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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: A2024-114920

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHER JUDGES: NO
- (3) REVISED: **NO**

In the matter between

ABRAHAM ZWELISHA MTSHALI

Appellant

And

ROAD ACCIDENT FUND

Respondent

Coram: L DE SOUZA-SPAGNOLETTI, AJ
(J DLAMINI, J AND M KRUGER, AJ CONCURRING)
Heard on: 10 SEPTEMBER 2025
Delivered: 30 SEPTEMBER 2025

JUDGMENT- FULL BENCH APPEAL

BACKGROUND

1. This matter centres around a claim against the Road Accident Fund (RAF) arising from injuries sustained by the appellant in a motor vehicle collision on 7

February 2020. Appellant was 46 years old at the time of the collision. The claim was lodged with the respondent on 22 April 2021 and summons was served on 2 September 2021. The respondent failed to defend the summons.

2. Subsequent to service of summons and on 7th of December 2022, an order was handed down by Honorable Maier Frawley, J granting leave to the appellant to approach the registrar for the allocation of a default judgment hearing date ¹.
3. It is clear from the record, or what should have been included in the record of the appeal, that the respondent had ample opportunity to attend to the matter, was called upon to do so and simply neglected to. The bundle of documents reflecting this communication between the parties, which is referred to in appellant's heads of argument as Bundle "C" could not be found but there is a bundle found on the Caselines file of the default judgment itself ² which reflects such communication. This bundle does not appear to have been included in the record of the appeal but does, nonetheless form part of such record irrespective of its apparent, erroneous exclusion.
4. An application for default judgment was served on the respondent on 29 March 2023 ³. This application for default judgment came before Honorable Maisela, AJ on 24 January 2024 and was subsequently dismissed by her on 26 January 2024.
5. For the sake of completeness, the application for condonation brought by the appellant for the late application for a hearing date of the appeal is granted. The

¹ Caselines in the default judgment court file at 07-2

² Caselines in the default judgment file at D.1

³ Caselines at 004-7

papers in that application reflect a conscientious and ongoing attempt on the part of the appellant to procure a hearing date and to bring the matter before the appeal Court. In the circumstances, it is in the interests of justice to grant the same.

6. It is clear from the reasons for judgment of the Court a quo ⁴ that the entitlement of the appellant to apply for default judgment was not placed in issue, nor does this Court find issue therewith.
7. The grounds of appeal herein are numerous and with significant overlap. For the sake of expedience and where appropriate, the appellant's grounds of appeal are grouped and tackled collectively.

LEGAL FRAMEWORK

8. Rule 31(2)(a) of the High Court Rules states the following:

“Whenever in an action the claim or, if there is more than one claim, any of the claims is not for a debt or liquidated demand and a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff may set the action down as provided in subrule (4) for default judgment and the court may, after hearing evidence, grant judgment against the defendant or make such order as it deems fit.”

9. The appellant well sums up the standard of proof and credibility of the evidence presented in his quotation of the Venter Du Plessis judgment⁵ which in turn

⁴ Caselines 002.10 at 002-84

refers to the Stellenbosch Farmers Winery Group Pty Ltd case⁶. It must be noted that in the Venter du Plessis case, the court was faced with two irreconcilable versions of events. That is not the case in the matter before this court. The evidence of the appellant in this case is undisputed and non-contradictory.

10. A court of appeal is generally reluctant to disturb the factual findings of a trial court but will do so where such findings are based on false premises or where relevant facts have been ignored or where the conclusions are plainly wrong.⁷
11. Findings of credibility cannot be judged in isolation but require to be considered in the light of the proven facts and the probabilities of the matter under consideration.⁸
12. Rule 38(2) is discussed below under the relevant ground of appeal.

GROUND OF APPEAL ON MERITS

13. The evidence in this matter reflects that on 7 February 2020 and on the R23, Standerton, N3, at or close to the onramp, the appellant was the driver of a white, Toyota taxi T[...] involved in a collision.

