REPUBLIC OF SOUTH AFRICA

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

Case Number:21973/2023

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
[redacted]	
SIGNATURE	DATE: 21 July 202

In the matter between:

SIPHIWE PHAHLANE Plaintiff

And

THE ROAD ACCIDENT FUND Defendant

JUDGMENT

NOKO J

Introduction

[1] The plaintiff, Siphiwe Phahlane, instituted civil suit against the Road Accident Fund ("*defendant*") in terms of the Road Accident Fund Act.[1]("the Act") The suit is for the damages that arose as a result of injuries sustained from a motor vehicle collision. The said collision arose allegedly as a result of the negligent driving of an insured motor vehicle by an insured driver. The plaintiff's attorneys delivered an amended particulars of claim a day before the hearing, seeking to increase the amount claimed by the plaintiff.

[2] The defendant is represented by the Office of State Attorney, who delivered notice to defend and the plea. The defendant was aggrieved by the late delivery of the amended particulars of claim, as the defendant was denied an opportunity to deliver the consequential plea.

[3] The parties' legal representatives discussed amongst themselves and agreed that, subject to the court's approval, there should be a separation of merits and quantum. In addition, that the court should make a determination of quantum limited to future medical and/ or hospital expenses, which are generally catered for in terms of an Undertaking issued in terms of section 17(4) of the Act, be separated from other heads of damages.

[4] Counsel for the defendant stated that the defendant has no evidence to present before the court to gainsay the plaintiff's evidence, and to this end, the parties agreed that the matter may proceed on papers.

Background

[5] The following background was set out by the counsel acting on behalf of the plaintiff. The particulars of claim stated that the plaintiff was a passenger in a motor vehicle driven by Babuseng Gideon Obakeng on 4 April 2022 on a road along Nature Reserve, Zonkezizwe, Heidelberg. The insured vehicle capsized and rolled over. The said accident arose as a result of the negligent driving on the part of the driver of the insured vehicle who was speeding. The plaintiff was in the process ejected from the said vehicle.

[1] Act 56 of 1996 as amended.

Merits

Plaintiff's Evidence

The plaintiff testified under oath that on 4 April 2022, she, together with his colleagues, were rostered to do patrol in the nature reserve and were driving in a double-cab Mahindra bakkie, with registration letters and numbers JP 96 JL GP. She was a student on an in-service training at the Nature Reserve. The bakkie carried 2 passengers in front including the driver and is meant to carry three passengers at the back, but there were four at the back on this day. They were driving on a tarred road which had several humps. The driver was speeding and on approaching a hump at a high speed, he tried to avoid it by swerving off the road but lost control of the vehicle, which then rolled. All of those in the vehicles were flung out, including the driver.

[6] Counsel for the plaintiff referred the plaintiff to the accident report in which the driver stated that he got dizzy and lost control of the vehicle. The plaintiff disputed this assertion and indicated that they were all having a conversation in the vehicle, including the driver. She could have observed this, and the driver could have been quiet and not participated in the discussions.

[7] After the accident, she was assisted by, *inter alia*, her manager and other colleagues on the scene of the accident. They were taken to hospital on the same day. She was taken to Alberton private hospital, and his other injured colleagues were taken to the public hospital in the area. She was kept at the hospital for a period of a month and then transferred to Netcare rehabilitation centre where she spent a period of a month.

[8] She stated under cross-examination that she estimates the speed at which they were travelling to have been 80 kilometres per hour in a 40 kilometres zone. She re-stated further that all of the passengers including the driver were flung out of the vehicle through the windows and the windscreen. Though both the front and the back seat had seatbelts, none of the passengers had their seatbelts on.

[9] In compliance with the Act, the plaintiff lodged a claim with the defendant, submitted RAF 1 duly completed by the treating medical practitioner, Dr Mogagabe, the accident report, a copy of the plaintiff's Identity document, a copy of the hospital records and section 19(f) affidavit. The treating medical practitioner confirmed that the plaintiff was kept at the hospital for the period starting on 4 April 2022 until 26 April 2022.

