

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

Case Number: 674/20

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: YES

(3) REVISED: NO

DATE **31 JULY 2025**

**SIGNATURE**

In the matter between:

**V L MODUKANELE**

Plaintiff

and

**ROAD ACCIDENT FUND**

Defendant

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**JUDGMENT**

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This judgment and the order incorporated herein is handed down electronically by circulation to the applicant's legal representatives by e-mail and by uploading to CaseLines.

**Moultrie AJ:**

[1] This is an action instituted by the plaintiff against the Road Accident Fund in terms of section 17(1) of the Road Accident Fund Act, 56 of 1995 for damages arising from bodily injuries allegedly sustained by him in a motor vehicle accident that occurred on 27 October 2018 in Felicia Street, Hartswater, Northern Cape.

*The pleaded issues, and the agreements reached during pre-trial procedures*

[2] The plaintiff pleads that he was a pedestrian at the time of the accident, that he was “struck from behind” by a motor vehicle driven by an identified driver (whom I will refer to as “the driver”), and that the sole cause of the accident was the negligent conduct of the driver. The plaintiff pleads that he sustained the injuries in the accident “specifically but not limited to”: (i) concussive and diffuse brain injury; (ii) whiplash injury to his spine; (iii) fracture of his right tibia and fibula; (iv) various bruises, abrasions, contusions and lacerations; and (v) psychological shock and trauma.

[3] The plaintiff’s pleaded claim encompasses the following heads of damages allegedly suffered as a result of such injuries: (i) R10,000 in respect of past medical and hospital expenses; (ii) an order requiring the RAF to furnish an undertaking as envisaged in section 17(4) of the RAF Act in respect of future hospital and medical treatment; (iii) R500,000 in respect of past and future loss of earnings and earning capacity; and (iv) an amount of R600,000 for non-pecuniary loss.<sup>1</sup>

[4] The RAF delivered a special plea disputing the court’s jurisdiction to grant the damages claim for non-pecuniary loss (colloquially referred to “general damages”) on the basis of the plaintiff’s alleged non-compliance with the procedures and requirements prescribed under section 17(1A) of the RAF Act in Regulation 3 of the Road Accident Fund Regulations<sup>2</sup> for the purposes of obtaining an determination that the plaintiff indeed suffered a “serious injury” (“the prescribed assessment process”). I note that this determination is a jurisdictional requirement for an award of damages for non-pecuniary loss in terms of the proviso to section 17(1) of the RAF Act.

[5] In pleading over, the RAF only admitted (i) the identities of the parties; (ii) the jurisdiction of the court; and (iii) the date and place of the accident. All of the other material allegations in the particulars of claim are denied. The plea also advanced a positive defence in the form of the plaintiff’s alleged non-compliance with the

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<sup>1</sup> The *quantum* of the claimed damages was originally R290,000 in respect of loss of earnings and R200,000 in respect of general damages, but was increased by means of an amendment to which the RAF did not object, and which was perfected prior to the commencement of the trial.

<sup>2</sup> RAF Regulations, published under GN R770 of 2008 in GG 31249 of 21 July 2008, as amended.

prescribed assessment procedures and that he in fact did not suffer a serious injury, as well as the following further positive defences: (i) that the sole cause of the accident was the negligent conduct of the plaintiff; and (ii) alternatively, the defence of sudden emergency; and (iii) further alternatively, contributory negligence on the part of the plaintiff, and apportionment under the Apportionment of Damages Act, 34 of 1956 in the event that it may be found that the accident was in part caused by negligence on the part of the driver.

[6] The plaintiff did not deliver a replication, and the issues in dispute as they appear from the pleadings were not further narrowed during pre-trial procedures.

[7] It was, however, recorded in the signed minute of a pre-trial meeting held on 1 March 2022 that:

- a. the RAF was “at this stage willing to use the [medico-legal] reports of the plaintiff”, which were identified as those of an orthopaedic surgeon, an occupational therapist, an industrial psychologist and an actuary, but that it was “busy with investigations and reserves [its] rights” in this regard;
- b. the RAF supplied the same answer (i.e. that it was willing to use the reports of the plaintiff but was still investigating and reserved its rights) in response to the following enquiries made by the plaintiff:
  - i. whether the RAF admitted the injuries and sequelae thereof as set out in the various medico-legal reports;
  - ii. whether the RAF admitted the factual allegations and opinions contained in the expert notices of the plaintiff;
  - iii. whether the RAF required the examination of any person or item in terms of Rule 36; and
- c. the plaintiff’s attorneys would prepare bundles of the documents to be used at the trial (which may include copies), which documents the parties agreed “are what they purport to be and they may be used without formal proof” but noted that they do “not admit the correctness thereof [and] as such the correctness of the content will have to be determined at the trial”.

