



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)**

CASE NO.: 720/2022

Reportable	Yes/No
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In the matter between:

NONEZILE MARASI

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

Cengani-Mbakaza AJ

Introduction

[1] The plaintiff instituted an action against the defendant arising from a motor vehicle accident that occurred on 01 March 2021. The accident allegedly occurred on the tarred road commonly described as R408 linking Dutywa and

Willowvale districts. Despite the fact that the accident report describes the area as Ntlabane junction, the plaintiff described it as Thaleni Administrative Area.

[2] At a pre-trial conference held on 17 June 2025, the parties agreed that the plaintiff would bear the duty to begin and that there would be a separation of issues between the merits and the quantum. In terms of Rule 33(4) of the Uniform Rules of court, this agreement was ratified at the commencement of the trial proceedings.

The pleadings

[3] In her particulars of claim, the plaintiff alleges that the sole cause of the accident was the negligence of the truck, driven by the insured driver, bearing registration numbers and letters (‘registration numbers’) D[...]. According to the plaintiff, the insured truck driver was negligent in one or more of the following grounds: he failed to keep the insured vehicle under proper control; he failed to take action to avoid the accident, when by exercise of reasonable care and skill could and should have done so; he failed to apply brakes timeously when in circumstances he could and should have done so; additionally he failed to apply brakes timeously when in circumstances he could and should have done so. Furthermore, he drove the insured vehicle at an excessive speed.

[4] In its plea, the defendant denies that the insured driver was negligent at any given time. It pleads that the plaintiff was the sole cause of the accident in that she failed to take a proper lookout; to keep the motor vehicle under proper control. She drove the motor vehicle at an excessive speed and bumped a pole resulting in the overturn of her motor vehicle. She lost control of the motor vehicle due to her failure to apply brakes. Basically, the defendant pleads that the plaintiff’s motor vehicle was not involved with any other motor vehicle during the accident.

The plaintiff’s case

[5] The plaintiff testified that on the day in question, she was driving a vehicle with registration numbers J[...], accompanied by her son Mr Xolisa Xam ('Mr Xam'). As she drove her vehicle a truck suddenly emerged from the gravel road at Thaleni Administrative Area, on an adjoining tarred road.

[6] She stated that the truck failed to stop at the stop sign where the gravel road meets the tarred road. This caused the truck to collide with her vehicle. Resultantly, her car veered off the road causing a collision with a pole.

[7] After the accident, she lost consciousness and was taken to Willowvale clinic, then transferred to Butterworth hospital and finally to Frere hospital where she received treatment for injuries she sustained. The plaintiff briefly complained of spinal cord injuries and more injuries on her body. She informed the court that she reported the accident to the police months after the accident as she was progressing very slow in terms of healing.

[8] During cross-examination, she was advised that the truck's registration numbers she provided to the police when reporting the accident are non-existent. She told the court that her son provided the registration numbers as she was unable to do so herself due to being unconscious after the accident.

[9] When asked about the lack of hospital records in Willowvale and Butterworth, she stated that she did not know why they were not presented but maintained that she had received treatment at those medical centres.

[10] Mr Xam testified that his mother was driving normally when a truck suddenly appeared from the gravel road and failed to stop causing a collision with their vehicle. Her mother's car swerved off the road and hit a pole. He noticed that his mother was not moving and with the help of the villagers, they laid her on a blanket next to the road.

[11] Mr Xam explained that he did not report the accident because he tried calling the police without any success. An off-duty police officer advised him to prioritise getting his mother to the hospital due to her severe injuries. He explained that the truck did not stop, so he could not obtain its registration numbers. During cross-examination, Mr Xam testified that a bystander helped to obtain the registration numbers from the moving truck. When asked to explain further details of the truck, Mr Xam explained that this was ‘a hit and run.’ After the closure of the plaintiff’s case, the defendant closed its case without presenting any evidence.

The issues

[12] The issues for determination are whether the plaintiff has discharged the onus of establishing on a balance of probabilities that the cause of the accident was the sole negligence of the insured driver, and whether the identity of the insured owner or driver has been established.

