

**IN THE HIGH COURT OF SOUTH AFRICA
(MPUMALANGA DIVISION, MIDDLEBURG)**

Case no.: 4227/18

(1) REPORTABLE: YES/NO

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

(3) REVISED.

Date: 04/08/2026

Signature

In the matter between:

R[...] S[...] E[...] O.B.O

R[...] S[...] N[...]

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

Heard : 23 March 2026

Coram : MALOWA AJ

JUDGMENT

MALOWA AJ

Delivered : This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down of the judgment is deemed to be **31st July 2026 at 10:00**

INTRODUCTION

“In a case such as this, where the matter is opposed and issues have been argued, litigants are entitled to be informed of the reasons for judge's decision. Moreover, a reasoned judgment may well discourage an appeal by the loser. The failure to have reasons may have the opposite effect”.

– JH Botes and Lady Grey (Pty) Ltd v Nedbank Ltd (Corbett, Hoexter JJA and Howard AJA; heard on 17 March 1983 and judgment delivered on 29 March 1983).

1. This is a loss of support matter. The parties agreed to argue the matter on documents filed on Caseline only. The plaintiff's legal representative was Mr. H. Nkabinde instructed by Komane Attorneys while the defendant was the Road Accident Fund which instructed Advocate L. Maleka. The insured driver was one Freddy Masilela and was the sole independent and an eye witness. The merits and quantum in this matter were not subject of dispute but only loss of support.

2. The dispute was brought by the plaintiff on her personal capacity and also on behalf of the minor child, as a grandmother and guardian of the minor child called, N[...] R[...]. It is a claim for a loss of support emanating from the death of plaintiff's son P[...] L[...] R[...] who died in a motor vehicle accident collision involving the motor vehicle with registration number E[...] he was driving and that of an insured driver with registration number D[...] on the 27th August 2012 at about 13H00 on Stoffberg Road, Middleburg, Mpumalanga Province.

3. The Plaintiff has in terms of section 17(1) of the Road Accident Fund Act 56 of 1996 approached the court to show negligence as a form of fault that give rise to liability on the part of the defendant. The slightest degree of negligence that he intended to show will be sufficient to satisfy the requirement of negligence to render the Defendant liable.

4. The plaintiff's legal representative argued that the insured driver had negligently contributed to the accident because in the insured driver's own written statement made to the police he stated something that shows that he was negligent to a particular degree that constituted at least one percent negligence. This alleged admission of negligence as stipulated by the plaintiff's legal representative emanate from the fact that the insured driver breached at least one of his duties as he said he saw the deceased vehicle "coming to his

direction”, but n nonetheless failed to avoid the accident by doing what a reasonable person under the prevailing circumstances be capable of reasonably foreseeing the damage flowing from his negligent act and must also take reasonable steps to prevent damage from occurring.

The plaintiff's legal representative has submitted that there are three grounds upon which the defendant insured driver was negligent, and that he failed to be evade the collision, he drove at excessive speed, and he failed to apply brakes in time, adequately or at all. It is said the evidence relied upon for such submission includes reliance on the insured driver's statement.

4. The plaintiff's legal representative further argued that because the insured driver said he saw the vehicle coming to his direction, he was supposed to do something positive in time to avoid the said collision. Furthermore because the insured driver said he assumed that the deceased driver lost control of the vehicle that called for him automatically to act in such a manner that he will avoid the accident because he himself was still in control of the motor vehicle he was driving.

5. Furthermore it was stated by the plaintiff's legal representative that the insured driver ultimately swerved the motor vehicle he was driving to the right

side of the gravel part of the road, while trying to apply brake, but did not do that in time, to avoid a collision.

6. The plaintiff's legal representative further alleged that it could not be true that the insured driver was driving at a speed of about 80 km per hour as he would have stopped quickly and near the point of impact than where his motor vehicle came to a standstill. The plaintiff's counsel said it would not have been possible to drag the deceased driver's vehicle for about 100 meters from the spot the point of accident impact.

