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**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

APPEAL CASE NO: HCAA27/2024

COURT A QUO CASE NO: 1340/2020

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO THE JUDGES: YES/NO

(3) REVISED: YES/NO

DATE: 1/9/25

SIGNATURE

In the matter between:

MATULUDI LAVY JAN

APPELLANT

And

ROAD ACCIDENT FUND

RESPONDENT

Heard : 1 August 2025

Delivered: 1 September 2025 by circulation to the parties' legal representatives

Coram: Naude Odendaal J et Pillay AJ et Stroh AJ

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date for hand-down is deemed to be on 1 September 2025.

JUDGEMENT

Pillay AJ

Introduction:

- [1] The appellant appeals against the whole of the judgment and order of Justice Muller J, which was granted on 2 October 2023, wherein the respondent was ordered to be liable for sixty percent of the appellant's proven damages. The appellant's leave to appeal was granted by the Supreme Court of Appeal ("the SCA") on the 28 June 2024.
- [2] The appellant raised the following grounds of appeal.
- [2.1] His Lordship erred in finding the respondent to be liable for only sixty percent of the plaintiff's damages.
- [2.2] The learned Judge should have found the insured driver to be one hundred percent negligent and the sole cause of the accident.
- [2.3] His Lordship erred in deciding the matter on the basis of apportionment in respect of merits. There was no factual or legal basis to attribute forty percent negligence to the plaintiff.
- [2.4] The Court failed to accept uncontested oral evidence of the plaintiff as conclusive.
- [2.5] The respondent was not present at court; therefore, plaintiff was entitled to one hundred percent Default Judgement on merits.

- [2.6] The Court failed to have regard to the principles enunciated in the matter of Jacques Kritzinger v Road Accident Fund (A70/2022) 2023 ZAGPPHC 730(21 August 2023).
- [2.7] There was no evidence to gainsay the plaintiff's oral and documentary evidence.
- [2.8] The Court erred in finding that the plaintiff's evidence was inconsistent and contradictory.
- [2.9] The Court erred in finding that the plaintiff was not an honest witness and not impressed with his evidence. There was no factual and legal basis for this finding.
- [2.10] The Court erred in finding that the plaintiff was an unreliable witness. The plaintiff was clear that he did not know the name of the insured driver and that Dinah Choma was a passenger in his own vehicle, however the Court insisted that Dinah Choma was the insured driver.
- [2.11] The Court erred in finding that in his particulars of claim, the plaintiff failed to allege that the road was a curve with a yellow lane and a ditch on the side.
- [2.12] The Court erred in finding that the particulars of claim made no reference to the insured driver overtaking. It is submitted that this is a matter of evidence.
- [2.13] In the particulars of claim the appellant pleaded facts not evidence. Therefore, the Court was presented with oral evidence of when, how, and where the accident happened.
- [2.14] The plaintiff's oral evidence was consistent with his section19(f) affidavit.
- [2.15] The Court erred in finding that the section19(f) affidavit is only relevant for lodging the claim with the respondent and same should be disregarded for purpose of trial.
- [2.16] The Court erred in finding that the section19(f) affidavit have no evidential value at all.
- [2.17] The Court erred in concluding that a section19(f) could only be considered by a Court if there are inconsistencies in the plaintiff's oral evidence. The

court failed to take judicial notice of the affidavit, because it was consistent with the plaintiff's oral evidence. In this regard it is submitted that the Court misdirected itself.

[2.18] The Court erred in finding that the plaintiff failed to take evasive steps to avoid the collision. This was despite the plaintiff's evidence that he tried to avoid the accident by swerving to the left side of the edge of the road on the yellow lane and there was a ditch, which could not allow him to move far left.

[2.19] The learned Judge grossly erred in issuing an order so brought that it contradicted his own judgement.

[2.20] The order was therefore invalid for lack of clarity and ambiguity.

[2.21] By making such a Court order, the Court failed to exercise its discretion judicially and in the interest of justice.

[2.22] The order granted by the Court had immediate and substantial effect and the harm that flowed from it was serious, immediate, and ongoing.

[2.23] It was submitted that in the interest of justice the order granted by the Court should be set aside and appealed.

