

SOUTH AFRICA / JUDGMENT

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

COURT

North Gauteng High Court, Pretoria

BEFORE

Moshona

CASE / FILE NUMBER

65311/17

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Policy**IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG DIVISION,****PRETORIA****CASE NO 65311/17****(1)****REPORTABLE: NO****(2)****OF INTEREST TO OTHER JUDGES: YES****(3)****REVISED**

DATE: 12/2/25
SIGNATURE
In the matter between:-
BRAVEMAN
MVELO MADLALA
Plaintiff
and
ROAD
ACCIDENT FUND (RAF)
Respondent

Summary: In an action where the offending motor vehicle and its driver has not been established, the onus to prove negligence still rests on the claimant. It is not sufficient for the claimant to on his ipse dixit without any form of corroboration testify that the unidentified motor vehicle was negligent. Where a Court is not satisfied that a claimant has discharged his onus of proof, absolution from the instance is warranted. This Court was not satisfied with the say-so of the plaintiff. Accordingly, an absolution from the instance was warranted.

ORDER
It is ordered:-

1. The Road Accident Fund is absolved from the instance.
2. There is no order as to costs.

JUDGMENT

MOSHOANA J

- [1] This is an action instituted by the plaintiff, Mr Braveman Mvelo Madlala against the defendant, the Road Accident Fund (RAF) for damages arising from the bodily injuries suffered by him in a motor vehicle accident that occurred on 31 July 2016. As customary, the RAF, despite having delivered a plea resisting the action, failed to appear in Court to tender any evidence. At the trial of the action, this Court received oral testimony from the plaintiff only.

FACTUAL MATRIX AND EVIDENCE TENDERED

- [3] On 31 July 2016, a motor vehicle accident occurred. The plaintiff sustained bodily injuries as a result of that accident. He was hospitalised and received medical treatment. In his pleadings, the plaintiff alleged that the accident happened as a result of the negligent driving of an unidentified motor vehicle. The RAF disputed this allegation. In order to prove the alleged negligence, the plaintiff delivered oral testimony.
- [4] Briefly, the testimony of the plaintiff was that on the day in question, he was travelling along an unknown road in Midrand. The road is a single carriage way with one lane in each direction. He was a driver at the time, driving, without any passengers, a vehicle with registration letters and numbers C[...] 3[...] V[...] G[...]. As he approached what he termed a “gentle curve” on this unknown road, he noticed an unidentified motor vehicle which emerged from the opposite lane. What happened next, the said unidentified motor vehicle, without any warning, encroached into his lane of travel, so he testified.
- [5] He took an evasive action by swerving to the left in an attempt to avoid a collision between his vehicle and the unidentified vehicle. He, due to the sudden emergence of the unidentified vehicle, lost control of his motor vehicle and hit a tree. The driver of the unidentified motor vehicle failed to stop at the scene of the accident. He sustained injuries and was taken by an ambulance from the scene of the accident to the hospital. With regard to the merits of the claim, the plaintiff closed his case without leading any other evidence.

ANALYSIS

- [7] It must be pointed out upfront that the claim of the plaintiff falls under section 17(1)(b) of the Road Accident Fund Act (RAFA)[1]. This Court, must declare, that claims falling under this section are the most problematic ones, particularly where the RAF does not present any version. Litigants seem to have taken a view that once evidence is presented that an unidentified vehicle caused the accident, this Court as a matter of course must be satisfied that the RAF is liable.
- [8] As it shall be demonstrated below, this Court takes a view that the liability of the RAF is not as axiomatic as the litigants wish to have it. Section 17(1)(b) of RAFA provides as follows:

“17 Liability of Fund and agents – (1) The Fund or an agent shall

- (b) subject to any regulations 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 (third party) for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself ... caused by or arising from the driving of a motor vehicle by any person ..., if the injury ... is due to the negligence or other wrongful act of the driver or owner of the motor vehicle ...”

[9] What bears emphasis is that the liability is subject to constraints set out in a regulation. Before consideration is given to the regulations, it is of significance to adumbrate, what appears to this Court to be the essential requirements to ignite liability of the RAF. Those are-

- Bodily injuries (pertinent to this case);
- Caused by or arising from the driving of a motor vehicle by another person;
- The bodily injury is due to the negligence or wrongful act of the driver or owner of the motor vehicle.

