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**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Not Reportable

Appeal Case No: A109/25

Court A Quo Case No: 8574/19

In the matter between:

NICOLENE MARIA PALM

Appellant

And

THE ROAD ACCIDENT FUND

Respondent

Neutral citation:

Coram : Ndita J, Wille J and Mgengwana AJ

Heard : 9 March 2026

Delivered : 23 April 2026

Summary: Appeal – Absolution from the instance – Rule 39(6) of the Uniform Rules of Court – Negligence – Section 17 of the Road Accident Fund Act 56 of 1996 – Pleadings – Admission of the occurrence of the motor vehicle accident – Evidence – Inferences to be drawn from substantially unchallengeable real evidence i.e. gouge marks on the road surface.

Judgment handed down: This judgment is handed down electronically by circulating to the parties or legal representatives by email. The date for the handing down of the judgment is deemed to be April 2026.

ORDER

1. The appeal is upheld with costs together with counsel's costs at Scale C.
2. The order of absolution from the instance with costs is set and substituted with the order that the matter be remitted to the court *a quo* for further evidence.

JUDGMENT

MGENGWANA, AJ (NDITA, J and WILLE, J)

Introduction

[1] This is an appeal against the decision of Acting Judge Dlamini-Smit (the court *a quo*) to grant an order of absolution from the instance with costs in favour of The Road Accident Fund (the Respondent) after the Respondent applied for same at the close of Appellant's case. The order granting absolution from the instance is contained in her judgement which was delivered on 22 July 2024.

Factual Background

[2] On 10 October 2015 at approximately 15h15 on the R43 between Wolseley and Worcester, a motor vehicle accident (the accident) took place between a JMC Double Cab with registration letters and numbers C[...] there and then driven by the Appellant, a Hyundai truck with registration letters and numbers C[...]2 there and then driven by one Mr. Jacobs (the First Insured Driver), a Ford Ranger with registration letters and numbers C[...]3 there and then driven by one Mr. Cyster (the Second Insured Driver) and an unknown motor vehicle there and then driven by an unknown insured driver. First and Second Insured Drivers were both towing trailers.

[3] In her Second Amended Particulars of Claim, the Appellant pleaded that the accident was caused by the sole negligence of the First Insured Driver who was negligent in various respects which this Court will not repeat. In the alternative, the Appellant pleaded that the accident was caused by the sole negligence of the Second Insured Driver, who was negligent in various respects, which this Court will also not repeat. In the further alternative, the Appellant pleaded that the accident was caused by the sole negligence of the Unknown Insured Driver, who was negligent in various respects, which this Court will also not repeat. In the further alternative, the accident was caused by the joint negligence of all the aforementioned insured drivers.

[4] The Respondent did not file a Plea to Appellant's Second Amended Particulars of Claim however, in its Plea to the First Particulars of Claim of the Appellant it admitted the occurrence of the accident but denied that it was caused by the negligence of the First Insured Driver. In the alternative, the Respondent denied that the negligence of the First Insured Driver causally contributed to the accident should the court find that the accident was caused by the negligence of the First Insured Driver which allegation is still denied. In the further alternative, the Respondent pleaded that the accident was caused by the sole negligence of the Appellant who was negligent in various respects which this Court shall also not repeat. In the further alternative, and in the event of the court finding that the First Insured Driver was negligent in any of the respects alleged (which is denied) and such negligence contributed causally to the accident (which is also denied) then the Respondent pleads that the accident was caused partly due to the

negligence of the First Insured Driver and partly due to the negligence of the Appellant.

[5] During the hearing of the matter, the Appellant testified that she was driving from the direction of Wolseley towards Worcester and while so driving, she was involved in an accident. Other than this, she could not be of any assistance to the court *a quo* as she does not have any independent recollection of the mechanics of the accident as she only regained consciousness seventeen days after the date of the accident in the Worcester Medi-Clinic Hospital. However, her husband (Mr. Palm) testified as follows:

(a) That between 15h45 and 16h00, while travelling from Wolseley towards Worcester, he came upon a very chaotic accident scene in which he sadly established that his wife was involved.

(b) That this accident involved multiple vehicles. He first saw the First Insured Vehicle with a large trailer that was facing the Wolseley direction and then saw the vehicle that had been driven by the Appellant facing the Worcester direction but was on its incorrect side of the road. He also saw a Ford Ranger that was also involved in the same accident.

