



**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Not reportable

Case no: 3834/2021

In the matter between:

LECHESA THABO ARCHIBALD KHAILE

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

Neutral citation: *Khaile v RAF* (3834/2021) [2025] ZAFSHC 387 (3 December 2025)

Coram: Daffue J

Heard: 3 September 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email and released to SAFLII. The date and time for hand-down is deemed to be 16h00 on 3 December 2025.

Summary: Negligence – collision on a straight road between a MAN truck and Volkswagen Polo motor vehicle – point of impact near the middle of the road although accepted to be in plaintiff's correct lane of travel – the court held that the plaintiff, the driver of the Volkswagen Polo motor vehicle, should have given a wider berth between his vehicle and the approaching MAN truck – also that he failed to take sufficient and timeous evasive action – apportion of damages 75/25% in favour of plaintiff.

ORDER

1 The defendant is liable to pay 75% of the plaintiff's proven or agreed damages.

2 The defendant shall pay the plaintiff's agreed or taxed costs of the merits trial, inclusive of counsel's fees on scale B.

JUDGMENT

Daffue J

Introduction

[1] This is yet again one of those numerous cases on the High Court rolls throughout the country where trials proceed effectively unopposed and default judgment is sought. The following *dictum* of the Supreme Court of Appeal in *MMK obo MK v RAF* is apposite:¹ 'When the RAF does not participate in the process of adjudicating matters to finality, the courts seized with the case are placed in an invidious position. They are required to bring special care to bear, lest an order is made which compels the RAF to pay damages not proved. It is simply not in the interests of justice that this should occur. It is to be hoped that the RAF, as an organ of state managing public funds, will take reasonable steps to avoid recurrences of what occurred here.'

Parties

[2] The plaintiff is Mr LTA Khaile, an adult male employed as a constable by the South African Police Service (SAPS), residing in Riebeeckstad, Welkom, Free State Province. The defendant is the Road Accident Fund (the RAF), a juristic person constituted as such by virtue of s 2 of the Road Accident Fund Act 56 of 1996.

¹ *MMK obo MK v RAF* [2025] ZASCA 136 para 34.

The pleadings

[3] The plaintiff claims damages from the RAF arising out of a motor vehicle collision that occurred on 2 December 2018 at approximately 04h50 on the provincial road between Riebeeckstad and Henneman. Several grounds of negligence are alleged, the most relevant being that the driver of the MAN truck failed 'to stay in his correct lane of travel and subsequently drove in the oncoming lane'. Therefore, it is alleged that the driver of the MAN truck was 100% negligent in causing the collision. As a result of the collision the plaintiff sustained injuries and suffered damages.

[4] The RAF filed its standard plea, denying negligence and damages. It seeks a dismissal of the plaintiff's claim, alternatively that the claim be reduced in accordance with the Apportionment of Damages Act 34 of 1956. No agreement was reached in respect of a separation of issues during the pre-trial conference and consequently, the matter was certified trial-ready in respect of merits and *quantum*.

Separation of issues

[5] Notwithstanding the aforesaid certification, the parties agreed on the day of the hearing as follows:

- a. the allegations in paras 1, 2.2 and 9 of the particulars of claim which were disputed in the RAF's plea, were admitted;
- b. a separation of issues to the extent that the disputes contained in paras 3 and 4 of the particulars of claim read with the corresponding paras of the plea be adjudicated first, the remainder of the disputes pertaining to *quantum* to stand over for later adjudication if required. I made an appropriate order in terms of rule 33(4) of the Uniform Rules of Court.

A brief factual exposition

[6] The plaintiff was the only witness to testify in the proceedings. Bearing in mind that the RAF failed to properly investigate the circumstances surrounding this collision and/or to consult with witnesses, Mr Ostermeyer, on behalf of the RAF, did not properly cross-examine the plaintiff. Consequently, I shall provide a brief factual exposition of the facts presented by the plaintiff.

[7] The plaintiff and his girlfriend at the time left Riebeeckstad for Henneman the day before the collision to attend funeral proceedings of a relative of his girlfriend. They travelled on the same road on which the collision occurred later. After attending the funeral proceedings, they returned to Riebeeckstad during the early morning of 2 December 2018.

[8] It is common cause that the road between Riebeeckstad and Henneman is a two-lane carriageway with one lane for traffic in each direction. In the area where the collision occurred, the trajectory of the road is straight. The plaintiff testified accordingly, and it is also apparent from the photographs presented by him in accordance with the provisions of rule 36(10) of the Uniform Rules of Court and referred to during his evidence.