*The RAF’s non-appearance, separated issues and the issues for determination*

[8] Despite having opposed the action, delivered its plea and participated in the

pre-trial procedures, the RAF failed to appear on the date of the trial.

[9] At the commencement of the trial, the plaintiff's counsel sought an order that the claim for general damages (including the special plea of jurisdiction in that regard) and the quantification of his claim for past medical and hospital expenses be separated and postponed for later determination in terms of Rule 33(4). I was of the view that a separation on this basis would be convenient and indicated that this would be recorded in the order to be issued.

[10] The trial for the determination of the remaining issues proceeded in terms of the procedure provided for in Rule 39(1). In view of the *viva voce* evidence that was given (see below), it is necessary for me to deal at this stage with a preliminary question regarding the issues that arise for my determination in the matter.

[11] Although the Rule 39(1) procedure may correctly be described as "default judgment", even in circumstances such as the present where the proviso to the rule does not apply (i.e. where the claim is not for a debt or liquidated demand),<sup>3</sup> it is not correct that the only evidence necessary to be adduced in order to obtain judgment is in relation to the assessment (i.e. quantification) of the claimed unliquidated damages. In particular, I do not agree with the submission of the plaintiff's counsel that the Constitutional Court's *dictum* in *Baliso* to this effect is of application in cases such as the present.<sup>4</sup> Not only was *Baliso* not decided in the context of the Rule 39(1) procedure (indeed, it was not even decided on the basis of the procedure in Rule 31(2)(a), which is the procedure the court was referring to in the relevant passage), but it would simply be incorrect to say that "the claim is not opposed" where a party who has defended and pleaded does not appear. It cannot be accepted that all of the factual allegations made in the particulars of claim other than for the purposes of quantum "are admitted or not disputed" – the contrary is

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<sup>3</sup> *Katritsis v De Macedo* 1966 (1) SA 613 (A) at 617E-F.

<sup>4</sup> *Baliso v First Rand Bank t/a Wesbank* 2017 (1) SA 292 (CC) para 12: "In terms of our civil procedure, default judgment for a debt or liquidated demand is granted on an acceptance of the allegations as set out in the summons, without any evidence. Where the claim is not for a debt or liquidated demand, the court may, after hearing evidence, grant judgment. This is usually only evidence on the amount of unliquidated damages. The reason for not hearing evidence on the other factual allegations made in the summons or particulars of claim is that, because the claim is not opposed, it may be accepted that those allegations are admitted or not disputed."

manifestly the case. What is more, even where there is indeed no opposition, the Supreme Court of Appeal has confirmed that “where the cause of action is delictual, damages can in most cases only be determined after evidence has been led also in relation to the cause of action”,<sup>5</sup> although this may be done on affidavit in terms of Rule 38(2).<sup>6</sup>

[12] Notwithstanding the foregoing, it seems to me that the non-appearance of a defendant who has defended and pleaded does have consequences. In particular:

- a. there is full bench precedent in this division<sup>7</sup> that the plaintiff need only satisfy the court that the accident was partly caused by the negligence of the driver in order to be awarded “100%” of the total damages that may be assessed (quantified) in respect of the injuries (i.e. damage) sustained in the accident; and
- b. as a result, it would not be appropriate for me to consider the pleaded positive defences of sudden emergency and contributory negligence.<sup>8</sup>

[13] The issues remaining for determination are thus limited to:

- a. fault, i.e. whether the accident was partly caused by any negligence on the part of the identified driver;

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<sup>5</sup> *EFF v Manuel* 2021 (3) SA 425 (SCA) para 101, approving the statement to that effect in *Dorfling v Coetzee* 1979 (2) SA 632 (NC) at 635B-D, a case involving a claim for damages flowing from a motor vehicle accident. See also *Knight NO v Harris* 1962 (1) SA 317 (SR) at 318G-H.

<sup>6</sup> *Madibeng Local Municipality v Public Investment Corporation Ltd* 2018 (6) SA 55 (SCA) para 26, holding that “[t]he approach to rule 38(2) may be summarised as follows. A trial court has a discretion to depart from the position that, in a trial, oral evidence is the norm. When that discretion is exercised, two important factors will inevitably be the saving of costs and the saving of time, especially the time of the court in this era of congested court rolls and stretched judicial resources. More importantly, the exercise of the discretion will be conditioned by whether it is appropriate and suitable in the circumstances to allow a deviation from the norm. That requires a consideration of the following factors: the nature of the proceedings; the nature of the evidence; whether the application for evidence to be adduced by way of affidavit is by agreement; and ultimately, whether, in all the circumstances, it is fair to allow evidence on affidavit.

