



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case no: 497/2024

In the matter between:

M[...] M[...] K[...] obo M K

APPELLANT

and

ROAD ACCIDENT FUND

RESPONDENT

Neutral citation: *M M K obo M K* (Case no 497/2024) [2025] ZASCA 136
(25 September 2025)

Coram: MEYER, GOOSEN, SMITH and KEIGHTLEY JJA and MODIBA
AJA

Heard: 3 September 2025

Delivered: 25 September 2025

Summary: Action for damages arising from driving of a motor vehicle – issue of negligence of insured driver settled by agreement – court order recording liability of Road Accident Fund 56 of 1996 – ordering the furnishing of an undertaking in terms of s 17(4)(a) of Road Accident Fund Act – trial of remaining issues proceeding in default of appearance of RAF – trial court

dismissing claims on basis of failure to prove injuries and elements of liability – full court confirming order of the trial court – whether order in respect of s 17(4)(a) resolved causation of loss – failure to present any evidence at default hearing dispositive of matter – appeal dismissed.

ORDER

On appeal from: Limpopo Division of the High Court, Polokwane (Muller ADJP, Kganyago J and Manzini AJ, sitting as court of appeal):

- 1 The appeal is dismissed with no order as to costs.
- 2 The Registrar of this Court is directed to deliver a copy of this judgment to the Legal Practice Council of South Africa for its further consideration and attention.

JUDGMENT

Goosen JA (Meyer, Smith and Keightley JJA and Modiba AJA concurring)

[1] The appellant instituted an action for damages against the Road Accident Fund (the RAF) arising from injuries sustained by her minor child (MK) in a motor vehicle collision which occurred on 8 October 2013. At the time of the collision MK was three years old. The action was commenced on 16 October 2018.

[2] On 11 February 2019, the Limpopo Division of the High Court, Polokwane (the high court), per M G Phatudi ADJP, granted an order that the RAF is 100% liable for the appellant's agreed or proven damages. It also ordered that the RAF must furnish an undertaking in terms of s 17(4)(a) of the Road Accident Fund Act.¹ The matter thereafter proceeded to trial upon the remaining issues.

¹ Road Accident Fund Act 56 of 1996.

[3] The trial on the remaining issues proceeded as a request for default judgment since there was no appearance for the RAF. On 29 December 2021, the high court per Semanya DJP (the trial court) dismissed the appellant's claims. It made no order regarding the costs. Leave to appeal was granted to the full court of the high court (the full court).² The full court dismissed the appellant's appeal on 17 November 2023. This Court granted the appellant special leave to appeal on 10 April 2024. The appeal was adjudicated in terms of s 19(a) of the Superior Courts Act.³

[4] In the appeal to the full court and in the appeal to this Court, the appellant placed considerable store upon the order of the high court which was granted by Phatudi ADJP (henceforth the Phatudi order). In essence, the appellant's contention on appeal was that the trial court was precluded from finding that the appellant had failed to prove that the minor had suffered injuries in the collision which caused the loss. The terms of the Phatudi order, it was submitted, satisfied the question of causation. Accordingly, the trial court was required only to assess and quantify the loss suffered.

[5] Two issues arise in this matter. The first concerns the effect, if any, of the Phatudi order upon the adjudication of the matter. The second concerns the evidential basis upon which the trial court adjudicated the appellant's claims.

[6] In light of this, it is necessary to set out the circumstances in which the litigation was conducted before the high court. The appellant was represented by her attorneys of record throughout the case. The RAF was represented during the pleading stage and until the so-called merits of the claim were settled. It is not apparent from the record whether the RAF was represented when the

² The order is dated 20 May 2022.

³ Superior Courts Act 10 of 2013.

Phatudi order was granted. It is, however, clear from the record that after the Phatudi order and until the matter was finalised before the trial court, the RAF was not represented.⁴ The transcript of proceedings before the trial court indicates that the matter proceeded as a ‘default’ judgment. The RAF did not participate in the appeal before the full court. Although the RAF was notionally represented in proceedings before this Court, it did not participate in the appeal.⁵

Circumstances giving rise to the Phatudi Order.