⁵ Venter Du Plessis v RAF (138/2020) [2021] ZASCA 64 (26 May 2021)

⁶ Stellenbosch Farmers' Winery Group Ltd. and Another v Martell & Cie SA and Others (427/01) [2002] ZASCA 98; 2003 (1) SA 11 (SCA)

⁷ R v Dhlumayo and Another 1948 (2) SA 677 (A) at 705 ; Beukes v Smith [2019] ZASCZ 48 para 22; ST v CT (1224/16) [2018] ZASCA 73; [2013] 3 All SA 408 (SCA)

⁸ Santam Bpk v Biddulph [2004] ZASCA 11; [2004] 2 All SA 23 (SCA) para 5 ; Brits v Shoprite Checkers (Pty) Ltd and Another [2025] ZANCHC 48

14. The Police Accident Report⁹ confirms the aforementioned information, including the identity number of the appellant and also records the conveyance of several passengers in the vehicle at the time of the collision.

GROUND 1.2- 1.4,1.7-1.8, 1.11 and 1.17-1.18

The Court a quo failed to have due regard or attach proper weight to the evidence before it

15. The merits evidence placed before the Court a quo included inter alia the following:

15.1 The police report of the accident ¹⁰;

15.2 An affidavit by the officer who attended the scene, Constable Monyana ¹¹;

15.3 The police sketch plan of the collision and key ¹²;

15.4 Appellant's section 19 affidavit ¹³;

15.5 Appellant's sketch plan of the collision ¹⁴;

15.6 Appellant's affidavit in support of default judgment ¹⁵.

16. The narrative description of the accident in the police report states the following:

⁹ CL 003-7 at 003-20

¹⁰ CL 003-20

¹¹ CL 003-35

¹² CL 003-28

¹³ CL 003.6

¹⁴ CL 003.8

¹⁵ CL 004.5

“Driver was unable to explain to the police what happened before the accident occurred, he was transferred to hospital.” (own emphasis) ¹⁶.

“6 passengers taken by A0659 ambulance”

17. The police report also incorporates a detailed sketch plan and key ¹⁷ which plan and key accords with the version of the collision as deposed to by the appellant. The existence of a collision appears patently clear from the report and sketch with the noting of an unclear point of impact but nevertheless recording that there was debris strewn all over the road.
18. The warning statement of the appellant of 23 January 2021 ¹⁸ notes the appellant having foregone his right to remain silent. It also records that the appellant was travelling on the R23 Road from Heidelberg and that when he reached the N3 Freeway bridge, he noticed a truck coming from the right hand direction, entering the road when he was close by and with appellant being unable to avoid it. It states that the truck hit his taxi. Appellant’s rough sketch ¹⁹ accords with this and both the sketch and the warning statement accord with the police sketch plan aforementioned.
19. The appellant’s affidavit in support of default judgment²⁰ also accords with the balance of the evidence. In this affidavit, further information is provided by the appellant who states that the insured driver failed to stop and executed a right

¹⁶ CL 003-21

¹⁷ CL 003-28

¹⁸ CL 003-31

¹⁹ CL 003-38

²⁰ CL 004.5 at 004-19

hand turn when it was inopportune and unsafe to do so. He states that the collision caused his vehicle to overturn.

20. The affidavit of Constable MS Monyana ²¹ confirms that he attended the scene of the appellant's collision. On his arrival, he found paramedics assisting the passengers of what at that time appeared to be a badly damaged, white, Toyota taxi with registration number and letters T[...]. He confirms in this affidavit that the driver of the taxi was already in one of the ambulances and he confirms that the driver was seriously injured. He confirms that the passengers were all taken to different hospitals. The witness to the collision stated that the truck never stopped after causing the accident. ²²
21. The appellant was made available to lead oral evidence for the Court a quo should it have sought clarity. This readiness to testify is noted by the appellant at paragraph 23 of his affidavit in support of default judgment too ²³. This Court cannot find reason to penalize the appellant for the Court a quo's refusal to hear his evidence.
22. The evidence as a whole, as it was available at the time of hearing the application in the Court a quo, provides ample proof of the occurrence of the collision as well as ample detail in relation to how the collision occurred. The sketch plan too confirms that the point of impact was on the roadway with debris strewn over the intersection. The appellant confirms that there was

²¹ CL 003-35

²² CL 003-37

²³ CL 004.5 at 004-27

nothing he could do to avoid the collision²⁴. As stated afore, this evidence stands before court undisputed.

