

SOUTH AFRICA / JUDGMENT

Ngwenya v Road Accident Fund (07832/16) [2025] ZAGPJHC 286 (7 March 2025) [2025] ZAGPJHC 286

COURT

South Gauteng High Court, Johannesburg

BEFORE

S M Katzew

CASE / FILE NUMBER

07832/16

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 07832/16

1. REPORTABLE: YES/NO
2. OF INTEREST TO OTHER JUDGES: YES/NO
3. REVISED

In the matter between:

NGWENYA, NTHATO BAFANA Plaintiff And ROAD ACCIDENT FUND Defendant

Summary:

- [1] Practice and procedure - pleadings - notice of summary amendment without affording counterparty an opportunity of objecting thereto in terms of Rule 28(2) – absence of statement to that effect not depriving party receiving the defective notice of opportunity of exercising the procedural right of objecting to proposed amendment within the 10 days afforded by Rule 28(2) – non-compliant notice can competently be followed by delivery of amended pages within the period prescribed by Rule 28(5)
- [2] Practice and procedure – non-compliant notice of amendment to pleading in terms of Rule 28(2) – no objection by party receiving notice – amended pages not delivered within 10 days of expiration of 10 days to object as required by Rule 28(5) and (7) – proposed amendment lapsing when amended pages not delivered within prescribed time – amended pages delivered after expiry of deadline without application for extension of deadline in terms of

Rule 27(1) and (2) constituting irregular step which counterparty prima facie entitled to ignore without formal application for setting aside

- [3] Court – notwithstanding lapsed amendment process by a party, amended pages delivered without objection by counterparty – inaction by counterparty manifesting indifference to patent disregard by adversary for procedural sustainability of proceedings – exercise of Court’s inherent power to mero motu intervene to maintain procedural sustainability of proceedings under Court’s watch
- [4] Evidence – document – use of in cross examination – no objection by either party to authenticity or truthfulness of contents - containing hearsay admission by non-party against party with identity of interest – hearsay evidence admissible without need to satisfy requirements of section 3(1)(c)(i)- (vii) of Law of Evidence Amendment Act 45 of 1988
- [5] Evidence – assessment of – single witness relied on to prove merits only for claim against RAF arising out of motor vehicle collision – discrediting of single witness on issues of quantum unrelated to merits – credibility on merits intact – witness satisfying requirement of being credible for single witness evidence on merits
- [6] Negligence – vehicle driven by plaintiff colliding with rear end of reversing insured vehicle - statement by Fund in Court that it does not have witness to dispute plaintiff’s version of collision - plaintiff’s version that he unable to avoid collision with erratically reversing insured vehicle prima facie evidence of driver of insured vehicle failing to keep a proper lookout
- [7] Contributory negligence – uncontradicted evidence by plaintiff that he unable to avoid collision – evidence and estimated measurements at inspection in loco revealing plaintiff was travelling at an excessive speed when he first observed erratic reversing of vehicle which probably prevented him from slowing down

sufficiently – no reliable indicators that collision could have been avoided by plaintiff – on a preponderance of probability

excessive speed of plaintiff may have increased impact of collision but was not the cause thereof – proximate cause of collision

remains uncontrolled and erratic reversing by driver of insured vehicle and his breach of duty of care by failing to keep a proper

lookout while reversing

The plaintiff instituted action against the defendant Road Accident Fund (“the Fund”), an insurer in terms of the Road Accident Fund Act 56 of 1956, for compensation for damages arising out of injuries sustained by the plaintiff in a collision between a vehicle driven by the plaintiff and a vehicle (“the insured vehicle”) insured by the Fund for the damages claimed by the plaintiff that were caused by the fault of the driver of the insured vehicle.

The parties agreed to a separation of merits and quantum. The Court herein is seized only with merits.

During the proceedings, the plaintiff delivered a notice of summary amendment of his particulars of claim, to which the Fund did not object. After expiry of the period for delivery of amended pages as provided for in Rule 28(5), the plaintiff delivered an amended particulars of claim without an accompanying application in terms of Rule 27(1) and (2) for an extension of the deadline imposed by Rule 28(5).

Held *mero motu*, that the notice of summary amendment, although non-compliant with the requirement of affording the counterparty an opportunity of objecting thereto in terms of Rule 28(2), did not deprive the counterparty of the procedural right of objecting to the proposed amendment within the 10 days afforded by Rule 28(2) and that accordingly the notice of summary amendment was not an irregular step in the proceedings.

