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**IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY**

Case No: 1453/2022

Reportable: YES / NO

Circulate to Judges: YES / NO

Circulate to Magistrates: YES / NO

Circulate to Regional Magistrates: YES / NO

In the matter between:

JUNÉ VAN DER MERWE

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

Heard on: 26 – 27/03/2025

Delivered on: 08/08/2025

Summary: Action. Delict. Claim against the Road Accident Fund – Bodily injuries. Liability and quantum separated – Accident Reconstruction Expert – Approach to expert evidence restated – expert opinion must be based upon facts established by way of admissible evidence.

ORDER

In the result, the following order is made:

The plaintiff's claim is dismissed with costs on party and party scale.

JUDGMENT

MAMOSEBO ADJP

- [1] On 03 February 2021 plaintiff, Ms Juné Van der Merwe, was the driver of a Toyota Yaris with registration number V[...] which collided with a Ford Ranger vehicle driven by the insured driver, Mr RP Rheeder, with registration number J[...] on the N12 in the vicinity of Landbou Road and Elcon School turn-off in Kimberley. She now claims damages in respect of the injuries sustained in the amount of R2,884,552.42 against the Road Accident Fund (RAF). On 03 February 2023 the parties agreed to separate the merits and quantum in terms of Rule 33(4) of the Uniform Rules of Court.
- [2] On the issue of merits, the crisp issue for determination is whether the RAF should be held liable for the collision that the plaintiff contends was caused by the sole negligence of the insured driver.

The plaintiff's evidence

- [3] In the Rule 37-minute plaintiff gave an indication that her case would comprise the evidence of two witnesses, herself and Mr KW Lötter (the Accident Reconstruction Engineer). However, her father, who was throughout the proceedings present inside the courtroom, was also called to testify.
- [4] This is what the plaintiff has pleaded at para 4 of her Particulars of Claim:
- ‘The aforesaid motor vehicle accident was caused exclusively by the sole negligence of the insured driver who was negligent in one or more or all of the following respects:
1. He failed and/or neglected to keep a proper look out;
 2. He failed and/or neglected to apply the brakes of his vehicle timeously or at all;

3. He failed and/or neglected to have and to keep his vehicle under proper control;
4. He failed and/or neglected to avoid the collision when by the exercise of reasonable care, skill and the taking of reasonable precautions, he could and should have done so.
5. He drove his vehicle at an excessive speed under the prevailing circumstances; and
6. He allowed his vehicle to move into the lane for oncoming traffic.'

[5] The plaintiff testified that on the night of the accident she drove the vehicle (Yaris) in the company of a friend, Ms Zan-Marie Olivier, who has subsequently passed on. She has no recollection of the accident or whether there were any steps that she took to evade the accident. She only remembers being taken to hospital and being sedated. She regained consciousness at Gariep Hospital two or three days later. She spent four to six weeks in the intensive care unit and thereafter two weeks in the normal ward. She sustained a fracture to her left hand, multiple fractures to the left lower leg involving her knee and multiple fractures to the left foot. She neither sustained a head nor brain injury. She visited the scene of the accident two months later after her discharge from the hospital. She did not have any physical or mental pre-accident impediments that could have prevented her to drive that night.

[6] Dr Konrad Walter Lötter, of Du Métier Technical investigations and Consultants (Pty) Ltd testified as an accident reconstruction expert. He is a mechanical engineer with a BEng (Mech) from the University of Pretoria obtained in 1992. His expertise was not disputed. He compiled a report dated 13 March 2021, buttressed with oral testimony on how in his opinion the accident occurred. He relied on a copy of the accident report form (AR) furnished by the South African Police Services (SAPS), electronic photographs of the two vehicles which included the left front wheel of the

Ford Ranger, copies of a video clip taken of a screenshot where the original video was displayed and a copy of a document from the insurance company with photos indicating a mark on the centre line of the road. Plaintiff's father took Mr Lötter to the scene for inspection on 25 February 2021. Before the inspection he was furnished with information and photographs by the insurance company. He also inspected the one tyre of the Ford Ranger and analysed Google Earth images.

[7] According to Lötter the N12 comprises two normal driving lanes. Its dimension areas are the following: the northbound lane is approximately 3.7m wide with an emergency lane of 1.85m wide; the southbound lane is approximately 3.85m wide with an emergency lane of 1.8m wide. Lötter opines that the accident happened 150m after the insured driver had executed a curve indicated by a visible deep gorge mark which was highlighted on the road by the insurance investigators and not by him. The final resting positions were also pre-marked before his inspection with the letters CL and TP which were references to client and third party, respectively. The Ford Ranger rested on the approaching side of the road about 3.6m on the side from which the plaintiff's vehicle (Toyota Yaris) was travelling. The Yaris rested close to the centre line. Lötter conceded that it is not possible to estimate the location of rest of the vehicles from the video clip.

