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

CASE NO: 10057/2022

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

(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO

(3) REVISED

DATE: 23/04/2026

SIGNATURE

In the matter between:

MALULEKE LYDIA XITSUNDZUXO

PLAINTIFF

ID NUMBER: 9[...]

and

ROAD ACCIDENT FUND

DEFENDANT

LINK NUMBER: 5209954

JUDGMENT

CORAM: ZITHA, AJ
Heard on: 23rd January 2026
Delivered: 23st April 2026

INTRODUCTION

[1] This is a delictual claim for damages as a result of a motor vehicle collision which occurred on the 31st December 2021. The matter appeared before Court by a way of Default Judgment application on the 23rd January 2026. The Plaintiff was a pedestrian at the time of the collision.

PARTIES

[2]. The plaintiff is **MALULEKE XITSUNDZUXO LYDIA** an unemployed adult female, born on the 07th July 1996 and who is currently 29 (twenty-nine years of age. At the time of the collision, the plaintiff was twenty-five (25) years old.

[3]. The defendant is the **ROAD ACCIDENT FUND**, a juristic person established in terms of section 2(1) of the Road Accident Fund Act 56 of 1996 ("*the Act*") with full legal personality and of address 3[...] I[...] Street, Menlo Park, Pretoria, Gauteng.

COMMON CAUSE

- [4]. It is common cause that the Plaintiff was a pedestrian when he was hit by a motor vehicle. The vehicle that collided with the Plaintiff was driven by the insured driver. The date, place and time of the collision is not in dispute.

ISSUES IN DISPUTE

- [5]. The only aspect in dispute is the negligence on the part of the insured driver.

EVIDENCE BEFORE COURT

- [6]. The Plaintiff (Ms Maluleke Lydia Xitsundzuxo) testified that:

- 6.1. On the day in question of the 31st December 2021 at about 12H50 midday, She was walking on the side of the road.
- 6.2. She never saw the motor vehicle before the collision. She could not give a clear description of the colour of the motor vehicle that collided with her.
- 6.3. She was told that she hit by a car, by an unknown boy that never came and testified before Court.
- 6.4. She does not remember where the car hit her on her body.
- 6.5. She did not see the vehicle that collided with her before and after the collision.
- 6.6. She does not remember whether the accident occurred inside or outside the road.
- 6.7. She does not remember if there were any steps the insured would have taken in order to avoid the collision.

- 6.8. She remembers the police coming back to the scene with the insured driver. The police asked her questions and they recorded everything.
- 6.9. Following the accident, she was evacuated to Malamulele Hospital by an ambulance
- 6.10. She was referred to the accident report by her counsel. The accident report tells a very different story. According to the accident report, the point of impact was in the middle of the road. The policemen that compiled the sketch plan was not called.
- 6.11. At the end of the plaintiff's evidence in chief, I asked her questions in order to elucidate certain aspects of her evidence. Those related to point of impact on the road, her path on the road and the path of the vehicles as per the accident report. Below I set out what emerged from the plaintiff's evidence during my questioning.
- 6.12. She did not see the vehicle, or heard the hooter before the collision. She surmised that she was knocked down by a motor vehicle. The vehicle that knocked her down came from behind. The point of impact as depicted on the sketch plan is indeed on the path of vehicles that were approaching from behind.
- 6.13. The plaintiff further testified that it was from an unknown boy that she heard that she was knocked down by a motor vehicle as a matter of fact.
- 6.14. The police officer who drew the accident report on his visitation of the alleged accident scene; and the alleged boy (eyewitness) were not called to testify.
- [7]. The plaintiff thereafter closed it's case.
- [8]. Defendant did not call any witnesses to testify.

SUBMISSIONS ON BEHALF OF THE PLAINTIFF

[9]. Mr Chauke submitted that the plaintiff succeeded in establishing, on balance of probabilities, that a motor vehicle occurred outside of the road and the insured driver was the sole cause of the accident.

Mr Chauke further submitted that the contradiction in the accident report was not material as to result in the rejection of the plaintiff's version.

It was further submitted on behalf of the plaintiff, as an alternative argument, that in the event that the court finds that the accident was not due to the sole negligence of the unknown driver, but that the plaintiff contributed to its occurrence by her negligence, the appropriate degree of apportionment of liability may accordingly be applied. Two proposals were made in that regard. The first proposal was that the defendant should be held liable ninety percent (90%) in favour of the plaintiff's agreed and/ or proven damages. The second proposal was that the defendant should be held liable eighty percent (80%) in favour of the plaintiff's agreed and/ or proven damages. I hold a different view which I will elaborate later on.