Held *mero motu* further, that the non-compliant notice of summary amendment of the particulars of claim could competently be followed by delivery of amended pages in terms of Rule 28(5).

Held *mero motu* further, that the proposed amendment lapsed when the plaintiff failed to deliver the amended particulars of claim within the time prescribed by Rule 28(5).

Held *mero motu* further, that delivery of the purported amended particulars of claim thereafter constituted an irregular step which the counterparty was *prima facie* entitled to ignore without the need for a formal application for the setting aside thereof.

The only evidence in the trial on the merits was that of the plaintiff. He testified to having observed the insured vehicle reversing

erratically at high speed from a roadblock and of him being unable to avoid colliding into the rear end of the insured vehicle. The Fund indicated at the outset of cross examination of the plaintiff that it did not have a witness to dispute the plaintiff's version of the collision.

During cross examination of the plaintiff, the Fund referred to the Accident Report (AR) Form, which although forming part of a bundle of documents constituting an exhibit before the Court, had not been formally introduced into the evidence by either party. Neither party had expressed any reservations concerning the admissibility of the Accident Report (AR) Form or the truthfulness of the contents thereof and neither were there any qualifications regarding documents in the bundle recorded in the pre-trial conference minute.

Held, that the brief descriptions of the collision by both drivers in the Accident Report (AR) Form, although hearsay, were admissible without the need to satisfy the requirements for the admission of hearsay evidence in terms of section 3(1)(c)(i)-(vii) of the Law of Evidence Amendment Act 45 of 1988, despite the privity of interest between the driver of the insured vehicle and the Fund.

The brief description of the collision by the insured driver in the Accident Report (AR) Form corroborates the plaintiff's version of a front/rear collision as testified to by the plaintiff and eliminated the only doubt about his credibility on the merits created by a contradiction in a pre-trial affidavit in terms of Rule 35(9) where the plaintiff described the collision as head on.

Held, further, that the availability of the plaintiff's passenger to testify was not established and accordingly held further, that no adverse inference can be drawn against the plaintiff for not having called his passenger as a witness.

Held, further, that the availability of the driver of the insured vehicle to give evidence was also not established and accordingly held further, that no adverse inference can be drawn against either the plaintiff or the Fund for not having called the driver of the insured vehicle to testify.

Held, that although the Fund did not call a witness to dispute the plaintiff's version of the collision in his evidence which

disclosed a prima facie breach of a duty of care by the driver of the insured vehicle, on the plaintiff's own version in evidence and at an inspection in loco he was driving at an excessive speed when he observed the insured driver reversing erratically and uncontrollably, which on a preponderance of probability prevented him from slowing down sufficiently as he approached the insured vehicle, which increased the force of impact of the collision but did not cause the collision. Contributory negligence of plaintiff set at 10%.

JUDGMNET

KATZEW, AJ:

- [1] This is a claim by the Plaintiff against the Road Accident Fund ("the Fund") for compensation for injuries allegedly suffered by the Plaintiff in a motor vehicle collision.
- [2] The matter was allocated to me for trial on the merits only on 28th February 2023 following an agreement between the parties to separate merits and quantum.
- [3] Counsel for the Plaintiff, Mr. Lukhele, and Ms. Makhathini for the Fund came to see me in Chambers on the morning of the hearing. Ms. Makhathini advised me that she was unable to proceed immediately on the merits due to her only having been instructed the night before when the Fund's previous representative had suddenly become unavailable.
- [4] It was thus agreed for the matter to stand down to 14h00 for commencement of the Plaintiff's evidence on the merits and thereafter to be stood down to 10h00 on the following day, 1st March 2023, to afford Ms. Makhathini an opportunity to prepare for cross-examination.
- [5] Pursuant thereto, the Plaintiff commenced with his evidence-in-chief at 14h00 on 28th February 2023, whereafter the matter stood down to 10h00 on the following day, 1st March 2023.

[6] At the commencement of proceedings on 1st March 2023, it soon became apparent that there were several shortcomings in the uploading of the papers onto Caselines. I raised with the parties' legal representatives that the matter was not ripe for trial, where to they agreed, whereafter I delivered the following Ruling, in terms whereof I postponed the matter to 10th and 11th July 2023 for continuation of the trial on the merits, with costs in the cause:

"RULING

This matter was allocated to me on 28th February 2023 for the hearing of evidence only on the merits, the parties having agreed to the separation of merits and quantum.

