IN THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION, MIDDELBURG (LOCAL SEAT)

CASE NO. 1359/2023

(1) REPORTABLE: NO/YES

(2) OF INTEREST TO OTHER JUDGES: NO/YES

(3) REVISED

DATE 06/07/2026

SIGNATURE.

In the matter between:

LEBOGANG JASTICE KEKANA **PLAINTIFF**

And

ROAD ACCIDENT FUND **DEFENDANT**

This judgment is made by the Judge whose name is reflected herein and submitted electronically to the parties and/or their legal representatives by e-mail.

This judgment is further uploaded to the electronic file of this matter on Caselines by the Judge and/or his/her secretary. The date of this judgment is deemed to be the 6th day of July 2026

JUDGMENT

BAM, AJ

[1] The plaintiff has instituted a damages claim against the defendant ("the RAF") arising from injuries he sustained in a motor vehicle accident on 4 September 2022. The claim is in terms of section 17(1) of the Road Accident Fund Act No. 56 of 1996 ("the Act")

[2] On the date of trial, the plaintiff's counsel, Mr M. Mhlanga, raised an objection to the presence of the legal representative for the RAF on the basis that the matter is supposed to be heard on an unopposed basis. This is because the defendant filed a notice of intention to defend only and had not filed a Plea to date.

[3] Upon enquiry by the court as to whether the plaintiff had served a notice of bar, Mr Mhlanga responded that it was not served but the Plea should have been filed anyway in accordance with the requirements of the rules. He said that failure to file same entitles the plaintiff to proceed on a default basis.

[4] Attorney for the defendant, Mr. N. Mhlanga counteracted the submission by indicating that the plaintiff's attorneys have been engaging with the defendant despite the latter not having filed a Plea. This therefore in the absence of a notice of bar entitles the defendant to be present in court and to defend the matter. Counsel for the plaintiff admitted to several engagements with the defendant for purposes of securing an offer.

[5] I decided to have the matter proceed since the defendant had not been barred from pleading as is prescribed in the rules. I relied on the case of *Magdalena v Road Accident Fund [2024] ZAGPPHC 398* wherein Kubushi J referring to Erasmus: Superior Court Practice, described the effect of Rule 26 as follows:

> "Failure to deliver a declaration or plea within the time stated <u>does not</u> entail an automatic bar; a notice of bar must be given."

[6] Failure to deliver a replication or subsequent pleading within the time stated entails an automatic bar and no notice of bar is necessary in this regard. Erasmus

referred to the case of *Landmark Mthatha (Pty) Ltd v King Sabata Daliyendyebo Municipality*[1] in which the court stated the following regarding Rule 26:

> "According to Rule 26 a failure to deliver a replication or subsequent pleading will result in an automatic barring. Such automatic barring, whilst it may result in some form of prejudice in that the party concerned may be prevented from pleading its case fully and properly, will result in the shutting of the doors of the court to such litigant by way of default judgement. The only pleadings, which according to the rule, require a notice of bar to be served as a precursor to the barring of such litigant from pleading further are, in effect, a declaration and a plea (and an exception to particulars of claim or a declaration as a precursor to pleading thereto). It follows logically that the framers of the rules must have had in mind that an automatic barring of a declaration or a plea, would be too drastic a measure. Hence the requirement that the defaulting party ought to be placed under bar by way of notice to file the relevant pleading within the five-day period before such party is regarded as being in default of filing the pleading concerned and *ipso facto* barred."

[7] Rule 26 thus isolates a replication or subsequent pleadings thereto from the other pleadings for purposes of barring. It is noted that the second sentence of the rule says:

"If any party fails to deliver any other pleading, within the time laid down in these rules, or within any extended time allowed in terms thereof, any other party may by notice served upon him require him to deliver the pleading referred to in the notice within 5 days after the day upon which the notice is delivered. Any party failing to deliver the notice shall be in default of filing such pleading and ipso facto barred."

[8] Since the plaintiff was already present in court to testify on the merits of the case, it was agreed that it would be in the interest of the proper administration of justice to proceed to hear his testimony while postponing the quantum portion of the case *sine die*. I accordingly made an order of separation of issues in terms of Rule 33(4) of the Uniform Rules of Court

[1] Landmark Mthatha (Pty) Ltd v King Sabata Daliyendyebo Municipality: In re African Bulk Earthworks (Pty) Ltd v Landmark Mthatha (Pty) Ltd 2010 (3) SA 81 (ECM) at 86B-C

[9] The plaintiff testified that on 4 September 2022 he and a friend travelled to Siyanqoba Township to drop off 2 ladies who were returning home from attending a funeral. He was driving his blue VW Golf with registration numbers J[...]. On their way back, after passing the taxi rank along the Verena Road, a vehicle emerged in front of him on his lane and collided head-on with his vehicle. He became aware of this vehicle when it was too close for him to take any evasive action. The time was about 02h00 in the early hours of the morning.

[10] The plaintiff testified further that people rushed to the scene to assist and pulled him out through the back seat because his door would not open. He lost consciousness thereafter and woke up when he was taken out of the ambulance at Witbank Hospital.