THE LAW

[10]. In order to succeed in her claim, the plaintiff had to establish on a balance of probabilities that her injury arose out of the negligent driving of a motor vehicle and that there is some connection between the driving and her injury.¹ In the present case, the plaintiff will only succeed if she satisfies the Court on a preponderance of probabilities that her version is true and accurate and therefore acceptable. It is trite that the estimate of the credibility of a witness will be inextricably bound up

¹ *Kemp v Santam Insurance Co Ltd* 1975(2) SA 329 (C) at 330F; *Van Wyk v Lewis* 1924 AD 438 at 444.

with a consideration of the probabilities of the case.²

Explaining what the standard of proof on a balance of probabilities entails, learned author Schwikkard states as follows:³

‘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.’

[11]. And, in *Stacey v Kent*,⁴ Kroon J wrote:

‘The inquiry after the case remains whether the plaintiff has, on a balance of probabilities, discharged the onus of establishing that the collision was caused by negligence attributable to the defendant.’

In the discussion that follows I apply these principles of the law to the facts of the plaintiff’s application for default judgment.

[12]. In *Ntsala and Others v Mutual and Federal Insurance Co Ltd* 1996(2) SA 184(T) the honourable Judge Els. Stated the following “The onus rests on the plaintiff to prove negligence on the part of the defendant’s driver”.

[13]. In *Davies v Grossling* 1935 WLD 107 in this case, although the driver hooted to the

² *National Employers’ General Insurance Co Ltd v Jagers* [1984] 4 All SA 622 (E), at 624-5.

³ Schwikkard PJ (*et al*), *Principles of Evidence*, 4th Ed, 2016, page 627, at 32.7.

⁴ 1995 (3) SA 344 (ECD) at 352I-J.

pedestrian he was found to be negligent since he did not take extra caution.

- [14]. In *Manual v SA Eagle Insurance Co Ltd* 1982(4) SA 352(c) at page 357 paragraph A the court said *"The principles to be extracted from these cases are as follows.*

"A motorist who sees a pedestrian on the roadway or about to venture thereon should regulate his driving so as to avoid an accident. The pedestrian may by his conduct convey to the motorist the impression that he recognises, and intends to respect, the motorist's right of way. When such an impression is conveyed by the pedestrian, the motorist may proceed on his way accordingly. Whether the motorist is reasonably entitled to assume or infer, from the conduct of the pedestrian, that his right of way is being recognised and respected, is a question of fact to be decided in each case. Some examples are to be found in the decisions cited above. When the assumption is not justified, the motorist must regulate his driving to allow for the possibility or probability that his vehicle may not enjoy an unobstructed passage. Where a pedestrian reacts appropriately to the presence of an approaching vehicle, the critical enquiry is whether a reasonable motorist would foresee the reasonable possibility that the pedestrian might nonetheless act irrationally by moving, perhaps suddenly, into the vehicle or its path. That possibility exists for young children, for adults who are plainly drunk, and may arise in other cases."

- [15]. In my view this decision sets out succinctly the duties of a motorist when a pedestrian is crossing the road as well as the duties of a pedestrian when crossing the road.

- [16]. The author W.E. Cooper in *Delictual Liability in Motor Law* 1996 edition at pages

193-194 writes as follows about a pedestrian's duty when crossing the road a road: "A pedestrian who intends crossing a road should do so at an opportune moment and he must exercise reasonable care. He must use his senses to ascertain whether any motor vehicles are approaching. He should keep a proper look-out; he should acquaint himself with the vicinity and scan the road so as to ascertain whether any motor vehicle on the road may be an actual or potential risk to his safety. Usually, a pedestrian will look to the left and to the right before entering the road. Once he reaches the centre of the road, he should devote his attention to motor vehicles approaching from his left". See also *Beech and Another v Setzkorn and Another* 1928 CPD 500 at 504; *Singh v New India Assurance Co Ltd* 1966(4) SA 154(D); *Mazibuko v Santam Insurance Co Ltd and Another* 1982(3) SA 125 (A).

- [17]. The same author, *supra*, on page 195 comments as follows about the duties of a driver: "A driver is required to exercise reasonable care and vigilance not only towards a pedestrian he sees, or ought reasonable to see, on or near the road; he is obliged to exercise the same reasonable care and vigilance towards an unseen pedestrian whose presence he should reasonably foresee or anticipate because, for example, of the proximity of a school or of a passenger bus."
- [18]. In *Dlangamandla v Road Accident Fund* 2011(5) SA 565(FB) on paragraph 27 the court said "it has been held that a reasonable, prudent pedestrian should not cross the road when doing so exposes himself to the reasonable risk of collision with passing vehicles". In *Dlangamandla v Road Accident Fund* *supra* in this case a collision took place between a pedestrian and a vehicle at about 19H10. The Plaintiff in that case was wearing dark clothes and the driver of the vehicle had seen the Plaintiff from a distance. The court held that under those prevailing circumstances the driver should have adjusted his speed long before reaching the pedestrian.