[10] Observably, the onus to establish existence of these essential requirements lies squarely on the shoulders of a claimant. Failure to discharge the onus in respect of any of these essential requirements implies that the RAF is not liable to compensate. In casu, this Court was satisfied that the plaintiff sustained bodily injuries. On the available evidence, this Court is not satisfied that the said bodily injuries were caused or arose from the driving of a motor vehicle by another person. Also, that the bodily injury is due to the negligence of the driver of a motor vehicle. On his own version, the plaintiff lost control of the motor vehicle he was driving. Having lost control, he hit a tree. Thus, the injuries he sustained, as he testified, were caused by the collision with the tree.

[11] However, the case that the plaintiff was seeking to mount is that of him losing control as a result of the negligent driving of the unidentified motor vehicle. The version that the unidentified motor vehicle suddenly encroached into his lane of travel is uncorroborated. Other than testifying that he was approaching a gentle curve, there is no evidence as to the layout of the unnamed road. No photographs were presented. The Accident Report (AR) indicates that there was only one vehicle involved. The sketch plan attached to the AR does not indicate any other vehicle and the direction it would have emerged from.

[12] Section 16 of the Civil Proceedings Evidence Act (Evidence Act)[2] provides as follows:

Sufficiency of Evidence

“16 Judgment may be given in any civil proceedings on the evidence of any single competent and credible witness.”

[13] Credible evidence is evidence that is likely to be believed. A credible witness is a witness who is believed to be truthful. It remains the duty of this Court to assess the evidence of the plaintiff in order to weigh the probabilities.[3] In my view, it is never sufficient for a plaintiff to, without any form of corroboration, say-so, that an offending vehicle caused him or her to lose control of a vehicle driven by him or her. A greater possibility exists that such a say-so may have been manufactured.

Such that, it may be easy for a driver who had lost control of a vehicle due to his or her own lapse of concentration, to allege that another unidentified vehicle did so. This possibility was observed by the SCA in the matter of Mbatha v MMVAF (Mbatha)[4]. The Court expressed itself in the following terms: -

“[11] Taking into consideration that there are good reasons for having stricter requirements for unidentified vehicle cases, the argument has to fail. In these cases the possibility of fraud is greater; it is usually impossible for the Fund to find evidence to controvert the claimant’s allegations; the later the claim the greater the Fund’s problems...”

[14] This Court takes a firm view that inherent in these cases of unidentified vehicle is the greater possibility of fraud. This, requires any Court faced with such cases to carefully scrutinize the evidence, particularly that of a single witness. The cautionary rules are bound to apply. The sentiments expressed in Mbatha were reverberated by the SCA almost two decades later in Jones v RAF (Jones)[5]. There, the SCA expressed itself as follows:

“[22] The reason appears to be a view that the regulation serves a legitimate government purpose, which is to eliminate fraud and to facilitate proof, because the possibility of fraud is greater in unidentified vehicle, since it is usually difficult for the RAF to find evidence to controvert the claimant’s allegations...”

[15] It is important to observe that the SCA found that the regulation exist to facilitate proof. The regulation with regard to unidentified vehicle has undergone various metamorphosis. It seems to be the case that the situation of unidentified vehicles is now regulated by regulation 2 as published in the GG 31249 of 21 July 2008. In the main, the regulation regulates the prescription period. When read out of context, it simply means that once the claim is lodged within the two year period, such may be considered to be compliant. In my view, the regulation ought to be read symbiotically with the requirements outlined in section 17(1)(b) of RAFA already discussed above.

[16] This Court agrees with the sentiments expressed by the learned Raulinga J in Ninteretse v RAF (Ninteretse)[6], when he expressed himself in the following terms: -

“...the plaintiff bears the onus to prove on a balance of probabilities that the insured driver was negligent and that the negligence was the cause of the collision from which he sustained the bodily injuries. There is no onus on the defendant to prove anything. Even in the instance where the defendant has not tendered evidence to rebut the evidentiary burden of the prima facie case presented by the plaintiff in this case, the plaintiff may not succeed with his claim depending on the nature and weight of the evidence so tendered.”