[7] On 7 November 2018, the RAF addressed an offer of settlement to the appellant’s attorneys. The offer was accepted by the appellant’s attorneys and, on 5 December 2018, a notice of acceptance of the offer of settlement was filed at court. The notice attached the accepted offer.⁶ The offer of settlement reads as follows:

‘The Road Accident Fund (RAF) has considered the available evidence relating to the manner in which the motor vehicle accident giving rise to this claim occurred. The RAF has concluded that the collision resulted from the sole negligence of the RAF’s insured driver. Consequently, without prejudice, the RAF offers to settle the issue of negligence *vis-à-vis* the occurrence of the motor vehicle collision on the basis that the insured driver was solely negligent in causing the motor vehicle collision.

This offer is limited to the aspect of negligence as to the manner in which the collision occurred. This offer may not be interpreted or construed in a manner that would have the RAF concede any other aspect of the claim. To avoid doubt, the RAF reserves all its rights in law with regards to all other procedural and substantive aspects of the claim.’ (Emphasis added.)

⁴ All of the Uniform Rule 36(9) notices qualifying experts for the purposes of the trial, were filed after the Phatudi order and all are addressed to the RAF directly. Most were filed in August 2021, shortly before the trial proceedings.

⁵ A notice of acting was filed by the State Attorney after special leave to appeal was granted by this Court.

⁶ The appeal record filed before this Court identifies the notice and the offer as follows: *Notice of Acceptance of Offer of Settlement (Merits) dated 5 December 2018 with attached letter from Road Accident Fund to Mashabela Attorneys dated 7 November 2018*. The notice bears a receipt stamp from the RAF attorneys at the time dated 6 December 2018 and a receipt stamp by the Registrar of the high court dated 7 December 2018.

[8] The offer contained a clause stating that acceptance of the offer would only be deemed valid if it is accepted in totality. If any additions or alterations are made, those would be regarded as a counter-offer and would not constitute a valid agreement unless the counter-offer is accepted. Provision was made for signature upon acceptance. The offer was accepted as tendered. No counter-offer was made by the appellant. Apart from this offer, as accepted, there is no other correspondence or document on record which deals with the RAF's liability as accepted by it.

[9] It is not known whether the RAF was represented when the case came before Phatudi ADJP. The Phatudi order contains a customary introduction which states that 'having considered the documents filed of record and having heard the plaintiff and defendant', it is ordered that:

- '1. The Defendant is liable at 100% of the plaintiff's agreed or proven damages.
2. The defendant furnishes an undertaking in terms of section 17 (4) (a) of the Road Accident Fund Act 56 of 1996 of future accommodation in a hospital or nursing home or rendering of a service to plaintiff or supplying goods to plaintiff arising out of the injuries sustained by plaintiff in the motor vehicle collision on the 08th October 2013, after such costs have been incurred and upon proof thereof;
3. The aspects of quantum is postponed sine die for determination; and
4. The defendant to pay the plaintiff's taxed or agreed party and party costs on the High Court scale within 14 days of taxation or agreement of costs which costs shall include costs of Counsel and medical experts (if any).'

[10] The terms of this order are inconsistent with the documents which had been filed of record. The settlement agreement was in respect only of the negligence of the insured driver. There was no agreement that the RAF was liable to compensate the appellant for any loss the minor may have suffered. Furthermore, the RAF had not tendered an undertaking in terms of s 17(4)(a) of

the RAF Act, nor could it have, in light of its reservation of all of its procedural and substantive rights in law.

[11] There is, therefore, a disjuncture between the terms of the settlement agreement and those of the Phatudi order. This raises real concern about how the order came to be made in those terms. I shall return to the effect, if any, of this order hereunder. A further matter of concern, is the nature of the reliance placed upon the order by the appellant's legal representatives.

[12] In prosecuting the appeal before the full court reliance was placed upon the 'fact' that an order was made 'on the undertaking by the [RAF]'.⁷ In this Court, the appellant's legal representatives averred, in the application for special leave to appeal, that the RAF had given an undertaking and that it was 'common cause' that the minor had been injured in the collision.⁸ This was sustained in the submissions filed before this Court. This is plainly in conflict with the express terms of the settlement agreement. There is no evidence that the RAF had given an undertaking in terms of s 17(4)(a) and that it had thereby conceded the causal nexus between the injuries suffered and the collision. I shall also return to this hereunder.