In the discussion that follows I apply these principles of the law to the facts of the plaintiff's application for default judgment.

EVALUATION /APPLICATION OF THE FACTS TO THE LAW

- [19]. Despite the fact that RAF's defence was struck out, this Court must be satisfied, on the facts presented by the plaintiff through her evidence that on a preponderance of probabilities, (a) she suffered bodily injury; (b) arising out of the negligent driving of a motor vehicle, (c) the probable point of impact in the road.
- [20]. That the plaintiff sustained an ankle injury (left lateral malleolus ankle fracture) on 31st December 2021 is common cause. What must be determined is whether her injury was caused by the negligent driving of a motor vehicle, whether, the plaintiff contributed to the accident in question and whether the point of impact was outside of the road or inside the road.
- [21]. The starting point is that the plaintiff was a single witness. Section 16 of the Civil Proceedings Evidence Act 25 of 1965 provides that judgment may be given in any civil proceedings on the evidence of any single competent and credible witness. In other words, only credible evidence shall be sufficient to enable a Court to give a default judgment.
- [22]. There is of course no rule of thumb or formula to apply in determining the credibility of a single witness. The trial court will weigh the evidence of the single witness and consider its merits and demerits, and having done so, decide whether it is trustworthy and whether it is satisfied that the truth has been told despite the

shortcomings or defects or contradictions in the witness's evidence.⁵

[23]. The essence of the plaintiff's testimony is that she did not see what happened at the crucial moment regarding her claim – i.e., how the accident took place. She could only estimate that the bang she heard nothing, her falling down, and the injury she sustained were as a result of the unknown vehicle colliding with her.

[24]. It bears emphasizing that the plaintiff's evidence must be based on facts and nothing else, and certainly not conjecture. There is no direct evidence of the accident and how the alleged accident happened. The picture portrayed by the plaintiff is that the driver of the vehicle that knocked her down did not stop after the alleged accident. At best for her, her version that she was knocked down by a car is derived from what she heard from an unknown boy. She would have conveyed this, in turn, to those attending to her at public Hospital.

[25]. I am asked to make a finding, from the foregoing evidence, that the accident took place; and to draw an inference of negligence on the part of the unknown driver, or to make such findings of contributory negligence as may appropriately be made against the plaintiff.

[26]. As is trite, there must be positive proven facts from which such inferences can be made. If there are none, the method of inference fails and what is left is mere speculation or conjecture.⁶

[27]. On the plaintiff's version, it follows that the unknown boy is the one who must be

⁵ *S v Sauls* [1981 \(3\) SA 172](#) (A) at 180E–G.

⁶ *S v Essack & another* 1974 (1) SA 1 (A) at 16C–E, quoting with approval *Caswell v Powell Duffryn Associates Collieries Ltd* [1939] 3 All ER 722 at 733.

taken as having possessed knowledge of facts regarding how the accident happened. His evidence was, therefore, crucial. However, no basis was laid for the unavailability of the evidence of this unknown boy. There was no affidavit deposed to by the unknown boy that formed part of the police docket. Such evidence remains inadmissible hearsay. What therefore remains is circumstantial evidence from which it must be inferred that the plaintiff's injury arose from the alleged driving of the motor vehicle; and if so, whether the unknown driver was solely negligent.

[28]. The cardinal rule of inferential reasoning is that the inference that is sought to be drawn must be consistent with all the proved facts; if it is not, then the inference cannot be drawn.⁷ The inference sought to be drawn must, furthermore, be the 'more natural, or plausible, conclusion from amongst several conceivable ones' when measured against the probabilities.⁸ As held in *Ocean Accident and Guarantee Corporation Ltd v Koch* 'plausible' in this context means 'acceptable, credible, suitable'.⁹

[29]. In order for this Court to infer that a motor vehicle accident occurred out of which the injury of the plaintiff arose, and that the accident was caused by the sole negligence of the driver, it must be satisfied that the facts that have been set forth by the plaintiff reflect the probability of what took place on 31st December 2021 at the time and place that she alleges she was knocked down by a vehicle. Put differently, an inference of the actual occurrence of the accident and the negligence of the unknown driver would presuppose that this Court believes the plaintiff's evidence, or that there are facts which this Court finds to be proven which support the inferences to be drawn.

