

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

CASE NO: 2018-34184

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

DATE: 17/11/2025

MOKOSE SNI

In the matter between:

SUNNYBOY MATSHEREMANE

Applicant

and

THE ROAD ACCIDENT FUND

Respondent

JUDGMENT

MOKOSE J

[1] This matter came before the court on the trial default judgment roll. This is an action against the Road Accident Fund ("RAF") for compensation of damages sustained by Mr Matsheremane as a result of a motor vehicle accident which occurred on 27 July 2017. The State Attorney appeared in court on the morning although the defendant's defence had been struck out.

[2] Other than the issues of merits and quantum, which had been placed before the court for purposes of obtaining default judgment, a further issue that arose was

the position of the defendant where its defence had been struck out and the participation of the defendant in the proceedings.

[3] A cursory look at the file indicates that an order was granted on 11 October 2022 on application before Khumalo J on the unopposed motion roll where an order in the following terms was granted:

“1. Respondent’s defence in the main action is struck off for non-compliance with Court Order dated 20 January 2022.

2. The costs of the application to be paid by the Respondent.”

[4] The matter was previously on the roll of the unopposed motion court before Fourie J wherein an order had been granted, *inter alia*, that the respondent (Respondent in the present matter) complies with a Rule 21(4) Notice in terms of the Uniform Rules of Court and to file a reply within 10 days of service of the order. This order was not complied with.

[5] The consequences of a defendant’s plea being struck out means that there is no defence before the court in which the defendant answers to the plaintiff’s cause of action. It is for this reason that the plaintiff was authorised to approach this court to obtain judgment by default.

[6] However, the plaintiff in the matter sought to have any further participation by the defendant precluded. This is after Counsel for the respondent arrived and sought to participate in the proceedings. Counsel for the applicant relied on old authorities that once a defence had been struck out, a defendant “..... *shall be placed in the same position as if he had not defended.*”¹

[7] Twala J in the matter of *Stevens and Another v RAF*² held a different view to that expressed above and held as follows at [11]: “.....*the striking out of the defence of the defendant does not in itself bar the defendant from participating in these proceedings. The defendant is entitled to participate in these proceedings, but his participation is restricted in the sense that it cannot raise the defence that has been*

¹ Langley v William 1907 TH 197, Leggat and Others v Forrester 1925 WLD 36

²² (26017/2016) [2022] ZAGPJHC 864 (31 October 2022)

struck out by an order of court. It is therefore not correct to say the defendant was not entitled to cross-examine the plaintiffs after giving evidence, furthermore, the cross-examination was on the evidence tendered by the plaintiffs and the defendant did not attempt to introduce its own case during the cross-examination.”

[8] In respect of the conflicting views pertaining to the striking out of a defendant's defence, the point can be clarified by taking note of the fact that the “*old authorities*” in the matter referred to above all pre-date the Constitution. Section 34 of the Constitution guarantees “*everyone....the right to have a dispute that can be resolved by the application of the law decided in a fair hearing before a court.*” It follows that any application of such regulation should be interpreted in a manner which least interferes with or limits the exercise of the substantive right of access to courts.³

[9] It is also trite that the striking of a defence is a drastic measure. It precludes a defendant from advancing legal defences raised as special pleas and from placing countervailing evidence to that of the plaintiff before the court which evidence may be important for the determination of the matter by the court. Accordingly, the participation of the defendant's counsel was allowed in the proceedings but in respect of the issues of law and not its defence which had been struck out.

[10] On 10 July 2024 the plaintiff served a Notice in terms of Rule 28 wherein an intention was noted by the plaintiff to amend the particulars of claim to include further injuries sustained by the plaintiff in the accident and an increase the total damages in the sum of R10 520 000,00 made up as follows:

- | | | |
|----|----------------------------------|---------------|
| 1. | Non-emergency medical treatment: | R20 000,00 |
| 2. | Past loss of earnings: | R1 000 000,00 |
| 3. | Future loss of Earnings: | R6 000 000,00 |
| 4. | General Damages: | R3 500 000,00 |

The particulars of claim were amended. No opposition to the application in terms of Rule 28 was filed by the defendant.

³³ Unreported case T obo P v RAF (9117/2019) dated 18 April 2024

[11] The court needs to determine the consequences of substantial amendments to the particulars of claim where the defendant's defence has been struck out. The question to be asked is whether an amendment to the plaintiff's particulars of claim after a defence has been struck out "open the door to a new plea".

[12] In general, the delivery of a substantial amendment to a plaintiff's particulars of claim, even if only in respect of the quantum, has the effect of "re-opening" the pleadings. This has the result that *litis contestation* falls away. In the case of *Olivier v MEC for Health, Western Cape*⁴ the court held as follows:

"When due consideration is had to the amended particulars of claim, the amendments are substantial and material. There are new aspects that in my view would require some consideration. It may be so that this increase in quantum did not alter the cause of action, the identity of the parties and the scope of the issues in dispute.....Notwithstanding, the scope of damages has been increased significantly, and it would without doubt require a pleading."

I respectfully align myself with this view.

[13] In the *Olivier* case (*supra*) the amount of damages had increased from R6 105 000,00 to R7 155 000,00 and were found by the court to have been a substantial amendment which would result in the pleadings being "re-opened". In the matter *in casu* the plaintiff had pleaded that the total damages amounted to the sum of R2 170 000,00 and the amendment was for the sum of R10 520 000,00 an increase in the amount of R8 350 000,00.

[14] A pertinent question is whether the "re-opening of the pleadings" would also apply where the defendant's defence had been struck out. In the matter of *Natal Joint Municipal Pension Fund v Endumeni Municipality*⁵ the original concept of *litis contestation* was explained with reference to Roman Law. In modern practice it is synonymous with the close of pleadings.