[10] The counsel for the plaintiff further referred to the affidavit deposed to on behalf of the plaintiff in terms of section 19(f)[2] of the Act. The plaintiff stated under oath that she was a passenger in the insured motor vehicle which was involved in an accident arising from the negligent driving by the insured driver who was over speeding. Reference was also made to the Accident Report[3] which confirms that the occurrence of the accident and importantly the date on which the accident took place. Though the plaintiff's particulars or that of other passengers are not reflected but the driver did make a statement after he was discharged from hospital.

[11] Counsel for plaintiff submitted that in the nature of the plaintiff's claim as a passenger, it is sufficient that one should only prove 1% negligence on the part of the driver to succeed with a claim. In addition, the evidence should be assessed on a balance of probabilities. Further reference was made of the principle of *res ipso loquitor,* and to this end, the counsel contended that ordinarily a vehicle cannot just roll off the road, and the conclusion in this case is that the driver was speeding.

[12] In reply to the asking by the Court that since the accident report states that the driver claimed to have been dizzy and lost control wouldn't she be able to argue emergency medical condition and escape from being accused as being negligent, the counsel retorted that the driver is not present to provide such evidence and to this end the Court should proceed on the basis that such evidence does not exist. If any credibility should be accorded to the said evidence the author would have come forward, and the defendant would not have been reluctant to procure his attendance to attend Court to testify.

[2] See CL 04-336.
[3] See CL 04-119.

[13] The defence argued that the admission by the plaintiff that she did not wear the seatbelt meant that she contributed to her worsening of the injuries. Counsel for the defendant referred to *Ngozo v Road Accident Fund* (21866/2012) [2013] ZAGPJHC 390 (19 November 2013) in which the Court held that the refusal to wear a seat belt was considered a conduct short of what a passenger should have done and contributed to the damages he suffered.

[14] The plaintiff stated during evidence that the vehicle was fitted with seatbelts but none of the people in the vehicle had their seatbelts on. There was no explanation furnished to justify why the seatbelts were not on. In addition, whilst she was aware that the vehicle had the capacity to carry 3 passengers in the back seat, there were four people who occupied the seat. To this end, the defendant's counsel contended that the plaintiff contributed to her negligence and should therefore be liable for 25% of the liability. The counsel referred to *Vorster & Another v AA Mutual Insurance Association Ltd* 1982(1) SA 145 (T), where the court stated that the test is whether the claimant acted contrary to what is expected of a reasonable person. Reference was made to *Ngozo v Road Accident Fund* (21866/2012) [2013] ZAGPJHC 390 (19 November 2013) where the court held that "… the plaintiff's contributory negligence amounts to 20% for failure to wear a seatbelt."

[15] The plaintiff on the other hand referred the court to *Loots v MEC for transport, Roads and Public Works (587/2014)[2018] ZANCHC 60 (05 September 2018)* where it was held that this issue should be referred for determination by the court which would deal with quantum as it speaks to the duty of the plaintiff to mitigate her damages and not strictly issue of negligence relating to the cause of the accident to which she cannot be held liable.

[16] The plaintiff's counsel contended that the issue of contributory negligence would be appropriately dealt with by the court considering the quantum. He referred to *Kumalo,*[4]

[4] *Kumalo v Road Accident Fund* (21864/2018) [2024] ZAGPJHC 613 (2 July 2024)

which quoted with approval the sentiments echoed in *Loots,*[5] where Lever AJ stated that the claimant contributed to negligence by not wearing the seatbelt and stated further that:

> "However, because no evidence had been led before him on how her not wearing a safety belt contributed to her injuries, he further held that the apportionment of damages arising from the failure to wear a safety belt be reserved for the court that dealt with quantum."[6]

[17] Brand AJ held that whilst he has found that there was indeed contributory negligence no facts were placed before him to determine the extent to which such negligence contributed to the injuries and to this end *Loots* and the case which served before him wherein sufficient evidence was presented without which he was indisposed to make a finding or a determination on the exact extent of such contribution. In addition, the claimant in *Loots* was not flown out of the vehicle after the accident.