7. The plaintiff's counsel alleges that because there were no immediate evasive maneuver or steps taken by the insured driver according to him that shows contributory negligence on his part.

THE DEFENDANT'S CASE

8. On the other hand, the defendant's legal representative alleged that there is no case to answer, based on number of reasons and as such she applies for absolution from the instance quoting grounds which she identified as flaws from the plaintiff's case.

9. She stated that the plaintiff's case is made up from the bar by the legal representative. She said this is so because in the particulars of claim, the plaintiff failed to allege the defendant's factual wrongful, omission or commission as currently argued contrary to what is stated in the documents.

10. There was no allegation of failure of the insured driver to take reasonable step in correlation with a reasonable driver and furthermore there was also no evidence presented to show that had the insured driver taken appropriate measure timeously as alleged to evade collision, he would have succeeded in so doing.

Madlala v Road Accident Fund (RAF) (65311/17) [2025] ZAGPPHC 153 (14 February 2025)

11. It is also trite that no onus rests on the defendant to establish, on a balance of probabilities, the correctness of his explanation as to the circumstances which led to the event's occurrence.

Guardian National Insurance Co Ltd v Saal 1993 (2) SA 161 (CPD).

12. Defendant's legal representative argued that the insured driver was right in his lane having the right of way. She further stated that the insured driver acted in a state of sudden emergency or an eminent danger.

13. The defendant's legal representative argued that there is absence of evidence on material facts and there is no demonstration of material evidence to collaborate it. She argued that Rule 18 (4) of the Uniform Rules provides that;

"Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defense or answer to ant pleading as the case may be with sufficient particularity to enable the opposite party to reply thereto".

14. It was argued by the defendant's counsel that, under the plaintiff's particulars of claim the defendant does not seem to know against whom the case is as there is no blameworthiness against anyone. She further stated that the plaintiff had acted contrary to the aforesaid Rule and while having done that plaintiff bring new evidence from the bar to make up for omitted material information critical for the case.

15. She pointed out that in the particulars of claim there is no where it is stipulated that the plaintiff has lost control of the motor vehicle and without

amending the particulars of claim that allegation cannot stand. It was submitted that the plaintiff has failed to discharge the onus of proof on the balance of probabilities and her case should be dismissed alternatively absolution from the instance be granted. She stated that the case that the plaintiff put in court is not the same as the one the defendant was called to answer, and ordinarily one should stand by her own case.

16. The defendant's legal representative further argued fact that the insured driver could not stop the vehicle to a standstill for a distance of about 100 meters on a flat surface cannot be regarded as a sign of over speeding and or negligence on his part. The defendant's counsel stated that while the insured driver had stipulated that he drove at a reasonable and specific speed contrary the plaintiff's counsel's submission from the bar.

At the close of the plaintiff's case, the defendant had applied for absolution from the instance.

ANALYSIS OF FACTS

17. In consideration of the defendant's application for dismissal of the plaintiff's claim, a test had to be applied. The test for absolution to be applied by the trial

court at the end of the plaintiff's case was formulated in *Claude Neon Lights (SA) Ltd vs Daniel* 1976 (4) SA 403 (A) at 409 G-H and applied at the end of Plaintiff's case in *Gordon Lloyd Page and Associates v Rivera and Another* 2001 (1) [SCA] at 92E-93A.

"...When absolution from the instance is sought at the close of the plaintiff case the test to be applied is not whether the evidence led by the plaintiff established what will finally be required to be established, but whether there is evidence upon which a court applying its mind (not should ,nor ought to) find for plaintiff".

Also see **Gascoyne vs Paul and Hunter** 1917 TPD 170 at 173. **Ruto Flour Mills (Pty) Ltd Adelson** (2) 1958 (4) SA 307 (T).

18. The rule requires the material facts relied upon to be stipulated clearly and concisely. The fact and contents relied upon is if it is from a statute, it must be pleaded, not the evidence to be used in support of fact.