[2.24] It was the appellant's case that a different Court would come to a different conclusion.

[2.25] In light of the above, the appeal had a reasonable prospect of success.

[3] The appellant sought that the appeal be upheld and that the judgment be set aside and substituted with the following order, "That the respondent is liable for one hundred percent of the appellant's proven damages," and that the respondent pay the taxed or agreed party and party costs.

Brief Background:

[4] The appellant instituted action to recover damages from the respondent, flowing from a motor vehicle collision. Notice to defend and a plea was filed, however on the date of trial, amidst notice of set down having been served on the

respondent, there was no appearance, on behalf of the respondent. The matter proceeded by default and only in respect of the merits.

- [5] The appellant testified that on the 21st day of December 2017, between 14H00PM and 15H00PM in the afternoon, he was driving near Glen Cowie Nebo, in his Corolla Professional, motor vehicle with registration number D[...]. This was a two-way tarred road and the visibility was clear. There was a curve in the road and there was an oncoming motor vehicle, which was travelling at a high speed, and it was overtaking. It was at this stage that the appellant was approaching, and this vehicle returned to its lane, colliding with the motor vehicle it was overtaking and then changed direction and collided with his motor vehicle.
- [6] The appellant testified that he tried to swerve to the yellow line but there was a deep trench, and he tried to brake but it was too late. The vehicle that collided with his vehicle was a Toyota van with unknown registration number and the other vehicle involved was a Condor type of vehicle. He indicated that three motor vehicles were involved in the collision. He sustained an injury to his thigh and was transported to hospital by ambulance. The driver that caused the collision was not injured but driving under the influence of alcohol, as it was alleged that there was alcohol found in the vehicle. At hospital blood was drawn from both the drivers and he received treatment. He identified the driver of the vehicle as being one Diana Tchoma who was not injured but was transported with him to hospital.
- [7] The appellant testified that at the time of the collision, the yellow line was on the left-hand side of his vehicle, but he was unable to go far left, as there was a ditch. He later indicated that Diana Tchoma was a passenger in his vehicle and that he misunderstood the question, concerning the identity of the driver, who collided with him.

- [8] Counsel for the appellant addressed the Court *a quo* and indicated that the insured driver was the sole cause of the accident and that in the absence of any blame, to be attributed to the appellant, merits should be awarded one hundred percent, in favour of the plaintiff. The Court *a quo* referred to the pleadings, wherein no mention was made, of the curve in the road, or of the overtaking vehicle and the collision with the other motor vehicle and finally, the collision with the appellants vehicle, as testified to by the appellant. There was further no mention in the pleadings, concerning the insured driver overtaking when it was dangerous to do so. In response the appellant's counsel drew the Court's attention to the Section 19(f) affidavit, of the Road Traffic Act¹ as corroboration of the appellant's version of the incident. The Court *a quo* inquired whether the purpose of the Section 19(f) affidavit, was for confirmation of the evidence of the appellant, which counsel thereafter conceded, that it was not, and that same would only have been relevant, if there was a material difference between the Section 19(f) affidavit and the appellant's evidence.
- [9] Counsel thereafter indicated that the pleadings, as contained in the particulars of claim, did not give too much detail, pertaining to the curve and the nature of the road and that the insured vehicle was overtaking another vehicle. He however indicated that, the allegations would be found in the evidence and the Court *a quo* should take judicial notice, of the affidavit under oath by the appellant, together with the oral evidence before the Court *a quo*.
- [10] The appellants counsel conceded that the Court *a quo* had the discretion concerning whether the insured driver was one hundred percent negligent, however he motivated that the appellant confirmed his version and in the absence of inconsistencies flowing from his evidence and the reliability thereof the appellant should succeed one hundred percent in respect of the merits only. The issue of quantum was to be postponed sine die and costs in respect of the

¹ Act 56 of 1996 as amended.

merits should be awarded to the appellant. The Court *a quo*, exercising its discretion on the merits, granted judgement in favour of the appellant, in that the respondent was liable for sixty percent of the appellant's proven or admitted damages and the respondent was to pay the costs. As highlighted earlier, it is on account of this judgement and order that the appellant has approached this Court on appeal.