Quantum

[18] Counsel for the plaintiff directed the Court's attention to the application which was launched in terms of Rule 38 of the Uniform Rules of Court for the admission of the evidence of the expert witness as couched in their affidavits to which their respect comprehensive reports were attached. The defence counsel stated that she has read the application and has no objection to the application being granted.

[19] The counsel sought to refer to the evidence of certain experts for the purpose of proving the claim for future hospital and or medical expenses. He referred to the hospital records, which confirmed the date when the plaintiff was admitted and the details of the injuries suffered. It further confirmed that the plaintiff was admitted and kept at the hospital from Netcare Union Hospital until he was discharged. It set out the treatment that was also applied to his injuries.

[5] *Loots v MEC for Transport, Roads and Public Works* (587/2014) [2018] ZANCHC 60 (05 September 2018)
[6] At para 6.

[20] Reference was also made in respect of the report by the primary doctor, Dr DE Gantz who is the Orthopaedic Surgeon, who has the following qualifications, MD FCS (SA) ORTH. The orthopaedic surgeon reported that from the records at his disposal, an indication is that the plaintiff has sustained the following Injuries: traumatic brain injury, wedge compression fractures of T6 and T8, blunt injury to the chest, fracture of the right femur and pubic rami, and laceration in her vagina. She would need the following treatment in future: Conservative treatment costing R50 000.00; spinal surgery costing R180 - 250 000.00; removal of internal fixation (R50 000,00) and eradication of infection costing R150 000.00.

[21] The Neurosurgeon, Dr TP Moja who has MB. Ch.B.: FCS (SA) Neurosurgery, CME, confirmed the injuries as identified by the orthopaedic surgeon and recommended the following future medical treatments; future conservative treatment of her headaches, back pain, pelvic and right leg and consult a general practitioner with an estimated cost of R20 000,00. And further that should the plaintiff develop late post-traumatic epilepsy, an estimate costs for treatment would be R12 000.00 to 14 000.00 per year.

Issues

[22] Issues for determination are whether the plaintiff has satisfied the requirements set out in the Act for the claim to be valid and whether the plaintiff has proved her claim for future medical and hospital expenses.

Legal principles.

[23] It is trite that in a passenger's claim, a claimant needs to prove only 1% negligence of the part of the driver. It was held in *Prins v Road Accident Fund,*[7]that "It is common cause that a passenger needs only to prove the proverbial 1% negligence on the part of an

[7] (21261/08) [2013] ZAGPJHC 106. See also *Groenewald C v Road Accident Fund* (74920/2014) [2017] 879 at para [3].

insured driver in order to get 100% of damages that she is entitled to recover from the fund."

[24] Where an inference of negligence is likely to be drawn it is therefore required of the defendant to testify to displace the inference of negligence being drawn. With regard to the principle of *res ipsa loquitur* it was stated in *Bomela*[8] that "It was incumbent on the defendant to displace the *prima facie* inference by means of an explanation. No such evidence has been adduced in these proceedings. A finding of *res ipsa loquitur* means that the collision impels an inference of negligence on the part of the insured driver, in the absence of an explanation. As the defendant has failed to lead any exculpatory evidence, this Court ineluctably finds the insured driver negligent and solely liable towards the plaintiff.[9]

[25] It was held in *Wells and Another*[10]

> "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 unlawful act of the driver of the insured vehicle or the owner thereof or his servant. The decision as to whether, in a particular case, these prerequisites have been satisfied involves two separate enquiries. Broadly speaking, the first pre-requisite is concerned basically with the physical or mechanical cause of the bodily injury, whereas the second is concerned with legally blameworthy conduct on the part of certain persons as being the cause of the bodily injury ('due to' having the same meaning as 'caused by' - *Workmen's Compensation Commissioner v S.A.N.T.A.M. Beperk,* 1949 (4) SA 732 (C) at pp. 736 - 7). Accordingly, these enquiries may follow wholly distinct lines."3

[8] *Bomela v Road Accident Fund* (1345/22) [2024] ZANCHC 35 (22 March 2024).
[9] Id at para 54.
[10] *Wells and Another v Shield Insurance Co and Others* 1965 (2) SA 865 (C).

