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

CASE NO: 80059/2019

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES

DATE 02 October 2025

SIGNATURE

In the matter between:

MBONGELENI BARNABAS MBATHA

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 02 October 2025.

JUDGMENT

Kubushi J

Introduction

[1] This is a damages claim by the plaintiff, Mbongeleni Barnabas Mbatha (Mr Mbatha) for bodily injuries sustained in a motor vehicle accident that occurred on 6 October 2016 in Esijozini. The claim is against the Road Accident Fund (“the Fund”) as the statutory insurer in terms of the Road Accident Fund Act¹ (“the Act”).

[2] The allegations in Mr Mbatha’s particulars of claim is that the claim arose from a motor vehicle collision that occurred when a motor vehicle with an unknown registration number (the insured motor vehicle), there and then driven by an unknown driver (the insured driver), collided with the motor vehicle bearing registration number N[...] being driven by Mr Mbatha. The full and further particulars of the insured driver are alleged to be unknown to Mr Mbatha.

[3] In its plea, the Fund denied the existence of another motor vehicle in the collision and in the alternative pleaded that the conduct of Mr Mbatha was the sole cause of the collision. Further alternatively the Fund pleaded contributory negligence on the part of Mr Mbatha in the event the court made a finding that the insured driver was the proximate cause of or contributed to the negligence in the accident.

[4] Both liability and quantum were in dispute. To prove liability, Mr Mbatha personally tendered oral evidence which was supported by the oral evidence of Mr Qalaza Dlamini (Mr Dlamini) who was said to be a passenger in the motor vehicle that was driven by Mr Mbatha at the time of the accident. The Fund did not call any witnesses. For the damages part of the claim, Mr Mbatha filed experts reports in respect of the injuries sustained. No experts’ reports were filed by the Fund to counter Mr Mbatha’s experts’ reports.

[5] At the commencement of trial, counsel for Mr Mbatha applied in terms of rule 38(2) of the Uniform Rules of Court for the admission of the evidence of the orthopaedic surgeon, the occupational therapist, the industrial psychologist and the actuary, on affidavit. As the application was not opposed, it was granted.

Evidence of Mr Mbatha

¹ Act 56 of 1996, as amended.

[6] Mr Mbatha's testimony is that he was involved in a motor vehicle accident on 6 October 2018. He was the driver of the motor vehicle and had two passengers, namely, Mr Dlamini and Mr Xolani Sithole (Mr Sithole). Mr Sithole was sitting in the front passenger seat whilst Mr Dlamini was sitting in the back seat. He was driving along Esijozini Road at around 20h00. As he was driving, he noticed a cow in the road and there was a truck approaching on the opposite side of the road. The cow was on the side of the road where the truck was travelling. As the truck and his motor vehicle were about to bypass each other, the truck suddenly veered from its side of the road into the lane of his travel. He swerved off to avoid the imminent collision with the truck, unfortunately his motor vehicle rolled. He then heard people talking and he asked for their help. An ambulance was called which pitched up with the paramedics and he was taken to hospital.

[7] He was first taken to the Church of Scotland Hospital where he was X-rayed. The next morning, he was transferred to Greys Hospital in Pietermaritzburg where they specialise with spine injuries, and where he was operated on. He was hospitalised there for four or five months. After that he was transferred to Dundee Hospital where he was hospitalised for another five months. From Dundee Hospital he was transferred to Phoenix Rehab Centre in Durban where he stayed for six months. When he was released to go home, he was on a wheelchair as he could no longer walk which is what he was able to do before the collision. He is still experiencing pain on the spine just below the neck. His left-hand area is also painful.

[8] At the time of the collision he was employed as a Chief Human Resource Officer at the Church of Scotland Hospital. Because of being bound to the wheelchair he can no longer perform the services of a human resource officer. The collision also affected his voice because since after the collision he speaks slowly. His employment has not been terminated as he continues to draw his salary as a chief human resource officer every month since after the collision. He has, however, recently received a telephone call from his employer informing him that a process for the termination of his services has been started. That is, his employer is in the process of medically boarding him.

