



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GQEBERHA)**

CASE NO: 2364/2024

In the matter between:

SIYANDA XOKI

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

RUSI J

[1] The plaintiff sued the Road Accident Fund (the Fund) for damages resulting from a collision that occurred on 24 May 2023 at or near Matanzima Road in KwaNobuhle township, Kariega, Eastern Cape. On that occasion an unidentified vehicle (the vehicle) driven by an unidentified driver collided with him. At the time of the collision, the plaintiff was a pedestrian. He alleges that the collision was caused by the sloe negligence of the unidentified driver in driving the vehicle.

[2] Resulting from the alleged negligent driving of the vehicle by the unidentified driver, the plaintiff sustained bodily injury. He now claims against the Fund under several heads the amount of R2 610 000.00 in damages.

The pleadings

[3] In his particulars of claim, the plaintiff pleaded the following material facts in support of his claim: on or about 24 May 2023, at or near Matanzima Road in KwaNobuhle township, Kariega, Eastern Cape, an unidentified vehicle driven by an unidentified driver collided with him while he was a pedestrian. As a result of the collision, he sustained serious bodily injuries. The collision was caused by the sole negligence of the unidentified driver. The several grounds of negligence relied upon by the plaintiff are, inter alia, that, the unidentified driver:

- (i) failed to keep a proper lookout;
- (ii) drove the unidentified vehicle at an excessive speed;
- (iii) failed to apply brakes timeously or at all;
- (iv) failed to avoid the collision when by the exercise of reasonable care and skill he/she could and should have done so;
- (v) failed to sound a warning concerning his/her oncoming approach;
- (vi) failed to stop after colliding with him.

[4] In response to these averments, the Fund, in its plea, alleged that “it has no knowledge of them, cannot admit or deny them and put the plaintiff to the proof thereof.”

The trial

[5] The trial of this matter proceeded only on the question of the Fund’s liability for the plaintiff’s claim. Quantum of the plaintiff’s damages and other

issues raised in the claim were separated for determination at a later stage pursuant to an order granted by this Court on 05 March 2025 in terms of Uniform Rule 33(4).¹

The issues

[6] The issues to be determined by this Court as formulated by the parties in their minute of the pre-trial meeting dated 03 October 2025 are:

- (a) whether the collision occurred as pleaded by the plaintiff; and
- (b) whether that collision, if it occurred, was due to the sole negligence of the unidentified driver of the unidentified vehicle.

The question of onus and duty to begin.

[7] As envisaged in Uniform Rule 39(13), the plaintiff bore the onus to prove his claim and thus the duty to begin adducing evidence.

The case for the plaintiff

(a) *Ms Xoki-Godoma's evidence*

[8] The plaintiff adduced the evidence of Ms Xoki-Godoma (Ms Godoma) who identified herself as his aunt. Ms Godoma testified that it was around 17h00 on 23 May 2023 when a male person unknown to her arrived at her home and reported that the plaintiff had been involved in an accident. The report came not long after the plaintiff had left her house for work. She rushed to the scene of the accident in her vehicle. On arrival thereat, she found the plaintiff lying unconscious on the side of the road. He was bleeding from his head and there was blood on the road surface where he laid. The onlookers that had gathered at the scene indicated to her that the plaintiff was knocked down by a vehicle which dragged him along the road. She did not know any of the persons

¹ Per Gqamana J.

gathered at the scene. Her attention was on getting the plaintiff help. The vehicle that collided with the plaintiff did not stop. She phoned the police and the ambulance, but none arrived. She resolved to convey the plaintiff in her vehicle to the Port Elizabeth Provincial Hospital. From this hospital, the plaintiff was transferred to the Livingston Hospital where he received further treatment.

[9] It further emerged from Ms Godoma's testimony that she and the plaintiff do not live in the same house; the plaintiff lives in his own house. Asked by Mr *Dlamini* in cross-examination how she came to know that the plaintiff had been leaving for work if they do not live together, Ms Godoma explained that the plaintiff had gone to her house to fetch lunch.

(b) The plaintiff's evidence

[10] The plaintiff's evidence was that at the time of the accident he was employed at the poultry production company named Sovereign Foods. After he left Ms Godoma's house, he made his way to work. He was a pedestrian and he had to cross Matanzima Road in KwaNobuhle. The time was around 17h00 - 18h00 and there was still light. He was dressed in blue jeans and a blue jersey.

[11] The road was flat and narrow with two lanes running in opposite directions. The shoulder of opposite side of the road to which he was to cross was paved with small bricks. The pavement was on the same level as the road surface. Before he crossed the road, he saw an Avanza², brownish in colour approaching from a distance of approximately 30 metres. The Avanza's path of travel was in the lane on the side of the road to which he intended to cross and there was no vehicle traveling in front of it. He was the only person crossing the road at the time. There were no other vehicles travelling on the side of the road he was to cross from.