[17] Dealing with a “hit and run” situation, this Court in Dlamini v RAF and Others (Dlamini)[7] expressed itself in the following terms: -

“In order to fall under the parameters of the above section, it must be alleged and proven that (a) a motor vehicle was driven; (b) the identity of the owner or driver of that motor vehicle has not been established. To the extent that Dlamini alleges that a motor vehicle was driven, he bears the onus to

prove that allegation. It does not follow that because a claimant alleges that the identity of a driver or owner was not established then a motor vehicle was driven and wrongfully for that matter. Proving that a motor vehicle was driven does not require the ipse dixit of the claimant. What is required is evidence. In law, evidence means any of the material items or assertions of fact that may be submitted to a competent tribunal as a means of ascertaining the truth of any alleged matter of fact under investigation before it.[8] If the ipse dixit was sufficient, then in all cases, including the fabricated ones, of "hit and run" the RAF will be obligated to pay.

As noted above, this type of a claim is subject to the provisions of the Regulations. On 25 April 1997, the Minister of Transport empowered by section 26 of RAFA published the Regulations. In terms of regulation 2 (1) (b), in the case of any compensation or any claim for compensation referred to in section 17 (1) (b) of the Act, the Fund shall not be liable to compensate any third party unless – (b) the third party took all reasonable steps to establish the identity of the owner or the driver of the motor vehicle concerned. In dealing with similar provisions applicable to the Canadian law, the Court in *Leggett v Insurance Corp. of British Columbia* (Leggett[9]), per the learned Mr. Justice Taylor stated the following:

"As the trial judge recognized, the protection against fraudulent claims is only one of the purposes of the requirement that the claimant show inability to identify the other driver and owner as a condition of being able to claim under the section. In my view the overall purpose of the section is to limit the exposure of the corporation to claims brought by persons who, in the matter seeking to identify those responsible for

accident, have done everything they reasonably could to protect what ordinarily would be their own interest, and which, by virtue of the section, become the interests of the corporation. The corporation's exposure under the section is limited to claims brought by those who could not have ascertained the identity

of the parties responsible. It does not, in my view, extend to claims by those who have chosen not to do so.

This Court echoes the same sentiments echoed above. Where a claimant eschews the responsibility to take reasonable steps to identify the owner or driver, such a claimant does not have a claim against the RAF. The Supreme Court of British Columbia was also guided by Leggett when in *Springer v Kee*[10] it concluded thus:

"The onus is on the plaintiff to establish that she made all reasonable efforts to establish the identity of the driver. Although each case must be decided on its own facts, the authorities indicate that the onus is not one easily displaced, even in the circumstances in which the unidentified vehicle has fled the scene. Geopel J. also notes at para 18, that the plaintiff is under a continuing obligation following an accident to use all reasonable efforts to ascertain the identity of the driver.

In my view a proper determination of the efforts which might reasonably lead to discovering the identity of the unknown driver or owner must be made with due regard to the location where the collision occurred and the circumstances in which the collision occurred. For an example, a collision which occurs at a busy intersection of a well-populated area on a weekday 8:30 a.m., in relatively slow-moving traffic might be witnessed by many people who: recognised the car or driver in question, or noted the licence plate number...”

In an instance where, the negligent driver fled the scene, Kerr J in *Morris v Doe*[11] examined the steps taken by the plaintiff to ascertain the identity of the negligent driver in the days or weeks following the accident. As it shall be demonstrated later, Dlamini led no evidence of any steps he took to identify the driver or owner of the bakkie. This failure to take steps is compounded by the fact that it took Dlamini two years to report the accident. With regard to the occurrence of the accident, Dlamini is the only witness, thus the cautionary rule finds application. Mr Geach SC argued that cautionary rules only apply in criminal cases. I do not agree. Section 16 of Civil Proceedings Evidence Act[12] expressly provides that the evidence must be from a credible witness.

It is a rule of evidence that traditionally the evidence of a single witness should be treated with caution.[13] The evidence of Dlamini must be reliable and trustworthy. The question is, is his evidence reliable or not? Dlamini bears the overall onus to prove that the RAF was indeed liable to have compensated him. On the other end of the pendulum lies the fact that

Dlamini may have lost control of the vehicle whereafter it capsized and injured him. In *National Employers' General Insurance Co Ltd v Jagers (Jagers)*,[14] the erudite Eksteen AJP confirmed that discharging the onus on the balance of probabilities simply means that the Court must be satisfied, on the balance of probabilities, that the plaintiff was telling the truth and his version was therefore acceptable. The fact that there is no countermanding version does not necessarily transmute the uncorroborated version to be true and acceptable.