[9] Prior to the collision he was a soccer player which he can no longer do. He is married with four children. At the time of giving evidence, he was fifty four years old and could not remember at what age he was when the collision occurred. He testified that it is painful for him because he is no longer able to do things that he was able to do like bathing, going to the toilet and many other things that he was able to do unassisted. He was at the time going for physical therapy sessions. Since after the collision he suffered a stroke and is now taking high blood pressure medication and his health is not good.

[10] He was referred to a statement that he made in terms of section 19(f) of the Act wherein he did not say anything about a cow, and a warning statement that he made to the police and asked to explain the inconsistencies in the statements and the evidence given in court. His explanation was that it was the first time he wrote such a statement and did not know what to include and not include in the statements. He was also asked to explain the discrepancy between the section 19(f) statement wherein he mentioned that he was travelling at Mandleni gravel road at Esijozini area and the evidence in court wherein he stated that he was travelling in Esijozini Road. His explanation was that the collision happened in Esijozini Road, and he was going to Mandleni.

[11] Under cross examination not much was added to the evidence that Mr Mbatha had already tendered except the steps that he took when he saw the cow and the oncoming truck. Mr Mbatha's evidence in that regard is that when he saw the cow he kept to his side of the road and drove at the same speed he was driving before he saw the cow. He stated that there was no need to reduce the speed as he was driving at 60km/h and when he saw the truck he dimmed the lights of his motor vehicle which were on bright at the time he approached the truck. He was also asked why Mr Sithole was not called to give evidence since in his statement Mr Sithole mentioned that Mr Mbatha was avoiding the cow instead of the truck. His response was that since the accident he has not met with Mr Sithole and does not know where he is, currently. On a question from the court, he stated that the cow was on the left side of the truck.

Evidence of Mr Dlamini

[12] The evidence of Mr Dlamini was that on 6 October 2018, he was travelling in the motor vehicle being driven by Mr Mbatha. He was together with Mr Sithole as passengers in the said motor vehicle. They were from Tugela Ferry Town going to a place called Empoto. He was sitting in the back seat and more between the two front seats as he was talking to Mr Sithole. When they passed the bridge on the Esijozeni Road, they were going uphill and there was a donga on the side of the road. As they were going uphill there was a black cow in front of them but more on the right side of the road (on the side of the oncoming traffic). A truck appeared in the opposite direction to them. As the truck approached in trying to avoid the cow it veered away from the cow and came towards their lane of travel. The last thing he saw was Mr Mbatha trying to avoid the truck. Under cross examination, he stated that when he first saw the truck it was some distance away from the cow. He, also, could not testify as to what steps Mr Mbatha took in trying to avoid the accident.

Arguments

[13] I deal first with argument relating to the merits of the claim before dealing with damages.

Plaintiff's Argument

[14] It was argued on behalf of Mr Mbatha that he has made out his case on a balance of probabilities. The contention is that the case is clear. There is no dispute that there was a collision. It is common cause that Mr Mbatha was seriously injured in the collision and is now a paraplegic, so the argument went.

[15] The submission made was that the undisputed evidence of Mr Mbatha that there was a truck that swerved into his lane of travel was corroborated materially by Mr Dlamini. A further submission was that negligence should be attributed to the driver of the unidentified truck and not to Mr Mbatha, because there is no evidence before court to dispute that the unidentified driver of the truck was in fact negligent. The contention being that had Mr Mbatha not have swerved to the left, there would have been a head on collision with the truck. Mr Mbatha did everything possible that any driver would have done under the circumstances. This, however, is not the test, the test is whether Mr Mbatha in the situation he was, did what a reasonable person would have done.