Issues for determination:

- [11] The crisp issue for determination concerned whether the Court *a quo* erred in finding that the appellant was contributory negligent in the manner in which he drove, on the date in question. Whether this finding was irregular, as the matter proceeded by way of default, without evidence in rebuttal of the appellant's uncontested evidence, concerning the collision being entirely, on account of the negligence, of the insured driver.
- [12] What baring did the section 19(f) affidavit have on the proceedings and was same necessary to be considered by the Court *a quo*.
- [13] Whether the appeal should succeed and the prayers sought be granted with costs.

The Legal Principles and Analysis:

- [14] In **P P v J P**² the Court noted the following concerning interference with the discretionary power of the Court of first instance,

² See (A3007/20) [2020] ZAGPJHC 281 (2 November 2020) at paragraph 22 to 26.

“The circumstances under which a court of appeal may interfere with a lower court’s exercise of a narrow discretion were restated as follows in Ferris and another v FirstRand Bank Ltd 2014 (3) SA 39 (CC) at para [28]:

‘28 An appeal court may interfere with the exercise of a discretionary power by a lower court only if that power had not been properly exercised. This would be so if the court has exercised the discretionary power capriciously, was moved by a wrong principle of law or an incorrect appreciation of the facts, had not brought its unbiased judgment to bear on the issue, or had not acted for substantial reasons.’

In instances where a lower court exercises a narrow discretion, the ordinary approach on appeal is that the ‘the appellate court will not consider whether the decision reached by the court at first instance was correct, but will only interfere in limited circumstances; for example, if it is shown that the discretion has not been exercised judicially . . .’ (see Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa 2015 (5) SA 245 (CC) at para 85).

It would therefore not be competent for this Court to interfere with and set aside the exercise of the trial Court’s discretion merely because this Court would have preferred the trial Court to have followed a different course among those available to it. It would equally not be competent for this Court to alter the percentage of the benefits that should be forfeited by the respondent merely because this Court believes that its preferred percentage is the appropriate percentage.

The appellant must therefore satisfy this Court that the trial Court has exercised its discretion capriciously or upon a wrong principle, that it has not brought its unbiased judgment to bear on the question that was before it or has not acted for substantial reasons.”

- [15] It must be borne in mind that an Appeal Court needs to first consider whether this threshold has been met for such interference. It is an established principle, that

the Court a *quo* being involved in the hearing of the matter, was best equipped to determine whether the negligence of the insured driver cause the collision or if both the appellant and the insured driver were negligent, and whether blame may be apportioned based on a percentage allocation, in terms of the Apportionment of Damages Act³.

[16] **Rule 18 (4) of the Uniform rules of Court** provides, “Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto.” From the particulars of claim the appellant alleged that the incident occurred “on the 21st day of December 2017 at approximately 22H30 at Glen Cowie Limpopo Division”⁴. This was in stark contrast to the appellant’s evidence where the incident occurred between “14:00 or 15:00 in the afternoon”⁵ this was never addressed by the appellant’s counsel. The particulars of claim indicated further...

*“The plaintiff was a driver of the motor vehicle bearing registration numbers and letters D[...] when an unknown motor vehicle driven by an unknown driver (hereinafter referred to as the insured driver) collided with his motor vehicle. The aforesaid collision was caused by the negligent driving of the insured driver, **She** having been negligent in one or more or all of the following respects;*

He failed to keep a proper lookout; he failed to keep the vehicle he was driving under properly effective control;

He drove at an excessive speed in the circumstances;

He failed to apply the brakes of his vehicle either timeously adequately or at all;

³ See Act 34 of 1956

⁴ See paragraph 4 of the particulars of claim on page 4.

⁵ See page 3 of the merits trial transcripts.

He failed to take any or adequate steps to avoid the accident when by the exercise of reasonable care and diligence he could and should have done so.

[17] This was in stark contrast with the evidence tendered as recorded above. As noted by the Court *a quo* these wide, loose ended, and broad statements could have been applicable to any “plaintiff” concerning a motor vehicle collision. The appellant argued that the role of the pleadings was there to merely allege facts which would be supplemented by the evidence. This conflicts with the principle that the pleadings are the basis on which a claim is formed and to which the opponent must respond. In instances where the pleadings are vague, the opponent would not be able to properly respond thereto. As correctly highlighted by the Court *a quo*, that there were no specific averments made concerning how this collision occurred, with specific reference to the curve in the road and the overtaking by the insured vehicle, whilst it was dangerous to do so. Nevertheless, the Court *a quo* accepted the widely drafted particulars of claim to be sufficient to cover the evidence of the plaintiff.

