IN THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISON, PRETORIA

CASE NO: 078043/2024

(1) REPORTABLE:~~YES~~/NO

(2) OF INTERST TO OTHER JUDGES :~~YES~~/NO

(3) REVISED

DATE 09/02/2026

SIGNATURE

In the matter between:-

MTHOKOZISI NKOSI	**PLAINTIFF**
And	
THE ROAD ACCIDENT FUND	**DEFENDANT**

JUDGEMENT

MATIKA AJ

Introduction

1. This is a damages claim by the plaintiff, Mthokozisi Nkosi (Mr Nkosi) for bodily injuries sustained in a motor vehicle accident that occurred on 27 March 2023 in Kwesamkhulu, Waterbus, Pongola, Kwazulu Natal province.
2. The claim is against the Road Accident Fund ("the Fund") as the statutory insurer in terms of the Road Accident Fund Act[1] ("the Act").

Default

3. This is an application for default judgment in terms of Rule 31(2) (a) [2] The combined summons was served on the Defendant on 18 July 2024.
4. The Defendant was afforded 10 days within which to deliver a notice of intention to defend and failed to file its notice of intention to defend. The *dies* has expired.
5. Application for default judgement was served on the defendant on the 21 November 2024.
6. Notice of Set-down for the 30 January 2026 was served electronically on the 10 December 2025 and by hand on the 12 December 2025.
7. Up to date hereof, the Defendant still remains in default of filing a notice of intention to defend, thereby justifying the Plaintiff to proceed on the default judgment roll on a default judgment basis.

Disputed issues

[1] Act 56 of 1996, as amended.

[2] Rule 31(2)(a) reads: "Whenever in an action the claim or, if there is more than one claim, any of the claims is not for a debt for liquidated demand and the defendant is in default of delivering of <u>notice of intention to defend</u> or of a plea, the plaintiff may set the action down as provided in sub-rule (4) for default judgment and the court may, after hearing evidence, grant judgment against the defendant or make such an order as it deems fit."

8. The matter was set-down for merits only, and therefore the issue of liability is separated from the issue of quantum in terms of Rule 33(4) of the Uniform Rules of the court.

9. The allegations in Mr Nkosi's particulars of claim is that the claim arose from a motor vehicle collision that occurred when a motor vehicle with registration numbers and letters, K[...] (hereinafter referred to as "*the insured motor vehicle*") there and then driven by one Mr Ketuwe Mohoto (hereinafter referred to as the "*insured driver* ") collided with the motor vehicle with registration numbers and letters: N[...]. At the time of the time of the collision plaintiff was a driver of the motor vehicle with registration numbers and letters: N[...].

10. The plaintiff's pleaded case on the particulars of claim is that: *" The collision was caused by the sole negligence of the insured driver, who was negligent in one or more or all of the following respects: He executed an inappropriate and dangerous manoeuvre without ascertaining whether it was safe to do so; he changed lanes at an inopportune time without ascertaining whether it was safe to do so; he drove at an excessive speed under the circumstances; he failed to apply his breaks timeously, sufficiently or at all ,alternatively he drove a vehicle with a defective braking mechanism; he omitted to drive with due care, skill, caution and/or circumspection; he failed to keep his vehicle under proper control; he failed to avoid the collision when by the exercising of reasonable care and skill he could and should have done so ,he failed to keep a proper lookout* . "

11. The plaintiff deposed to section 19(f) affidavit in terms of the Act[3] under oath describing how the accident happened, According to the said affidavit it is stated as follows :

[3] Act 56 of 1996, as amended.

"*I was travelling towards N2 road between Kwesamkhulu and waterbus, Pongola, when a truck came to my lane of travel, while I was trying to avoid head on collision, it lost control and hit my motor vehicle on the side. The truck driver is Ketuwe Mohoto*."

12. The accident was reported at the South African Police Service in Pongola under CAS No: 2221032023 and a certain constable Nxumalo of the Accident Unit completed accident report, a sketch plan and photographs, from Constable Nxumalo description of the accident, it is clear that he does not know how the accident occurred. He recorded that "*It is alleged by the truck driver that he was travelling straight approaching Kwesamkhulu while Toyota Tazz coming from opposite direction jumped the lane and hit the first trailers of his truck*".

13. The Police Accident report, the plan and key to the plan were properly discovered and no objection to their use were lodged. No evidence gainsaying the Plaintiff`s version of the how the accident happened.

Evidence of Mr Nkosi

14. Mr Nkosi's oral testimony is that he was involved in a motor vehicle accident on 27 March 2023 at approximately 20:00. He was a driver of Red Toyota tazz, the accident occurred on the N2 road, between Kwesamkhulu and waterbus in Pongola road, the visibility was not clear as the accident took place at night and his lights were on and working properly at the time of the accident, He further testified that he was driving 80 kilometres per hour and maximum speed limit is 100 kilometers per hour and he was driving within the normal speed limit, he testified that the vehicle he was driving belongs to one Mr Sanele Ntshangasi, who was a passenger at the time of the accident, he

testified that the truck had bright lights on, he testified that the accident took place on the curve, he testified that the truck came from the opposite direction, the truck went to his lane of travel and he tried to avoid head on collision by swerving to the left, and when he came back to the road he collided with the back trailer of the truck. He testified that the truck was driving at a higher speed, he blamed the driver of the truck for said collision.