<sup>7</sup> See, for example *Fox v RAF* [2018] ZAGPPHC 285 (26 April 2018). While I have considered the recent judgment of Muller J in *Maroga and Another v Road Accident Fund* 2025 JDR 3013 (LP), I have concluded that it is neither directly on point (it related to a default judgment in the absence of a plea) nor binding on me (as the decision of a single judge in another division).

<sup>8</sup> While I make no finding as to the precise incidence or nature of the onus or evidentiary burden that may lie upon a defendant to prove these defences (see *RAF v Grobler* 2007 (6) SA 230 (SCA) para 3 and *Harrington NO v Transnet Ltd t/a Metrorail* 2010 (2) SA 479 (SCA) para 33), I have no doubt that no “burden of proof lies upon” the plaintiff in the language of Rule 39(1) in respect thereof. In view of the separation order referred to above, I also need make no finding as to whether or not the RAF’s non-appearance has the consequence that a court may assume that the jurisdictional requirements referred to in paragraph [4] above in relation to the award of general damages for non-pecuniary loss have been met.

- b. causation of bodily injury, i.e. whether the plaintiff sustained any bodily injuries as a result of the accident, and if so, what they were;
- c. whether the plaintiff is likely to require any future medical and hospital treatment as a result of those injuries, in which case he would be entitled to the claimed order for an undertaking in terms of section 17(4) for future medical and hospital expenses in respect of those injuries;
- d. whether the plaintiff suffered any past or future loss of earnings or loss of earning capacity as a result of the injuries proven to have been sustained in the accident and, if so, what amount of damages should be assessed in respect of such losses; and
- e. costs.

### *The evidence and analysis*

[14] Evidence was adduced in the form of the *viva voce* testimony of the plaintiff himself as well that of a second witness, Mr Gras. Further evidence was adduced pursuant to Rule 38(2), including the affidavits of medical experts and an actuary, for the purposes of establishing and quantifying the plaintiff's loss of earnings claim. In the absence of any representation on behalf of the defendant at the trial, none of this evidence was challenged, and some of it was admitted in view of the pre-trial minute.

[15] Subject only to the issue of causal negligence on the part of the identified driver, I am satisfied that the evidence adduced establishes that: (i) the plaintiff suffered bodily injury in the form of right tibia and fibula fractures<sup>9</sup> as a result of the accident; (ii) he is entitled to the undertaking that he claims in respect of that injury; (iii) that it is more probable than not that he has or will suffer a loss of earning capacity as a result of that injury; and (iv) that he should be awarded damages in respect of that loss in the amount reflected in the draft order presented by his counsel.

[16] The evidence in relation to the circumstances under which the accident occurred was as follows.

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<sup>9</sup> Report of Dr Marin dated 24 March 2021, paragraph 6.

[17] Shortly before the accident occurred, the plaintiff was in a tavern with Mr Gras. Having left the tavern, they initially stood on the pavement on the same side of the road, discussing soccer. The plaintiff and Mr Gras then proceeded to partially cross the road, but stopped on the tarred road surface, in the roadway of the far lane. The plaintiff testified that “we thought it was safe, we never thought a vehicle would pass”. He explained that they were smoking “and whilst we were smoking, we ... went on discussing soccer”. While they were doing so, they were also “dancing” with a crowd of other of patrons of the tavern who were “roaming” in the area. He was hit “from behind” by the vehicle driven by the driver.

[18] Mr Gras’s evidence was consistent with this version. In particular, he testified that he and the plaintiff stopped walking “just before the end of the second lane”, that “we never left the road”, that “we stood on the edge of the road on the other side” and that “we were dancing and discussing” when the accident occurred.

[19] Although this evidence would appear to me to give rise to a clear inference that the accident was at least in part caused by negligence on the part of the plaintiff, I have found above that the only question that I am required to determine is whether it also establishes that the accident was, at least in part, caused by any negligence on the part of the driver.

[20] I find that it does. In particular, the fact that there was a crowd of people on (or even next to) the road would have placed a reasonably careful driver on their guard. This, combined with the fact that the plaintiff and Gras were evidently standing on the road and in the driver’s path of travel for some time (enough to be “smoking”, “discussing” and “dancing”) before the accident, leads me to the conclusion that the negligence of the driver was – at least to some extent, however small – a causal factor in the occurrence of the accident.

