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

Case Number: 8386/21

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

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

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

DATE 03 July 2025

SIGNATURE

In the matter between: -

SIBUSISO MOEMISE

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

Heard on: 02 April 2025

Delivered: 03 JULY 2025 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 15:00 on 03 JULY 2025

JUDGEMENT

MAMANYUHA AJ

INTRODUCTION

- (1) This is a claim for damages arising from a motor vehicle accident that occurred on 01 December 2018. The plaintiff was a pedestrian at the time of the collision. The matter is proceeding in respect of merits only; quantum of damages is separated from liability and postponed *sine die*.
- (2) The defendant filed a notice to defend but failed to deliver a plea within the required timeframe. In the absence of the plea being filed the plaintiff served a notice of bar on the defendant on 08 November 2023.
- (3) This court was called upon to deal with merits, proceeding on a default basis. After hearing the evidence of the plaintiff and argument by counsel, I reserved judgment.

PLAINTIFF'S CASE

- (4) The plaintiff, Mr Sibusiso Moemise testified that on 01 December 2018 at approximately 21h45, he was a pedestrian, jogging, while wearing reflective gear. The insured driver approached plaintiff from behind, while he was running in an area usually designated as parking spaces, on the side of Heckroodt Circle Road, and collided with him from behind. The insured driver then fled the scene.
- (5) The plaintiff further testified that where the accident happened, is an area frequented by a lot of pedestrian foot traffic and there was also a lot of foot traffic on the evening in question.
- (6) The plaintiff testified that he was running on the left side very close to the curb and that there was a pavement on the left-hand side of the road but he did not run there as there was rubble on the day.

- (7) The plaintiff testified that the road was a single vehicle carriage way from each direction but the road was wide enough such that it was practice that cars would park on the side of the road during the day even though this was not necessarily a designated parking,
- (8) Counsel for the plaintiff, confirmed that it would not be incorrect for a vehicle to drive in the area in which vehicles would have parked during the day as this was not a designated parking area.
- (9) Plaintiff testified that every time when he hears the vehicle coming from behind him, he would look back, and in this instance, he looked back and realised that the vehicle was driving at the centre of the road.
- (10) Mr Molotsi was the second witness who testified on behalf of the plaintiff that he saw the plaintiff running before the accident. The vehicle that hit the plaintiff was close to the runner, and as it approached the runner it swerved a bit towards the runner as there was a bit of a deep on the road and the next thing there was a bang. He then stopped his own vehicle and went across to assist the runner.
- (11) Counsel for the plaintiff submitted that the insured driver must have or should have seen the plaintiff, the insured driver collided with the pedestrian and then ran away. Counsel argued that the defendant was negligent with regard to the collision.
- (12) Counsel further argued that the defendant failed to plead contributory negligence and because the defendant failed to plead contributory negligence then the plaintiff is therefore entitled to be awarded 100% of his proven or agreed damages.

ANALYSIS

- (13) **The first question to be answered is whether the insured driver was negligent in causing the accident;**

In the landmark case of Kruger v Coetzee (1966) 2 SA 428 (A), the court held that negligence arises if:

*“(a) **diligens paterfamilias** in the position of the defendant -:*

(i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and

(ii) would take reasonable steps to guard against such occurrence; and

(b) the defendant failed to take such steps.”

- (14) In the case before me the defendant was not available to dispute the plaintiff's version that the insured vehicle, driven by the insured driver, collided with the plaintiff who was jogging with his back turned from the vehicle.
- (15) In these circumstances, a **diligens paterfamilias** would have foreseen the reasonable possibility that their conduct could harm the plaintiff and result in patrimonial loss, and would have taken steps to prevent it. The insured vehicle failed to take such precautions and consequently collided with the plaintiff. In terms of section 17(1) of the Road Accident Fund Act, RAF is 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.
- (16) The insured driver was negligent for the purpose of establishing liability on the defendant in terms of the RAF Act.
- (17) **The second question then arises as to whether the plaintiff himself was negligent by running on a public road with cars coming behind him as opposed to running against oncoming traffic.**
- (18) Plaintiff testified that he preferred to run with the cars behind him because, it was easier to turn left on the road that leads to his home without first crossing

from the right if he was running on the right-hand side, also that the other side is steeper and better for him to first go up than going down.

- (19) To determine whether the plaintiff should bear any responsibility for the damages resulting from the accident, the court must apply the same ***diligens paterfamilias*** test: would a reasonable person in the plaintiff's position have foreseen the likelihood that their own conduct could cause injury resulting in patrimonial loss, and would they have taken steps to prevent that outcome.
- (20) The plaintiff testified that he could not run on the sidewalk because it had rubble, when asked why he could not then run on the right and safer side of the road and facing oncoming traffic, he mentioned his preference of the left-hand side because of the reasons cited under paragraph 18 above.
- (21) A failure to exercise reasonable care in one's own interest constitutes contributory negligence on the part of a plaintiff. Had the plaintiff moved over to the right-hand lane, he would have gained an unobstructed view of oncoming traffic, thereby significantly enhancing his ability to avoid danger.
- (22) The plaintiff by his own conduct falls below the standard of a reasonable person. In the circumstances, the court finds him contributorily negligent.