[26] The plaintiff is required to discharge the onus endowed on her to prove negligence on the part of the insured driver on a balance of probabilities. It was stated in *Ninteretse*[11] 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. There is no onus on the defendant to prove anything. Even in instances 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 tender.

[27] I had regard to the evidence of the plaintiff which remained unchallenged by the defendant. The plaintiff withstood the cross-examination by the defendant's counsel. To this end, I am persuaded that the plaintiff has discharged the onus on her to prove her case against the defendant.

[28] With regard to the contributory negligence, whilst the Court may make a determination when adjudicating over the liability the court may where appropriate, refer to the attribution of such negligence to the damages to the court which would adjudicate over the quantum. See (see *Bowkers Park Komga Co-operative Ltd v SAR & H and Vorster v AA Mutual Insurance association Ltd and General Accident Versekeringsmaskappy SA Bpk v Uijs.*

[29] In the exercise of determining the comparative culpability of both parties the court should therefore consider degree of negligence of the plaintiff in relation to the "… damage which has been caused by the combination of that negligence of the defendant." The claimant's conduct may not have necessarily contributed to the damage-causing event, but aggravated the extent of the loss.[12] It was also observed from the authors[13] after having had regard to *Union National South British Insurance Co Ltd v Vitoria* 1982 (1) SA 444 (A)

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[11] *Ninteretse v RAF* (29586/13) [2018] ZAGPPHC 493 (2 February 2018).
[12] Id
[13] Wille's Principles of South African Law, 9th ed at 1151.

that "… If a passenger in a motor car fails to wear a seat belt and his or her injuries are worse than they would have been if the seat belt had been worn, the plaintiff would be contributorily negligent in relation to the extra harm so caused, even though he or she was not negligent in relation to the accident itself".

[30] The Appellate Division held in *Uijs*[14]. that the Act does not provide for the reduction of the claim for damages in relation to the degree to which the claimant was at fault "… but to such extent as the Court, having due regard to the degree to which he was at fault, deemed just and equitable". In this case, the claimant was obstinate and irrational, but his conduct did not contribute to the accident but having regard to justice and equity, the court *a quo* could not be faulted for reducing his damages by a third.[15] The Appellate Division did not settle the tension[16] whether the determination of the degree of fault of the plaintiff invariably determines the degree of fault of the defendant.[17]

[31] The court held in *Kumalo* at paragraph 74 that no sufficient evidence was presented but it concluded that the plaintiff was contributorily negligent but "… cannot and do not determine in what manner and to what degree. The court was unable to determine the manner and extent to which his not wearing a safety belt contributed to his harm".. As such, the court ordered that indeed the plaintiff contributed to the harm he suffered by not wearing a safety belt at the time of the accident," and the exact attribution of contributory negligence and consequent apportionment of damages is reserved for decision by the court that determines the quantum of damages."