### *Conclusion, costs and order*

[21] In the circumstances, I find that the defendant is liable to the plaintiff for 100% of the damages as he has proved (and of such further damages as he may prove or as may be agreed) are recoverable in respect of the bodily injury that I have found he sustained in the accident.

[22] I have considered the formulation of the order in the draft submitted by the plaintiff's counsel, and have adjusted it to reflect the following principles that I consider appropriate:

- a. the admission of evidence on the basis of Rule 38(2) was pursuant to a procedural ruling, and it is unnecessary to include it in the final order;
- b. the separation order logically precedes all other orders;
- c. the purpose of the declaratory relief is to specifically identify the bodily injuries in respect of which the defendant's liability under the separated and postponed claims remains to be determined;
- d. the scope of a section 17(4) undertaking is specified in the RAF Act, and cannot be adjusted by the court;
- e. it is appropriate to identify the bodily injury in respect of which an award of damages is made;
- f. the costs order should specify the relief in respect of which it is granted and (other than expert-related costs) should ordinarily not specifically include orders dealing with standard litigation costs (such as the costs of attorneys and counsel undertaking specific tasks such as preparing bundles, attending trial etc.) unless specifically justified, for example in relation to counsel's preparation of heads of argument prior to the trial (which I considered to be helpful in this case); and
- g. when a matter has been determined rather than settled, it is not necessary for the court to have regard to any contingency fees agreement that may have been concluded.

[23] I make the following order:

1. The plaintiff's claim for general damages and the issue of the quantification of his claim for past medical and hospital expenses are separated from the rest of the issues in terms of Rule 33(4) and are postponed for later determination.
2. It is declared that the defendant is liable to the plaintiff (subject to the statutory limitations on the award of general damages contained in the Road Accident Fund Act, 56 of 1996 and the regulations promulgated thereunder), for 100% of such general damages and damages for past medical and hospital expenses as may be proved or agreed are recoverable in respect of the right

tibia and fibula fractures that he sustained as a result of the motor vehicle collision that occurred on 27 October 2018 (“the bodily injury”).

3. The defendant is ordered, within 14 days from the date upon which this order is served on it, to furnish the plaintiff with an undertaking in terms of section 17(4) of the Road Accident Fund Act 56 of 1996 (as amended) in respect of the costs of all future medical and hospital treatment as he may require in consequence of having sustained of the bodily injury.
4. The defendant is ordered to pay the plaintiff the sum of R256 837.00 (Two Hundred and Fifty-Six Thousand Eight Hundred and Thirty-Seven Rand) in respect of the loss of earnings suffered by the plaintiff in consequence of having sustained the bodily injury, which amount shall be paid into the trust account of Gildenhuys Malatji Incorporated, ABSA Bank, Brooklyn Branch, Account Number 4[...], Branch Code 3[...] under Reference: G ERASMUS/01893548 within 180 (one hundred and eighty) days from the date upon which this order is served on the defendant.
5. Should the defendant fail to make payment of the aforesaid sum within the period stipulated in paragraph 4 above, it shall be liable to the plaintiff for interest thereon at the applicable interest rate *per annum* to the date of final payment, which will include the interest due and payable.
6. The defendant is ordered to pay the plaintiff’s taxed or agreed costs of suit on the high court scale, including the costs of counsel on Scale B (including for the formulation of heads of argument), incurred for the purposes of obtaining the relief granted herein, which costs shall subject to the discretion of the taxing master, include but not be limited to the costs of (i) travelling to, accommodation and attending to examinations with; (ii) obtaining the medico-legal and actuarial reports (including addendum reports, RAF form 4 reports, joint minutes or reports) of; (iii) expert affidavits for the purposes of trial of; and (iii) all radiological reports and examinations conducted by the following experts:
  - 6.1 Dr JJ Schutte;
  - 6.2 Dr JP Marin, Orthopaedic Surgeon;
  - 6.3 Dr H Swanepoel, Clinical Psychologist;
  - 6.4 A Nieuwoudt, Occupational Therapists;
  - 6.5 B Oosthuizen, Industrial Psychologist; and

6.6 Mr J Potgieter, Actuary.

**RJ MOULTRIE  
ACTING JUDGE**

Appearances: For the plaintiff: HJ Strauss, instructed by De Bruyn & Strauss  
Attorneys, c/o Gildenhuis Malatji Inc., [gerasmus@gminc.co.za](mailto:gerasmus@gminc.co.za)  
For the defendant: No appearance