[9] At about 04h50 a motor vehicle collision occurred between the plaintiff's Volkswagen Polo sedan motor vehicle and a MAN truck. The lights of both motor vehicles were turned off and visibility was good. There were potholes in the road, more so in the lane travelled in by the MAN truck. The potholes on the plaintiff's side did not affect his travelling. The plaintiff estimated that he was travelling approximately 50 cm from the white broken line dividing the two lanes as the two vehicles were approaching each other. The MAN truck was travelling towards Henneman and the plaintiff towards Riebeeckstad. The plaintiff was travelling at a speed between 60 and 70 km/h at the time.

[10] The plaintiff testified that when the MAN truck approached the potholes it swerved to its right across the white broken line. He estimated, by pointing out a distance in court, that this occurred when the vehicles were between eight to ten meters apart. He veered off to the left, but when his vehicle was approximately one meter from the white broken line, a side-on collision occurred with the MAN truck on the plaintiff's correct side of the road. It is obvious from the photographs that no head-on collision occurred. The right-hand side of the Volkswagen Polo was damaged, with some damage to the front right thereof as well. According to the plaintiff, he could not swerve more to his left as that would have caused him to leave the road, causing much more damage. I do not agree but will revert soon.

[11] The plaintiff did not talk to any SAPS officer immediately after the collision as he was taken to hospital. The information contained in the accident report form attached to his claim filed with the RAF was not provided by him. He suggested that the information could have been tendered by his ex-girlfriend. Whoever gave the information to the SAPS officer stated that the point of impact was in the middle of the road.

[12] Four months after the collision several photos were taken of the scene. The plaintiff accompanied the photographer and made pointing-outs to that person who remained unidentified. These photographs were presented to the court in accordance with the provisions of rule 36(10). The RAF did not object thereto as it was entitled to do. The one photograph depicts an X made with a black Koki pen, indicating the point of impact exactly in the middle of the road. On another photograph an X is marked just off the middle of the road, but in the MAN truck's correct lane. The plaintiff was adamant during his testimony that these two X's were incorrectly drawn onto the photographs. They should have been drawn in his lane of travel. The plaintiff's counsel submitted that I should ignore these X's as they are in direct conflict with the plaintiff's credible and uncontested evidence. More about this later herein.

[13] The plaintiff testified about his awareness and knowledge of potholes along the road. A warning sign in this regard appears on some of the photos. A speed limit of 80 km/h applied. The plaintiff testified that the driver of the MAN truck swerved to his right and across the white broken line to avoid the potholes on his side of the road.

[14] The plaintiff testified that the relationship between him and his girlfriend had been terminated and that he could not get hold of her to testify on his behalf. Therefore, he closed his case after his testimony.

Evaluation of the evidence and the plaintiff's submissions

[15] I emphasise that according to the plaintiff, the MAN truck without warning swerved to the right across the white broken line dividing the two single lanes. Although he managed to steer his Volkswagen Polo motor vehicle to the left, he could not avoid a collision. I shall evaluate the plaintiff's version whilst trying not to require of him 'the

foresight of a Hebrew prophet and the agility of an acrobat.’² Therefore, I caution myself to take care to avoid excessive demands upon the concept of the reasonable driver.

[16] A litigant who fails to adduce evidence about a fact in issue, whether by not giving evidence or by failing to call witnesses, runs the risk of the opponent’s version being believed.³ However, the fact that the one party fails to adduce evidence to contradict the other party’s version does not necessarily mean that that version should be accepted. It will always depend on the probative strength of such version, *ie* whether it was strong enough to cast an evidentiary burden on the party failing to present evidence.

[17] Against this background, I shall weigh the probabilities as they arise from the evidence and the evidential material as well as the circumstances of the case. As held in *Maitland and Kensington Bus Co (Pty) Ltd v Jennings*,⁴ for judgment to be given for a plaintiff, the court must be satisfied that sufficient reliance can be placed on their story for there to exist a strong probability that such version is correct. In *Ocean Accident and Guarantee Corporation Ltd J v Koch*,⁵ it was held that the evidence presented by the burdened party must be such that the court can say that it is more probable than not, for the burden to be discharged.