² A multi-purpose vehicle that seats a maximum of 7 passengers.

[12] He was unable to estimate the speed at which the Avanza was driven. As he was rushing to work, he believed that he could safely cross to the other side of the road. There was nothing obstructing the view of the driver of the oncoming Avanza. He had traversed the greater part of the roadway when, two steps away from the pavement, the Avanza collided with him. It hit him on his lower back. After colliding with him, it dragged him across the road. He lost consciousness and regained it in hospital. He remained at the Livingston Hospital for four months. He was unable to identify the registration numbers of the vehicle or the driver as the vehicle did not stop after colliding with him.

[13] Before the collision, he did not hear the Avanza's hooter as a warning of its approach; nor did he hear the screeching of the tyres signifying the driver's attempt to apply brakes. In his illustration of how the collision took place, the plaintiff adduced the evidence of a sketch plan and key thereto. The sketch plan which bears the KwaNobuhle South African Police Service (SAPS) case administration system number – CAS 56/07/2023 was admitted as Exhibit "A". It was indicated that the sketch plan was utilized for illustrative purposes, since the plaintiff would not call the police officer who compiled it. The point of impact is depicted on the sketch plan as being within the parameters of the roadway. The distance between the baseline of the surface and the point of impact measured 2 metres. The point where the plaintiff landed after the impact measured 2.5 metres from the point of impact.

[14] The plaintiff referred this Court to several paragraphs of the medical report dated 12 October 2024 and compiled by Dr Chris van der Walt, a Plastic and Reconstructive Surgeon.³ The report indicates in those portions that on 27 May 2023 the plaintiff underwent a debridement of his bilateral calcaneus (an injury to the heel bones) and posterior limbs with below knee back slab casts

³ Page 74 to 97, in particular, page 79 of the said report, paragraphs 5.2.15 to 5.2.19.

applied in theatre. On 05 June 2023 he underwent Surgery for re-debridement and application of vacuum dressings to both his feet. On 08 June 2023 he was subsequently transferred to the plastic surgery department at the Port Elizabeth Provincial Hospital for skin graft and flap procedures. On 09 September 2023 he was taken to theatre for a sural flap⁴ for the right calcaneus and a skin graft for the left calcaneus.

[15] Asked in cross-examination how it came about that the vehicle collided with his lower back, the plaintiff explained that he had been crossing the road at an angle with his left foot forward and right foot back. Mr *Dlamini*'s cross-examination extensively dealt with the circumstances in which the plaintiff made a decision to cross the road at the time he did. The cross-examination was presumably intended to establish that the plaintiff crossed the road when it was inopportune for him to do so and thus exposed himself to the risk of collision with passing vehicles. I will revert to this aspect later on in this judgment.

[16] Apart from this aspect, the plaintiff was asked to explain the circumstances in which the sketch plan was drawn considering that he would have been in hospital at the time it was drawn. His explanation was that his consultation with the police regarding the collision followed the report which his aunt had previously made. He is the one who subsequently provided the police with the details of the accident as they appear from the sketch plan.

[17] The version of the plaintiff that the collision did occur and that resulting from it he sustained bodily injury was not challenged during his cross-examination. This concluded the plaintiff's case. The defendant closed its case without leading any evidence in rebuttal of the plaintiff's version.

⁴ A surgical skin and tissue transfer, used to repair lower leg, ankle and foot.

The parties' submissions

[18] Counsel for the plaintiff, Mr *Frost*, submitted that the unidentified driver of the vehicle had an obligation to keep a proper lookout on the road. In the light of the plaintiff's evidence regarding the road layout and the circumstances in which the collision occurred, there was no reason for the unidentified driver not to see him as he was crossing the road. The evidence suggests that unidentified driver failed to take evasive action to avoid the accident. Mr *Frost* invited this Court to infer from the fact that the vehicle dragged the plaintiff across the road after colliding with him that it was driven at high speed. He criticised Mr *Dlamini's* attempt at introducing the unpleaded issue of contributory negligence. Mr *Frost* submitted that the plaintiff has discharged the onus of establishing the Fund's liability on a balance of probabilities.

[19] On behalf of the Fund, Mr *Dlamini* emphasized that the onus to prove the Fund's liability lies squarely on the plaintiff. He took the view that even though the defendant adduced no evidence in rebuttal, this Court is entitled to draw an inference that the plaintiff crossed the road when it was inopportune for him to do so.