The trial court proceedings

[13] The matter came before the trial court on 8 November 2021. When the matter was called, counsel for the appellant stated that the matter was

⁷ *K.M.M obo K.M v Road Accident Fund* [2023] ZALMPPHC 112 para 40.

⁸ In the affidavit deposed to in support of the application for special leave it is stated that:

'The respondent further tendered to furnish a written undertaking assuming liability for the applicant's future medical and hospital expenses.'

The affidavit goes on to state:

'It is common cause that the minor child sustained injuries. These injuries have caused serious impediments to the minor child. The experts' reports are in place to substantiate the severity of the injuries. There is no intervening act. The minor is continuously suffering as a result of injuries sustained in the accident that the respondent conceded to have occurred. The occurrence of the accident resulted in injuries which are not disputed by the respondent. In fact, the respondent has conceded to the injuries.'

proceeding by way of default judgment in relation to general damages and future loss of earnings only. The transcript of proceedings indicates that a ‘damages affidavit’ was handed up together with bundles of expert reports. No viva voce evidence was presented. Following an extensive address and engagement between counsel and the presiding judge, judgment was reserved. On 29 December 2021, Semanya DJP delivered a judgment dismissing the appellant’s claims for delictual damages.

[14] It must be emphasised that despite the reference to a ‘damages affidavit’ and references to affidavits by the experts, no affidavits appear in the record. This is not to suggest that the record is defective. On the contrary, it points to the absence of any supporting affidavits. There are a number of occasions in the transcript when counsel directs attention to an affidavit of an expert only for such reference to be to the report of the relevant expert. It is the duty of the attorney prosecuting an appeal on behalf of a client to ensure that a proper record is placed before this Court. The attorney is obliged to ensure that it is complete and that it complies with the rules of this Court.⁹ There was no suggestion that the record was incomplete. To the contrary, the attorney certified that he had complied with the provisions of Rule 8. We can only infer, therefore, that there were no affidavits deposed to by the experts confirming their reports. Significantly, there is also no evidence by the appellant, in which the factual basis of the claims is explained.

[15] The absence of any evidentiary material to confirm the expert reports and to establish the facts upon which the claims might be adjudicated, is fatal to the

⁹*Rennie NO v Gordon and Another NNO* 1988 (1) SA 1 (A) at 20D-F. See SCA rule 8(6)(i) which requires that the record contains a ‘correct and complete index of the evidence, documents and exhibits in the case’.

appellant's case. In *Economic Freedom Fighters and Others v Manuel*, this Court stated:¹⁰

‘Thus, in undefended actions in which unliquidated damages are claimed, our courts have insisted on hearing viva voce evidence in order to make a proper assessment and issue an appropriate award. In *Venter v Nel* the court, in dealing with a claim by a plaintiff for damages she sustained as a consequence of being infected with HIV during a sexual encounter, noted that it was dealing with an undefended action, and said the following:

“The practice in this Division is to hear some evidence on claims for damages, but inevitably the enquiry is not as detailed or controversial as it would be were the matter defended, were the defendant represented by counsel and were the evidence of the witnesses who testified for the plaintiff tested by way of cross-examination and by the defendant leading countervailing evidence.”

[16] As this Court observed in *Madibeng Local Municipality v Public Investment Corporation Ltd*¹¹, the default position in trial actions is that viva voce evidence be led. That may be dispensed with by agreement and subject to the trial judge exercising a discretion to permit evidence to be adduced by affidavit instead. In this case no evidence was presented.

[17] That, in my view, ought to be the end of the matter. The trial court did not however, deal with the case upon that basis. Rather, the court examined the ‘evidence’ as contained in the myriad expert reports presented on behalf of the appellant. After a comprehensive assessment of the reports, the trial court concluded that the appellant had failed to prove that the minor child had suffered loss arising from injuries sustained in the collision. In coming to this conclusion, the trial court noted significant and material contradictions between the expert reports. These related to different accounts of the nature of the injuries which were said to have been suffered by the minor in the collision. The

¹⁰ *Economic Freedom Fighters and Others v Manuel* 2021 (3) SA 425 (SCA) para 100. See also *Venter v Nel* 1997 (4) SA 1014 (D) on the necessity for evidence to be presented.