Grounds 1.5 - 1.6, 1.13 - 1.16

Standard of proof, Rule 31, discretion of the Court and operation of Rule 38(2)

23. Further to what is stated in the “Legal Framework” section above, the Court a quo refused to hear viva voce evidence despite counsel noting the appellant’s presence and availability to lead such evidence. The Court declined to hear such evidence on the basis that leave had been granted under Rule 38(2) for the hearing to proceed on the papers.²⁵

24. Rule 38(2) of the Uniform Rules of Court states the following:

“38 (2) The witnesses at the trial of any action shall be examined viva voce, but a court may at any time, for sufficient reason, order that all or any of the evidence to be adduced at any trial be given on affidavit or that the affidavit of any witness be read at the hearing, on such terms and conditions as to it may seem meet: Provided that where it appears to the court that any other party reasonably requires the attendance of a witness for cross-examination, and such witness can be produced, the evidence of such witness shall not be given on affidavit.”

25. The Court a quo would have had a discretion to hear the viva voce evidence of the appellant and this Court finds that such discretion was not exercised

²⁴ CL 4.5 AT 004-19

²⁵ Paragraph 12 of reasons for judgment; Caselines 02.10 at 002-87

judiciously. It was well within the discretion of the Court a quo to hear such evidence while concurrently agreeing to evidence being presented on affidavit. The refusal of the Court a quo to hear such evidence, particularly bearing in mind the questions posed by it, was misplaced as the appellant would have been capable of resolving at least some of the queries raised by Court a quo. This Court however does not find that the answers, or the absence thereof to the questions posed, were crucial to the consideration of the matter nor did they impact materially on the finding that this Court makes.

26. The dismissal of the application for default judgment reflects a misplaced exercise of the Court a quo's discretion under Rule 31.
27. The failure of the appellant to provide a version to the police on the scene is amply explained on the papers, particularly in the police report and in the affidavit of Mr Monyana who confirms that the appellant was seriously injured and already in one of the ambulances on the scene. The Court a quo erred in finding this to be of relevance in the analysis and assessment of the matter.
28. The absence of any defence in an application for default judgment can of course heighten the caution of a court. A court should not rely blindly on the evidence of an applicant as a respondent is not represented or present to give its version of events. Despite this caution however, it must be borne in mind that the onus of proof in a matter such as this remains on a balance of probabilities.

Failure of appellant to obtain witness statements or to call taxi passengers

29. The appellant's version of the collision was and is amply supported by the collateral evidence, including the police report, sketch plan and the affidavit of Constable Monyana who attended the scene. The absence of the witness statement in these circumstances is not fatal to the appellant's case.

Ground 1.12

Appellant's charge and apparent detention for reckless and negligent driving as a reason for dismissal

30. The format of the police warning statement is noted by this court ²⁶. Such format is seen commonly in our Courts with the sheer volume of RAF cases running through them week to week. It is noted that the appellant willingly provided this warning statement, foregoing his right to remain silent and further that such statement does not conflict with his Section 19 affidavit nor with his affidavit in support of default judgment. The Court a quo enjoyed ample opportunity to question the appellant and refused such opportunity. This Court does not find the format of this warning statement nor the information contained therein to hold any basis for dismissal of the appellant's action.

CONCLUSION ON MERITS

²⁶ CL 003-30

31. It is trite for the purposes of liability that culpa arises if a reasonable person in the position of the driver in question would foresee the reasonable possibility of his conduct causing harm and would take reasonable steps to guard against such occurrence.²⁷
32. In the normal course, where a Defendant has pleaded contributory negligence and an apportionment, the Defendant would have to adduce evidence to establish negligence on the part of the Plaintiff on a balance of probabilities²⁸. That is not the case here as the appellant's version sits before the Court in patent clarity and uncontested.
33. The insured driver is noted to have left the scene of the collision. Considering the extent of the collision which caused the taxi to overturn, this departure is significant. The driver would have been aware of the harm caused yet appears to have left rather than face the music.
34. The appellant in this appeal states that he could not avoid the collision²⁹. In appellant's warning statement it is clear that he was aware of his surroundings as he had noticed the approaching truck prior to the collision. He states that when he was close to the bridge, the truck entered the road. This indicates on his version, that the truck was simply too close for him to avoid the collision³⁰.

²⁷ Kruger v Coetzee 1966 (2) SA 428 (A)

²⁸ Johnson, Daniel James v Road Accident Fund, Case Number 13020/2014 GHC at para 17 confirming Solomon and Another v Musset and Bright Ltd 1916 AD 427

²⁹ CL 003.6

³⁰ CL 003-32

35. On the evidence presented, there is no basis upon which this Court can find reason for apportioning blame. The Court is alive to the fact that this aspect could have possibly been placed in issue had the respondent taken any one of the many opportunities it had to apply itself to a defence of the matter. It neglected to do this as it neglected to engage in an attempt to resolve the matter prior to the handing down of judgment.
36. This Court finds that the appellant proved his case on a balance of probabilities.