(c) That upon inspecting the trailer, which was towed by the First Insured Vehicle, he noticed that it was a large trailer which did not have a tyre on its right front wheel, and he also noted that the First Insured Vehicle had a lot of damage. He also noted scrape marks on the tarred road, which led roughly from the white line on the centre of the road towards the resting place of the trailer. He testifies that there was a clear marking next to the white line which he thought must

have been the point of impact and that this mark was on the correct side of the First Insured Vehicle's path of travel but about thirty-forty centimeters from the white line. He went on further to testify that this gouge mark was caused by the rim of the First Insured Vehicle's trailer immediately after the tyre came off.

(d) During his evidence, two photographs of the spot at which the accident took place were entered into record and these photographs showed that the accident took place at a straight and wide road. Mr. Palm also added that visibility was actually good, the skies were clear and the afternoon was warm and sunny and that one could see very far.

The above constituted the uncontroverted evidence of Mr. Palm. After leading the evidence of Mr. Palm, the Appellant closed her case.

[6] The Respondent did not lead any evidence, but it promptly applied for absolution from the instance in terms of Rule 39(6) of the Uniform Rules of this Court which was granted by the court *a quo* on 22 July 2024.

Findings of the court *a quo* in the absolution from the instance application

[7] The court *a quo* made the following findings:

(a) There is no evidence that the First Insured Vehicle collided with the Appellant's motor vehicle.

- (b) Even if such collision took place, there is just no evidence as to how the said collision occurred and Mr. Palm could not assist in this regard.
- (c) That Applicant's attempt to suggest that the collision occurred either at the centre of the road or close to the centre of the road is not supported by any evidence and therefore the decision of the Appellate Division in *Cantamesa v Reinforcing Steel Co. Limited*¹ is not applicable as there is no evidence that the First Insured Driver had seen the Appellant's motor vehicle approaching.
- (d) There is no evidence upon which a Court, applying its mind reasonably, could or might find for the Appellant.

Grounds of appeal

[8] The grounds of appeal advanced by the Appellant are as follows:

- (a) That the court *a quo* erred in the following respects:
- (i) By finding that there was no evidence of a collision between the Appellant's motor vehicle and the First Insured Vehicle despite the Respondent admitting such collision to have taken place in its First Plea and the undisputed *viva voce* evidence of Mr. Palm that the Appellant collided with the right side of the First Insured Vehicle and thereafter collided with the trailer causing the front wheel to come off and leave gouge marks on the road surface.
- (ii) In finding that the Appellant's contention that the collision occurred either at the centre of the road or close to the centre of the road is not supported

¹ *Cantamesa v Reinforcing Steel Co. Limited* 1940 AD 1

by any evidence even though Mr. Palm observed gouge marks, which amount to a corroboration of his observation, caused by the rim of the trailer some thirty-forty centimeters from the middle of the road indicating that the collision occurred more or less in the centre of the road.

(iii) In finding that it was necessary for Mr. Palm to have some level of expertise to assess the gouge marks on the road surface indicating the point of collision (Judgement para [12]). It is trite that the evidence of a lay witness is sufficient to substantiate the point of collision with reference to supporting facts. In this case, the uncontested supporting facts constitute the gouge marks near the centre of the road, which led directly to the trailer that was being towed by the vehicle driven by Mr. Jacobs, the driver of the First Insured Vehicle.

(iv) In failing to find that the evidence of Mr. Palm that the collision occurred either at the centre of the road or close to the centre of the road constitutes *prima facie* evidence of negligence on the part of the driver of the First Insured Vehicle, Mr. Jacobs.

(v) In failing to apply the principles enunciated in *Jadezweni v Santam Insurance Co. Limited & Another*² and *Cantamesa v Reinforcing Steel Co. Limited*³.

(vi) By failing to correctly apply the test in regard to a court granting absolution from the instance at the close of Plaintiff's case. In this regard there was *prima facie* evidence upon which a court applying its mind reasonably to such evidence could or might find for the Appellant.

Issues for determination

² *Jadezweni v Santam Insurance Co. Limited & Another* 1980 (4) SA 310 (CPD) at 312

³ *Ibid*

[9] From this Court's reading of both the Court *a quo*'s judgment and Notice of Appeal and having considered the arguments on appeal, it is apparent that this Court is enjoined to make a determination on the grounds of appeal, and this would entail a consideration of the court *a quo*'s findings on:

(a) Whether the court *a quo* was correct in finding that there is no evidence that the First Insured Vehicle collided with the Appellant's motor vehicle.

(b) Whether the court *a quo* was correct in finding that there is just no evidence as to how the said collision occurred and Mr. Palm could not assist in this regard.