15. He testified further, that as a direct results of the said accident he sustained injuries on his head, chest, knees, left leg and thigh, he was taken by ambulance from the scene of the accident to Itshelejuba hospital. This has been confirmed by the Hospital records.

16. The defendant did not call any witness on merits.

Authorities

17. The claim in this instance falls under section 17(1) (b) of the Act[4]. 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

[4] Act 56 of 1996, as amended

due to the negligence or other wrongful act of the driver or owner of the motor vehicle …" (own emphasis)

Issues for determination

18. It is common cause, in this instance, that the plaintiff, Mr Nkosi has suffered bodily injuries. The Fund's liability to compensate Mr Nkosi accordingly turns on the question of whether the driver of the truck was negligent and whether such negligence, if proven, caused the damage suffered by Mr Nkosi. If so, the Fund is statutorily liable to compensate Mr Nkosi 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.[5]

19. It is trite law that the *onus* rests with the plaintiff to prove negligence on the part of the defendant. There is no *onus* on the defendant to show that he had not been negligent, but, once the plaintiff has proved an occurrence giving rise to an inference of negligence on the part of the defendant, the latter has to give an explanation which is sufficient to dispel the *prima facie* proof of negligence, otherwise he runs the risk of judgment being given against him. *See:* ***Ntsala and 0thers v Mutual & Federal Insurance Co Ltd*** **1996 2 SA 184 (T).**

20. It is trite that every driver has a duty to scan the road ahead of him at all times, and to avoid a collision from happening. In the matter of ***Road Accident Fund v Grobler*** [6] the Supreme Court of Appeal held that in a situation similar as *in casu,* the proper approach is not to confine the inquiry

[5] Act 56 of 1996, as amended
[6] (96/06) ZASCA 78; (2007] SCA 78(RSA); 2007 (6) SA 230 (SCA) (31 May 2007)

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 he/she had an opportunity to take measures ahead of the emergency to avoid the accident, and he/she failed to do what a reasonable person in similar circumstances would have done, then he /or she would have been negligent.

21. In ***Road Accident Fund v Grobler*** [7] the Supreme Court of Appeal held that:"[19] It is clear from the evidence that the respondent was plunged into a situation of sudden emergency, that he had no more than a second within which to escape that emergency, and that he effectively was given a choice between danger, or veering away from it and hoping that it would not follow him.

22. **In *Rodrigues v SA Mutual* & *General Insurance Company Ltd*** [8] Van Heerden AJA stated the following on 280H-281A:" Where the evidence indicate that the accident occurred on the correct side of the insured driver and suggesting that the latter was plunged in a situation of sudden emergency as the result of the negligence on the part of the other driver who veered off his path of travel into the incorrect path, the former is in my view duty bound to show what steps he nonetheless took to avoid the accident.

Discussion

23. The Plaintiff must still satisfy the court that the insured driver was negligent in some way.

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7 2007 (6) SA 230 (SCA) (supra)

8 1981(2) SA 274 (A)

24. The Plaintiff's counsel Mr Malange, submitted that had the driver of the truck kept a proper lookout, he/she would see the plaintiff's vehicle and would have avoided the accident from happening. It was further submitted that the driver of truck was travelling at a higher speed and failed take avoid the accident as he was duty bound to do so, this submission was supported by evidence of Mr Nkosi. It was further submitted that the defendant is 100% liable to the plaintiff and no apportionment as there is no witness called on behalf of the defendant to testify.

25. The plaintiff's case before the court is that, the truck went to his lane of travel, this evidence is uncontested.

26. The general approach to follow in an instance where the vehicle travelled on the incorrect side of the road is *prima facie* proof of negligence on the part of the said driver, unless an explanation is given for such an action. **HB Klopper,**[9] has the following view:

> "(a) Collision on the incorrect side of the road – If there is irrefutable proof of a collision on the incorrect side of the road, such collision constitutes *prima facie* negligence on the part of the driver who was found to be on his incorrect side of the road at the time of the collision. Once the plaintiff has established that the collision did in fact occur on his side of the road, the defendant has to explain his presence on the defendant's incorrect side of the road. If the explanation is insufficient to dispel the inference of negligence arising from his presence on the incorrect side of the road, the defendant will be held negligent."

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[9] HB Klopper *The Law of Collisions in South Africa* 7ed (LexisNexis Butterworths, 2003) at 78.

27. Klopper's statement above is in support of provisions of **Regulation 296(1) of The Regulations to the National Road Traffic Act [10],** which reads as follows:

> "(1) Any person driving a vehicle on a public road shall do so by driving on the left side of the roadway and, where such roadway is of sufficient width, in such manner as not to encroach on that half of the roadway to his or her right: Provided that such encroachment shall be permissible– (a) where it can be done without obstructing or endangering other traffic or property which is or may be on such half and for a period not longer than is necessary and prudent and provided that it is not prohibited by a road traffic sign".