There was no plea by the defendant on Caselines and I asked my clerk to request a copy of the plea from the parties' legal representatives. A hardcopy of the plea was handed to the Court at the commencement of proceedings today, 1st March 2023.

It was agreed at the start of the hearing yesterday that the plaintiff would present evidence in chief and that the matter would then be stood down until 10:00 on 1st March 2023 to enable the legal representative for the defendant to prepare for cross-examination.

When proceedings re-commenced on 1st March 2023, a version of the defendant's plea was handed to the Court. I then noticed for the first time that the defendant's plea includes a special plea based on alleged non-compliance with section 24(2)(a) of Act 56 of 1996.

I enquired from the defendant's legal representative in Court, Ms Makhathini, whether the defendant intends pursuing its special plea. She responded that this depended upon the outcome of her investigations of the records on Caselines of certain medical reports. She further advised me that her investigations thus far had revealed uncertainty of whether all medical records had been uploaded on Caselines.

It then became apparent that there was uncertainty with regard to whether the particulars of claim uploaded on to Caselines was the latest amended version thereof, or the un-amended original. The same uncertainty seems to apply to the defendant's plea.

I then adjourned the Court and invited the parties' legal representatives to chambers to discuss the further conduct of the matter.

There is general agreement that notwithstanding the part-heard status of the matter, it is now clear that this matter is not trial-ready. I accordingly offered to postpone the matter to two days in a Court recess period to enable the parties to take the necessary steps to get the matter trial-ready for continuation.

It is impossible at this stage to apportion any blame for the commencement of what originally appeared to be a trial-ready matter but which on reflection emerged clearly as not being trial-ready.

I therefore propose postponing the matter to 10th and 11th July 2023 with costs in the cause."

- [7] On 10th July 2023 Mr. Lukhele appeared for the Plaintiff, but there was no appearance for the Fund. I contacted Ms. Makhathini by phone and she advised me that she was in Pretoria. She stated further that she had not seen the matter on the roll and that she had assumed that the Plaintiff was not proceeding.
- [8] Thereafter Mr. Lukhele and Ms. Makhathini discussed the further conduct of the matter over the phone. Mr. Lukhele informed me that they had agreed to the standing down of the matter to 10h00 on the following day, 11th July 2023, for continuation of evidence on the merits and for argument on the Plaintiff's special plea.
- [9] I accordingly stood the matter down to 10h00 on 11th July 2023 and reserved the question of the wasted costs of 10th July 2023.
- [10] At the commencement of proceedings on 11th July 2023, Mr. Lukhele confirmed the closing of the Plaintiff's evidence-in-chief that had taken place on 1st March 2023.
- [11] Ms. Makhathini then commenced with cross-examination of the Plaintiff, to which I shall revert later in the Judgment. Suffice to say at this stage that proceedings for the day ended at 15h05 with the Plaintiff still under cross-examination and with an agreement between the parties, endorsed by the Court, for the convening of an inspection in loco on 20th September 2023, and for continuation of cross-examination of the Plaintiff and the remaining proceedings on the merits on 21st and 22nd September 2023, including argument on the Fund's special plea.
- [12] No mention was made to the Court on 10th or 11th July 2023 of a purported amendment by the Plaintiff in the intervening period since the previous hearing on 1st March 2023.
- [13] During the preparation of Judgment, it became apparent to me that on the same day that the trial on the merits had commenced, namely 1st March 2023, the Plaintiff had delivered an irregular Notice Of Amendment in which he advised the Fund that he had summarily amended his Particulars Of Claims (sic). The notice also omitted to afford the Fund an opportunity of objecting to the amendment within 10 days as required by Rule 28(2).
- [14] The omission from the Notice Of Amendment of a notice of opportunity to object to the proposed amendment within 10 days did not impact on the validity of the Notice Of Amendment, because by virtue of the provisions of Rule 28(2), (3) and (4), the Fund was not deprived of its procedural right to have objected to the amendment within 10 days (see *Sasol South Africa Ltd t/a Sasol Chemicals v Penkin*[1]).
- [15] Besides purportedly amending the Plaintiff's gender which is wrongly stated as female in the Particulars Of Claims (sic), the Notice Of Amendment also gave notice to the Fund of a purported increase in the claim for past loss of income and future loss of income/earning capacity from R20 000,00 and R210 000,00 respectively to a consolidated loss of earnings and/or earning

capacity of R4 556 405,00.