[11] He said he sustained injuries and underwent surgery at Witbank Hospital to repair a fracture on his right thigh on 12 September 2022. He was treated with injections and medication and stayed at home for two months before going back to work.

[12] In response to questions posed by his counsel, he said the road was straight and did not have any streetlights. He told the court that the errant vehicle drove off after the accident. He repeated that the vehicle was too close when he noticed it, adding that he was not sure if it had its lights on. He confirmed the details appearing on the accident report as his and those of his vehicle.

[13] Upon cross examination by Mr. N Mhlanga for the RAF, he gave the following responses:

13.1 When he saw the insured vehicle, it was about 6 to 7 metres away, demonstrating by the distance between the witness box and one of the walls of the courtroom.

13.2 His own vehicle's lights were switched on.

13.3 The police were called by people who were on the scene after he had already been taken to hospital, he could not tell what happened immediately after the accident.

13.5 He learned about the particulars of the insured vehicle from the same people because they took pictures at the accident scene and gave them to his brother, who had arrived later.

13.6 When he went to open a case at the police station, he used the details given to him by his brother. He no longer has the pictures because he is now using a different phone.

13.7 The road has a dual carriageway, and the collision happened on his lane of travel.

13.8 He did not attempt to swerve because there were trees on the side he would have swerved to. He had applied his brakes, but it was too late to avoid the collision.

13.9 He possesses a valid driver's license which he obtained in 2015.

13.10 His passenger also got injured while he himself lost consciousness.

13.11 He did not give the pictures to his attorneys because he no longer has the phone they were stored on.

[14] Upon re-examination by his counsel, he confirmed that after the impact he did not see the people who came to help him; he just heard voices.

[15] Plaintiff had no further witnesses and closed his case. The defendant had no witnesses to call and closed its case. The parties agreed to submit heads of argument.

[16] In his heads of argument, counsel for the plaintiff submited that the plaintiff has discharged the onus to establish negligence on the part of the insured driver on a balance of probabilities. He further averred that even though the accident report contains only the version of the plaintiff, it remains relevant as a contemporaneous record in support of the plaintiff's attempts to report the collision. He asked the court to take into consideration that the defendant did not file a plea, nor provide any eyewitness account of the collision.

[17] Counsel referred to authorities to reiterate the trite principle that a claimant needs only prove 1% negligence on the part of the insured driver for liability to attach to the RAF in terms of section 17(1) of the Act. The fact that the collision happened

on the plaintiff's lane of travel constitutes *prima facie* evidence of negligence on the part of the insured driver as per the maxim *res ipsa loquitur*. All that is left for the court in the absence of contravening evidence is to evaluate the plaintiff's credibility and reliability, that is, whether his version is the most probable explanation of how the accident occurred. Counsel submitted that the plaintiff's version, taken in its totality, bears the hallmarks of reliability. There is a similar thread across all the documents in which the way the accident occurred is described which also ties up with his *viva voce* evidence. As a result, the plaintiff is entitled to judgment in his favour on the merits and the defendant ought to be held liable for his proven or agreed damages.

[18] Mr. N Mhlanga on the other hand started his argument by stating that the onus rests on the plaintiff to prove that his injuries were caused by the negligent driving of the insured driver. He referred to the conduct of the plaintiff shortly before the collision - that he did not hit his emergency brakes and did not even attempt to swerve. He also failed to call his passenger to corroborate his version or even produce photographs of the scene considering that the police report is incomplete as the author did not visit the scene.

[19] Mr. Mhlanga referred to case law in support of his contention that the plaintiff could have attempted one or two evasive steps and rejected the application of the *res ipsa loquitur* in favour of the plaintiff under circumstances where the best available evidence was not presented before court. The plaintiff, it was argued, had instead chosen to rely on hearsay evidence from people who attended the scene. Due to the failure to produce all the available evidence, the plaintiff cannot be allowed to benefit from inferential reasoning.

[20] Regarding the accident itself, Mr N Mhlanga says there is a probability that there was no second vehicle involved, the plaintiff could have lost control of his vehicle, or collided with a tree, or was driving at an excessive speed. He recommended that the court applies apportionment of 50% in favour of the defendant.

The Law

[21] The plaintiff's submissions are premised on the fact that there is no controverting evidence to his version as well as on the principle of *res ipsa loquitur*.

[22] It is trite that even in the absence of evidence by a defendant, a plaintiff still bears the onus to proof that his damages were occasioned by the negligent conduct of the defendant. In the case of *Kruger v Road Accident Fund [2024] ZAFSHC 110,* Opperman J made the following statement regarding the *diligens paterfamilias* test referred to in Kruger v Coetzee[2]:

> "[14] In the light of recent authorities, JR Midgley and JC van der Walt in Lawsa[3] have made the following observation: '*When assessing negligence, the focus appears to have shifted from the foreseeability and preventability formulation of the test to the actual standard: conduct associated with a reasonable person. The Kruger v Coetzee test, or any modification thereof, has been relegated to a formula or guide that does not require strict adherence. It is merely a method for determining the reasonable person standard, which is why courts are free to assume foreseeability and focus on whether the defendant took the appropriate steps that were expected of him or her.'*"