¹¹ *Madibeng Local Municipality v Public Investment Corporation Ltd* [2020] ZASCA 157; 2018 (6) SA 55 (SCA) para 26.

source of these was the appellant who had provided the experts with an account of the injuries alleged to have been suffered. Based upon the inconsistent reports given to the experts and the absence of any medical or hospital reports which could objectively establish the nature of the injuries, the trial court concluded that the opinions expressed by the experts were not reliable.

The full court

[18] The trial court granted the appellant leave to appeal to the full court. As already indicated the principal basis upon which the appeal was pursued was that the trial court was bound by the Phatudi order. Since it was only concerned with the assessment of damages, it was not open to the trial court to find that the appellant had not proved the causal nexus between the injuries arising from the collision and the loss suffered by the minor.

[19] The full court was therefore called upon to address the argument based upon the Phatudi order, and in particular the existence of the s 17(4)(a) undertaking. It was also required to deal with the merits of the trial court's findings on the evidence before it.

[20] In relation to this latter aspect, the full court did not address the fatal defect in the appellant's case before the trial court. It found, however, that the trial court was correct in its assessment of the existence of material discrepancies between the alleged factual basis upon which the experts expressed their opinions. It found that the trial court's assessment of the available evidence was correct. The appellant had failed to establish all of the elements upon which the RAF could be held liable for damages in delict.

[21] Turning to the Phatudi order, the full court reasoned that a settlement of the merits does not involve more than a settlement in relation to the negligence

of the insured driver. It does not imply that other elements of the delict are conceded. In relation to the s 17(4)(a) undertaking, the full court took the view that the furnishing of an undertaking is not a concession in relation to the fact that injuries were sustained and that they caused harm. It therefore dismissed the appeal and confirmed the order of the trial court.

The appeal before this Court

[22] An appeal lies against the order of the court below, and not the reasons advanced in support of that order. I emphasise this because, the broad brush-strokes of the reasoning of the full court on the effect of the Phatudi order, does not stand unqualified. A settlement on the ‘merits’ is not always only a settlement in relation to the negligence element in a delictual claim. It will depend upon the facts. Furthermore, the furnishing of an undertaking by RAF to pay future medical costs in terms of s 17(4)(a) could carry the implication that injuries were sustained for which the RAF is causally liable. Again, this will depend upon the circumstances in which the undertaking is given and, generally, the facts of the case.

[23] The order presently under appeal is one which dismisses the appellant’s claims against the RAF. Those were, as presented to the trial court, the claim for general damages and for loss of earning capacity. The principal question is whether the trial court correctly dismissed those claims.

[24] A claim in delict might be dismissed upon the failure to prove any one or more of the elements of the delict. Each of the elements must be proved. In the case of a claim for compensation for personal injury arising from the driving of a motor vehicle, the claimant must prove that the insured driver drove the motor vehicle wrongfully and negligently and that such conduct caused the injuries suffered by the claimant. It must be established that the claimant suffered harm

in consequence of the injuries. Finally, the claimant must quantify the loss in order to be compensated by determination of a monetary award.

The Phatudi order

[25] If we accept that, despite the provenance of the Phatudi order, it stands until set aside, then the question is what effect, if any, it could have had upon the determination of the two heads of damage which the trial court was called to assess.

[26] The appellant's case was that the Phatudi order, and in particular the order requiring an undertaking to be furnished, by necessary implication settled the question whether the minor child suffered injuries in the collision *and* that such injuries had given rise to loss suffered by the minor child. In my view, there is no substance to the argument. The Phatudi order contains no determination as to what injuries were suffered in the collision. There is no separate agreement which informs an understanding of the liability to pay for future treatment for 'injuries sustained in the collision'. On the pleadings, the allegation of injuries was still in issue. In the absence of a determination of the existence of injuries caused by the wrongful and negligent conduct of the insured driver and the consequential sequelae, no effect could be given to the order relating to the s 17(4)(a) undertaking.