Argument by the Fund

[16] The defendant's argument on the merits was limited to the fact that Mr Mbatha's evidence is that he saw the truck and then saw the cow by means of the lights of the truck. The submission was that every driver has a duty to always keep a proper lookout on the road, even in a sudden emergency. In this regard counsel referred to the judgment in *RAF v Grobler (Grobler)*,² where the following was stated:

“...In a situation like the present (sudden emergency situation) the proper approach is not to confine the enquiry into the negligence to the conduct of the drivers from the moment they become embroiled in an emergency. The inquiry must be extended to cover what steps the driver took to avoid the impending emergency. If he/she had the opportunity to take measures ahead of the emergency to avoid the accident, and he/she failed to do what a reasonable person in a similar circumstances would have done, then she/he would be negligent.” (emphasis added)

[17] He further referred to an unreported judgment of this Division in *Sedumemanyatela v RAF (Sedumemanyatela)*,³ where the court stated that –

“Even when an approaching vehicle is on its correct side of the road, a driver on his correct side may assume that the former will return timelessly to its correct side. But this assumption does not entitle a driver on the correct side of the road to remain passive in the face of threatening danger. As soon as the danger of a collision becomes evident, he is under the duty to take reasonable steps to avert one.”

[18] On the basis of the above judgments, it was argued that when one sees livestock on the road, there is already a situation that can become dangerous, and a driver has to take precautions. Mr Mbatha's evidence is that the only thing he did was to dim lights and to keep to his side of the road. He did not see the need to reduce speed because he was travelling at 60 km/h. The submission was that Mr

² [2007] 6 SA 230 (SCA) at para 30.

³ Case Number 65678/2012 delivered on 13 May 2014 at para 21.

Mbatha could have taken steps to avoid the collision by reducing speed, seeing that the accident happened at night. It was, therefore, argued that Mr Mbatha did not take reasonable steps that were available to him under the circumstances to avoid the collision.

[19] It was furthermore argued that Mr Dlamini who was a passenger in the motor vehicle did not see the cow and the truck at the same time as Mr Mbatha, and his evidence could not be of assistance to Mr Mbatha. Consequently, it was submitted on behalf of the Fund that the court make a finding of an apportionment of 50/50 negligence between Mr Mbatha and the insured driver.

Authorities

[20] The claim in this instance falls under section 17(1)(b) of the Act. Section 17(1)(b) of the Act stipulates the following:

“17 Liability of Fund and agents – (1) The Fund or an agent shall

(a) ...

(b) subject to any regulations made under section 26, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of neither the owner nor the driver thereof has been established,

be obliged to compensate any person (third party) for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself ... caused by or arising from the driving of a motor vehicle by any person ..., if the injury ... is due to the negligence or other wrongful act of the driver or owner of the motor vehicle ...” (own emphasis)

[21] From the above provisions it is clear that a claim for compensation for bodily injuries by the Fund under section 17(1)(b) of the Act arises from a motor vehicle accident where the identity of the driver or owner of the motor vehicle cannot be established. The bodily injuries must have been caused by the negligence or wrongful act of the unknown driver. The jurisdictional facts for compensation are that: the claimant must have suffered bodily injuries; such injuries must have been caused

by or arisen from the driving of a motor vehicle by any person; and the injury must be due to the negligence or other wrongful act of a driver or owner of the motor vehicle.

Issues for Determination

[22] It is common cause, in this instance, that the plaintiff, Mr Mbatha, has suffered bodily injuries. The Fund's liability to compensate Mr Mbatha accordingly turns on the question of whether the driver of the unidentified motor vehicle was negligent and whether such negligence, if proven, caused the damage suffered by Mr Mbatha. If so, the Fund is statutorily liable to compensate Mr Mbatha for his proven or agreed damages. The slightest degree of negligence on the part of the insured driver is sufficient to satisfy the requirements of section 17 (1) of the Act.⁴

Discussion

[23] The onus to prove this rests on Mr Mbatha, on a balance of probabilities. However, to the extent that contributory negligence is alleged, to avoid liability, the Fund must produce evidence to disprove the inference that the collision was caused by the insured driver's negligence. Failing which, the Fund is liable for Mr Mbatha's damages.⁵

[24] For all the reasons that follow hereunder, it is my view that Mr Mbatha has not proved his claim on a balance of probabilities.