[8] This is what Lötter said regarding the tyre and wheel of the Ford Ranger: There were signs of damage to the tyre which caused him to examine it in more detail. He observed that the tyre had minimal run-flat damage; the damage to the rim showed deep uneven penetrations into the rim, and opined that it was not caused by contact with the curb but probably with the metal components of the Yaris during impact; and further that the lettering on the tyre showed signs of scrape marks the appearance of which matches the rubbing marks on the upright curb.

[9] Lötter referred to the version of the insured driver furnished to the police at the scene and recorded in the accident report:

‘Driver of vehicle A alleges that he was travelling straight, [and] he saw a white vehicle from nowhere [which] bumped into him.’

The policeman made a note that the other driver was also injured, and he could therefore not speak to “them”. Lötter disagreed with the version of the insured driver contending that it would have meant that he travelled straight and did not see the Yaris approaching. According to him it was clear from his analysis that the damages to the two vehicles show that there was a significant angle at the time of impact. If the version of the insured driver is accepted, it would mean that the Yaris would have approached the Ranger at an angle from its left and off the road. He maintained that based on the perception reaction time of the driver of 1.5 seconds, the driver of the Yaris (plaintiff), in reaction to the Ford Ranger swerving, started to reduce speed.

[10] Plaintiff’s attorneys filed a Notice in terms of Rule 36(10) of the Uniform Rules of Court on 05 December 2022 informing the defendant of plaintiff’s intention to tender in evidence closed circuit television footage (CCTV) depicting the accident. The defendant was called upon to admit the CCTV footage within 10 days of receipt of the notice failing which the said footage would be received in evidence on production thereof without further proof. Mr Mogano did not file any objection. A video clip which is 6 seconds long was made available to the Court to view.

[11] Lötter’s testimony regarding the video clip was firstly, that it was taken from a security camera close to the scene of the accident. Lötter, however, testified that because the video clip would have lost some clarity and the frames would have been irregular in appearance due to synchronisation between the camera and the screen, he selected intervals of 10 frames in an attempt to indicate the location of the headlights of the Yaris, the distances from the right-hand edge of the video image. He was able to determine the change in distance over time. He deduced that the Yaris was traveling at a constant speed considering the lines over the ten frames. He further added that the

headlights of the Ranger as it entered the frame appeared to be spaced wide which could indicate an angled approach of the Ranger at the time of impact.

- [12] Lötter conceded that he limited the video clip to what is visible. He did not have the original video but worked on the reproduced copy. There is a side glare from the headlights in contrast to the Ford Ranger flash of lights facing the camera, and making the quality of the picture poor and unlikely to see brake lights and close to impossible to make a finding based on whether brake lights were on or off. I must state that the quality of this CCTV video clip was very poor and despite having watched it several times I found it unhelpful and will not attach weight to what it purported to depict.
- [13] Lötter confirmed that he resides in Centurion and that the scene of the accident was pointed out to him by the plaintiff's father. Although the accident occurred on 03 February 2021, he only visited the scene on 25 February 2021. He did not verify whether there could have been other accidents between the two dates or not. He however confirmed that there were truck skid marks, of an unspecified age, depicted on photo 13 which he testified were irrelevant and disregarded them. He stated that he did not make the markings on the road depicted on photo 17 attached to his report but that those markings were furnished to him by the insurance company. The person who made the markings was neither identified nor testified. Lötter clarified that the mark on the curb was pointed out by the plaintiff's father but that he also saw it on the scene of the accident.
- [14] Lötter maintained that photo 3 had a visible mark on the curb which was linked to the accident in this instance. It was put to him that the mark was not visible on photo 3. He then, in an effort to justify his stance, explained that he has zoomed in and enhanced it as in photos 13 and 14 but he had spotted the mark. It was further put to him that photo 13 had other tyre marks. His response was that, as stated, he had excluded the other marks as they were truck marks and unrelated to this accident. He further stated that those additional marks were scuff marks and not brake marks.

[15] Lötter was further referred to a mark with white spots on the right side of the road. He explained that it was just to indicate some identifiable marks on the scene. Lötter testified that he cannot dispute that when the Ranger hit the curb the distance between the Ranger and the Yaris was 57m and consequently the Ranger swerved to the other lane. He disagreed with the proposition that had the plaintiff at that moment braked and stopped she could have avoided the accident and alluded to the 1.5 second reaction time and speed reduction happening in 0.8 seconds.