The legal principles

[13] The legal position is that in civil matters the plaintiff bears the onus of proving his or her case on a balance of probabilities. In the book titled

Principles of Evidence,¹ this principle is formulated as follows:

“In civil cases the burden of proof is discharged as a matter of probability. The standard is often expressed as requiring proof on a “balance of probabilities” but that should not be understood as requiring that the probabilities should do no more than favour one party in preference to the other. What is required is that the probabilities in the case be such that, on a preponderance, it is probable that the particular state of affairs existed.”

[14] In *Miller v Minister of Pensions*², Lord Denning articulated the civil standard of proof as follows:

¹ PJ Schwikkard (et al), *Principles of Evidence* (Jutastat e-publications, 5th Ed, 2023), at ch32-p 666.

² (1947) 2 All ER 372.

“It must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say, “we think it is more probable than not,” the burden is discharged, but if the probabilities are equal, it is not.”

[15] In terms of s 17(1)(a) of the Road Accident Fund Act (‘the RAF Act’) and regulations promulgated thereunder, the defendant is liable to compensate victims of motor vehicle accidents arising from the driving of a motor vehicle where the identity of the owner or the driver has been established. The relevant provision provides:

“17. Liability of Fund and agents

(1) The Fund or an agent shall—

- (a) subject to this Act, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of the owner or the driver thereof has been established;

be obliged to compensate any person (the third party) for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself or the death of or any bodily injury to any other person, caused by or arising from the driving of a motor vehicle by any person at any place within the Republic, if the injury or death is due to the negligence or other wrongful act of the driver or of the owner of the motor vehicle or of his or her employee in the performance of the employee's duties as employee..”

The parties’ submissions

[16] In the present matter, counsel for the plaintiff submitted that the court should find in the plaintiff’s favour given the corroborative evidence between the plaintiff and Mr Xam. To avoid repetition, some of the submissions made by the plaintiff’s counsel will be incorporated during the course of this judgment.

[17] The defendant’s counsel, on the other hand, argued that the witness who identified the truck’s registration numbers was not called to testify. Therefore, it

must be concluded that the plaintiff failed to identify the truck, thus rendering the provisions of s 17(1)(a) of the RAF Act inapplicable. Furthermore, it was contended that the plaintiff cannot invoke the provisions of s 17(1)(b) of the RAF Act since this was not pleaded.

Analysis

[18] In my view, the plaintiff's evidence is fraught with challenges. The argument that the plaintiff and Mr Xam's corroboration of the truck's involvement is sufficient to prove that the insured driver was established, and that the collision was caused by the sole negligence of the insured vehicle from which the plaintiff suffered injuries is unsubstantiated.

[19] The challenge with this proposition is that the plaintiff's case is based on s 17(1)(a) of the RAF Act³. In terms of this provision, the identity of the insured driver must be established on a balance of probabilities.

[20] In casu, the plaintiff's counsel's argument fly in the face of the plaintiff's case, given the fact that neither Mr Xam nor the plaintiff could dispute the non-existent registration details apart from relying on hearsay evidence which is generally inadmissible. Whilst the law sets out circumstances under which hearsay evidence can be accepted, such were not applied in the present matter. There was no foundation laid for the presentation of hearsay evidence in this regard. In addition, neither the plaintiff nor Mr Xam gave a full description of the truck to the court. Considering all these challenges, this court finds that the identity of the insured driver was not established.

[21] The plaintiff's counsel further argued that if the court finds that the identity of the driver was not established, the court can simply rely on s 17(1)(b) of the RAF Act, even though this provision was not pleaded.

³ As pleaded in her particulars of claim.

[22] Regarding the formulation of pleadings, the legal position is clear. A party stands and falls by its pleadings. The object of pleading is to ascertain definitely what is the question at issue between the parties; and this object can only be attained when each party states his case with precision⁴. The court in *Nyandeni v Natal Motor Industries*⁵, held that a pleader cannot be allowed to direct the attention of the other party to one issue, and then at the trial attempt to canvass another issue.