[27] In any event, the claims for compensation for general damages and for loss of earning capacity require the proof of facts which are specific to those heads of damage. In the case of general damages, these are only payable if the injury suffered is assessed as serious. In the case of patrimonial loss based on an impairment of earning capacity, it must be established that the impairment of capacity arises as a causal consequence of the type of injury suffered.

[28] In both instances, there must at least be evidence upon which a court can find that a particular injury was caused, before it might be determined that the injury is serious, within the meaning ascribed to the term by the Road Accident Fund Act or that its consequence will be an impairment of earning capacity.

[29] It simply does not follow that because there exists an undertaking or an obligation to provide such undertaking, the essential factual basis for an award under the heading of general damages or loss of earning capacity, need not be made.

[30] That being so, the existence of the Phatudi order did not relieve the appellant of the burden to prove the injuries caused by the collision and the consequences that flowed therefrom.

The trial court's assessment of the evidentiary basis of the claims

[31] I have already set out the basis upon which the trial court assessed the 'evidence' which served before it. It cannot be faulted in this assessment, as the full court correctly found. But in this case, whatever one might say about the trial court and the full court's treatment of the evidence before it, the fact remains that there was no properly admissible evidence before the trial court which established that the minor child suffered the injuries upon which the claim was based. There was therefore, no admissible and reliable factual evidence upon which the expert opinions could be premised. The findings of the trial court and the full court upon this aspect cannot be faulted in any manner. The consequence is that the appellant failed prove her claims against the RAF. The appeal must therefore be dismissed.

[32] Before making the order, I must return to concerns about the conduct of the appellant's legal representatives. I have already pointed to the fact that

averments and submissions were advanced which are in direct conflict with the facts disclosed on the record. This is deeply troubling. A legal representative should under no circumstances conduct themselves in a manner which may have the effect of misleading a court.¹² Where the matter proceeds in the absence of an affected party, there is an even higher duty to maintain absolute fidelity to the facts, especially when a settlement is to be recorded in a court order. We cannot conclude that this was not done. There is, however, sufficient indication on the record to warrant a proper investigation by the Legal Practice Council. We will accordingly direct that a copy of this judgment be forwarded to the Legal Practice Council for its consideration and such action as it may decide.

[33] The RAF's conduct in this matter also cannot escape comment. It is a matter of grave concern that the RAF was unrepresented during the most critical phases of the litigation. In the light of its careful reservation of the limits of admitted liability, its subsequent absence is inexplicable. It may well have been reckless.¹³

[34] When the RAF does not participate in the process of adjudicating matters to finality, the courts seized with the case are placed in an invidious position. They are required to bring special care to bear, lest an order is made which compels the RAF to pay damages not proved. It is simply not in the interests of justice that this should occur. It is to be hoped that the RAF, as an organ of state

¹² *Incorporated Law Society v Bevan* 1908 TS 724 at 731 where Innes CJ described the duty thus:

'But it implies this, that the practitioner shall say or do nothing, shall conceal nothing or state nothing, with the object of deceiving the Court; shall put forward no fact which he knows to be untrue, shall quote no statute which he knows has been repealed, and shall refer to no case which he knows to have been overruled. If he were allowed to do any of these things the whole system would be discredited. Therefore, any practitioner who deliberately places before the Court, or relies upon, a contention or statement which he knows to be false, is in my opinion not fit to remain a member of the profession.'

¹³ It is worth observing that following the Phatudi order, the particulars of claim were amended to increase the quantum of the claim from R3 010 000.00 to R12 100 000.00.

managing public funds, will take reasonable steps to avoid recurrences of what occurred here.

[35] I make the following order:

- 1 The appeal is dismissed with no order as to costs.
- 2 The Registrar of this Court is directed to deliver a copy of this judgment to the Legal Practice Council of South Africa for its further consideration and attention.

GOOSEN JA
JUDGE OF APPEAL

Appearances

For appellant: No appearance
 Mashabela Attorneys Inc
 c/o SMO Seobe Attorneys Inc, Bloemfontein

For respondent: No appearance
 State Attorney, Bloemfontein.