- [16] Notwithstanding that the Notice Of Amendment delivered on 1st March 2023 had in terms of Rule 28(5) lapsed on 31st March 2023, on 18th May 2023 the Plaintiff delivered a Particulars Of Claims (sic) As Amended containing a purported amendment to the Plaintiff's gender from female to male and the purportedly revised quantum.
- [17] A fortiori, the Particulars Of Claims (sic) As Amended delivered on 18th May 2023 is of no force and effect, which the Fund from a procedural point of view is prima facie entitled to ignore (see *Swart v Flugel*[2] and *Sasol South Africa Ltd t/a Sasol Chemicals v Penkin*[3]).
- [18] For the same reason, the Court is also entitled to ignore the Particulars Of Claims (sic) As Amended delivered on 18th May 2023. However, based on the Fund's apparent indifference to the procedural flaws in the purported amendment, the Court is of the view that it needs to mero motu intervene to ensure the procedural sustainability of the proceedings under its watch. There can be no doubt that the Court retains the inherent power of supervising any shortcomings in procedural integrity of proceedings which are not combatted by an affected party (see *Lenz Township Co. (Pty.) Ltd. v. Munnik And Others*[4] and *Potgieter v Lid van Uitvoerende Raad: Gesondheid, Provinsiale Regering Gauteng en andere*[5]).
- [19] The Court's mero motu intervention in the flawed amendment process, which primarily concerns quantum, also falls squarely within the purview of the agreement between the parties to seek the Court's judgment on inter alia the Fund's special plea, which essentially encompasses the safeguarding of the Fund's interests on quantum.
- [20] To formalize the Court's approach to the Particulars Of Claims (sic) As Amended, the Court proposes mero motu to preface its orders on the special plea and the merits with an Order that the Particulars Of Claims (sic) As Amended dated 18th May 2023 is of no force and effect due to the lapsing of the Notice Of Amendment dated 1st March 2023 on 31st March 2023.
- [21] I move now to an analysis of the Fund's defences on the merits as contained in its plea dated 31st May 2017.
- [22] Included in the Fund's plea is a special plea directed towards non-compliance with section 24(2)(a) of the Road Accident Fund Act 56 of 1996 ("the Act"). The relevant portion of the special plea reads as follows:

"The [Fund] avers that the Plaintiff has not complied with all the Requirements of Act 56 of 1996. In amplification hereof the [Fund] avers that the Plaintiff has failed to submit a Statutory Medical Report which was completed by the first treating doctor or superintendent of the hospital where the claimant was first admitted as contemplated in the (sic) section 24(2)(a) of the Act."

- [23] Upon a proper construction, the Fund appears to be contending in the special plea that the medical report that was delivered by the Plaintiff's attorney on 6th September 2016 did not constitute a Statutory Medical Report in terms of section 24(2)(a) of the Act due to its non-completion by either the first treating doctor or the superintendent of the hospital where the Plaintiff was first admitted.
- [24] In cross-examination of the Plaintiff on 11th July 2023 (which was directed towards his credibility to be relied on as a witness to the cause of the collision), Ms. Makhathini confronted the Plaintiff with the contents of Netcare Emergency Department Patient Treatment Form dated 4th October 2014 (which forms part of RAF1 Form signed by Dr. Khalid Mirza on 28th September 2016), which is considerably at odds with the Plaintiff's evidence on the length of his stay in hospital and his injuries suffered as a result of the collision.
- [25] As a result of the Fund's resort to the RAF1 Form in cross-examination of the Plaintiff, the entire bundle of documents lodged together with the RAF1 Form as part of the Plaintiff's claim against the Fund under cover of a letter by the Plaintiff's attorney dated 6th September 2016 was admitted into evidence as Exhibit "A" (I am unable to reconcile the date on the covering letter with the date of Dr. Mirza's signature to the RAF1 Form recorded as 28th September 2016 – however, this anomaly does not appear to be an issue between the parties).
- [26] Although there was no agreement between the parties in paragraph 8 of the Minutes Of The Pre-Trial Conference held on 9th March 2022 on the status of the documents in the Bundle to be prepared by the Plaintiff, there was no suggestion by the parties that the documents comprising Exhibit "A" are not what they purport to be. Neither was it recorded in the Minutes Of The Pre-Trial Conference that the Court can only take cognisance of the portions of documents that are referred to in evidence.
- [27] The Court can therefore accept that the Netcare Emergency Department Patient Treatment Form dated 4th October 2014 is what it purports to be and that the contents thereof are regarded as true by the parties, which includes the name of a doctor L. Nhlapo, who is recorded as having consulted with the Plaintiff on the Plaintiff's arrival at hospital at 00h20 on the night of 3rd/4th October 2014, which was the night of the collision in the matter.
- [28] Dr Nhlapo's signature appears in the undated Discharge Column, and Dr Mirza's name appears as the Accepting Doctor on 4th October 2014 in the Admission Column.
- [29] In the Nursing Notes Column there appear chronological entries of observation of the Plaintiff from 00h25 to 04h00 on 4th October 2014, including a note that at 02h50 the Plaintiff was referred to Dr. Mirza and that a CT could not be done due to medical aid restraints. A note in the same column records that at 03h25 the Plaintiff was taken for a CT. At the bottom of the column next to the item "Final Diagnosis" appears the entry "Concussion ...".