Dlamini bore the onus to show that a wrongdoer caused the damage he suffered. In other words, he must create a causal link between the damages he suffered and the actions of the wrongdoer. [15] Dlamini was emphatic that the banging sound when the vehicle he was driving collided with the trailer was still indelibly edged in his mind. However, he could not tell the Court what the colour of the bakkie was. Ironically, only when the Court enquired, did he manage to describe the trailer and its size, details that are too complicated to remember twenty years later, than the mere colour of the bakkie. On his own version, which only emerged when the Court was seeking clarity, he recalls seeing the bakkie through the rear view mirror approaching at a high speed behind him. Such attention to details would, in my view, simultaneously have drawn his attention to the colour of this vehicle driven at a high speed. Hamilton visited the scene of the accident the very next day after being given a location by the police, and the only thing he could encounter was the radio of the Fiat Uno vehicle. Strangely, nothing was found related to the trailer since, on Dlamini's uncorroborated version, he collided with the trailer and not the bakkie.”[16]

- [18] What is particularly concerning in this matter is that, there is no credible evidence to suggest that the alleged encroaching into the lane of travel of the plaintiff is causally linked to the collision with the tree, which on the sketch drawn, appears to be lying some meters away from the shoulder of the unknown road. It is apparent from the version of the plaintiff that swerving to the left successfully avoided a potential head on collision. Thus, had he not collided with the tree, he would not have been injured. The Important and unanswered question is why did he drive into the tree after he successfully avoided a head on collision?
- [19] Regard being had to the above unanswered question, it must axiomatically follow that the plaintiff negligently injured himself. He tendered no evidence as to how it came about that he collided with a tree in the process of seeking to avoid a collision. Did he see the tree but because he himself lost control he could not avoid the collision with the tree? This Court is none the wiser. Did he attempt to apply the brakes as and when his vehicle was heading towards a tree? This Court was not told. On his version the alleged offending vehicle did not make any contact with his vehicle with a possibility of pushing it towards the tree that caused him injuries. With these important questions lingering in the mind of this Court, is the Court satisfied? Far from it.
- [20] An interesting finding was reached by the Court in Masila. Although this Court is not bound by those findings, this Court finds them apt when regard is had to the evidence tendered in this matter – the collision with the tree. At paragraph 17 the court expressed:
- “17 ...In my view this mean that before the alleged bright lights, if any, at the distance of over 8 metre the plaintiff should have realised that there was a donkey in front of her unless she drove her motor vehicle without a proper lookout... but in my view the cause of accident is not the bright lights from unknown insured motor vehicle but it is a donkey on the road which she could not abruptly realised..”*
- [21] Quintessentially, had the plaintiff not collided with the tree, which collision this Court was not told that it was unavoidable, he would not have sustained the bodily injuries he sustained. It must be so that when the collision with the tree happened, the unidentified motor vehicle had long safely gone past. The onus lies on the plaintiff to prove that his injuries were caused by the negligent driving of the unidentified motor vehicle. The fact that section 16(1) of the National Road Traffic Act[17] was allegedly contravened does not in of itself suggest negligence at all. The alleged fact that the contravention happened, is predicated on very shaky grounds. It remains the ipse dixit of the plaintiff not supported by any objective facts. It could well be that there was no another vehicle. The AR, suggests that it was a one vehicle accident. That vehicle, being the vehicle of the plaintiff, collided with the tree. Of significance, the plaintiff,

unashamedly stated to the Metro Police and to this Court that he lost control of the vehicle prior to hitting the tree on the side of the road. Losing control of a vehicle is generally considered to be a form of negligence as it is indicative of a failure to exercise reasonable care and skill while driving. Since this Court is bereft of cogent evidence to support the cause of the loss of control, the conclusion to reach in such dearth of evidence is that the injuries were caused by the

negligent driving of the plaintiff. Such evidence is insufficient to ignite liability contemplated in section 17(1)(b) of RAFA. To the extent that the plaintiff suggested that he acted by colliding with a tree in a sudden emergency, the doctrine of sudden emergency does not apply to him and the tree. The RAF had pleaded in the alternative that in the event a collision between the plaintiff's motor vehicle and that of the insured driver occurred then and only then did the RAF allege contributory negligence.