[18] The appellant sought the Court to take cognizance of the Section 19(f) affidavit, for purposes of corroboration of the allegations as testified to by the appellant. The relevant portion being paragraph 3 which reads as follows;

“On or about the 21 December 2017 at approximately 22H30 at Glen Cowie, Mawiakae, Limpopo Province, I was a driver of the motor vehicle bearing registration numbers and letters D[...], when another motor vehicle overtook on the curve, went back to its lane and hit another motor vehicle, then lost control and hit my motor vehicle.”

It is perturbing that this information was available to the appellant from the onset, before proceedings could be instituted against the respondent, yet these averments did not feature, in the particulars of claim. This Court aligns itself with

the sentiment of the Court *a quo* concerning the vague particulars of claim, as no reason was forthcoming, why the information as contained in the Section 19(f) affidavit was not relied upon when drafting the particulars of claim.

[19] The appellant relied on the case of **Kritzinger v Road Accident Fund**⁶ wherein the Court held at paragraph [11], “ *that the Court was bound to interfere with the findings of the Court a quo for several reasons: firstly where it was not satisfied with the s19(f)(i) affidavit it should have called for the viva voce evidence of the appellant, and secondly because there was no evidence before it that an apportionment was appropriate. Thus, I am of the view that the test set out in Santam and Blom has been satisfied.*” Also at paragraph [18], “*there being no other evidence placed before Court, the appellant should have succeeded a quo in toto on the merits*”. Regard was had to the case, the details of which, differ materially from the one before the Court *a quo*. It must be noted that unlike Kritzinger, evidence was placed before the Court *a quo*, through the testimony of the appellant. The purpose for which counsel of the appellant, sought to rely on the Section 19(f) affidavit was to corroborate the appellant’s evidence concerning the circumstances of the collision, the problem however, was that same was not reflected in the averments as contained in the particulars of claim, as highlighted above and on which the appellant instituted proceedings against the respondent.

[20] Regard was had to the trite principle that judgment may be given in any civil proceedings on the evidence of any single, competent, and credible witness. In **Daniels v General Accident Ins Co Ltd**⁷ it was said *that*.

“The single witness, more particularly where he is one of the parties, must be credible to the extent that his uncorroborated evidence must satisfy the court that on the probabilities it is the truth.”

⁶ (A70/2022) [2023] ZAGPPHC 730 (21August2023)

⁷ 1992 (1) SA 757 (C)

Related to this is the following from **S v Sauls and Others**⁸;

“The trial judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told”

In **Siffman v Kriel**⁹ the Court noted that.

“It does not follow because evidence is uncontradicted, that therefore it is true. Otherwise, the court, in cases where the defendant is in default, would be bound to accept evidence the plaintiff might tender. The story told by the person on whom the onus rests may be so improbable as not to discharge it.”

[21] In as much as the appellant was at pains to justify the aspect that the Court a *quo* erred by indicating that the appellant was not reliable in his evidence it was clear that there were fundamental issues with the appellant's version of events in contrast with the particulars of claim. As highlighted by the Court a *quo*, the appellant when testifying before the Court failed to mention that he had a passenger travelling with him on the date in question at the time of the collision. The appellant identified the driver of the insured vehicle, being a woman called Diana Tchoma¹⁰, that caused the collision. The appellant thereafter indicated that Diana Tchoma was rather a passenger in his vehicle (a witness to the collision, who could have testified, corroborating the appellant's version, who was not called) and he testified that he had made a mistake, when he indicated that she

⁸ 1981 (3) SA 172 (A) at 180F

⁹ 1909 TS (1) 538 at 543

¹⁰ See page 8 of the transcribed record at line 10 to line 20.

was the driver that caused the collision¹¹. The averment pertaining to Diana Tchoma was not contained in the particulars of claim.