[30] In a PATIENT TRANSFER FORM dated 04-10-14 to 09-10-14 forming part of Exhibit “A”, Dr. Mirza’s name appears alongside an illegible description of a column in the top right corner of the form (there is no name of another doctor corresponding to this column), and in the same PATIENT TRANSFER FORM under the heading “PATIENT REPORT (HISTORY OF PATIENT’S HOSPITALIZATION)” appears the following entry:

“A 30 yrs male admitted in HCU on the 04th of October 2014 with a history of motor vehicle accident and patient seen by doctor who diagnosed him as having post MVA concussion.”

Patient condition is stable GCS is 16/15. Normal power both upper and lower limbs. Patient was seen by doctor Viljoen this morning and verbalized that the patient must be transferred to section 9. Conditionally patient is stable.”

[31] Prima facie these documents exhibit a diagnosis by Dr. Mirza in the early hours of 4th October 2014 of the Plaintiff suffering post motor accident concussion, which was a matter of hours after the incident that had caused the concussion.

[32] In her Defendant’s Heads Of Argument Re: s24(2)(a) dated 22nd September 2023, Ms. Makhathini states that the ground for the Fund contending that the requirements of section 24(2)(a) of the Act have not been met is that the first treating doctor, Dr. L. Nhlapo, did not complete the medical section of the RAF1 Form.

[33] My finding based on the prima facie correctness of the contents of Exhibit “A”, which were never put in doubt by the Fund, is that Dr. Nhlapo and Dr. Mirza both qualified as the first treating doctor for the purpose of completion of the medical section of the RAF 1 Form and moreover that within a matter of hours after the accident, Dr. Mirza made the first, and what prima facie appears to be the only, diagnosis of the Plaintiff’s condition, which was post motor vehicle accident concussion.

[34] My further finding is that the evidence demonstrates actual compliance with section 24(2)(a) of the Act. In this regard, I agree with the submissions of Mr. Lukhele in his supplementary PLAINTIFF’S HEADS OF ARGUMENT dated 10th January 2024, which were delivered pursuant to my invitation to both Mr. Lukhele and Ms. Makhathini on 22nd September 2023 to deliver supplementary heads of argument on the entire proceedings (including on the RECORD OF THE INSPECTION IN LOCO HELD BEFORE THE HONOURABLE ACTING JUDGE S. KATZEW ON 21 SEPTEMBER 2023 that was compiled by my Registrar Mr. O.T. Fakude), which invitation Mr. Lukhele took up by delivering his supplementary PLAINTIFF’S HEADS OF ARGUMENT on 11th January 2024..

[35] I accordingly find further that there is no need to investigate Mr. Lukhele’s alternative submission in his supplementary PLAINTIFF’S HEADS OF ARGUMENT dated 10th January 2024 that the Plaintiff’s claim is deemed valid in terms of section 24(5) of the Act by virtue of the Fund’s alleged failure to object to the validity of the claim within 60 days, which the Plaintiff had raised in paragraph 2 of his REPLICATION TO DEFENDANT’S GENERAL & SPECIAL PLEA dated 7th June 2017.

[36] In this regard, Ms. Makhathini in her DEFENDANT’S HEADS OF ARGUMENT RE: S24(2)(a) dated 22nd September 2023 mentioned that:

“The Defendant ... raised an objection on the 16th of September 2016, of non-compliance with section 24(2)(a), in that the medical section of the RAF1 form has not been completed by the treating doctor. ... The objection letter to the Plaintiff’s Claim has been uploaded on case lines, under 0000, however till today, the Plaintiff’s claim remains non-compliant.”

