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IN THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION, MBOMBELA MAIN SEAT

JUDGMENT

Not Reportable

Case no: A2025-115445

In the matter between:

KHOZA HLULANI OBEDIENCE **APPELLANT**

and

ROAD ACCIDENT FUND **RESPONDENT**

Coram: **Ratshibvumo DJP, Nobanda-Mooti *et* Mangena AJJ**

Heard: 21 August 2026

Delivered: 02 November 2026

Summary: Appeal—Rule 38(2) of the Uniform Rules of Court —Failure to properly adduce evidence on affidavit — Court could not make a determination— Uniform Rule 33.

ORDER

On appeal from: The Mpumalanga Division of the High Court, Mbombela, per Zakwe AJ (Sitting as a court of first instance)

1. The Appeal is upheld.
2. The order of the *court a quo* is set aside, and the matter is remitted for trial *de novo* before another judge.
3. There shall be no order as to costs.

JUDGMENT

Mangena AJ (Ratshibvumo DJP & Nobanda AJ concurring).

Introduction.

[1] The appellant appeals against a judgment and order granted by the trial court on 05 May 2025 dismissing his claim for delictual damages arising out of a motor vehicle accident. Leave to appeal was granted by the trial court on 13 June 2025. The notice of appeal was filed two days late, and a condonation application was filed for the late filing. The attorney explained that he made a mistake in computing the days, calculating from the date of the court stamp on the court order instead of the actual date the appeal was

granted. It appears to us to be a genuine error, and the delay is not inordinate. The prospects of success are also good, and condonation is granted.

Background.

[2] The appeal arises from the following background facts. The appellant was knocked down by a motor vehicle with registration letters KMH[…], driven by the insured driver, Mr Zwelithini. The insured driver, according to him, deviated from his path of travel to avoid a collision with an oncoming motor vehicle. He then knocked down the appellant in the middle of the road, who, at the time, was a pedestrian.

[3] The appellant was later taken to hospital for treatment and was admitted for some considerable time. He subsequently lodged a claim against the Road Accident Fund ("the RAF") for payment of damages suffered from the alleged negligence of the insured driver.

[4] When the claim was not settled within the prescribed timeframe, he instituted action proceedings setting out the facts in his particulars of claim upon which he alleged that the insured driver was negligent and that his negligence caused him the damages he suffered.

[5] The RAF defended the claim and denied liability on the basis that the insured driver was not negligent; alternatively, and if it is found that he was negligent (which is denied), that such negligence did not cause the accident or that he contributed to it.

[6] From the foregoing, it is clear that the RAF squarely placed liability in dispute, and in particular that the insured driver was the cause of the accident through his

negligence. This became more pronounced during the pre-trial hearing where it recorded its position in the minutes as follows: -

> "It is the Defendant's contention that the Plaintiff contributed to the occurrence of the accident and the extent thereof will be decided by the Court. It further indicated that it would like to cross-examine Plaintiff and any of his witnesses(s)."

[7] The matter came up for trial on 04 November 2024, and upon enquiry by the Court into its status, the Presiding Judge was briefly informed by the legal representatives that they had agreed to proceed on paper, and that heads of argument would be filed according to the agreed timelines.

[8] As is evident, no application was made to adduce evidence by way of affidavit, as provided for in Rule 38(2) of the Uniform Rules of Court ("the Uniform Rules"). For the avoidance of doubt, we consider it necessary to quote in full the interaction between the Court and the legal representatives of the parties. The exchange is short and reproduced here as it appears in the transcribed record

8.1 Court proceedings held on 04 November 2024 at Mbombela High Court—

"Registrar:	Matter number 3 case number 795/2024, Khoza Hlulani Obedience versus RAF.
Plaintiff's Counsel:	May it please you my Lord I confirm appearance on behalf of the Plaintiff.
Defendant's Counsel:	May it please you my Lord, I appear for the Defendant.
Court:	Thank you, what is the position with regards to this matter?

Plaintiff's Counsel: My Lord, we are ready to proceed; only damages is currently in dispute. However, there is an agreement between the Plaintiff and Defendant to proceed on paper, My Lord.

Court: Okay, Defendant's Counsel.

Defendant's Counsel: As the court pleases, My Lord. My Lord, I do admit that we are ready to proceed, and the matter is going to proceed on paper.

Court: Okay, alright, the matter will stand down for a few minutes, then.