[23] In the case of *Kruger v Coetzee* supra, the court provided guidance on how to approach the issue of apportionment of liability. In paragraph 23, it held that:

> "Section 1 of the Apportionment of Damages Act 34 of 1956 gives a discretion to the trial court to reduce a plaintiff's claim for damages suffered on a just and equitable basis and to apportion the degree of liability. Where apportionment is to be determined, the court is obliged to consider the evidence as a whole in its assessment of the degrees of negligence of the parties. Writers have opined that apportionment of liability should only generally be considered where it can be proven that the plaintiff was in a position to avoid the collision. In this instance in order to prove contributory negligence, it is necessary to show that there was a causal connection between the collision and the conduct of the plaintiff, this being a deviation from the standard of a *diligens paterfamilias.*"

[2] 1966 (2) SA 827 (A)
[3] LAWSA 3rd Ed. At 284 para.55

[24] In the case of *Nichol v Road Accident Fund [2025] ZAGPJHC 113*, the court held, regarding a pedestrian accident, that:

> "Even accepting that the accident would not have occurred had the plaintiff not been on the side of the road, through application of the *sine qua non* ("but for") test, this does not in itself attribute liability to the plaintiff. The plaintiff's conduct should not only have factually caused, or materially have contributed to the accident occurring, but also have been sufficiently proximately connected to it, to meet the causal element of the definition of Section 1 of the Apportionment Act (read with section 17 of the RAF Act.)"

[25] In his section 19 (f) affidavit, the plaintiff says he was driving a dark blue Golf with registration numbers J[...] which collided with a white Corolla bearing registration numbers W[...]. He alleges that the collision was due to the sole and exclusive negligence of the driver of the insured vehicle. He added that he sustained injuries for which he was hospitalised and treated at Witbank Hospital.

[26] The accident report does not have a sketch of the accident as the compiler did not visit the scene. The description of the accident is taken from the interview with the plaintiff and corroborates what is stated in paragraphs 6 and 7 of the Particulars of Claim. What is significant for purposes of this trial is that the report contains the details of the insured driver and of the vehicle he was driving. He could have been called to testify in support of the alleged contributory negligence.

[27] It is correct that the insured driver, according to the testimony before court, was *prima facie* negligent by driving on the incorrect lane in the face of oncoming traffic. A *diligens paterfamilias* would have foreseen that his conduct may cause injury to the plaintiff or any other road user using the left lane. However, the principle of *res ipsa loquitur*, the crux of which is circumstantial inference, does not mean that the conduct of the plaintiff should not be scrutinised. Where the defendant raises contributory negligence, there must be evidence to establish negligence on the part of the plaintiff on a balance of probabilities.

[28] In his own words, Mr Kekana testified that his vehicle collided with a white Corolla at 02h00 and there was nothing he could have done to avoid the collision because by the time he noticed the insured vehicle, it was about 6 to 7 metres away. He said he was not sure if the headlights of the insured vehicle were switched on,

but those of his own vehicle were on. When his counsel asked if he could have done anything to prevent the collision, he said there wasn't and did not elaborate further. Upon cross-examination he gave the same response but indicated that there were trees on the side to which he would have swerved, so instead, he hit his brakes.

[29] There is no evidence presented to dispute that the insured driver was driving on the incorrect lane. Mr Mhlanga's submission in his heads of argument to the effect that there might have been no second vehicle involved at all was not put to the plaintiff during cross-examination. Furthermore, the plaintiff explained why he could not take evasive action upon seeing the vehicle that close. One could think of several ways in which he could have warned the insured driver such as hooting or flashing lights or even swerving to the right. But all these should be viewed against the facts of the case and especially the proximity between the two vehicles at the time the plaintiff noticed the insured vehicle. The defendant cannot rely on the contentions emanating from the plaintiff's own testimony to reduce its liability. The same test would have to be applied to establish contributory negligence on the part of the plaintiff, namely whether a *diligens paterfamilias* faced with the same circumstances would have foreseen the possibility of his omissions causing an injury leading to patrimonial damages.

[30] It is therefore my considered view that the plaintiff has discharged the onus of proving liability on the part of the defendant and that his conduct or omission under the circumstances ventilated before court was not a sufficiently proximate cause of the accident for purposes of apportionment. In the premises, the defendant is 100% liable for the plaintiff's proven or agreed damages. The insured driver was the sole cause of the accident that occurred on 4 September 2022.

[31] Consequently, the following order is made:

1. An order of separation of issues in terms of Rule 33(4) of the Uniform Rules of Court.
2. Adjudication of Quantum is postponed *sine die.*
3. The defendant is liable for payment of 100% of the plaintiff's proven or agreed damages arising from the accident that occurred on 22 September 2022.
4. Costs shall be costs in the cause.

L J N BAM

ACTING JUDGE OF THE HIGH COURT

MPUMALANGA DIVISION, MIDDELBURG

APPEARANCES

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DATE OF HEARING:	**9 June 2026**
DATE OF JUDGMENT:	**6 July 2026**