[22] As correctly highlighted by the Court *a quo*, the appellant indicated that the police and ambulance arrived at the scene, he and the insured driver that caused the collision, were present and they were transported to the hospital. Both had their blood drawn, as it was alleged that the driver was driving under the influence of alcohol. It is trite therefore that record of the driver's details and that of the motor vehicle was ascertainable, yet the particulars of claim once again referred to an unknown driver of an unknown motor vehicle. The Court *a quo* was at pains, to verify the circumstances surrounding the collision and the steps taken by the appellant to avoid the collision. The appellant was evasive concerning where he was prior to, during and after the collision¹². There was no evidence led concerning the speed at which the appellant was driving prior to the collision and the distance between the vehicles, at the time that the appellant first saw the vehicle driven by the insured driver. This Court can find no fault with the findings of the Court *a quo* in respect of the evidence which was tendered.

[23] The appellant argued that since the trial proceeded on merits by way of default, there was no evidence, in rebuttal to the appellants version and as such the respondent should have been found to be one hundred percent liable. This reasoning is flawed. It does not automatically mean that because the respondent was absent, the appellant's version must automatically be accepted, without determining whether all the elements have been proven concerning the issue of negligence. As highlighted above in **Siffman v Kriel**¹³ the Court noted;

"It does not follow because evidence is uncontradicted, that therefore it is true. Otherwise, the court, in cases where the defendant is in default,

¹¹ See page 11 of the transcribed record at line 1 to line 11.

¹² See page 5 of the transcribed record at line 1 to line 5, page 6 line 19 to line 23, page 7 line 6 to line 8, page 9 line 15 to page 10 line 16.

¹³ See 1909 TS (1) 538 at 543

would be bound to accept evidence the plaintiff might tender. The story told by the person on whom the onus rests may be so improbable as not to discharge it.”

From all the evidence placed before the Court *a quo* it was clear and apparent that there were discrepancies in the appellant’s version. These discrepancies could not be overlooked simply on account of the respondent failing to participate in the proceedings. Thus, the ruling by the Court *a quo* is unassailable due to the issues highlighted above.

Costs:

- [24] The approach to awarding costs is succinctly set out in **Ferreira v Levin NO and Others, Vryenhoek and Others v Powell NO and Others**¹⁴ as follows;

“The Supreme Court has, over the years, developed a flexible approach to costs which proceeds from two basic principles, the first being that the award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer, and the second that the successful party should, as a general rule, have his or her costs. Even this second principle is subject to the first. The second principle is subject to a large number of exceptions where the successful party is deprived of his or her costs. Without attempting either comprehensiveness or complete analytical accuracy, depriving successful parties of their costs can depend on circumstances such as, for example, the conduct of parties, the conduct of their legal representatives, whether a party achieves technical success only, the nature of the litigants and the nature of the proceedings. I mention these examples to indicate that the principles which have been developed in relation to the award of costs are by their nature sufficiently

¹⁴ 1996 (2) SA 621 (CC) at paragraph 3:

flexible and adaptable to meet new needs which may arise in regard to constitutional litigation...

[25] This Court accepts that this appeal was sought by the appellant and was not opposed by the respondent. In as much as the appellant sought costs if successful, it does not automatically mean that the respondent be awarded costs consequent to the appeal failing, as highlighted the respondent did not participate in the appeal proceedings and therefore, it is just and fitting that this Court order that there be no order as to costs.

Ruling:

[26] Based on all that has been said above and the reasons given, it is just and equitable that this appeal be dismissed. The appellant failed to establish that the discretion exercised by the Court *a quo* was not exercised “judicially” and there was no merit for this Court to interfere.

Order:

[27] In the result the following order is made:-

[27.1] The appeal is dismissed.

[27.2] No order as to costs.

KL PILLAY
ACTING JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE

I concur and it is so ordered,

**M NAUDE-ODENDAAL
JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE**

I agree,

**JD STROH
ACTING JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE**

APPEARANCES:

**FOR THE FIRST APPELLANT : Advocate SS Masina
INSTRUCTED BY : Komane Attorneys**

FOR THE RESPONDENT : NO APPEARANCE

DATE OF HEARING : 1 August 2025

DATE OF JUDGEMENT : 1 September 2025