[16] The last witness for the plaintiff was her father, Mr Jaco Van der Merwe. He was not present when the collision occurred. He was at home sleeping and was awakened by a telephone call from the hospital informing him that his daughter was in hospital after being involved in an accident. He rushed to the hospital first and thereafter went to the scene to fetch her belongings (laptop and handbag) from her vehicle. Both vehicles were on the left driving surface of the road. He returned to the hospital. When asked whether he had pointed out the scene to the reconstruction expert he responded in the negative adding that he had pointed out the marks made on the road. It was further put to him that he was the one who kept contact with the police and had access to the police docket which he denied, stating that he only saw the accident report at their attorney's office.

[17] The plaintiff closed her case, and the defendant applied for absolution from the instance. The correct approach to an application for absolution at the end of a plaintiff's case was stated by Harms JA in *Gordon Lloyd Page & Associates v Rivera*¹:

'The test for absolution to be applied by a trial court at the end of a plaintiff's case was formulated in *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) at 409G – H in these terms:

'...(W)hen absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff

¹ 2001 (1) SA 88 (SCA) at 92 – 93. See also *De Klerk v Absa Bank Ltd* 2003 (4) SA 315 (SCA) at 323.

establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. (Gascoyne v Paul and Hunter 1917 TPD 170 at 173; Ruto Flour Mills (Pty) Ltd v Adelson (2) 1958 (4) SA 307 (T).)' This implies that a plaintiff has to make out a prima facie case – in the sense that there is evidence relating to all the elements of the claim – to survive absolution because without such evidence no court could find for the plaintiff.'

[18] I refused absolution. Defendant closed its case. As pointed out by Herbststein and Van Winsen² the reasoning is different from that applicable when the court comes to consider, after having heard the evidence for the plaintiff and the evidence, if any, tendered for the defendant, whether to grant absolution from the instance at the close of the defendant's case. The enquiry then is: 'Is there evidence upon which the court ought to give judgment in favour of the plaintiff?'³ What stands for determination is whether or not the defendant should be held liable for injuries sustained by the plaintiff in a motor vehicle accident.

[19] The Constitutional Court in *Lee v Minister of Correctional Services*⁴ held that there can be no liability if it is not proved, on a balance of probabilities, that the conduct of the defendant caused the harm. The parties had agreed during the pretrial conference dated 03 February 2023 that the plaintiff bears the onus of proof. Herbststein and Van Winsen⁵ explained the following pertaining to the burden of proof:

'In *Pillay v Krishna*,⁶ Davis AJA stated the three basic rules which govern the incidence of the burden of proof – the onus probandi, which is a matter of substantive law and not a question of evidence as:

² The Civil Practice of the High Courts of South Africa, Fifth Edition, Volume 1, Juta, page 921

³ Ibid De Klerk para 38

⁴ 2013 (2) SA 144 (CC) para 39

⁵ The Civil Practice of the High Courts of South Africa, Fifth Edition, Volume 1, Juta, at 895

⁶ 1946 AD 946 at 951 - 954

- (a) If one person claims something from another in a Court of law, then he has to satisfy the Court that he is entitled to it.
- (b) Where the person against whom the claim is made is not content with a mere denial of that claim, but sets up a special defence, then he is regarded as putting that defence as being the claimant. For his defence to be upheld he must satisfy the Court that he is entitled to succeed on it.
- (c) He who asserts, proves and not he who denies, since a denial of a fact cannot naturally be proved provided that it is a fact that is denied that the denial is absolute.

Davis AJA went on to say:

‘But I must make three further observations. The first is that, in my opinion, the only correct use of the word *onus*’ is that which I believe to be its true and original sense (cf D.31.22), namely, the duty which is cast on the particular litigant, in order to be successful, of finally satisfying the Court that he is entitled to succeed on his claim, or defence, as the case may be, and not in a sense merely of his duty to adduce evidence to combat a *prima facie* case made by his opponent. The second is that, where there are several and distinct issues, for instance a claim and a special defence, then there are several and distinct burdens of proof, which have nothing to do with each other, save of course that the second will not arise until the first has been discharged. The third point is that the *onus*, in the sense in which I use the word, can never shift from the party upon whom it originally rested. It may have been completely discharged once and for all, not by any evidence which he has led, but by some admission made by his opponent on the pleadings (or even during the course of the case), so that he can never be asked to do anything more in regard thereto; but the *onus* which then rests upon his opponent is not one which has been transferred to him: it is an entirely different *onus*, namely the *onus* of establishing any special defence which he may have. Any confusion that there may be has arisen, as I think, because the word *onus* has often been used in one and the same judgment

in different senses, as meaning (1) the full *onus* which lies initially on one of the parties to prove his case, (2) the quite different full onus which lies on the other party to prove his case on a quite different issue, and (3) the duty on both parties in turn to combat by evidence any *prima facie* case so far made by his opponent: this duty alone unlike a true onus, shifts or is transferred.'