[18] Our courts have accepted over many decades that it is often difficult for drivers of motor vehicles and/or passengers or other witnesses to estimate time, speed and distance. The following was said in *Cooper and Bamford*:⁶

‘Calculations based upon estimate times, distances and speeds are frequently presented to the Court as a basis upon which it is then asked to draw certain inferences and to find certain facts as proved. In dealing with such calculations the Courts have always borne in mind the notorious difficulty witnesses have of making accurate estimates often made in the anguish of the crisis. And as Ogilvie Thompson, AJ (as he then was), said in *Van der Westhuizen and Another v SA Liberal Insurance Co Ltd* 1949 (3) SA 160 (C) at p 168: “. . . the strictly mathematical approach, though undoubtedly very useful as a check, can but rarely be applied as an absolute test in collision cases, since any mathematical calculation so vitally depends on exact positions and

² *Broom v Administrator, Natal* 1966 (3) SA 505 (D&CLD) at 516F-H.

³ *Brand v Minister of Justice and Another* 1959 (4) SA 712 (A) at 715D-716H and the authorities referred to by Schmidt and Rademeyer, *The Law of Evidence* para 3.2.4.1.

⁴ *Maitland and Kensington Bus Co (Pty) Ltd v Jennings* 1940 CPD 489 at 492.

⁵ *Ocean Accident and Guarantee Corporation Ltd v Koch* 1963 (4) SA 147 (A) at 157D.

⁶ *Cooper and Bamford, South African Motor Law* at 296-297, accepted with approval in *Minister van Vervoer v Bekker* 1975 (3) SA 128 (O) at 130F-G.

speeds; whereas in truth these latter are merely estimates almost invariably made under circumstances wholly unfavourable to accuracy."

[19] The plaintiff's evidence *in casu* is a typical example. According to him, he was driving half a metre (50 cm) from the white broken line before the collision and after he had taken evasive action, he was approximately one metre from that line when the collision occurred. This is an afterthought to reconstruct the collision in his mind. The collision occurred in 2018, seven years ago. The most important incorrect estimate is the distance between the two vehicles when the plaintiff noticed the MAN truck swerving to its right. The distance of eight metres is just totally unacceptable. If both vehicles were travelling at 60 km/h, they would be closing in on each other at a combined speed of 120 km/h. A simple mathematical calculation will prove that a vehicle moving at 60 km/h travels at 16.7 metres per second. At 120 km/h (the estimated combined speed *in casu*), the two vehicles would be travelling 33.4 metres in one second.⁷ The normal person's reaction time in these circumstances can be as quick as 0.75 seconds, but even as slow as 1.6 seconds. Reliable and accepted evidence in this regard has been presented to the courts by experts over the years as is apparent from many reported judgments. Therefore, the distance between the two vehicles would have been in the vicinity of 30 metres for the plaintiff to start with evasive action. The fact that the plaintiff incorrectly estimated the distance to be eight to ten metres, does not mean that he is a lying witness, but merely that not much can be deducted from his estimates, not only on this issue, but also his estimates pertaining to his position in his lane before and at the time of the collision.

[20] I am satisfied that judicial cognisance may be taken from the fact that a large and clumsy, heavy vehicle like a MAN truck not only takes a longer distance to come to a standstill when the brakes are applied, but cannot be moved from the one side to the other as swiftly and efficiently as a small sedan motor vehicle like a Volkswagen Polo or any other standard sedan motor vehicle.

[21] Although I accept that a driver on the correct side of the road, like the plaintiff in *casu*, is entitled to assume that approaching traffic will do likewise, such driver is not relieved of the duty to exercise reasonable care. This in my view, is particularly applicable

⁷ WE Cooper *Delictual Liability in Motor Law* revised edition of *Motor Law* vol 2, *Principles of Liability* (1996) revised ed at 492.

in casu where there was on the plaintiff's own version potholes on the road, especially severe in the lane travelling in by the MAN truck. Drivers in that lane should have been expected to take evasive action to avoid driving through the potholes. The plaintiff was aware of the condition of the road insofar as he had travelled it the previous day. If he kept a proper look-out, he would have noticed the potholes in the MAN truck's lane of travel and foreseen that the driver might try to avoid these potholes and, in the process, changing direction towards the middle of the road. The plaintiff, having been aware of the danger, did not appreciate the risk and did not act as could be expected of the reasonable driver.

[22] Bearing in mind the obvious difference in width between a MAN truck and a Volkswagen Polo motor vehicle, as well as the manoeuvrability of the two vehicles, the plaintiff would have had much more space and opportunity to manoeuvre his vehicle in his lane of travel. I do not accept the plaintiff's version that he could not move more to his left. The photos indicate a wide gravel shoulder, covered with short grass, on the same level as the road.