19. A defendant may apply to be absolved from the instance, if the plaintiff at the close of their case for the plaintiff and after the conclusion of the whole case, the plaintiff has not made out a prima facie case in the sense that there is evidence

relating to all elements of claim to survive absolution because without such evidence, no Court could find for the Plaintiff.

Marine & Trade Insurance co. Ltd vs Van Der Schuff 1972 (1) SA 26 (A) at 379-38A, Also **Schmidt Bewysreg** 4th edition at 91 to 92.

20. The defendant argued that plaintiff has not make out a case for the relief sought. Furthermore it was submitted that he failed to prove that contributory negligence on the part of the insured driver as there is no evidence relating to all the elements of the claim. The question may be, whether there is evidence upon which a reasonable man might find for the plaintiff.

21. The defendant's counsel argued that there is no indication of omission on the defendant's part which makes him negligent. The plaintiff's legal representative alleged that the insured driver saw (from the statement) "the deceased driver coming to him". The acting out of emergency cannot be a fault because number of factors could have an impact on such conduct, to wit;

- the thinking that the driver or deceased's vehicle could return to its correct lane.
- the incident might have happen as a sudden emergency

22. The defendant's counsel argued that the deceased was 100% responsible for the accident and even with proverbial being Solomon's wisdom under the insured driver's position, nothing could have been done to avoid the collision.

It was argued on the defendant's part that if the deceased as a driver lost control of his own vehicle, that is the primary cause of the accident and it cannot be the insured driver's problem to have advanced driver's skills to avoid accident with abilities he doesn't have and couldn't brainstorm them under a split of a second. It's argued that the insured driver acted as a reasonable person and even if he could have a choice, he respectively saw deceased's vehicle with sudden emergency then heard a bang and stopped immediately.

23. The defendant's counsel argued that the plaintiff had presumed that there was a high speed allegedly driven by the insured driver. She further argued that there was supposed to be an expert report filed on the issue of speed and or accident re-construction on how accident happened, but instead the plaintiff's legal representative presented the argument as if it is an evidence from the bar.

24. The defendant's counsel argued that the defendant would only have been liable if the accident happened as a result of the contributory negligence on the part of the insured driver and in *casu* there is no such evidence. She quoted the case of *Madlala vs RAF* where the driver lost control of the motor vehicle and hit

an object due to his own lapse, *prima faerie* the evidence therein shown that the driver has committed negligence on his own.

25. The court asked plaintiff's legal representative, to clarify what makes him assume that the insured driver drove at an excessive speed, but not doing that based on established fact or available information. He stipulated that the fact that the vehicle of the insured driver couldn't stop his vehicle within 100 meters while the deceased's vehicle was stuck underneath it, is evident of the high speed he was driving.

26."The court must decide whether the plaintiff has, on the face of the evidence presented, and established a prima facie case covering all the elements of the claim. If she has, absolution must be refused, if she has not, the court must then consider whether it is in the interest of justice to end the litigation at this stage or to continue regardless and require the defendant to present evidence. Ultimately, the court exercises a discretion to grant or refuse absolution. Although the discretion should be exercised cautiously, when the occasion arises, and justice so demands, absolution should be granted".

Makhana J Labour Court -Thandiwe Mosango & Road Traffic Management corp. (JS755/22) 2026 ZALCJHB 153 (18 May 2026)

Heard on the 7- 8 May 2026

27. The question is whether the plaintiff has met the low threshold required at the close of her case namely, whether there is evidence upon which the court, applying its mind reasonably to such evidence, could or might find in her favour. This approach was set out in the Gordon Lloyd & Ass having been formulated in the case of Claude "or upon which a reasonable member might find for the plaintiff"

Gascoyne v Paul and Hunter 1917 TPD at 173, Rusto Flour Mills (Pty) Ltd v Adelson (2) 1952 (4) SA 307 (T)

Without such evidence no court could find for the Plaintiff

Marine & Trade Insurance Co. Ltd vs Van der Schyff 1972 (1) SA 26 (A) at 37 G – 38 A.