Plaintiff's Counsel: As the Court pleases.

Defendant's Counsel: As the Court pleases.

Court adjourns

Registrar: Recalling matter number 3, case number 795/2024 Khoza Hlulani Obedience versus RAF.

Plaintiff's Counsel: May it please you, My Lord, I am for the Plaintiff.

Court: Alright, is Defendant's Counsel back online as well?

Plaintiff's counsel: I do believe she is online, My Lord.

Defendant's counsel: I am here, my Lord.

Court: Okay, I have just quickly checked the file, and I noticed that there are no heads of argument. I am going to need heads in respect of this matter. I can make arrangements as to when the Plaintiff can file, and the Defendant can respond.

Plaintiff's counsel: As the court pleases, My Lord, the Plaintiff can file by the 13th of November, My Lord.

Court: Defendant's counsel.

Defendant's counsel: My Lord, I can file my heads by the 15th of November, My Lord.

Court: Alright, the court will make the following order.

Order

Court: The matter stands down, and the plaintiff is ordered to file the heads on or before the 13th November 2024, and the Defendant is ordered to file the heads on or before 15 November 2024."

[9] Consequent to the order above, the trial court delivered its judgment and order on 05 May 2025 as alluded to above. In the judgment, the trial court identified the issues for determination as follows:

"[47.1] Whether the Plaintiff succeeded to prove on a balance of probabilities that the insured driver negligently or wrongfully caused the accident.

[47.2] And whether, as a result of the accident, the Plaintiff sustained injuries which entitle him to claim for damages."

[10] After traversing the provisions of Section 17(1) of the Road Accident Fund Act, 1996, the Court established that the Plaintiff bore the onus to prove on a balance of probabilities that the insured driver drove the vehicle "wrongfully or negligently". It then proceeded to "evaluate the facts" to determine whether the Plaintiff proved, on a balance of probabilities, that the injuries he sustained in the accident were caused by the insured driver's wrongful or negligent driving.

[11] As part of its "evaluation", the trial court considered, amongst others, the Section 19 (f)(i)-(ii) affidavit and statements made by the insured driver to the police, as well as the statement of another passenger in the insured vehicle who explained how the accident happened. It also considered what the appellant told the experts during his consultation to quantify his damages. The Plaintiff reportedly stated that he does not know how the accident happened as he lost consciousness and regained it later while in hospital. This factor apparently weighed heavily with the trial judge. We say so because the court said in the body of the judgment, "there is no evidence to gainsay the evidence of the insured driver and his witness. No effort was made by the Plaintiff to do so, probably because he does not know what happened." It proceeded to say that "on the evidence of the insured driver and his witness, it cannot be found that the insured driver acted negligently and it appears that he might have been faced with what the defendant described as a *sudden emergency".*

[12] Based on the above, the trial judge concluded that the RAF could not be held liable for compensation and dismissed the claim with costs.

The appeal.

[13] The appellant is aggrieved by the order and attacks it on various grounds, including that the learned judge misapplied the law governing the admission of evidence by affidavit. It is submitted on his behalf that the trite principle of our law is that parties are bound by their pleadings. Factual allegations contained in the pleadings stand unchallenged where parties have agreed to place evidence by way of an affidavit. In

support of this contention, we were referred to *Esorfranki Pipelines (Pty) Ltd v Mopani District Municipality*[1] where Goosen AJA (as he then was) said the following:

> "There is no procedural impediment to the reception of evidence, by a trial court, by way of affidavit. If the parties agree that facts may be placed before a court by way of affidavit and agree that the deponent will not be cross-examined, then the factual allegations contained in the affidavit stand unchallenged. Where that occurs, no dispute of fact arises."

Rule 38 (2) procedure

[14] As a matter of law, Goosen AJA is correct. The position he expressed above is an articulation of the provisions of Rule 38(2) of the Uniform Rules which reads as follows: -

> "(2) The witnesses at the trial of any action shall be orally examined, but a court may at any time, for sufficient reason, order that all or any of the evidence to be adduced at any trial be given on affidavit or that the affidavit of any witness be read at the hearing, on such terms and conditions as to it may seem meet: Provided that where it appears to the court that any other party reasonably requires the attendance of a witness for cross-examination, and such witness can be produced, the evidence of such witness shall not be given on affidavit."