[37] There is no reference to this letter in the Fund’s special plea under the heading DEFENDANT’S SPECIAL PLEA: NON-COMPLIANCE SECTION 24(2)(a) that forms part of the Fund’s plea dated 31st May 2017, and neither does this letter form part of the Fund’s list of discovered documents in the FIRST PART OF THE FIRST SCHEDULE of the DEFENDANT’S DISCOVERY AFFIDAVIT dated 17th July 2017.

[38] Finally on this issue, the letter was never introduced into evidence by the Fund, and neither was it included in a bundle of documents that are regarded by the parties as what they purport to be, with the result that the Fund’s alleged written objection to the fully compliant claim did not come up for consideration by the Court.

[39] The alleged letter would in any event have been irrelevant in view of my finding of actual compliance by the Plaintiff with the requirements of section 24(2)(a) of the Act.

[40] There is accordingly in my view no merit in the special plea, which will be dismissed.

[41] As already stated, I had invited both Mr. Lukhele and Ms. Makhathini to deliver supplementary heads of argument at the hearing on 22nd September 2023. Further hereto, on 28th June 2024, the Plaintiff’s attorney addressed the Court as follows in a letter:

“ ...

Kindly be advised that this matter was heard by the Honourable Acting Judge Katzew in September 2023, wherein it was agreed that both parties (sic) counsel will submit Supplementary Heads of Argument to the court without further oral submissions, thereafter judgment will be made

accordingly.

The Plaintiff’s Supplementary Heads of Argument were submitted by hand to the Honourable Acting Judge Katzew on the 11th of January 2024 at Sundown (sic), Sandton. Further, in a telephonic conversation with our Mr Bvuma, counsel for the Defendant Ms Makatini (sic) advised that she does not intend to submit Supplementary Heads of Argument and that the Honourable Acting Judge may proceed to make a ruling on this matter with consideration of the Heads of Argument the Defendant had already submitted to the court.

... “

[42] I now turn to a consideration of the evidence on the Plaintiff’s claim on the merits.

[43] The Plaintiff alleges in the Particulars Of Claims (sic) dated 27th February 2017 that on 4th October 2014 (this should read 3rd October 2014 – the Court will mero motu amend the incorrect dates in paragraphs 4 and 5) at approximately 21h00, a motor vehicle collision occurred along Diepkloof (although

not specified, it is common cause that the reference is to Diepkloof Road, Soweto) between motor vehicle with registration letters and number JLZ 441 GP driven by him and motor vehicle with unknown registration letters and number. The driver of the latter

unidentified vehicle is also not identified.

[44] The Plaintiff in paragraph 5 of the Particulars Of Claims (sic) appears to attribute the cause of the collision to the negligence of both drivers involved in the collision, namely himself and the unidentified driver of the unidentified other vehicle involved in the collision. After describing the unidentified vehicle that collided with him as the 1st insured vehicle and his vehicle as the 2nd insured vehicle in paragraph 4, the Plaintiff alleges as follows in paragraph 5 (my underlining for emphasis in the sub-paragraphs):

“The collision was caused as a result of the both (sic) negligence of the insured driver who were negligent in one and/or more and/or all of the following respects:

5.1 They failed to keep a proper lookout;

5.2 They drove at a speed that was excessive having regard to the circumstances prevailing at the time of the collision.

5.3 They failed to apply the brakes of the insured motor vehicle timeously or at all, at a stage and/or time when they could and should have done so;

5.4 They failed to take evasive action or to keep their vehicles under proper control at a stage when they could and should have done so;

5.5 They failed to avoid a collision when by exercising reasonable care they could and should have done so; (sic)”

[45] It is important to determine whether this was intentional or a result of an error by the draftsman of the Particulars Of Plaintiff’s Claims (sic), because if the former, the Court cannot make a finding beyond the Plaintiff’s concession of contributory negligence.

[46] Either the Plaintiff’s instructions to his legal advisors included an element of culpa on his behalf for the collision that influenced the formulation of the Plaintiff’s allegation for less than 100% negligence on the part of the driver of the first insured vehicle, or the ambiguous pleading is a result of an error by the draftsman of the Particulars Of Plaintiff’s Claims (sic).

[47] Despite the gravity of the ambiguity, the ambiguity is repeated in identical terms in paragraphs 4 and 5 of the abortive Particulars Of Claims (sic) As Amended. In his supplementary PLAINTIFF’S HEADS OF ARGUMENT dated 10th January 2024, Mr. Lukhele hints at a possible error on the part of the draftsman by contending for 100% liability of the

Fund in paragraph 64 but then concludes in paragraph 65 with an alternative contention for an apportionment of liability of 90/10 in favour of the Plaintiff. The contention in paragraph 64 is ambiguous in itself in light of the apparent concession of an element of culpa in paragraph 5 of the Particulars Of Claims (sic).