28. The plaintiff's further evidence is that he was travelling towards N2 road between Kwesamkhulu and waterbus, Pongola, when a truck came to his lane of travel, While he was trying to avoid head on collision, the truck lost control and hit motor vehicle on the side. The sketch plan shows the trailer of the truck on the plaintiff's lane of travel. In **Marais v Caledonian Insurance Co Ltd**[11] the court held that proof that a vehicle was travelling on the incorrect side of the road is accepted as *prima facie* proof of driver's negligence.

29. The plaintiff further evidence is that the insured driver is the sole cause of accident, this evidence was not challenged by the defendant.

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[10] National Road Traffic Act 93 of 1996

[11] 1967 (4) SA 199 (E) at 202F.

30. The plaintiff also testified that the truck had bright lights on throughout, this evidence was not challenged.

31. The plaintiff evidence was that the insured driver was travelling at high speed, this evidence was not challenged.

32. There is no evidence regarding the speed at which the insured driver was driving, there's no explanation of the truck /driver's presence on the plaintiff's lane of travel, there is no evidence explaining why the truck bright lights were on all the times.

33. There is no evidence placed before the court as to what steps the insured driver took to avoid the imminent sudden emergency he found himself in, the insured driver is the person who could have told the court what steps he took to avoid the collision as he was duty bound to, but was not called to do so.

34. The plaintiff's evidence calls for an answer from the defendant and in the absence of any version contrary to the plaintiff's version, I find on the evidence before me, that there is nothing to suggest that the plaintiff drove negligently in any way.

Contributory negligence

35. There is no plea from the defendant, and the issue of contributory negligence is simply not raised.

36. A full Court of this division recently confirmed in the matter of **Allan Rae v Road Accident Fund** [12] that if no contributory negligence is pleaded, no apportionment should be made. The court a quo initially found

[12] 2025 (A114/2022) (21 May 2025)

contributory negligence on the part of the plaintiff (appellant, Allan Rae) and apportioned liability at 75/25%, in the plaintiff’s favour. The full court set aside the 75/25 apportionment, holding the RAF 100% liable based thereon that: the appellant's version of the accident was the only version before the court, and was supported by the accident report; the RAF did not file a defence or submit any plea of contributory negligence; there was no basis for the lower court to infer negligence on the part of the plaintiff.

37. In **Fox v RAF** [13] the Full Bench of this Honourable Court stated:

> *“ Defendant would have to adduce evidence to establish negligence on the part of the Plaintiff on a balance of probabilities.”*

38. In **Moloi v RAF** [14] the court held: *“The* defendant called no witnesses to prove such contributory negligence. It follows therefore that the Plaintiff's version on the cause of the accident remained unchallenged and therefore no contributory negligence could be established by the Defendant.”

39. In **Kabini v Road Accident Fund**[15] *the* court held: *“It is trite that a plaintiff only has to prove 1% negligence on the part of an insured driver for a claim to be established. It is then for the defendant to prove contributory negligence on the side of the plaintiff.”*

40. The defendant bears both the onus and duty to begin to prove contributory negligence on the part of the Plaintiff. In ***Laurens v Road***

13 *(A548/16) [2018] ZAGPPHC (26 April 2018)*
14 (84024/2016) [2020] ZAGPPHC 87 (26 March 2020)
15 26209/2018) [2020] ZAGPPHC 100 (19 February 2020)

Accident Fund [16] this court considered the judgments of ***Ntsala v Mutual & Federal Ins Co Ltd 1996 (2) SA 184 (T) 190, Alberts v Engelbrecht 1961 (2) SA 644 (T)*** **and** ***Motor Insurers Association of South Africa v Boshoff 1970 (1) SA 489 (A) 502*** **in reaching the conclusion that the onus rests upon the Defendant to begin**.

41. In ***Ndaba v Purchase***[17] the court stated, where contributory negligence is not pleaded by the defendant, *"[t]hat being so, it seems to me that the case resolved itself into a so-called one percenter and that no question of contributing negligence or apportionment of damages could arise'.*

42. In **Blignaut v RAF (24248/2015)[2017] ZAGPPHC 940(15 December 2017) it** was confirmed that: *"It is trite law that the defendant must prove the contributory negligence of the plaintiff's. The defendant failed to discharge its onus in proving plaintiff s contributory negligence. I therefore find no contributory negligent on the part of the plaintiff".*

43. In light of the fact that no contributory negligence pleaded by the defendant and no evidence adduced by the defendant to prove contributory negligence on the part of the plaintiff, I am of the view that contributory negligence is not applicable in this matter.

44. In the premises ,I make the following order:

(a) The Draft Order marked "X" is made an order of Court

16 31816/2017) [2018] ZAGPPHC 621 (23 August 2018),

17 [1991] 2 All SA 63 (E) 63

F MATIKA

Acting Judge of the

High Court of South Africa

Gauteng Division, Pretoria

APPERANCES:

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For the Defendant: No Appearances