[25] Firstly, I find that the evidence given by Mr Mbatha does not sustain the claim as set out in his particulars of claim. As it has been held, a successful delictual claim entails the proof of a causal link between a defendant's actions or omissions, on the one hand, and the harm suffered by the plaintiff on the other hand.⁶ As *per* Mr Mbatha's particulars of claim, his claim arose from a motor vehicle collision that occurred when his motor vehicle with registration number N[...] "collided" with the insured motor vehicle. Yet, his evidence in court is that the damages he suffered arose from the accident that occurred when his motor vehicle rolled over as he prevented colliding with the insured motor vehicle. According to his evidence, the

⁴ *Goode v SA Mutual and Fire Insurance* 1979 (4) SA 301 (W).

⁵ *Fox v RAF* (A548/16) [2018] ZAGPPHC 285 (26 April 2018) para 12.

⁶ *Oppelt v Department of Health* 2016 (1) SA 325 CC para 35.

insured motor vehicle veered into his lane of travel when it bypassed the cow that was in the road. The evidence specifically indicates that there was no “collision” between the two motor vehicles. Mr Mbatha’s reliance on the collision that happened between the two motor vehicles in his particulars of claim is not proven by his evidence. He has, as a result, failed to establish the casual connection between the damages he is claiming and the actions of the insured driver.

[26] It is trite that a litigant falls or stands by the pleadings. If what it alleges in the pleadings is not proved by evidence, or as is the case, is contrary to the evidence, the testimony of the plaintiff stands to be dismissed.⁷ On this issue alone, Mr Mbatha’s claim ought to be dismissed.

[27] Secondly, Mr Mbatha’s evidence does not establish that the damages he is claiming for the injuries he suffered in the accident, were caused by the negligent driving of another person.

[28] The following was said in regard to the onus of proof of negligence in *Arthur v Bezuidenhout & Miery*:⁸

“There is in my opinion, only one enquiry, namely: has the plaintiff having regard to all the evidence in the case, discharged the onus of proving on a balance of probabilities the negligence he has averred against the defendant?”

[29] In his particulars of claim, Mr Mbatha alleges at paragraph 5 thereof that –

“The aforementioned collision has been caused solely by the exclusive negligence of the unknown insured driver, who was negligent in one, more or all of the following aspects:

He/She drove at a speed that was excessive in the circumstances;

He/She failed to reduce speed of his/her vehicle when he/she ought to and should have done so;

He/She failed to keep any proper lookout;

⁷ See *Pardon v Road Accident Fund* (689/21) [2024] ZAMPMHC 36 (10 June 2024).

⁸ 1962 (2) SA 566 (A).

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

He/She failed to keep the vehicle he/she was driving under proper or effective control;

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

[30] On the other hand, the sum total of Mr Mbatha’s evidence is that as he was driving along the road, he noticed a cow on the right side of the road, and a truck approaching on the opposite side of the road. As the truck and his motor vehicle were about to bypass each other, the truck suddenly veered from its side of the road into the lane of his travel. He swerved off to avoid the imminent collision with the truck, unfortunately his motor vehicle rolled. The allegation is that his injuries were caused by the negligent driving of the driver of the truck in swerving in his (Mr Mbatha’s) lane of traffic.

[31] None of the conduct of the insured driver alleged above, was established by Mr Mbatha in his evidence. There is also no allegation in the particulars of claim that the negligence of the unidentified driver was as a result of swerving in the lane of travel of Mr Mbatha, thus causing Mr Mbatha to veer off the road.

[32] The evidence of his witness, Mr Dlamini, does not come to Mr Mbatha’s assistance, as he is simply regurgitating the evidence of Mr Mbatha as it is. Consequently, Mr Mbatha has failed to establish the negligence of the insured driver and that the injuries he sustained were caused by the negligent driving of the insured driver. There is, thus, no casual link between the injuries suffered by Mr Mbatha and the driving of the insured motor vehicle.