[23] In my view, the plaintiff acted like a daredevil. He was taking a huge risk to drive so close to the white broken line (on his estimated version, half a metre or 50 cm) when approaching the MAN truck. I do not take an armchair approach, but in my experience, no reasonable person will leave a space of 50 cm or perhaps a fraction more between their small sedan motor vehicle and an approaching heavy vehicle such as a MAN Truck. It is not uncommon for head-on collisions to occur in the middle of the road during heavy rainstorms or thick mist,⁸ and nowadays due to potholes so frequently encountered on our roads. The width of the lanes has not been measured, but it is evident that the MAN truck would have taken up most of its lane. In one of the photo's tendered in evidence the truck approaching the photographer occupied about the full width of the lane in which it was travelling. I am satisfied that the plaintiff acted negligently in not allowing more space between him and the MAN truck as the vehicles were approaching each other and before any lateral movement as alleged took place. If he allowed a wider berth, his chances of avoiding the collision would be so much better.

⁸AA *Onderlinge Assuransie-Assosiasie Bpk v De Beer* 1982 (2) SA 603 (A) at 614H-617E.

[24] I do not believe that the plaintiff, a constable in the employ of SAPS, and obviously known to his ex-girlfriend's relatives, was unable to locate her to ensure that she testifies in support of his claim. I am tempted to make a negative deduction from the failure to call her, but insofar as no contradictory evidence was led by the RAF, I would refrain from doing so. She is probably the person who pointed out to the SAPS officer where and how the collision occurred with reference to a possible point of impact.

[25] The plaintiff failed to call the photographer and/or the person that marked the photographs with the 'X' in two instances. This occurred four months after the collision and thus nearly seven years ago. At least in the one instance, the point of impact is depicted exactly on the white broken line. The plaintiff's explanation is not accepted. He tried in his evidence to show that the point of collision was in his lane and as estimated by him, a metre from the white broken line. It is trite that even the opinion of an experienced policeman as to the point of impact must be considered with care. In *casu*, no road markings, oil or water spillage, or debris were found on the scene, and no photographs serve as evidence in this regard. The plaintiff also did not testify about anything indicative of a possible area of collision. In any event, it is preferred to refer to an area of collision rather than a point of collision. Although credible direct evidence is often accepted above evidence pertaining to the reconstruction of a collision, the plaintiff's estimates cannot be relied upon. The two vehicles were not involved in a head-on, but a side-on collision. This is apparent from the plaintiff's evidence and the damage to his vehicle. The Volkswagen Polo's right-side was damaged.

[26] I am satisfied that bearing in mind the relatively slow pace in which a clumsy vehicle such as the MAN truck could have moved laterally, the plaintiff, if he was vigilant as could have been expected of the reasonable person in the circumstances, could have avoided the collision by either taking precautionary measures earlier and/or veering slightly more to the left.

[27] Mr Ostermeyer asked a view questions during cross-examination but bearing in mind that he did not really have a version to put to the plaintiff, he could not make any impact. However, notwithstanding that, he submitted that insofar as the collision occurred in the middle of the road, the court should find that the plaintiff was also negligent and that a 50/50% apportionment should be made. I do not agree that the two drivers are to

be blamed equally. Obviously, if I had the opportunity to hear evidence of the MAN truck driver, I might have come to such a conclusion.

[28] The driver on the correct side of the road is entitled to assume that the approaching traffic will do likewise. At the same time, such driver is not relieved of the duty to exercise reasonable care. As soon as it would be evident to a reasonable driver that there is danger of a collision arising from the inability, refusal or neglect of the wrongdoer to give way, the rightful user of the road is bound to take all reasonable steps to avoid a collision.⁹ It may be necessary for the driver on the correct side of the road to deviate to his extreme left and even to move off the tar portion of the road onto the gravel strip adjacent thereto, but the failure to do so is not necessarily negligence.¹⁰ Invariably, the time factor is of vital importance in determining whether the driver on the correct side of the road was negligent in not taking sufficient steps to avoid a collision.