[23] A persuasive comment by the Malawian Supreme Court is apposite in this regard. In *Malawian Railway Ltd v Nyasulu*⁶, the court stated as follows:

“Generally, parties are adversaries, it is left to each of them to formulate their cases in their own way subject to the basic rules of pleadings. Each party is bound by its own pleadings and cannot be allowed to raise a different fresh case without due amendment properly made. Each party knows the case it has to meet and cannot be taken by surprise at the trial. The court itself is bound by the pleadings as they are. It is no part of the court to enter upon enquiry into the case before it other than to adjudicate upon the specific matters in dispute which the party themselves have raised by the pleadings. Indeed the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. Moreover in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice...

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “ Any Other Business” in the sense that points other than those specified may be raised without notice.”

[24] Basically, courts are warned to observe cardinal rules relating to the pleadings and the trial cannot be allowed to become a ‘free for all’ with a

⁴ *Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (A), at 107C-H.

⁵ 1974 (2) SA 274 (D) at 279 B.

⁶ (MSCA Civil Appeal 13 of 1992) [1998 MWSC 3 (10 November 1998- this is cited from the (1960) “The Present Importance of Pleadings written by Sir Jack Jacob at para 174.

complete disregard of the issues raised in the pleadings.⁷ To put issues into perspective, the relevant provision of s 17(1)(b) of the RAF Act is apposite. It provides as follows:

“17. Liability of Fund and agents

(1) The Fund or an agent shall—

...

(b) subject to any regulation 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 (the third party) for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself or the death of or any bodily injury to any other person, caused by or arising from the driving of a motor vehicle by any person at any place within the Republic, if the injury or death is due to the negligence or other wrongful act of the driver or of the owner of the motor vehicle or of his or her employee in the performance of the employee's duties as employee...”

The wording of sections 17(1)(a) and 17(1)(b) of the RAF Act shows a clear difference in their intent and application. Therefore, there is no legal basis to rely on a different statute than the one pleaded. Furthermore, the plaintiff’s counsel submitted that from the outset, the claim was lodged under the provisions of s 17(1)(a) of the RAF Act. This common cause fact weakens the plaintiff’s case further as she is bound by the initial choice of statute.

[25] As regards to negligence, this court echoes the sentiments raised by Holmes J in the locus classicus case of *Kruger v Coetzee*⁸:

“Headnote :

⁷ Erasmus, Superior Court Practices, RS 18,2022,D1-230.

⁸ 1966 (2) SA 428 (A).

...In an action for damages alleged to have been caused by the defendant's negligence, for the purposes of liability *culpa* only arises if a *diligens paterfamilias* in the position of the defendant not only would have foreseen the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss, but would also have taken reasonable steps to have guarded against such occurrence; and the defendant failed to take such steps.”

[26] On the facts of this particular case, the plaintiff’s counsel’s argument that the defendant presented no evidence and therefore should be automatically liable for negligence has no factual and legal basis. I share the sentiments raised by Raulinga J in *Ninteretse v RAF*⁹, where he stated as follows:

“[16]...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.

[17] 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 evidence 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.”

[27] It is well-established that the obligation of the defendant to compensate a plaintiff for damages for bodily injury must arise from the negligent driving by the insured driver. In *Grove v Road Accident Fund*¹⁰, a case that this court was referred to by the defendant’s counsel, the court held:

“There can be no question of liability if it is not proved that the wrongdoer caused the damage of the person suffering the harm. Whether an act can be identified as a cause, depends on a conclusion drawn from available facts and relevant probabilities. The important question is how one should determine a causal nexus, namely whether one fact follows from another.”

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

¹⁰ [2011] ZASCA 55 (31 March 2011).

[28] In *casu*, the lack of evidence to support the involvement of the insured driver, the delayed accident report and lack of investigation regarding the point of impact as well as a clear location where the accident occurred leaves many unanswered questions about the accident. Consequently, the plaintiff's claim must fail.

Costs

[29] The general rule is that a winning party is entitled to costs. The defendant's counsel submitted that since the plaintiff is an older person, they cannot argue that she should bear costs and leave the issue of costs in the court's discretion. In exercising its discretion, this court departs from the general rule.

Order

[30] The plaintiff's claim is dismissed, with no order as to costs.

N. CENGANI-MBAKAZA
ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

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Heard on	:	12 November 2025
Judgment Delivered on	:	02 December 2025