[33] Lastly, similarly as in *Ninteretse v RAF (Ninteretse)*,⁹ wherein the court made a finding that the plaintiff wanted to escape liability based on sudden emergency, in

⁹ (29586/13) [2018] ZAGPPHC 493 (2 February 2018).

this instance, Mr Mbatha sought to posit liability on the insured driver by claiming sudden emergency.

[34] Mr Mbatha sought to insinuate sudden emergency when he testified that when the insured motor vehicle swerved in his lane of travel he immediately veered off the road to avoid a head on collision with the insured motor vehicle. The court in *Grobler*, held that in a sudden emergency situation, the proper approach is not to confine the inquiry into the negligence to the conduct of the driver from the moment they became embroiled in an emergency. The inquiry must extend to cover what steps a driver took to avoid the impending emergency. If a driver had an opportunity to take measures ahead of the emergency to avoid the accident, and he failed to do what a reasonable person in similar circumstances would have done, then he /or she would have been negligent.

[35] It is the evidence of Mr Mbatha that he saw the cow before the insured motor vehicle appeared. When asked during cross examination what steps he took, he stated that he kept on his side of the road and continued driving at the same speed. His contention was that he did not see any need to reduce speed as he was travelling at 60 km/h on a gravel road. And when, the insured motor vehicle appeared he only deemed the lights which were on bright at the time.

[36] As it was stated in the case of *Sedumemanyatela* even when an approaching vehicle is on its incorrect side of the road, a driver on his correct side may assume that the former will return timeously to its correct side. But this assumption does not entitle a driver on the correct side of the road to remain passive in the face of threatening danger. As soon as the danger of the collision becomes evident, he is under a duty to take reasonable steps to avert one.

[37] I am in agreement with the Fund's argument that when one sees livestock in the road, particularly at night, already there is a situation that can be very dangerous, a driver has to take precaution. However, the evidence indicates that Mr Mbatha saw the truck and also saw the cow before the collision and the only steps he took was to dim his lights and confine himself to his side of the road. He did not reduce his speed. This, in spite of appreciating that it was 20h00 at night and was driving on

a gravel road. There was a cow on the road and there was a truck coming from his opposite direction. There was a threatening danger, and he was under a duty to take evasive steps to avoid that danger. This he could have done by merely reducing speed. He, however, failed to do so. It is my view that a reasonable driver in the position of Mr Mbatha would have done so.

[38] I am in alignment with the statement by my brother Moshoana J in *Madlala v Road Accident Fund*,¹⁰ that claims falling under section 17(1)(b) of the Act (like in this instance) are problematic, particularly where the Fund does not present any version. Litigants seem to have taken a view that once evidence is presented that an unidentified motor vehicle caused the accident, the court, as a matter of course, must be satisfied that the Fund is liable.

[39] Nevertheless, the judgment of my brother Raulinga J in *Ninteretse*¹¹ where he remarked as follows, is instructive:

“I have already intimated in this judgment above that the plaintiff bears the onus to prove on a balance of probabilities that the insured driver was negligent and that the negligence was the cause of the collision from which he sustained the bodily injuries. There is no onus on the defendant to prove anything. Even in the instance where the defendant has not tendered evidence to rebut the evidentiary burden of the *prima facie* case presented by the plaintiff in this case, the plaintiff may not succeed with his claim depending on the nature and weight of the evidence so tendered.”

Conclusion

[40] Consequently, the plaintiff's claim is dismissed with costs on scale A.

E.M KUBUSHI

¹⁰ (RAF) (65311/17) [2025] ZAGPPHC 153 (14 February 2025) para [7].

¹¹ At para 28.

**JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

Date of Hearing: 21 February 2025

Judgment delivered: 02 October 2025

APPEARANCE:

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Instructed by:

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