(c) Whether the court *a quo* was correct in finding that the suggestion that the collision occurred either at the centre of the road or close to the centre of the road is not supported by any evidence.

(d) Whether the court *a quo* was correct in finding that the decision of the Appellate Division in *Cantamesa v Reinforcing Steel Co. Limited* is not applicable as there is no evidence that Mr. Jacobs had seen the Appellant's motor vehicle approaching.

(e) Whether the court *a quo* was correct in its finding that there is no evidence upon which a Court, applying its mind reasonably could or might find for the Appellant.

Applicable legal principles

[10] Absolution from the instance is governed by Rule 39(6) of the Uniform Rules of this Court which reads as follows:

“At the close of the case for the plaintiff, the defendant may apply for absolution from the instance, in which event the defendant or one advocate on his behalf may address the court and the plaintiff or one advocate on his behalf may reply. The defendant or his advocate may thereupon reply on any matter arising out of the address of the plaintiff or his advocate.”

[11] Miller AJA, as he then was, held as follows in *Claude Neon Lights (S.A.) Ltd v Daniel* regarding the test for absolution from the instance:

“When absolution from the instance is sought at the close of plaintiff’s case, the test to be applied is not whether the evidence led by the plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. (*Gascoyne v Paul and Hunter*, 1917 T.P.D. 170 at p. 173; *Ruto Flour Mills (Pty) Ltd v Adelson (2)*, 1958 (4) S.A. 307 (T))”⁴

[12] In making the distinction between “might” and “ought” Beadle C.J. said the following in *Supreme Service Station (1969) (Pty) Ltd v Fox and Goodridge (Pvt) Ltd*:

“The distinction here between “might” and “ought” in this context is an important one. It must be assumed that any judgement which court “ought” to give must be the correct judgement, as no court “ought” to give a judgement which is incorrect. Once it is accepted that a judgement which the court “might” give may differ from that which it “ought” to give, it is clear that the judgement which it “might” give and which differs from the judgement which it “ought” to give must be an incorrect judgment. As a matter of logic, therefore, in considering what a reasonable court “might” do, allowance must be made for it making a reasonable mistake and giving an incorrect judgement. It is pure casuistry to say that no

⁴ *Claude Neon Lights (S.A.) Ltd v Daniel* 1976 (4) SA 403 [A.D.] at 409 G-H

reasonable court would give an incorrect judgement, if this were so there would be no need for Courts of Appeal.”⁵

[13] The Learned Chief Justice went on to say the following with regards to the applicable test:

“The test, therefore, boils down to this: Is there sufficient evidence on which the court might make a reasonable mistake and give judgement for the Plaintiff? What is a reasonable mistake in any case must always be a question of fact and cannot be defined with any greater exactitude than by saying that it is the sort of mistake a reasonable court might make, a definition which helps not at all.”⁶

[14] Schreiner A.J. held as follows in *Coetzee v van Rensburg* with regards to the importance of track marks and similar substantially unchallengeable evidence:

“Bearing in mind how difficult it is for even honest witnesses to estimate speeds, distances and relative positions with reasonable accuracy, courts rightly attach great importance to track-marks and similar substantially unchallengeable evidence”⁷

[15] It is also stated in the Second Volume of the book titled Motor Law by W.E. Cooper that the point of collision (impact) may be inferred from debris and brake marks related to the accident.⁸

[16] In the case of *Jadezweni v Santam Insurance Co. Ltd and Another*⁹, two motor vehicles were involved in an accident: one had a driver and a passenger, and the other had only a driver. Unfortunately, all three of them died because of the accident, and there were no eyewitnesses to the accident. This resulted in the court having no choice but to draw inferences of

⁵ Supreme Service Station v Fox and Goodridge (Pvt) Ltd 1976 (4) SA 91 [R.A.D.] at para 92 H-93 A

⁶ Ibid at para 93 C

⁷ Coetzee v van Rensburg 1954 (4) S.A. 616 (A.D.) at p. 618

⁸ Motor Law by W.E. Cooper Volume Two at page 420

⁹ Jadezweni v Santam Insurance Co. Ltd and Another 1980 (4) SA 310 [CPD]

negligence from the undisputed facts before it after evidence was led. After been invited to find that the collision occurred more or less in the centre of the road and to infer from that that both drivers were at fault, Watermeyer J.P. held as follows:

“I am in agreement with his submission that if either of the vehicles was across the center line at the time of the collision the inference would be that the driver of that vehicle was negligent. I am also in agreement with his submission that, if one of the drivers was on his correct side and saw that the other was travelling on his incorrect side, or was about to cross over to his incorrect side, it would be negligence on his part if he failed to take all reasonable steps to avoid a collision. (*Cf Cantamesa v Reinforcing Steel Co Ltd 1940 AD 1; Van Staden v Avenant en ‘n Ander 1971 (2) SA 456 (NC).*)”¹⁰

[17] In *Cantamesa v Reinforcing Steel Co Ltd*, Centlivres J.A. cited Innes C.J. who held as follows in *Solomon and Another v Mussett & Bright* (1926, A.D. p. 443):

“So soon as it would be evident to a reasonable man that there is danger of an accident, arising from the inability, refusal, or neglect of the wrongdoer to give way, then the rightful user of the road is bound to take all reasonable steps to avoid an accident.”¹¹

[18] After analyzing the undisputed evidence before him, Watermeyer J.P. also held as follows:

“In my view the evidence is sufficient to satisfy me on a balance of probabilities that the area of impact was a strip some two to two and a half feet wide near the center of the road. The Volkswagen was probably over the center of the road by a foot or two and the Datsun, if not over the center, then only just on its correct side. From this it seems to me to follow that both drivers were negligent, the driver of the Volkswagen for going over the center line and the driver of the Datsun for not taking avoiding action by swerving to his left. He had adequate space to do so. His visibility from the point of impact was clear 200 yards ahead

¹⁰ Ibid at 313 H

¹¹ *Cantamesa v Reinforcing Steel Co. Ltd 1940 AD 1* at page 5

and he should have seen the driver of the Volkswagen had encroached, or was encroaching, on his half of the road. If he did not he was negligent in failing to keep a proper lookout.”¹²

Appellant’s principal submissions

[19] The crux of the submissions made by Mr. McClarty on behalf of the Appellant were as follows:

(a) That the court a quo’s finding that the Appellant’s attempt to suggest that the collision occurred either at the centre of the road or close to the centre was not supported by any evidence was incorrect.

(b) That the court’s finding that there was no evidence as to how the collision occurred is similarly incorrect. In this regard, Mr. Palm’s uncontested evidence is that from his observations at the collision scene, the Appellant’s vehicle and the vehicle driven by Mr. Jacobs were travelling in opposite directions on a wide, open road and collided at or near the centre of the road.

(c) That the court’s suggestion that Mr. Palm’s lack of expertise in assessing road marks or points of impact or collisions was somehow of relevance is incorrect. It is trite that the evidence of lay witnesses is sufficient to substantiate the point of collision with reference to supporting objective facts. In addition to this, opinion evidence is admissible if it is relevant, in this regard, the opinion evidence of a lay person is received when it is relevant, in the sense of it being able to materially assist the court.

(d) That the court should have applied the principles enunciated in the *Jadezweni* and *Cantamesa* cases already cited in this judgement which would have resulted in it finding that there was *prima facie* evidence that the driver of the insured vehicle was negligent.

¹² Ibid at 312 C-E

(e) That the courts have frequently emphasized that absolution should not be granted at the end of the Plaintiff's evidence except in very clear cases. It is only if there is no *prima facie* case against the Defendant that absolution should be granted after the Plaintiff has closed its case. He submitted that a *prima facie* case was made out that the insured driver of the Hyundai truck was causally negligent by failing to take steps to avoid the collision with the Appellant's motor vehicle when he could and should have done so.

Respondent's principal submissions

[20] Ms. Davis made the following submissions on behalf of the Respondent:

(a) That the Appellant cannot recall the collision and can therefore not give any evidence regarding how the collision occurred. Mr. Palm arrived at the accident scene after the incident had already taken place and can therefore similarly not give evidence on how the collision occurred.

(b) That the court should reject Mr. Palm's evidence as he has no expertise to give opinion evidence on the likely point of impact based on his observations on the markings on the road surface.

(c) That the Appellant did not tender any evidence to prove the material facts of her claim necessary for a court to attribute negligence to the truck driver, the driver of the Ford bakkie or the driver of the unknown motor vehicle.

(d) That the Respondent cannot be held liable in circumstances where the Appellant cannot prove that the conduct of the Insured Driver(s) / the Respondent caused the damage that the Appellant suffered. For delictual liability to arise there must be a causal nexus between the Respondent's negligent conduct and the Appellant's damages, therefore the Appellant must establish both factual and legal causation.

(e) That no evidence was placed before court to show that the Respondent's negligent act or omission was the cause of the harm giving rise to the Appellant's claim.

(f) That in a nutshell, the Appellant failed to discharge the onus placed on her.