28. The above may be similar to the current case, where the plaintiff has failed to establish an essential elements of the claim. There is no single witness called by the plaintiff to prove her case, despite being in a position to do so.

There is no other probabilities that were ventured into in a form of evidence which include but not limited to whether the vehicle was loaded or overloaded with commodity or not.

29. As contained in the summons and plea, the hearing of evidence brought forward by the parties; through their legal representatives were heard in argument. Where in an action, a party chooses to appear at the trial but elect not to lead evidence in order to satisfy the court that he or she is entitled to judgment on the issues raised by those claims, but argue through agreement with the opponent the burden of proof still remain despite the plea he is challenging appears or is considered bare denial. The same goes to how the defendant's plea was.

The plaintiff did not comply with the provisions of Rule 18(4) and had brought new evidence from the bar. There was no pleading of the deceased's motor vehicle having lost control. The plaintiff has failed to prove her case on the balance of probabilities.

Molusi vs Voges no. 2016 (3) SA 370 CC

It was further held that the evidence of negligence is mandatory requirement to be successful in one's claim for a compensation in terms of Section 17(1) of the RAF Act as held in the case of **Kekana N.O. vs Motshwaede vs RAF 206/2017/ 2018 ZASCA 75(31 May 2018)** where it was stated that ".... liability was to be determined based on the evidence of a single eye witness called by the plaintiff". Onus to prove liability of the claim, to establish liability, the evidence must determine both liability and quantum.

Plaintiff bear the onus to prove both liability and quantum by demonstrating that the plaintiff based the minor child has legally enforceable right to claim and also negligence or a wrongful act on the part of the insured driver that caused or contributed to the collision which resulted in the death of the deceased”

“The court has in the context of Constitutional challenges to legislation, acknowledge the importance of accuracy in the pleadings”

**Phillips and others vs National Public Prosecutors 2005 ZACC 115 2006 (1)
SA 505 (CC) that**

30. The duty is cast upon the plaintiff as the litigant, in order to be successful, by satisfying the court that's she is entitled to succeed on her claim. The incidence of the burden of proof in this sense is on each issue a matter of substantive law. The plaintiff has duty to adduce evidence which indirectly compel the defendant to combat a *prima facie* case if any, made by her opponent. The plaintiff's duty to adduce evidence is essential to ensure that in the most logical order and makes the defendant convincingly respond thereto by dispensing with the evidence which could support a finding in her favour.

31. It is trite that a party who asserts has a duty to discharge the onus of proof. In *African Eagle Life Assurance Co Ltd v Cainer*, 1980 (2) SA 234 (W) at 237D-H, Coetzee J applied the principle set out in *National Employers' General Insurance Association v Gany* 1931 AD 187 as follows: 'Where there are two stories mutually destructive, before the onus is discharged, the Court must be satisfied that the story of the litigant upon whom the onus rests is true and the other false. It is not enough to say that the story told by Clarke is not satisfactory in every respect, it must be clear to the Court of first instance that the version of the litigant upon whom the onus rests is the true version.

32. The approach to be adopted when dealing with the question of onus and the probabilities was outlined by **Eksteen JP in National Employers' General v Jagers, 1984(4) SA 437 E at 440 D**, as follows: 'it seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfied the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version

advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case.

33. However *in casu* the parties did not testify for the Court to determine their witness' credibility. In *casu* if the balance of probabilities favours the plaintiff, then the version of the plaintiff is probably true. If however the probabilities are evenly balanced, that is it and do not favour the plaintiff's case or the defendant's, the plaintiff cannot succeed. If the plaintiff's case was nevertheless believable and the court is satisfied that her evidence is true and that the defendant's version is false, then she was to succeed.