[15] In *Bafokeng Land Buyers Association and Others v Royal Bafokeng Nation and Others*[2], the full court of that Division provided the following guideline regarding presentation of evidence in trial proceedings. It said:

> "[62] The general rule in trials is that evidence should be given viva voce. This not only enables the court to assess the witness giving the evidence, but, more importantly, it also affords the party that has not called the witness the opportunity to cross-examine the witness, both to test

[1] *Esorfranki Pipelines (Pty) Ltd v Mopani District Municipality*, 2022 (2) SA 355 (SCA) at para 27.
[2] *Bafokeng Land Buyers Association and Others v Royal Bafokeng Nation and Others*, 2018(5) SA 566 (NWM) at para 62.

> the evidence that the witness has given and, equally importantly, the opportunity to elicit evidence from the witness which supports the cross-examiner's case.
>
> [63] Rule 38(2) contains an exception to this general rule. An applicant who seeks to invoke the exception must prove that 'sufficient reason' exists to do so. While this requirement confers a broad discretion on a court, in determining whether sufficient reason exists a court must bear in mind the disadvantages above of permitting this to both the court and the other side, and then consider whether the interests of justice nonetheless requires that the evidence be admitted on affidavit. The rule also contains an express proviso limiting the court's discretion, namely that, where it appears to the court that a party reasonably requires the attendance of the witness for cross-examination, and the witness can be produced, then the evidence of the witness shall not be given on affidavit.
>
> [64] The determination of 'sufficient reason' necessarily involves the exercise of a discretion, which discretion has to be exercised judicially, having regard to the options available to the court. A court on appeal may interfere with the exercise of discretion only if there has been a wrong application of legal principle or a misdirection of fact. The court on appeal does not have the power to substitute its own discretion on the basis that it would have exercised the discretion differently."[3]

[16] We align ourselves with the position set out in the above cases, including the paragraph relied upon by the appellant in *Esorfranki (supra)*.

[17] With the above said, however, we do not believe the appellant's reliance on *Esorfranki* is well placed. We say so because, in this matter, the parties did not agree to place facts before the court by way of affidavit, and the deponents (if any) will not be examined. In addition, no application was made to the presiding judge to adduce evidence by affidavit. In our view, the learned judge did not have an opportunity to exercise his discretion to determine whether there was "sufficient reason" to depart from the general rule governing how evidence is presented or adduced in trial proceedings.

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[3] Footnotes omitted. See also *Madibeng Local Municipality vs Public Investment Corporation*, 2008 (6) SA 55(SCA) at para 26.

[18] In the absence of a formal application detailing facts and circumstances warranting a deviation from the general rule, there was, in our view, no evidence placed before the court for evaluation in order to determine a factual dispute relating to liability. This is significant because it is a procedural issue. It reaffirms the position in our law that certain matters can be adjudicated through motion proceedings, and others only through action proceedings. Harms DP puts it better in *Cadac (Pty) Ltd vs Weber – Stephen Products Company&Others*[4], wherein he says:

> "Motion proceedings are not geared to deal with factual disputes — they are principally for the resolution of legal issues — and illiquid claims by their very nature involve the resolution of factual issues."

[19] In *Summermania Eleven (Pty) Ltd v Hattingh N.O,*[5] it was held that:-

> "In trial proceedings parties discharge the onus on them by giving oral evidence. The words *'shall be orally examined'* in rule 38(2) affirm this as the standard procedure. Reliability and credibility of the evidence given is then assessed and analysed through cross-examination. The trial court, however, has a discretion under the rule, to receive evidence given by way of affidavit…"

[20] We conclude on this aspect of the procedure for adducing evidence on disputed facts in unliquidated damages claims by quoting what the Supreme Court of Appeal said in *Economic Freedom Fighters and Others v Manuel*,[6] where it said:

> "[92] …An unliquidated claim for damages *must* be pursued by institution of an action…

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[4] *Cadac (Pty) Ltd v Weber – Stephen Products Company & Others*, 2011 (3) SA 570 (SCA) at para 10.
[5] *Summermania Eleven (Pty) Ltd v Hattingh NO*, (316/2022) [2024] ZASCA 42 at para 16.
[6] *Economic Freedom Fighters and Others v Manuel* 2021 (3) SA 425 (SCA) at paras 92-101. see also *MMK obo MK v RAF* (497/2024) [2025] ZASCA 136 (25 September 2025) paras 15-16