The legal principles and analysis of evidence

[20] Section 17 of the Road Accident Fund Act 56 of 1996 (the Act) makes provision for the Road Accident Fund's liability for loss or damage suffered by a person as a result of bodily injury caused by or arising from the driving of a motor vehicle by any person if the injury is due to the negligent or wrongful act of the driver. The driver and the vehicle that allegedly collided with the plaintiff are unidentified; hence, the claim falls under section 17(1)(b) of the Act, which provides as follows:

‘(b) subject to any regulation made under section 26, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of neither the

owner nor the driver thereof has been established, be obliged to compensate any person (the third party) for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself or the death of or any bodily injury to any other person, caused by or arising from the driving of a motor vehicle by any person at any place within the Republic, if the injury or death is due to the negligence or other wrongful act of the driver or of the owner of the motor vehicle or of his or her employee in the performance of the employee's duties as employee: Provided that the obligation of the Fund to compensate a third party for non-pecuniary loss shall be limited to compensation for a serious injury as contemplated in subsection (1A) and shall be paid by way of a lump sum.’⁵

[21] As the onus bearing party, the plaintiff must establish on a balance of probabilities that a collision occurred; his injury arose out of the negligent driving of a motor vehicle; and that there is some connection between the driving and his injury.⁶ In this regard, the defendant need not prove anything. The question to be answered is whether the plaintiff has, on a balance of probabilities, discharged the onus of establishing that the collision was caused by negligence attributable to the insured driver.⁷

[22] The assessment of the ‘balance of probabilities’ entails more than the fact that the probabilities favour one party and not the other. The onus resting on the plaintiff will be discharged if the court is satisfied on a preponderance of probabilities that his version is true and therefore acceptable, in that it is probable that the particular state of affairs existed.⁸ An assessment of the probabilities of a case furthermore inextricably entails the determination of the credibility of the witnesses.⁹

⁵ It is not necessary to refer to the provisions of the applicable regulation 2(1) which stipulates a two-year period within which a claim must be lodged where the driver or owner of the vehicle are unidentified. This issue did not arise in these proceedings.

⁶ *Kemp v Santam Insurance Co Ltd* 1975(2) SA 329 (C) at 330F; *Van Wyk v Lewis* 1924 AD 438 at 444.

⁷ *Stacey v Kent* 1995 (3) SA 344 (ECD) at 352I-J.

⁸ Schwikkard PJ (*et al*), *Principles of Evidence*, 4th Ed, 2016, page 627, at 32.7.

⁹ *National Employers' General Insurance Co Ltd v Jagers* [1984] 4 All SA 622 (E), at 624-5; *Santam Bpk v Biddulph* (105/2003) ZASCA (16 February 2004).

[23] It bears highlighting that there is before this Court one version pertaining to the issues it is called upon to determine and it is that of the plaintiff. That being the case, I must still have regard to the pleadings as they stand in so far as the defence posited by the defendant is concerned, and the plaintiff's version, as part of the determination to be made, whether the plaintiff has discharged the onus that rests on him.

[24] Thus, the fact that the plaintiff's version was not rebutted by the Fund does not mean that it must be accepted without further ado. This Court is obliged to travel beyond the plaintiff's say so and answer the question whether, on the conspectus of the evidence, the probability exists that on 24 May 2023 the plaintiff was knocked down by an unidentified vehicle resulting in him sustaining bodily injury.

[25] I have already stated that the plaintiff's version regarding the occurrence of the accident was not challenged in cross-examination. The version of his aunt, Ms Godoma regarding how she heard of the accident and her proceeding to the scene where she found the plaintiff lying on the road, injured, was equally not displaced by the cross-examination on behalf of the Fund. I am satisfied that both the plaintiff and his aunt adduced acceptable and coherent evidence regarding the occurrence of the collision. Their evidence must accordingly be accepted as the truth and thus plausible. This is not the end of my enquiry, for I must determine whether the negligent driving of unidentified vehicle by the unidentified driver was the sole cause of the collision as pleaded by the plaintiff.

[26] It is instructive to refer to the work of learned author W.E. Cooper¹⁰ where he states the following regarding a pedestrian's duty when crossing the road:

¹⁰ W.E. Cooper in *Delictual Liability in Motor Law*, 1996.

“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”.¹¹

[27] The learned author goes on to state as follows regarding the duties of the 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. . .’¹²

[28] 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 reasons are not far to seek – there is invariably a reasonable possibility or probability that the pedestrian might act irrationally by suddenly moving into the vehicle or its path. This possibility exists for young children, for adults who are plainly drunk, and may arise in other cases.¹³

[29] During argument, Mr *Dlamini* submitted that the court was entitled to draw an inference of contributory negligence against the plaintiff. In substantiating this contention, he submitted that the plaintiff crossed the road when it was inopportune for him to do so. While Mr *Dlamini* is correct in suggesting that this Court is entitled to draw such an inference, the present case is not one where this can be done for the reasons I state below.