[20] This case pivots on the reconstructed evidence of Lötter. Plaintiff claimed amnesia while her friend, Zan-Marie Olivier, had passed on. The injuries that the plaintiff sustained have been fully described above. Based on these injuries it is unfathomable why the admitting or treating doctor was not called to explain the correlation between her injuries to the hand, leg and foot and the amnesia that she claims to have suffered.

[21] In *PriceWaterhouseCoopers Incorporated and Others v National Potato Co-operative Ltd and Another*⁷

'[1] The basic principle is that, while a party may in general call its witnesses in any order it likes, it is the usual practice for expert witnesses to be called after witnesses of fact, where they are to be called upon to express opinions on the facts dealt with by such witnesses. While the conduct of the trial is usually a matter for the parties to determine as they present their cases, I have no doubt that, in the exercise of a judge's power to control trial proceedings, the judge may intervene to ensure that they are conducted in a manner that avoids delay and the unwarranted escalation of costs. Two courses of action were open to the judge. The first would have been to require NPC to identify the hearsay evidence that it wished to have admitted and make application for its admission on any available ground, and then to make a ruling on its admissibility. Such a ruling could always have been revisited at a later stage of the trial if necessary. The second, insofar as it was indicated that witnesses would be called to substantiate the hearsay evidence, was to require that Mr Collett's evidence stand down until such evidence had been

⁷ [2015] 2 All SA 403 (SCA) para 80

led and was properly before the court. That would have been an appropriate and permissible course for the judge to adopt. Instead Mr Collett was allowed to continue unchecked.'

The Court further remarked⁸

'[99] Lastly when dealing with the approach to an expert witness I have found helpful the following passage from the judgment of Justice Marie St-Pierre in *Widdrington*:

"Legal principles and tools to assess credibility and reliability

[326] "Before any weight can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist"

[327] "As long as there is some admissible evidence on which the expert's testimony is based it cannot be ignored; but it follows that the more an expert relies on facts not in evidence, the weight given to his opinion will diminish".

[328] An opinion based on facts not in evidence has no value for the Court.

[329] With respect to its probative value, the testimony of an expert is considered in the same manner as the testimony of an ordinary witness. The Court is not bound by the expert witness's opinion.

[330] An expert witness's objectivity and the credibility of his opinions may be called into question, namely, where he or she:

⁸ Ibid para 99

- accepts to perform his or her mandate in a restricted manner;
- presents a product influenced as to form or content by the exigencies of litigation;
- shows a lack of independence or a bias;
- has an interest in the outcome of the litigation, either because of a relationship with the party that retained his or her services or otherwise;
- advocates the position of the party that retained his or her services; or
- selectively examines only the evidence that supports his or her conclusions or accepts to examine only the evidence provided by the party that retained his or her services.'

[22] It is inexplicable that the plaintiff could claim amnesia without any substantiation thereto. Her father's evidence is of no consequence and unhelpful. Mr Lötter has conceded to relying on information furnished by the insurance company including the already marked points at the scene of the accident where none of the insurance company investigators were called to confirm the probative value of the evidence that he relied on. I have already commented on the poor quality of the video clip from which he also drew his conclusions. Although Lötter claims to have used his own expertise in arriving at his conclusion, his opinion seems to be based on tenuous factors that I am unable to attach value to and from sources upon whose credibility the probative value of such evidence depends, have not been called to testify. There was no application to this Court to admit such evidence as contemplated in s 3(1) of the Law of Evidence Amendment Act 45 of 1988. The inability of the plaintiff to testify on the crucial aspect of how the accident

occurred coupled with her failure to lead medical evidence in relation to her amnesia leaves a deficit in her case which cannot be cured by the accident reconstruction expert.⁹

[23] Regard being had to the evidence in its totality I cannot find that the plaintiff has discharged her onus of proving that the defendant was responsible for the collision. There is insufficient evidence to rule in her favour.

[24] In the result, the following order is made:

The plaintiff's claim is dismissed with costs on party and party scale.

**MAMOSEBO ADJP
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION**

For the plaintiff: Adv. H.E De la Rey
Instructed by: Haarhoffs Inc

For the defendant: Mr. A. Mogano
Instructed by: The State Attorney

⁹ See Road Accident Fund v Madikane (1270/2018) [2019] ZASCA 103 (22 August 2019)