GROUND OF APPEAL ON QUANTUM

37. It does not appear from the reasons for judgment in the Court a quo that the injuries of the appellant were related to the dismissal of the appellant's action. For the sake of completeness, the ample evidence on record reflects that he sustained the following injuries:

- 37.1 A mild traumatic brain injury with significant neuropsychological impairment;
- 37.2 Multiple lacerations and abrasions;
- 37.3 Significant, right sided conductive hearing loss;
- 37.4 Injuries to the neck and right shoulder.

38. The impairments found by the neuropsychologist, which are significant are also considered permanent and while the traumatic brain injury sustained has been

classified as a mild one, from an outcome based perspective, things look to be very different ³¹.

39. On the evidence, which evidence is clear and undisputed, this Court accepts the nature and extent of injuries as presented and further that the appellant has been rendered unemployable in the open labour market.

Grounds 2.2 - 2.5 and 2.7

Proof of appellant's earnings

40. The evidence reflects that the appellant worked as a taxi driver for a living. His affidavit in support of default judgment confirms this at paragraph 20 ³².

41. Much is made by the Court a quo of the appellant's belonging to a taxi association. It is further stated that the taxi association would have been capable of providing crucial information in relation to the appellant's earnings. Whether this would have been the case or not is unclear but irrespective of this, there is ample evidence that the appellant was working as a taxi driver at the time of the collision.

42. This Court notes the recordal on appellant's warning statement that he was unemployed. It must be highlighted that such statement was signed on 23 January 2021, almost a year after the collision at a time which on the evidence and at that time, he was unemployed.

³¹ CL 005.12

³² CL 004.5 at 004-24

43. Validation of earnings in the informal sector is not always easy. It is often impossible to assess such earnings with accuracy in a manner that one would of a victim employed in the formal sector. To refuse a claim for such loss solely because a victim in the informal sector neglected to formally record his earnings, would be patently unjust, particularly in circumstances where proof of his vocation is clear on the papers.
44. A court must exercise caution where evidence on loss of income is lacking and of course the less the proof, the greater the caution. Bearing in mind however, the historic absence of formal record keeping in the informal sector, it is not uncommon for a court to rely on peripheral evidence in combination with the viva voce evidence of the victim. It is curious and somewhat unfortunate that the Court a quo refused to hear the evidence of the appellant. Nonetheless, the confirmation on the police report coupled with the appellant's evidence on oath makes out a clear case that he was indeed working as a taxi driver/owner. This evidence in combination with that of the medico legal experts discharges the onus of proof with which the appellant is encumbered. This Court finds that the appellant was indeed working as a taxi driver at the time of the collision in question and that he was earning a living at the time of the collision as a taxi driver.
45. Appellant's undisputed evidence is that he was earning a net income of R2 500.00 per week, approximately R10 000.00 per month and that he received

his earnings in cash. He further confirms that he has not been able to work since the collision which accords with the evidence of the medico legal experts.³³

46. In her report, industrial psychologist, Ms Shein states that considering the appellant's working experience and education, he would have been mainly employable in jobs categorized as unskilled to semi-skilled and that such occupations tend to be more physically demanding. She opines it likely that but for the accident, he would have continued to work as a self-employed taxi driver. She also opines that should he have had to, he would have been able to secure alternate employment due to the experience he possessed and further that he would have been capable of working until retirement age of 65 years.³⁴

47. In paragraph 8.1.2 of her report, Ms Shein states that the appellant was most probably earning according to the Suggested Earnings Assumptions for non-corporate workers as reported in The Quantum Yearbook (Robert K. Koch2020), which for taxi owners was as follows:

- Taxi driver – Owner – Driver : R86 000 – R374 000 per year³⁵.

48. It is noted that the appellant in his calculation has utilized his own earnings figures rather than relying on those set out above. The earnings of approximately R10 000.00 per month and accordingly R120 000.00 per annum, fall very much at the low end of Koch's suggested earnings for a taxi driver/owner.