Discussion and findings

[21] It is clear from Ms. Davis' written and oral submissions that the main reason why she seeks the dismissal of the appeal is that the Appellant had failed to prove that the accident in question was as a result of the negligent driving of the insured driver(s) but she does not dispute the occurrence of the collision between a motor vehicle driven by the Appellant and any of the insured motor vehicles mentioned in the second set of the Particulars of Claim of the Appellant which include the First Insured Vehicle. Anyway, she could not dispute the collision between the Appellant's motor vehicle and the First Insured Vehicle because the Respondent had admitted in its Plea that there was indeed a collision between these vehicles and such admission was never withdrawn. It was therefore incorrect for the court *a quo* to come to a finding that there was no evidence to support the allegation that a collision occurred between Appellant's motor vehicle and First Insured Vehicle.

[22] Having made the aforementioned erroneous finding, then the court *a quo* proceeded to find that there is no evidence at its disposal talking to the mechanics of the accident in question. This finding was made despite the court *a quo* having been presented with the undisputed evidence of Mr. Palm

which was corroborated by the objective evidence of the accident scene immediately after the accident, i.e. gouge marks created by the rim of the trailer towed by the First Insured Vehicle, the resting place of the First Insured Vehicle, photographs depicting the width of the road and that the accident took place on a fairly straight road which would have resulted in the driver of the First Insured Vehicle having an unimpeded view of the road. The upshoot of the last piece of evidence is that the First Insured Driver should have seen the Appellant's motor vehicle approaching before the occurrence of the collision, the *Contamesa* case therefore finds application in the matter at hand. The evidence relating to the gouge marks which were identified as having been near the centre line of the road surface is enough to enable one to draw in inference on the exact point of impact as this piece of evidence was not second guessed.

[23] In addition to the above objective evidence, the court *a quo* was also referred to the case of *Jadezweni*. As previously stated in this judgement, in the *Jadezweni* case, there was no direct evidence from any witness stating how the accident occurred, the only undisputed evidence presented to court therein was the evidence of a traffic officer (who was not an expert witness) who also arrived at the accident scene after the occurrence of the accident as in the matter at hand. Having been presented with the undisputed evidence of the traffic officer, then the court in *Jadezweni* proceeded to draw inferences therefrom to reach a decision on the issue of negligence. As in this matter, the court in *Jadezweni* was presented with undisputed evidence that the point of impact was more or less in the centre of the road and having accepted this evidence, it then went on to infer that both drivers were negligent. The court *a quo*, therefore, erred in finding that it was not

presented with evidence portraying how the accident in the matter at hand occurred and could therefore not make a finding on the issues of causation and negligence.

[24] It seems to this Court that the problems of the court *a quo* originate from its failure to deal with the evidence of Mr. Palm, the court *a quo* neither accepted nor rejected same, it just decided to treat same as something that does not exist without making a finding in respect thereof. It committed a fundamental error in this respect, should it have sought to make a finding in respect thereof, it would have established that evidence relating to observations of scratch and/or brake marks on the road surface need not be given by experts to have evidentiary value in court as they, *per se*, constitute real evidence if uncontroverted. This was clearly stated in the case of *Coetzee v van Rensburg* which has already been cited in this judgement.

[25] In the *Cantamesa* case as well, the court relied heavily on evidence of tyre marks left by the cars involved in the accident to establish a point of impact and proceeded thereafter to draw inferences therefrom in order to arrive at a determination of negligence. The court *a quo* therefore, in the main, erred in ignoring the evidence of Mr. Palm in its entirety as this resulted in it misdirecting itself.

[26] Having made the findings above, this Court finds that there was abundance of evidence on which a Court, applying its mind reasonably could find for the Appellant. As a result, the appeal succeeds and the order of the Court *a quo* will accordingly be substituted as set out below.

Order

[27] In the result, I would propose the granting of the following order:

[27.1] The appeal is upheld with costs inclusive of Counsel's costs at Scale C.

[27.2] The order of the court *a quo* is set aside and substituted with the following order:

[27.2.1] The application for absolution from the instance is refused.

[27.2.2] The matter is remitted to the court *a quo* for further evidence.

T.J. MGENGWANA
Acting Judge of the High Court

I agree, and it is so ordered.

T. NDITA
Judge of the High Court

E.D. WILLE
Judge of the High Court

APPEARANCES:

For the Appellant:	Mr. R McClarty SC
Instructed by:	Heyns & Partners Inc.
	Ms. C S Van Heerden
For the Respondent:	Ms. M L Davis
Instructed by:	The State Attorney
	Mr. F Goosen