¹¹ Ibid page 193-194.

¹² Ibid, at page 195.

¹³ *Manual v SA Eagle Insurance Co Ltd* 1982(4) SA 352(C) at 357A.

[30] No factual basis was laid by the Fund in its plea and in evidence to support the contention that the plaintiff contributed to his injury by his own negligence by crossing the road when it was inopportune to do so. The Fund pleaded lack of knowledge of what the plaintiff alleged regarding how the collision occurred and it called him upon to prove his allegations. Subject to what I state immediately below, I acknowledge that it is usually difficult for the Fund to secure evidence to controvert the claimant's allegations in the case of an unidentified vehicle. This in turn poses a duty on the Court to carefully scrutinize the evidence presented.

[31] That being so, a party has a duty to allege in the pleadings the material facts upon which it relies for its claim or defence.¹⁴ It bears restating that pleadings serve the purpose of:

- ‘(a) Ensuring that both parties know what the points or issue between them are, so that each party knows what case he has to meet. He or she can thus prepare for trial knowing what evidence he or she requires to support his own case and to meet that of his opponent.
- (b) Assisting the court by defining the limits of the action.
- (c) Placing the issues raised in the action on record so that when a judgment is given such judgment may be a bar to the parties litigating again on the same issues, enabling a party to raise a defence of *res judicata* if the other party attempts to raise the same issues.’¹⁵

[32] In *Fischer and Another v Ramahlele and Others*,¹⁶ the Supreme Court of Appeal held that it is not for the court to raise new issues not traversed in the parties' pleadings or affidavits. The exception, which finds no application in the

¹⁴ *Minister of Safety and Security v Slabbert* (668/2009) [2009] ZASCA 163; [2010] 2 All SA 474 (SCA) (30 November 2009).

¹⁵ H. Daniels - Beck's Theory and Principles of Pleading in Civil Actions 6th edition (LexisNexis) pages 43-44.

¹⁶ In *Fischer and Another v Ramahlele and Others* [2014] ZASCA 88; 2014 (4) SA 614 (SCA); [2014] 3 All SA 395 (SCA) para 13 and 14.

present case, is where the court, on its own motion, raises a question of law that that appears from the evidence and is necessary for the decision of the case. Another exception is where the parties expand the issues by the in which they conduct the proceedings. In either case, the court is bound to have due regard to regard to the foundational principle of fairness in the conduct of litigation and the prejudice that may ensue on the part of the litigant against whom that course may operate.¹⁷

[33] Mr *Frost* referred me to the case of *Lwandile Goodman Tena v Road Accident Fund*, a judgment of Eksteen J,¹⁸ in which the learned judge held that where the defendant did not place the plaintiff's own negligence at issue by alleging it, either completely or to a certain degree, it is not open to counsel to raise it in argument.¹⁹

[34] I am in respectful agreement with the sentiments of the learned judge. In the present matter, similar to the matter of *Tena*, when counsel for the plaintiff objected to the cross-examination of the plaintiff on the issue of contributory negligence which was never pleaded by the Fund, Mr *Dlamini* abandoned the cross-examination.

[35] It was open to the Fund to place the plaintiff's own negligence in the occurrence of the collision at issue. It chose not to do so. There was, I may add, always an avenue for the Fund to seek an amendment of its plea since it appeared that the plaintiff's counsel was not amenable to the extension of the issues at trial by the ventilation in evidence of the issue of contributory negligence. That avenue was not explored.

¹⁷ Ibid.

¹⁸ *Lwandile Goodman Tena v Road Accident Fund*, unreported judgment of Eksteen J, Case No. 2866/2024, Eastern Cape Division of the High Court of South Africa, Gqeberha.

¹⁹ Ibid, para 19.

[36] In any event, the issue of contributory negligence is a substantive issue which is largely fact based. The present case is not one where the issues could be expanded upon ventilation during evidence in circumstances where the Fund did not specifically plead it. It was not available to Mr *Dlamini* to raise the issue in argument. Mr *Dlamini* was constrained to concede this fact.