[22] The doctrine of sudden emergency occurs where a person who, by another's want of care, finds himself in a position of imminent danger, cannot be held guilty of negligence merely because in that emergency he does not act in the best way to avoid the danger[18]. On the plaintiff's own version, the danger to have been averted was a head on collision with the alleged oncoming unidentified motor vehicle. In that imminent danger, the plaintiff acquitted himself with distinction to avoid the danger. Having successfully done so, that marks the end of the imminent danger situation. What then presented itself thereafter is another danger of a collision between the plaintiff's motor vehicle and the tree lying stationery few meters away from the shoulder of the unnamed road. Clearly, before such a collision happened, on the plaintiff's own version, he lost control of his own vehicle. Unfortunately, in this second imminent danger, the plaintiff failed to acquit himself with distinction. Perhaps, had he not lost control of his own motor vehicle, he could not have collided with the tree. That notwithstanding, the second collision, after successful avoidance of the first collision, is not covered by section 17(1)(b) of the RAFA. It is a collision with a tree as opposed to a motor vehicle.

Therefore, technically speaking, his actions prior to the second collision, in an attempt to avoid the collision, are of no moment

since the RAF had been removed from the equation. The insured motor vehicle had safely passed unscathed. Negligence, involves a

foreseeability test. There is no evidence to suggest that the unidentified driver of the unidentified insured motor vehicle would

have foreseen that his alleged actions of encroaching into the lane of travel of the plaintiff would have caused the plaintiff to collide with a tree and injure himself in the process. At best, the insured driver would have foreseen that his alleged encroachment into the lane of travel of the plaintiff would have caused a collision, which would have caused the plaintiff some bodily injuries. On the evidence of the plaintiff, such an eventuality did not occur. Where a Court, as it is the case herein, is faced with insufficient evidence to find in favour of a plaintiff, an absolution from the instance is warranted. This Court is not satisfied with the sufficiency of the evidence of the plaintiff and it is minded to grant an absolution from the instance. In an instance where default judgment is requested, of which, the present instance is, rule 39(1) of the Uniform Rules provides that in a default situation, the plaintiff must still prove a case on the balance of probabilities in order to obtain a favourable judgment[19]. For reasons outlined above, this Court is far from being satisfied that the plaintiff has provided sufficient evidence on a balance of

probabilities.

[23] In the premises, the order stated at the dawn of this judgment must issue and it is so ordered.

GN MOSHOANA

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Appearances:

Counsel for the plaintiff: Adv. K S Mashaba Instructed by: Macrobert Inc Attorneys, Pretoria

Counsel for the respondent: No appearance Date heard: 11 February 2025 Date of Judgment: 14 February 2025

[1] Act 56 of 1996 as amended.

[2] Act 25 of 1965 as amended.

[3] See Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and others 2003 (1) SA 11 (SCA) and Santam Bpk v Biddulph (105/2003) ZASCA (16 February 2004).

[4] 1997

(3) SA 713 (SCA).

[5] 2020

(2) SA 83 (SCA).

[6] (29586/13)

[2018] ZAGPPHC 493 (2 February 2018)

[7] (7658A/2008) [2024] ZAGPPHC 277 (20 March 2024).

[8] Nagel, Heinrich and Norton, Jerry. "Evidence". Encyclopedia Britannica, 18 Feb 2024, <https://www.britannica.com/topic/evidence-law>. Accessed 19 March 2024.

[9] 1992 CanLII 1263 (BC CA).

[10] 2012 BCSC 129 (CanLII)

[11] 2011 BCSC 253.

[12] Act 25 of 1965 as amended.

[13] See Northam Platinum Mines v Shai NO & others

(2012) 33 ILJ 942 (LC) and Ntoro v RAF

[2023] ZAGPJHC 357 (Ntoro).

[14] 1984 (4) SA 437 (E) at 440D-G.

[15] See *Grove v The Road Accident Fund*

[2011] ZASCA 55 at para 7.

[16] Paras 22-27 of *Dlamini*. See also *Masila v Road Accident Fund* (7718/2017) [2024] ZALMPPHC 203 (11 December 2024) (*Masila*)

[17] Act 93 of 1996 as amended.

[18] See *R v Cawood* 1944 GWL 50 at 54.

[19] See *Ntsala & others v Mutual & Federal Insurance Co. Ltd* 1996 (2) SA 184 (T) at 190E-F and *Sardi v Standard and General Insurance Co Ltd* 1977 (3) 776 (AD) at 780C-D.

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