³³ CL 004-25 to 004-26

³⁴ CL 006.10 at 006-98

³⁵ CL 006.10 at 006-102

Grounds 2.6 and 2.11

Application of contingency deductions on appellant's loss of earnings calculation

49. Future loss of income and/or earning capacity is at the best of times, a speculative endeavour. Courts sit with the unenviable task of speculating on scenarios placed before them by the parties. These scenarios have become commonly known as the “but for” and “having regard to” scenarios or “pre-morbid” and “post-morbid scenarios”.
50. In order to calculate a victim's loss of income, a probable exposition of his earnings trajectory both before and after the harm causing event is necessary.
51. The term general contingencies refers to the risk factors present in everyday life. The vicissitudes of life are such that even in the absence of a harm causing event, life and earning capacity is not without risk of loss.
52. Application of appropriate contingency deductions is a crucial component to reducing loss of earnings and earning capacity to a finite, monetary value.
53. The Goodall principle, commonly used in our Courts is premised upon the notion that a general contingency deduction of 0.5% per annum until date of retirement should be deducted off a victim's losses.³⁶

³⁶ Goodall v President Insurance Co Ltd 1978 (1) SA 389 (W)

54. In addition to the aforementioned principle, specific contingency deductions should be applied to a loss of earnings calculation where appropriate and also depending on the facts of each particular case. The application of contingency deductions falls within the discretion of the Court, it tasked with making a call on what is fair and reasonable ³⁷.

55. This Court cannot ignore the absence of appellant's proof of earnings and caters for the same by way of increased contingency deductions on both the accrued and future loss calculations.

55.1 The contingency deduction of 5% on accrued loss is increased to 15%.

The contingency deduction of R38 901 is accordingly increased to R116 703 rendering an accrued loss figure of R661 319;

55.2 The contingency deduction of 10% on future loss is increased to 25%. The

contingency deduction of R152 433 is accordingly increased to R381 082 rendering a future loss figure of R1 143 246.

Grounds 2.8 - 2.9

Evidence that appellant indeed was a taxi driver

56. The police accident report in the matter cites the appellant as the driver of a taxi involved in the collision and further confirms that he was conveying 6 passengers at the time of the collision³⁸. The appellant confirms his vocation in

³⁷ Oosthuizen v Road Accident Fund (2014/04972) [2015] ZAGPJHC 172

³⁸ CL 003.7

his supporting affidavit and the experts who have also provided affidavits³⁹ confirm the same. Had the Court a quo had reservations over this, it was placed in a position to view the appellant's pre-accident membership with the taxi association and also to hear his evidence. It refused this evidence which while unfortunate, is not fatal to the appellant's case as the evidence on record proves amply on a balance of probabilities that the appellant was indeed a taxi driver at the time of the collision.

Ground 2.12

Failure to postpone issue of general damages

57. This Court notes the error to address the issue of general damages. It is trite that a Court is not placed currently to make a finding on seriousness in the context of Regulation 3 of the RAF Regulations. This head of damages and the entitlement of the appellant to such an award ought to have been postponed sine dies.

Ground 2.13

Future medical and related expenses

58. The appellant is in need of an array of treatments and interventions, all of which are articulated in detail in appellant's medico legal reports.⁴⁰

ORDER

In keeping with the foregoing the following order is made:

³⁹ CL at section 006

⁴⁰ CL at sections 005 and 006

1. The appellant's appeal is upheld on both merits and quantum;
2. The respondent is liable for 100% of the appellant's damages;
3. The respondent shall pay an amount of R1 804 565 to the appellant for loss of income within 14 days of date of judgment and if unpaid within such period, with interest a tempore morae to date of final payment;
4. The respondent shall furnish the appellant with an undertaking to cover 100% of appellant's future medical, hospital and related expenses arising out of the injuries sustained by the appellant in a motor vehicle collision on 7 February 2020, after such costs have been incurred and upon proof thereof;
5. The issue of general damages is postponed sine dies with the entitlement of the appellant to such award to be referred to the Health Professions Council of South Africa for determination;
6. The respondent shall pay the taxed or agreed, party and party costs of the appellant on a High Court scale inclusive of the costs of counsel on scale B for 24 and 26 January 2024. Such costs shall further include those of all appellant's expert witnesses utilized for and in support of appellants application for default judgment.

L. DE SOUZA-SPAGNOLETTI
ACTING JUDGE OF THE HIGH COURT

JOHANNESBURG

For the Appellant:

Advocate M Roller

Instructed by Moss and Associates

(ref: RAF/JM/ac/m4177)

Respondent:

Road Accident Fund, 560/128795872/1101/10

Link number: 51381702