[37] Since there is no direct evidence of how it came about that the unidentified vehicle collided with the plaintiff; this Court must draw conclusions in this regard from the evidence adduced. This relates to the question of the unidentified driver's negligence. I have already accepted as probable the version of the plaintiff that the collision occurred as a result of which he sustained bodily injury. It is trite that in order for the court to draw inferences, there must be positive proven facts from which such inferences can be drawn. If there are none, the method of inference fails and what is left is mere speculation or conjecture.²⁰ Moreover, the inference sought to be drawn must be the 'more natural, or plausible, conclusion from amongst several conceivable ones' when measured against the probabilities.²¹ 'Plausible' in this context means 'acceptable, credible, suitable'.²²

[38] From the plaintiff's description of how the collision occurred, it emerges that he satisfied himself that the roadway was free from oncoming traffic permitting of him to safely cross. In his version, he was rushing to work. Hence, it does not appear that he lingered once he entered the roadway. Despite the existence of the *Avanza* which was approaching at a distance of 30 metres at the time the plaintiff entered the roadway, his evidence suggests that he crossed the road with promptitude. There is, furthermore, no indication that the driver of the

²⁰ *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.

²¹ *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.

²² *Ocean Accident and Guarantee Corporation Ltd v Koch* 1963 (4) SA 147 (A) at 159B-D.

vehicle, made any evasive manoeuvres or sounded any warning of his/her approach by hooting. Moreover, from the fact that the vehicle dragged the plaintiff for a distance of 2.5 metres, a more natural and plausible conclusion is that it must have been driven at high speed.

[39] Upon the consideration of the evidence adduced before me, I have no reason to reject the evidence of the plaintiff regarding the fact the bodily injury he sustained were as the result of the sole negligence of the unidentified driver in driving the unidentified vehicle. On the facts of the present case, I come to the conclusion that the plaintiff has established on a balance of probabilities that the Fund is liable for his claim. What remains is the question of costs.

Costs

[40] The general rule is that the successful litigant must be awarded its costs unless there are exceptional circumstances which justify a deviation therefrom. It is trite that in awarding costs, the court exercises its discretion in accordance with what is fair between the parties. No grounds exist in the present case for deviating from the general rule. Costs must accordingly follow the result.

[41] Mr *Frost* underscored the fact that on 05 March and 21 October 2025 the matter was enrolled for trial and on both dates the trial never commenced. He went on to submit that the matter was on the roll for trial on 03 August 2026 and subsequently postponed at the instance of the Fund. As of that date, the Fund's defence had still been that of lack of knowledge of the allegations that the plaintiff made in respect of the occurrence of the accident and the negligence of the unidentified driver in causing it. Mr *Frost* submitted that for these reasons, costs on scale B are warranted.

[42] One of the considerations relevant to the determination of the scale of costs is the manner in which the case was presented.²³ Mr *Dlamini* submitted that the onus rested on the plaintiff to prove its case against the Fund and there was no onus on the Fund to prove anything. In the light of this fact, there is no basis to criticise the Fund's plea of lack of knowledge.

[43] While Mr *Dlamini* is correct in stating that the onus rests squarely on the plaintiff to prove his case against the Fund, his submission overlooks the unconventional manner in which the Fund sought to conduct litigation in this case. There was in this trial an attempt to place at issue the plaintiff's own negligence in the occurrence of the collision. There does not appear to be any cogent reason why on the occasions when this matter was postponed, the issue of the plaintiff's contributory negligence was not given attention by the Fund if it was desirous of contesting it. The Fund inexplicably raised this issue during the plaintiff's testimony. This trial was needlessly drawn out as a result.

[44] I have sympathy for the legal representatives of the Fund who invariably deal with the high volumes of litigation related personal injury claims against the Fund. However, it remains their task to expeditiously conduct and/or supervise litigation on behalf of their client. Importantly, trial by ambush undermines the affected party's right to a fair trial. In the circumstances of the present case, costs on scale B are warranted.

Order

[45] In the result, I make the following order:

1. The Road Accident Fund (the Fund) is held liable for 100% for such damages as plaintiff is able to prove resulting from the bodily injury

²³ *Mashavha v Enaex Africa (Pty) Ltd* 2025 (1) SA 466 (GJ), para 14.

which he sustained pursuant to the collision that occurred at or near Matanzima Road, KwaNobuhle, Kariega, Eastern Cape, on 24 May 2023.

2. The Fund shall pay the plaintiff's taxed costs of suit on scale B referred to in Uniform Rule 67A, and such costs shall include the costs of trial for the 3rd and 11th of August 2026.

L. RUSI

JUDGE OF THE HIGH COURT

Appearances:

For the plaintiff : *Adv. A Frost*

Instructed by : BLC Attorneys, Gqeberha

For the defendant : *Mr N Dlamini*

The Office of the State Attorney, Gqeberha

Date heard : 11 August 2026

Date delivered : 18 August 2026