the section 19(f) affidavit and he had indicated that the section 19(f) affidavit was a technical document and did not explain what he meant in stating that it is a technical document. In fact, when I invited him to address me on what he meant, he indicated that "*it is water under the bridge*". He then conceded that he did not take the witness through that document and the reason was that it was the same as with what the witness (Plaintiff) testified about.

37. I enquired from the Plaintiff's counsel how do we know that for sure and he indicated that "He read the statement, so his submission is that the plaintiff managed to prove its case on balance of probabilities" The Plaintiff's counsel could not have been correct in this regard because the mere fact that he read the statement, does not entail that it was also read into the record and further he was not the one testifying. So, it did not help for him to have just read the statement just for himself. This is different and should not be conflated with Rule 38(2) application.

38. It is settled law that "Whatever the position may be concerning counsel's or attorney's authority to bind the client by admission formally made and recorded in a civil case, it seems undesirable that counsel's or attorney's opening of a case should be accorded decisive effect in regard to proof of facts necessary to a party's case or defence"⁸ In the matter of *Standard bank of SA Ltd v Minister of Bantu Education*,⁹ the court continued and stated that "if such matters are to be used in coming to a conclusion in a judgment, they must be set out therein and used, in the ordinary course of events, with considerable circumspection." This approach is reasonable and it should also be applicable to matters where counsel makes submissions which were not demonstrated or proved (my emphasis). As a result, his submission is rejected.

⁸ See Herbstein & Van Winsen - The Civil Practice of High Courts of South Africa 5th Edition, Vol 1, at page 891; *Standard bank of South Africa LTD v Minister of Bantu Education* 1966 (1) SA 229 at 242-243.

⁹ 1966 (1) SA 229 at 242H.

39. The burden of proof is on the Plaintiff; thus the factual basis must be established as a matter of probability. In essence the probabilities in the case must be such that on a preponderance, it is probable that the particular state of affairs existed.¹⁰

40. Section 17(1)(a) of the Road Accident Fund provides that:

"Liability of Fund and Agents-

(1) The fund or an agent shall

(a) subject to this Act, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of the owner or the driver thereof has been established;

(b)

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 the 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... " (emphasis added).

41. The evidence that we heard from the Plaintiff was that while facing oncoming traffic, he initially indicated that the vehicle came from where there was an accident and when I asked him whether he saw the vehicle the Plaintiff indicated that he did not see the vehicle and, further testified that there were no vehicles passing by,

¹⁰ In *Ocean Accident and Guarantee Corp v Kock* 1963 (4) SA 147 (A) at 1598-D Holmes JA stated: "The degree of proof required in a court of law is not 'absolute science' but merely (this being a civil case) a balance of probability; see *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1925 AD 245 at 263. As to the balancing of probabilities, I agree with the remarks of Selke J in *Govan v Skidmore* 1952 (1) SA 732 (N) at 734, namely: "...in finding facts or making inferences in a civil case, it seems to me that one may. As Wigmore conveys in his work on Evidence, 3rd ed, par 32, by balancing probabilities select a conclusion which seems to be the more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one." I need hardly add that "plausible" is not here used in its bad sense or of "specious", but in the connotation which was conveyed by words such as acceptable, credible, suitable (Oxford Dictionary, and Webster's international Dictionary)."

when he was asked whether he saw the vehicle he said "*No I did not see it*". When he was asked how he knew that the vehicle came from the accident which occurred earlier because he initially had indicated that he did not know what happened, he indicated that he was told later on, allegedly by others, including his sister. None of them were called to come and testify on his behalf.

42. On the available evidence, this court is not satisfied that the bodily injuries that the plaintiff suffered were due to the negligence of the driver of a motor vehicle. On his own version he did not see the vehicle, although he was on the right side of the pavement, allegedly outside the road, facing oncoming traffic and notwithstanding the fact that he could see the previous accident from afar, he stated that there were no vehicles passing which meant that he was aware of the activities on the road. There was no evidence of the sketch plan presented. The section 19(f) affidavit was never presented and relied on by the Plaintiff and in fact, the Plaintiff's counsel objected to it being referred to.

43. In the matter of *Ninteretse v RAF*,¹¹ Raulinga J indicated that "...the plaintiff bears the onus to prove on a balance of probabilities that the insured driver was negligent and that the negligence was the cause of the collision from which he sustained the bodily injuries. Even in the instance where the defendant has not tendered evidence to rebut the evidentiary burden of the prima facie case presented by the plaintiff in this case, the plaintiff may not succeed with his claim depending on the nature and weight of the evidence so tendered."

44. In reference to *Siffman v Kriel*,¹² I have already referred to what Innes CJ stated that:

"It does not follow, because evidence is uncontradicted, that therefore it is true... The story told by the person on whom the onus rest may be so improbable as to not discharge it. Further the appellate division in the matter of *Nelson v Marich*¹³ as per Centlives CJ at 149A-D stated:

¹¹ [2018] ZAGPPHC 493 (2 February 2018) at para 28.

¹² 1909 TS 538.

¹³ 1952 (3) SA 140 (A).

'The fact that there was no evidence to contradict the evidence given by the defendant does not mean that the Court is bound to accept the defendant's evidence.'"

45. Rule 39(1) provides that the Plaintiff may prove his claim so far as the burden of proof lies upon him and judgement shall be given accordingly. *In casu*, it is this court's view that the plaintiff has not succeeded in discharging this onus and the court is unable to come to a conclusion.

46. In circumstances where the court is faced with insufficient evidence to find in favour of the Plaintiff, an absolution from the instance is therefore warranted. This court is not satisfied with the sufficiency of the evidence of the Plaintiff and it is consequently granting an absolution from the instance.

Order

47. The following order is therefore made:

1. Absolution from the instance is granted.
2. No cost order is made as the matter is undefended.

LT LEBALLO
ACTING JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, PRETORIA

FOR THE PLAINTIFF: COUNSEL'S NAME WITHHELD
FOR THE DEFENDANT: NO APPEARANCE

DATE OF HEARING: 10 APRIL 2025
DATE OF JUDGEMENT: 29 MAY 2025