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[14] *General Accident Verseekeringsmaatskappy SA Bpk v Uijs N.O.* 1993 (4) SA 228[14] at 230 B – C
[15] Id. See also at 1150. Wille's Principles of South African Law. "…no other factor than The fault of the plaintiff and the defendant to be taken into account when assessing the amount by which the damages of the plaintiff should be reduced, It does not determine that the degree of fault conclusively determines this amount.: Rather, it requires a court to reduce the damages to such an extent as the court may deem just an equitable, having regard to the neglect to the degree in which the claimant was at fault in relation to the damages. See also Visser & Potgieter, 3rd ed at 306 (fn 201) where it is stated that "The Court added that a bona fide failure to wear a seatbelt will weigh less than an intentional omission".
[16] Though *AA Mutual Insurance Association Ltd v Nomeka* 1976 (3) SA 45 (A) held that once the fault of the claimant is determined it followed that the defendant's fault is determined.
[17] See Wille's Principles at 1150. In contrast writers of Visser and Potgieter states at p304.that *Uijs* judgment held that the extent of a plaintiff's fault is merely one of the number of factors which the court may take into account in order to reduce the plaintiff's damages in a just and equitable manner.

[32] On a proper interpretation of the section, it presupposes that there must first be a determination of damages and thereafter consider the downward adjustment amount of damages.[18]

Conclusion

[33] The evidence presented ineluctably demonstrated that the insured was negligent and caused the collision from which the plaintiff sustained injuries. Though evidence also demonstrated that the plaintiff chose to board an overloaded bakkie she also chose not to fasten the seatbelt. Her conduct in this regard contributed to the damages she suffered. The evidence led by the plaintiff to assist the court to determine the extent to which her negligence is attributed to the injuries was not sufficient to clearly delineate the requisite degree. In the circumstances, the degree thereof should be postponed to the court which would adjudicate over quantum.

Costs

[34] With regard to the question of costs, the counsel submitted that the plaintiff has proved its case on a balance of probabilities and the defendant should be ordered to pay for the costs. Further that the plaintiff and his attorneys signed a valid contingency fee agreement, and the same is supported by affidavits deposed to by the plaintiff and the attorney. She further stated that experts were subpoenaed to be on stand-by to be called to testify. As such, the court should order the defendant to pay the costs, including costs for the reports and reservation fees. The counsel persisted that the costs should be for the whole amount paid for the reports, even though the reports were only used only for future medical and hospital expenses.

[35] The defendant, on the other hand contends that the costs to be allowed should be for the two reports which counsel for the plaintiff referred the court to for the purposes of proving evidence regarding the future medical and hospital records. In addition, the costs

[18] Potgieter JM, Steynberg L., and Floyd TB '*Visser & Potgieter: Law of Damages*', 3rd Ed, Juta 2012. P303.

relating to RAF 4 should not be considered since they were incurred for the purposes of substantiating the claim for General Damages which has not be dealt with today. In retort counsel for plaintiff submitted the report of the occupational Therapist made reference to future medical and hospital expenses and should be included in the order. In addition, it is unheard of that the Court may order that a percentage of costs incurred in preparation of the report should be ordered, limited only to what was captured and presented to advance the claim for the quantum.

[36] In view of the fact that the experts will be called to substantiate damages and the fact that their limited evidence was not sufficient to demonstrate the extent to which the plaintiff's negligence contributed to her damages, the costs relating to such experts shall be dealt with at a later stage.

Order

[37] In the premises I order as follows:

1. The defendant is liable for the damages suffered by the Plaintiff as contemplated in the Road Accident Fund Act,
2. The adjudication on the quantum of damages suffered by the Plaintiff is postponed *sine die.*
3. The plaintiff contributed to the harm she suffered as a result of the failure to wear safety belt at the time of the accident and having boarded an overloaded insured vehicle,
4. The exact attribution of contributory negligence and consequent apportionment of damages is reserved for decision- by the court that determines the quantum of damages.

[redacted]

M V Noko
Judge of the High Court

DISCLAMER: This judgment is handed down electronically by circulation to the Parties /their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date for hand-down is deemed to be **21 July 2025**.

Dates:

Shearing: 11 March 2025.

Judgment: 21 July 2025

Appearances:

For the Plaintiff:	Mataboge LM. Instructed by Jerry Nkeli & Associates.
For the Defendant:	Sondlane D, Instructed by Office of the State Attorney.