34. The defendant's counsel indicated that she request that absolution from the instance be granted with costs. The basis of what she said was that there was no case against the defendant. She said the plaintiff has failed to even make a *prima facie* case, the evidence is inherently unacceptable to find liability on the defendant, and there is an absence of material facts, i.e., there is no demonstrable material evidence to corroborate the claim.

35. There is no admission or presumption in favour of the plaintiff for which the burden could have shifted to the defendant. If the duty was on the defendant and she failed to discharge the burden of proof or the duty to adduce evidence, the proper order would be judgment for the plaintiff's favour.

36. The defendant basically in her argument sought absolution from the instance at the close of the plaintiff's case. The test to be applied is whether the evidence established, what would finally be whether applying its mind reasonably to such evidence, could or might (not should, or ought to) find for the plaintiff. Absolution was asked for at the end of the plaintiff's case. Renouncing for the time being any tendency to, he is bound to speculate on the conclusion at which the reasonable man of his conception.

37. This is the process of reasoning which, however difficult its exercise. In deciding whether absolution should be granted at the close of the plaintiff's case, it must be assumed that in the absence of very special considerations, such as the inherent unacceptability of the evidence adduced, the evidence is true. Questions of credibility should not normally be investigated at this stage of

the proceedings, except where the witnesses have palpably broken down, and where it is clear that what they have stated is not true.

38. There was no evidence of speed limit or sign at the area of the accident vis-a-vis speed driven by the insured driver. The insured driver was not called to testify nor an expert called to give relevant opinion as to the accident caused by the plaintiff. On the defendant's version, the Plaintiff's particulars of claim alleges loss of control by the deceased driver and the defendant cannot be made to be liable by conduct of the deceased driver.

39. Having considered the summons, plea, pre-trial minutes, the plaintiff's evidence and parties' legal representative's arguments, the conclusion that the claim lacked the element of negligence on the part of the insured driver is inevitable. The plaintiff's evidence which has no single witness failed to establish even a basic case of negligence.

insured driver acted in like any reasonable driver would have acted, having put in that position with the same circumstances.

40. The evidence advanced on plaintiff's behalf is failing to establish from an informed or expert's opinion that the insured driver did not apply brakes or sufficiently and/or he was driving at an excessive speed due to distance the

insured driver travelled further after the accident to a point where his vehicle stopped with the vehicle driven by the deceased being under the truck. The argument was not supported by the particulars of claim and the plaintiff's evidence.

50. There is no evidence that the motor vehicle accident happen with a contributory negligence of the insured driver. Averments of unsubstantiated standardized allegations of negligence like "He failed to keep a proper lookout;" and or "He failed to apply brakes of his vehicle either timeously, adequately or at all;" if they are not supported by evidence, they are of no use. The material averment for making a proper case from the onset by the plaintiff should not be equated to a box-ticking exercise.

51. It is evident from the above that the plaintiff failed to show the defendant's contributory negligence, not only on the particulars of claim, but also on evidence relied. The standard allegation of negligence by the insured driver as stipulated above were cited with no evidence to support them. The plaintiff's counsel had difficulty in showing the contributory negligence of the defendant, and ended up being unsuccessful.

52. Where the plaintiff has failed to establish an essential elements of the claim which is negligence of the insured driver, the Court is bound to either dismiss the claim or where there is potential to amplify the averments made, give her an opportunity to do so. Herein the plaintiff did not even call a single witness to prove her case, despite being in a position to do so without hindrance. The insured driver in this case cannot be held accountable because there is insufficient evidence to find in favour of a plaintiff. Consequently this court has no choice but to order absolution from an instance because it is not satisfied that the evidence presented by the plaintiff warrant the order in her favour.

53. Absolution should be ordered in the interest of justice after having heard evidence for the plaintiff and the rebuttal of evidence through argument by the counsel for the defendant.

54. In the circumstances there is no evidence upon which the Court could reasonably find in favour of the plaintiff. Accordingly, the defendant should be absolved from further proceedings at his stage. Evaluation of the evidence adduced by the plaintiff at the trial is required.