> [93] This is not mere technicality. Claims for unliquidated damages by their very nature involve a determination by the court of an amount that is just and reasonable in the light of a number of imponderable and incommensurable factors. That exercise cannot be undertaken in proceedings by way of application. As Harms DP said in Cadac:
>
> '(M)otion proceedings are not geared to deal with factual disputes — they are principally for the resolution of legal issues — and illiquid claims by their very nature involve the resolution of factual issues.'
>
> …
>
> [101] In essence, the court held that in cases where damages are claimed in delict one would, in the normal course, require evidence in relation to the damages allegedly sustained. *In motor collision cases, of course, questions arise concerning negligence, contributory negligence and, where applicable, the apportionment of damages, in relation to all of which oral evidence is required.*" (Emphasis added)

[21] As we pointed out above, the RAF placed liability at the centre of the dispute, and the trial court correctly identified it as an issue for determination. It is indisputable that in delictual claims, Plaintiff is required to prove causation as one of the five elements of a delict. It is also trite that causation is a factual dispute which cannot be resolved on paper, as the Supreme Court of Appeal so aptly tells us. Indeed, law reports are replete with warnings to both legal practitioners and presiding officers that where the cause of action is delictual, damages can in most cases only be determined after evidence has been led in relation to the cause of action.[7]

[7] See *Esofranki supra* at paras 101 to 102.

Conclusion.

[22] In our view, the trial court erred on a procedural point regulating the admission of evidence and, in particular, the management of the proceedings. It went off on a tangent and found itself in a labyrinth of paper purporting to be evidence when it was not. It was therefore unsurprising to us that the trial judge remarked that he was in the dark as to how the accident happened. We also do not know, as no facts were placed before the court as evidence.

[23] As there was no evidence placed before the court, it follows ineluctably that the findings made regarding liability and onus cannot be allowed to stand. They were not founded on the established facts. The appeal should succeed. The appellant urged us to substitute the order and find that negligence was proved. We cannot do so in the absence of evidence establishing the proven facts. We will be committing the same error as the trial court. We believe the correct approach is to remit the matter to the trial court. In this regard, we are guided by the Supreme Court of Appeal in *Minister of Police v Mboweni and Another.*[8]

Costs

[24] Both parties contributed to the state of affairs, and neither should benefit from the ineptitude displayed here. They should have known there was a genuine dispute of fact relating to causation and alerted the court accordingly. Additionally, they should have formally brought an application in full compliance with Rule 38(2) of the Uniform Rules,

[8] 2014 (6) SA 256 (SCA).

as mentioned above, or, better still, approached the court with a stated case in terms of Rule 33.[9] There should be no order as to costs.

[25] In the result, it is ordered that:

1. The appeal is upheld.
2. The order of the *court a quo* is set aside, and the matter is remitted for trial *de novo* before another judge.
3. There shall be no order as to costs.

_____

MI MANGENA

ACTING JUDGE OF THE HIGH COURT

I agree.

_____

PL NOBANDA-MOOTI

ACTING JUDGE OF THE HIGH COURT

I agree, and it is so ordered.

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[9] *LMP v NJDP* [2025] ZALMPPHC 122 at para 18, in which the court referred to *Minister of Police v Mboweni and Another* (*supra*) at para 8. In it the court stated, "It is clear therefore that a special case must set out agreed facts, not assumptions. The point was re-emphasised in *Bane and Others v D'Ambrosi*, where it was said that deciding such a case on assumptions as to the facts defeats the purpose of the rule, which is to enable a case to be determined without the necessity of hearing all, or at least a major part, of the evidence…"

TV RATSHIBVUMO

DEPUTY JUDGE PRESIDENT

Appearances

For the Appellant:	Adv K Toma Johannesburg Society of Advocates Tel: 011 282 3700 Cell: 073 0100 750 Email: kumbi.toma@rsabar.co.za
Instructed By:	PN Hlatshwayo Attorneys Nelspruit Tel: 013 752 3647 Cell: 082 420 8424 Email: plato.nhlamulo@gmail.com
For the Respondents:	Adv V Mukwevho Johannesburg Society of Advocates Email: mukwevho@rsabar.com
Instructed By:	State Attorney Gugu Mokoena Email address: gugum1@raf.co.za Cell: 066 308 9159 Tel: 013 101 3722 Nelspruit 3rd floor admin block, R104 Samora Machel Drive