⁷ *R v Blom* 1939 AD 188 at 202-203.

⁸ *SA Post Office v Delacy and Another* 2009 (5) SA 255 (SCA) at para 35; *Cooper and Another v Merchant Trade Finance Ltd* (474/97) [1999] ZASCA 97 (1 December 1999) para 7; *Govan v Skidmore* 1952 (1) SA 732 (N) at 734C-E.

⁹ 1963 (4) SA 147 (A) at 159B-D.

[30]. The Plaintiff in this case when she gave her testimony it was clear to me that she was not proficient in the English language and he struggled to express herself properly. She failed to remember vital and key facts of the accident. Besides the shortcomings in expressing himself she managed to give evidence up until the end of his testimony. The Plaintiff's testimony is riddled with inconsistencies and improbabilities. In addition, she contradicted himself in material respects. I will mention just a few of these inconsistencies below:

- a). In her evidence in chief, when she was questioned by the court, she testified that the she does not remember where insured vehicle collided with her on the road. She could not remember whether the collision occurred inside or outside the road. Several questions had to be put to her. She was not an impressive and a reliable witness.
- b). She never saw the vehicle before the collision. She only saw the motor vehicle after the collision. She is not sure whether the car was red or maroon. The plaintiff was unable to explain why she was not able to see the motor vehicle before the collision.
- c). She testified that she does not know or remember how the accident occurred. She testified that she was told by an unknown boy about how the accident occurred. The name of the unknown boy (an eye witness) was not furnished and he never testified.
- d). According to section 19(f)affidavit, it is not confirmed that she was walking outside the road, whilst walking there an unkown motor vehicle came and collided with her.
- e). The plaintiff failed to give her evidence in a clear and direct manner. The plaintiff failed to explain why she was not able to see the motor vehicle before the collision.

CONCLUSION

[31]. From plaintiff's own testimony the court is satisfied that on a balance of probabilities she has discharged the onus placed on her in that:

- i) When walking next to the road she never saw the motor vehicle that collided with her;
- ii) She does not remember where the motor vehicle collided with her.
- iii) She conceded that the point of impact was not outside the road, but it was inside the road. That is on the correct lane of travel of the insured driver.
- iv) The accident report was introduced by the plaintiff in these proceedings, and it confirms a point of impact, which is not disputed by the plaintiff.

Taking all these factors into account, the court is satisfied that, on a balance of probabilities the Plaintiff has discharged the onus of showing that the insured driver was negligent.

[32]. However the Plaintiff is not without blame.

The court finds that the Plaintiff was also negligent as well in the following manner:

1. In her testimony she testified that she never saw the vehicle approaching at a high speed.
2. Whilst on the side of the road she did not exercise reasonable care by checking or looking how far the speeding vehicle was which she saw approaching earlier on.
3. As a pedestrian she had a duty to exercise reasonable care. See *Manuel v Eagle Insurance Co Ltd Supra*.

[33]. The court finds that Plaintiff has negligently contributed to the collision.

[34]. In the matter of A.A Mutual Insurance Association Ltd v Nomeka 1976(3) SA 45(A) the court held that “.... provided the Plaintiff’s fault is put in issue an apportionment of damages need not be specifically pleaded or claimed.”

[35]. The granting of a default judgment involves an exercise of the discretion by the court upon consideration of the evidence adduced in support of thereof. The vague manner in which the plaintiff described the incident and the inconsistencies between her description of the accident and what is contained in the accident report; coupled to her failure to call the person who must be assumed to have had knowledge of the accident, left this Court in the dark regarding how she sustained her injury.

[36]. On the evidence before me, I am able to find that the plaintiff’s injury arose from the driving of a motor vehicle that occurred in the middle of the road, on the correct path of the insured driver.

[37]. Taking all the evidence into consideration as well as case law referred to above the court is satisfied that both the Plaintiff and the insured driver were at fault.

ORDER

[38]. Accordingly, I make the following order:

- a) The defendant is held liable sixty percent (60%) of the plaintiff’s proven and/or agreed damages.

b) The Defendant is directed to pay the costs of the trial.

c) Separation in terms of Rule 33(4) is granted.

d) The application to set aside the Notice of intention to defend and Plea as an abuse of Court process is granted.

ZITHA. AJ

Acting Judge of the High Court

Gauteng Division

Pretoria

Appearances:

On behalf of the plaintiff: Adv. T. Chauke

Instructed by: Mashamba Inc.

On behalf of the defendant: No appearance