55. In the premises, the defendant's application for absolution from the instance at the close of the plaintiff's case ought to succeed in relation to the plaintiff's

alleged contributory negligence for loss of support claim against the defendant emanating from the insured driver's commission or omission.

56. The stance taken by the defendant and the procedure available is equivalent to Section 74 of the Criminal Procedure Act 5 of 1977 which allows badly formulated "... cases to be weeded out, thus protecting scarce judicial resources from being spent on cases which do not merit further judicial attention. In this way, absolution serves the interests of justice and promotes the more efficient and effective administration of justice".

Nico Van Wyk vs Venter et al by Moosa AJ CASE NO 21072/2010 Western Cape Division heard on the 12 May 2025 delivered on the 12 May 2025

57. In the current matter as in the above case, at the end of the plaintiff's case, there is an insufficiency of cogent evidence, or the absence of adequate testimony, so that no order ought to be made in the plaintiff's favour in respect of the claim.

58. "Therefore, what the defendant in casu seek at this stage of the trial is to be freed from blame in relation to the plaintiff's claim...", based on allegation of contributory negligence without substance.

Nico Van Wyk vs Venter et al

59. “If granted, absolution would have the effect of dismissing the claim in respect of which it was granted. However, since absolution does not lead to re judicata, the plaintiff would be able to re-file his claim afresh, presuming there is no legal impediment for him to do so (such as, operation of prescription.)”

Nico Van Wyk vs Venter et al

60. “The defendant argued that the plaintiff is required to make prima facie case and it has failed to do so. Its failure justifies defendant in bringing this application. Defendant argued that the plaintiff failed to call witnesses who were directly involved ...” and make averments in his particulars of claim showing the fault or negligence on the insured driver as a basic but critical requirement for liability. “... and this failure is fatal to the plaintiff’s case”.

Nissan SA Pty Ltd vs Senyatsi B Phasha by Ntanga AJ Gauteng Division, Pretoria 22 March 2024.

61. Accordingly, and assuming the plaintiff can prove the one percent of the alleged negligence on the part of the insured driver, the plaintiff’s remedy lay in the manner in which she present material facts and present evidence that show fault or wrongdoing on the part of the insured driver.

62. For all the above reasons, I find that the defendant is entitled to an order for absolution from the instance in relation to the plaintiff's claim. It is not in the interest of justice in these circumstances to permit this claim to proceed further in its current form.

COSTS

63. When a defendant is absolved from the instance, he is rightfully regarded as a successful party, considering the need to determine the issue of costs. The general rule is that the successful party should be awarded costs, however the court can in its exercise of its discretion, deprive a successful party of costs, unless there are good reasons for ordering costs to be paid by the unsuccessful successful party.

64. The deprivation of costs can be partially or wholly. However such discretion of the court to deprive the successful litigant of his costs cannot be exercised arbitrarily, equally the awarding of costs cannot be made with blindfold. Several consideration like the conduct or negligence of the successful litigant are taken into consideration.

65. It is imperative for the court to regards to the doctrine of effectiveness on issuing of costs where the unsuccessful party is unemployed, elderly and or a

minor child who cannot be in a position to satisfy the order that would have been granted against him or her on costs. Therefore moral consideration is one of the relevant factors in exercising the court's wide discretion on awarding of costs.

66. One of the grounds upon which the court can order that the successful party should not be awarded costs despite having been a successful party, it is where he would have had the plaintiff's claim dismissed at an earlier stage, but chose not to take that step. *In casu* it cannot be said that the defendant should have had the plaintiff's case dismissed earlier. However that is not the only instance where costs are not granted to a successful party, but it could have done something to except or place its defence in its plea.