CONTRIBUTORY NEGLIGENCE

- (23) Plaintiff's counsel relied on case law to reinforce the submission that, in the absence of a plea for contributory negligence, such negligence cannot be attributed to the plaintiff.
- (24) In my view, the court can still find such negligence on the plaintiff's own version if his evidence clearly supports such a finding.
- (25) In **AA Mutual Insurance Association Ltd v Nomeka 1976 (3) SA (A)**, the court considered whether the Apportionment of Damages Act applied where contributory negligence had not been formally raised in the pleadings. The plaintiff argued that the defendant was precluded from relying on contributory negligence, and that the court was therefore barred from applying the Act, even though the court found the plaintiff partly at fault. The court considered; **Van der Merwe v Fourie 1959 (3) SA 568 (E)**, **Tonyela v South African Railways and Harbours 1960 (2) SA 68 (C)**, **Logiotis v Van Eyck 1968 (3) SA 429 (E)**, where courts retained the discretion.

The court held in page 40: *"The weight of the decisions is therefore, that provided the plaintiff's fault is put in issue, an apportionment need not "be specifically pleaded or claimed. This is correct in my view."*

- (26) This approach was affirmed more recently in **Jafar v Road Accident Fund 2024 JDR 1970 (GP)** (unreported), para 26. Although neither party had explicitly pleaded or relied on contributory negligence, the court considered an apportionment of liability. This was permissible because the nature of the accident, the roles of both drivers, and their respective degrees of negligence had been thoroughly examined in the evidence, cross-examination, and argument. The judgment underscores that, while formal pleadings are important, courts may still assess contributory negligence where the evidence supports such a finding.

(27) Based on the aforesaid I conclude that the plaintiff was 30% negligent, while the insured driver was 70% negligent.

ORDER

1. The prayers to the Plaintiff's Application in terms of Rule 38 are hereby granted.
2. The Defendant's liability relating to the injuries sustained and damages suffered by the Plaintiff ("the merits"), be separated from the extent of injuries sustained and damages suffered by the Plaintiff ("the quantum").
3. The Defendant is ordered to pay 70% of the Plaintiff's proven or agreed damages.
4. The Defendant shall pay the Plaintiff's taxed or agreed party and party costs on the High Court scale, up to and including date of this order, the extent thereof to be subject to the discretion of the Taxing Master, subject thereto that:
 - 4.1 In the event that the costs are not agreed:
 - 4.1.1 The Plaintiff shall serve a notice of taxation on the Defendant or its attorney of record;
 - 4.1.2 The Plaintiff shall allow the Defendant 180 (one hundred and eighty) calendar days from date of allocator to make payment of the taxed or agreed costs;
 - 4.1.3 Should the payment not be effected timeously, the Plaintiff will be entitled to recover interest at the mora rate promulgated from time to time, per annum on the taxed or agreed costs from date of allocator to date of final payment.
 - 4.2 Such costs shall include:

- 4.2.1 The costs of and consequent to the appointment of counsel, Adv C M Dredge, on the Senior-Junior scale, and on scale B in accordance with the tariff of fees determined in the Uniform Rules of Court 67A and 69, including, but not limited to his perusal and preparation, as well as his day fee for 2 April 2025, as well as the costs of and consequent to him preparing, drafting, settling and bringing out Advice on Evidence and memorandum, Heads of Argument (both preliminary and final), founding papers to the Plaintiff's application in terms of Rule 38 and compliance affidavits, and the costs of him consulting with the Plaintiff and his attorney;
- 4.2.2 The costs of and consequent to the appointment of counsel, Adv L Keijser, on the Senior-Junior scale, and on scale B in accordance with the tariff of fees determined in the Uniform Rules of Court 67A and 69, including, but not limited to her perusal and preparation, as well as the costs of and consequent to her preparing, drafting, settling and bringing out founding papers to the Plaintiff's application for default judgment;
- 4.2.3 The costs of and consequent to the Plaintiff's trial bundle for purpose of default judgment, as well as the costs of 3 (three) copies thereof;
- 4.2.4 The costs to date of this order, which costs shall further include the costs of the independent assessors, Johan Botha and/or Theuns van der Merwe and/or Kobus van Graan, which shall include all of their travelling costs and expenses (time and kilometres), costs of and consequent to them locating and consulting with, and transporting all witnesses, and collating documentation and information, as well as formulating their report(s);

- 4.2.5 The costs of and consequent to the Plaintiff ensuring compliance with Case Lines (both time and tariff);
- 4.2.6 The costs of and consequent to the Plaintiff and the witnesses, Boitumelo Molotsi and Lerato Moemise's attendance of the trial on 2 April 2025, including travelling, accommodation and subsistence for both 1 April 2025 and 2 April 2025;
- 4.2.7 The Plaintiff's attorney's perusal and preparation in respect of the default judgment application.
5. The amount referred to in paragraph 4 will be paid to the Plaintiff's attorneys, Gert Nel Incorporated, by direct transfer into their trust account, details of which are the following:
- ABSA Bank
Account number: [...]
Branch code: 3[...]
REF: GN15192
6. The quantum be postponed *sine die*.

T. Mamanyuha
Acting Judge

FOR THE PLAINTIFF: Adv C M Dredge

Instructed by:
GERT NEL INC
REF: GN15192

FOR THE DEFENDANT: No appearance

HEARD: 02 APRIL 2025

DELIVERED: 03 JULY 2025