[15] A defence which would have been struck out by the court would have been a response to the plaintiff's pre-amendment case and to the quantum which the plaintiff

⁴ 2023 (2) SA 551 (WCC) at para 21

⁵ 2012 (4) SA 593 (SCA) at paras 13 and 15

would have claimed. Once that had been “frozen” by the close of pleadings and the plaintiff seeks to “unfreeze” its position, there can be no objection to allow the defendant to plead to this “re-opened” case. Rule 28(8) allows any party affected by an amendment to make a consequential adjustment to the documents filed.

[16] I am therefore of the view that the plaintiff cannot argue that the documents which had been filed by the defendant had been struck out and that it would accordingly not be allowed to file a plea in respect of the amendment. This would place an undue limitation on the defendant’s right in terms of Section 34 of the Constitution. Furthermore, a refusal to allow the defendant to plead to the “re-opened” claim would offend against a basic premise of our law being the principle of *audi alterem partem*. To refuse the defendant the right to plead to the “re-opened” claim would be manifestly unfair and contrary to the spirit of the Constitution. However, the court should not allow the defendant in pleading to the “re-opened claim” to delve into the issues of the merits or its previously struck out special pleas if any.

[17] I am satisfied that the notice in terms of Rule 28 was properly served on the respondent who opted not to oppose the application.

[18] The brief facts of the matter are that the applicant instituted a claim against the respondent for damages sustained in a motor vehicle accident on 27 July 2017 where he was the driver. According to the Affidavit in terms of Section 19(f) of applicant he was driving a motor vehicle bearing registration number J[...] 2[...] N[...] and was travelling from south to north on Kgosi Mampuru Street. He approached a traffic light at the intersection of Johannes Ramogwase Street, which was green, giving him the right to proceed. As he proceeded through this intersection, a motor vehicle bearing registration numbers Z[...] 7[...] G[...] driven by one Andries Beukes, travelling at high speed, proceeded through the traffic light, resulting in a collision with his motor vehicle.

[19] No witnesses were called to give evidence of the occurrence of the accident, so the court took note of the description of the accident from the accident report filed therein as also the Section 19(f) affidavit. It is noted from the accident report that the

vehicles had already been removed from the scene. Therefore, there is no sketch plan was available. However, the brief description of the accident on the report by the insured driver (Vehicle A) alleges that the driver of vehicle B (the plaintiff) skipped a red robot and was driving at high speed. The driver of vehicle B alleges that the insured driver failed to stop where the robot was red and against him.

[20] There are two mutually destructive versions of the accident. Furthermore, the plaintiff describes the accident to the clinical psychologist, and the details of the accident are reported as follows:

“He was driving own car coming from his place (where he was renting a single room with his spouse), Mamelodi, going to work, Rustenburg, around 04h00. The robot was amber on his side at a four-way intersection road and he proceeded to pass but another car approaching from the left side beat the robot and struck him in the middle of the intersection.”

[21] On the one hand we have the Section 19(f) affidavit and the Accident Report in which the plaintiff blames the failure to stop on the part of the insured driver for the accident. Then in his description to the clinical psychologist of the details of the accident, the plaintiff makes reference to a robot which was amber. There is therefore no clear evidence of how the accident occurred. The State Attorney, Mr Perumal submitted that an apportionment should be made of the liability however, he did not suggest the apportionment to be made by the court. No submissions were made by the plaintiff in reply on whether the court should apportion the damages.

[22] It is trite that where contributory negligence and apportionment of damages are pleaded, the defendant would have to adduce evidence to establish negligence on the part of the plaintiff on a balance of probabilities. The evidence can only be discharged by adducing credible evidence to support the case of the party on whom the onus rests with respect to their respective claims.

[23] This court is bound to determine the liability on the part of the defendant. The essential elements to determine liability are: (i) bodily injuries sustained by the plaintiff; (ii) caused by or arising from the driving of a motor vehicle by another person; and (iii) the bodily injury is due to the negligence or wrongful act of the driver of the insured vehicle. The onus to establish the existence of these elements lies

squarely in the court of the plaintiff. Failure to discharge the onus in respect of any of these elements implies that the defendant (the RAF) is not obliged to compensate the plaintiff.

[24] I note that there are two conflicting versions of the details of the accident. No sketch plan was placed before the court; the allegations by the plaintiff and the insured driver are mutually destructive; the Section 19(f) affidavit does not accord with the details given to the clinical psychologist on the details of the accident.

[25] The court in the matter of *Ninteretse v RAF*⁶ Raulinga J held the following:
“...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.”

I respectfully align myself with this sentiment.

[26] It is concerning in this matter that we have two mutually destructive versions of the accident, both of which were made by the plaintiff in the matter. There is no credible evidence that the insured driver was the cause of the accident. At the end of the trial, the plaintiff has failed to produce sufficient evidence upon which a reasonable court may grant judgment in favour of the plaintiff. Alternatively, the plaintiff has not produced sufficient evidence to establish a *prima facie* case. Accordingly, the court is bound to grant absolution from the instance as no evidence has been tendered by the plaintiff of the collision.

[27] Accordingly, the following order is granted:

- (i) The Defendant is absolved from the instance;
- (ii) No order is made as to costs.

⁶ (29586/2013) [2018] ZAGPPHC 493 (dated 2 February 2018)

SNI MOKOSE J
Judge of the High Court of South Africa
Gauteng Division, Pretoria

For the Plaintiff: Ms BM Tsabedze
On instructions of: Marisana Mashedi Inc

For the Defendant: Adv J Perumal
On instructions of: The State Attorney

Date of Judgement: 17 November 2025