67. In this case the question may be whether the decision to impose costs on the plaintiff will not be a misdirection by the court as per the principle adopted in the matter of Biowatch Trust v Registrar Generic Resources and others 2009 (10) BCLR 104 (CC) and subsequently reaffirmed in 25th May 2026 matter of MVC costs appeal judgment. This is where on appeal by MVC regarding May 2024 proceedings findings on cost order which was adverse on it was appealed against and it was set aside. The plaintiff had approached this court to enforce her Constitutional right as it was the case in Biowatch Trust matter. Although in

Biowatch Trust matter the Constitutional right challenged was public interest as against the private right interest in this matter, but the principle remain the same.

68. Similarly it was in the public interest to challenge the Constitutionality of an Act of Parliament where there was a lacuna on the amendment of Electoral Matters Amendment Act 14 of 2024 which happened without established financial thresholds, which in itself created an ongoing risk of unregulated and undisclosed funding and that the situation necessitates prompt intervention to maintain transparency and accountability in political funding subsequent to the desire to have Electoral Matters Amendment Act 14 of 2024 come into operation.

69. Further difference relevant herein may be state's legal fees vis-à-vis statutory body like the defendant herein. The principle remain identical, and enforcement of Constitutional right. The preamble of the Constitution of the Republic of South Africa, 1996 which intend to "... improve the quality of life of all citizens and to free the potential of each person.", "... heal the divisions of the past and establish a society based [not only] on democratic values [but also] social justice and fundamental human rights..." cannot seek to make an elderly person who has a daunting duty to raise a minor child on her deceased son to pay costs of suit because she was not successful in enforcing her democratic

rights. The plaintiff's minor granddaughter seek to enforce her Constitutional right to health care, food, water and social security including education. She was not successful in enforcing her democratic rights, although it may be in the interim.

70. The plaintiff's attempt to enforce the Constitutional right doesn't amount to abuse of legal process, frivolous or vexatious litigation to the unsuccessful party in this instance.

71. The imposition of costs of litigation, even if not punitive in nature, can inhibit a litigant to assert her legal Constitutional rights and responsibilities. In terms of Section 38(a) of the Constitution, she is empowered to approach the court acting on behalf of another person who cannot act in her own name (herein the minor child). Perhaps it may be for those reasons, the defendant should be saddled with costs incurred as there should be no cost order against the plaintiff for justifiable reasons.

72. "An abuse of judicial process is evinced when a party conducts litigation in an unreasonable manner to the prejudice of those who are materially forced to defend their interests. It is such conduct that has been viewed by courts as a justifiable basis to visit the culpable litigant with a punitive costs order" "...and

ordinarily there should be no adverse costs order against any private parties who were forced to enter the fray (Biowatch Trust matter). Force in this case is not on a defendant, but even on a plaintiff who is duty-bound to approach court to assist the minor child.

73. There is no outright failure on the defendant's side except that there was a bare denial in its plea and or lack of defence on its part which may have partially also contributed to plaintiff's conducting or handling the matter.

74. Although legal consideration is made on the matter per costs, in the exercise of its wide discretion as to costs, the court may in particular circumstances attach great weight to the moral obligation (or equity) of the parties.

Herbstein & van Winsen – The Civil Practice of the High Courts of South Africa Vol 2 (6th Edition) – Cilliers, Loots & Nel

75. The said moral consideration needs to be connected to the litigation in question as relevant to an award of costs, and so it is for that reason that the court chose to deprive a successful claimant of costs. The court's discretion to order costs is not restricted to punitive costs or dishonesty; it includes all cases

in which special circumstances or considerations justify the granting of such an order.

76. There are good reasons why costs ought not to follow the results. In making this determination, I had regards to different factors which include largely the re-affirming plaintiff's Constitutional.

77 Consequently I make the following **Order**;

(a) The defendant's application for absolution from the instance succeeds

(b) Absolution is granted in respect of plaintiff's claim,

(c) There is no order as to costs.

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M. Malowa

Acting Judge of the High Court

Mpumalanga Middleburg

Appearances;

For the Plaintiff: **Mr. H Nkabinde**

Instructed by: **Ntshosa Madiba Inc.**

For the Defendant: **Ms. L Maleka**

Instructed by: **Road Accident Fund**