[29] In *Van Staden v Avenant en 'n Ander*¹¹ the court held as follows and for the purposes hereof, I quote from the English summary:

'Where two vehicles pass each other then the danger areas of the two vehicles must not encroach upon each other to such an extent that a collision occurs. If the two danger areas encroach upon each other to such an extent that damage results, then there is negligence on the part of the one or both of the drivers. In the case of the drivers of motor vehicles the middle of the road is the extreme boundary to which the danger areas of the vehicles concerned extend to the inside, but if the danger area of one vehicle goes over the middle of the road then it does not relieve the driver of the other vehicle of his duty to do everything possible to avoid a collision.'¹²

In this case a 50/50% apportionment was made. I am satisfied that the facts *in casu* do not support such an apportionment.

[30] In *AA Onderlinge Assuransie Assosiasie Bpk v Sodoms*¹³ (*Sodoms*) the former Appeal Court accepted the trial court's apportionment of 75/25% apportionment in favour of the plaintiff. In a situation where the collision occurred approximately in the middle of the road. The plaintiff's negligence was attributed to the fact that he was driving too close

⁹ *Solomon and Another v Mussett and Bright Ltd* 1926 AD 427 at 433.

¹⁰ *Ndaba v Purchase* 1991 (3) SA 640 (N) at 643J-644A.

¹¹ *Van Staden v Avenant en 'n Ander* 1971 (2) SA 456 (NC) at 458H-459A (the quotation is from the English summary on 456H).

¹² *Ibid* 456H and for the Afrikaans version: 458H-459A.

¹³ *AA Onderlinge Assuransie Assosiasie Bpk v Sodoms* 1980 (3) SA 134 (A) at 139F-H.

to the middle of the road and that he did not swerve to his left in the short time available since becoming aware of the danger caused by the other driver who swerved into the plaintiff's lane of travel.

[31] I am satisfied that, based on the uncontradicted version of the plaintiff, the insured driver caused the MAN truck to veer across the white broken line, although ever so slightly, and that a collision occurred in the plaintiff's lane of travel. However, the plaintiff must take some of the blame for the collision for the reasons advanced herein, unless he should be excused based on the sudden emergency principle.

[32] Reliance on sudden emergency was considered in *Minister van Vervoer v Bekker*.¹⁴ I accept that the reasonable person is not a faintheart, but surely not the careless, ignorant and/or arrogant type that believe they have the right of way, regardless of circumstances. The reasonable driver must be able to cope with hazards that average drivers are likely to encounter daily. In *Ntsala and Others v Mutual & Federal Co Ltd*¹⁵ the point was made that a driver that suddenly finds himself in imminent danger, not of his own doing, and reacting to avoid the danger, shall not be held liable for negligence if a wrong option was possibly taken. I am satisfied that the plaintiff put himself in a position of imminent danger insofar as he left insufficient space between his vehicle and the approaching MAN truck. Furthermore, if he was vigilant as could be expected, he would have had sufficient time to avoid the collision, bearing in mind the difference in manoeuvrability between the two vehicles. I repeat that no reliance can be placed on the plaintiff's estimates. He cannot rely on sudden emergency to escape liability.

[33] Having found that the plaintiff was also negligent, although less so than the MAN truck driver, and that such negligence contributed to the collision, an apportionment of 75/25% in favour of the plaintiff should be made. Such finding is in line with that in *Sodoms*. The facts *in casu* are not too dissimilar with those in *Sodoms*.

Order

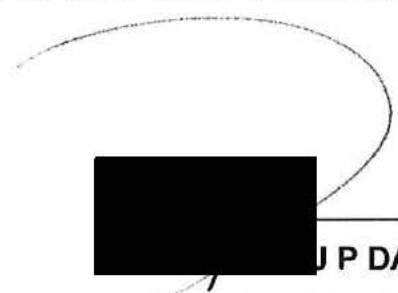
[34] In the result, the following order is made:

- 1 The defendant is liable to pay 75% of the plaintiff's proven or agreed damages.

¹⁴ *Minister van Vervoer v Bekker* 1975 (3) SA 128 (O) at 133D-135D.

¹⁵ *Ntsala and Others v Mutual & Federal Co Ltd* 1996 (2) SA 184 (T) 192F-H; see also the oft-quoted judgment, *SAR&H v Symington* 1935 AD 37 at 45.

2 The defendant shall pay the plaintiff's agreed or taxed costs of the merits trial, inclusive of counsel's fees on scale B.



J P DAFFUE
JUDGE OF THE HIGH COURT

Appearances

For the Plaintiff: JC Coetzer
Instructed by: Honey Attorneys, Bloemfontein.

For the Defendant: A Ostermeyer
Instructed by: Road Accident Fund, Bloemfontein.