[48] I am going to assume in the Plaintiff's favour that the ambiguous contents of paragraphs 4 and 5 of the Particulars Of Claims (sic) are the product of draftsman error and that the Plaintiff's claim should be read conventionally for 100% liability against the Fund. Any apportionment of liability that the Court may order is in any event contemplated by the Fund's prayer in its plea dated 31st May 2017 for an apportionment of liability in terms of the Apportionment Of Damages Act 34 of 1956 as an alternative to the prayer for dismissal of the Plaintiff's action.

[49] The first evidence received by me of the Plaintiff's version of the collision is contained in an Affidavit deposed to by the Plaintiff on 10th August 2017 which had been delivered to the Fund and filed of record on 8th February 2018 under cover of a NOTICE IN TERMS OF RULE 35(9) by the Plaintiff dated 7th February 2018. The Plaintiff states inter alia the following in the Affidavit:

"On the 4th October 2014 at 21h00 I was involved in a motor vehicle accident. I was a driver of a motor vehicle ... travelling along Diepkloof, Orlando. I was driving next to Reya vaya path and ahead of me there was a road block and as I approached the road block, another motor vehicle with registration numbers and letters unknown came speeding and travelling on my lane. I tried to avoid a head on collision by swerving out of the road but it was too late as the two vehicles collided head on. ..."

[50] In evidence-in-chief adduced on 28th February 2023, the Plaintiff, in describing the same alleged collision, stated that his uncle, Qule, was his only passenger and that while they were driving, he observed a huge roadblock with a lot of JMPD officers and a car reversing from the roadblock at high speed. He testified further that the JMPD officers were chasing the car with guns and that the reversing car was swerving left and right. He continued in his testimony that he was trying to avoid the car, but everything happened so quickly when it bumped into him, which he said had been coming to him fast and that he could not avoid it. He stated further that it bumped the car he was driving at the front. There was, according to him, a huge knock, a huge sound, and then he collapsed.

[51] The Court is left in the dark as to the reason for the Plaintiff's omission of the registration letters and number and particulars of the driver of the vehicle that collided with his vehicle from the Particulars Of Claims (sic), and from his evidence. This information is contained in the Accident Report (AR) Form that formed part of the lodgement documents for the Plaintiff's claim against the Fund that were delivered to the Fund under cover of the letter dated 6th September 2016, which are all included in the Bundle of documents that was made available to the Court.

- [52] The Accident Report (AR) Form was therefore available to both the Plaintiff and the Fund from before the commencement of the action.
- [53] It is moreover clear from the pleadings that both parties have at all material times regarded the source of the Fund's liability to the Plaintiff to be section 17(1)(a) of the Act, which contemplates claims for compensation arising from the driving of a motor vehicle where the identity of the owner or the driver thereof has been established.
- [54] A fortiori, both parties can be taken to have known the registration letters and number and identity of the driver of the vehicle that collided with the vehicle driven by the Plaintiff from before the institution of the action.
- [55] The anomaly of the non-disclosure to the Court of the registration letters and number and identity of the driver of the 1st insured vehicle was not explained to the Court by or on behalf of the Plaintiff, and neither was it canvassed by the Fund.
- [56] However, the Accident Report (AR) Form was referred to by Ms. Makhathini in the conclusion of her cross-examination of the Plaintiff on the questions of whether the Plaintiff was wearing a seatbelt at the time of the accident and whether the collision occurred on the Soweto Highway. The Accident Report (AR) Form is inconclusive on whether the Plaintiff was wearing a seatbelt at the time of the collision, but records that the accident occurred on the Soweto Motor Way at the intersection with Mpane.
- [57] Ms. Makhathini's resort to the Accident Report (AR) Form in cross-examination of the Plaintiff without protest as to its authenticity and truthfulness of its contents by the Plaintiff, and without any reservation by Ms. Makhathini on behalf of the Fund about its authenticity and truthfulness of contents, constitutes acceptance by both parties of the authenticity of the document and the truthfulness of its contents.
- [58] To reinforce the Court's entitlement to have recourse to the Accident Report (AR) Form to facilitate assessment of the evidence, it is listed as item number 20 at pages 95 to 99 of a Trial Bundle that was delivered to me by the Plaintiff's Attorney on 11th January 2024 and is also paginated as 62 to 66 as part of another Bundle and as 74 to 78 as a part of a third Bundle.
- [59] In the limited reference to documents comprising bundles during the hearing, neither party expressed any reservation concerning the status of documents as being anything other than what they purport to be and nor was there any protest to acceptance of their authenticity and truthfulness of contents. But for the implied consent of the parties to the unlocking of the contents of this document for the consideration of the Court, the following principle enunciated by Human, J. in *Howard & Decker Witkoppen Agencies and Fourways Estates (Pty.) Ltd. v. De Sousa*[6] would be applicable:

“There was no admission by plaintiff’s attorney in regard to the authenticity of the document nor an admission that the contents thereof were correct. Its contents could not therefore be used either as evidence or for the purpose of cross-examination ...”

- [60] Conversely, Ms. Makhathini’s unqualified use of the Accident Report (AR) Form in cross examination of the Plaintiff points to the Fund’s regard thereof as being authentic and acceptance of the contents as true.
- [61] The status of the Accident Report (AR) Form in casu is therefore distinguishable from the status of the corresponding report in *Makhathini v Road Accident Fund*[7] which was tendered in evidence in terms of section 3 of the Law of Evidence Amendment Act 45 of 1988 to prove a statement therein of the insured driver who could not be called as a witness because he had died from a cause unrelated to the collision in that matter.
- [62] It follows that the short descriptions of the accident by the 1st insured driver and the Plaintiff in the Accident Report (AR) Form in casu, although hearsay, are admissible without the need for resort to section 3 of the Law of Evidence Amendment Act 45 of 1988.
- [63] Before dealing with the contents of the Accident Report (AR) Form, the question that arises is whether an adverse inference can be drawn against either or both the Plaintiff and the Fund for their failure to call the driver of the vehicle that collided with the Plaintiff’s vehicle. The Plaintiff’s omission to call his Uncle Qule to corroborate his version gives rise to the same question.
- [64] It is competent for the Court to find in favour of the Plaintiff on the strength of his evidence alone. Section 16 of the Civil Proceedings Evidence Act 25 of 1965 provides that judgment may be given in any civil proceedings on the evidence of any single competent and credible witness.
- [65] Although the Plaintiff complained of memory loss, which he attributed to the accident and which he used as an excuse for anomalies and contradictions during his testimony, there was nothing about his demeanour while he was testifying to suggest impingement of his competence to testify.
- [66] His credibility was, however, impinged by the material contradictions in his evidence relating to physical and mental effects that the accident had on him, and by the contradiction between his version of a head on collision in the Affidavit dated 10th August 2017 and his evidence in Court of a rear end collision with the 1st insured vehicle.
- [67] The impingement of his credibility is however assuaged by several objective facts independent of his evidence which emerge from the Accident Report (AR) Form, which is reflected as having been compiled by Metropolitan Police Officer N. Molotsi with service number 30053206, whose signature dated 05/10/2014 appears on the report alongside a date stamp of the City of Johannesburg Metropolitan

Police Department for 2014-10-06.

[68] There is no doubt that were it not for the parties' implied consent to the authenticity and truthfulness of contents of the Accident Report (AR) Form, MPO Molotsi should have been called to prove its authenticity and the truthfulness of its contents. The Plaintiff ought also to have called MPO Molotsi to discharge the onus resting on him to prove the collision.

[69] However, the Fund has raised no objection to the Plaintiff's evidence in isolation of the collision, which leaves it to the Plaintiff to prove only the cause of the collision.

[70] The first of these objective facts inferred from the contents of the Accident Report (AR) Form is confirmation that the collision occurred on the Soweto Motor Way in Orlando East in Soweto at 8:45 on 03/10/2014 at night lit by streetlights.

[71] The second is that the collision was a head/rear end that occurred at a roadblock.

[72] The third is that the Plaintiff was travelling straight while the 1st insured vehicle was reversing in the same lane, which was the correct lane for both.

[73] The fourth is the brief description of the accident by Tsakane Ernest Shilenge, described as the driver of vehicle A on the AR Form, that

"He was driving west on Soweto Motor (sic) – he then missed his turning street – as he was trying to reverse to go back to the turning street – he did not notice that there was a vehicle coming – he then collided with vehicle "B" [the Plaintiff]."

[74] The fifth is the brief description of the accident by the Plaintiff described as the driver of vehicle B on the AR Form that

"He was driving west on Soweto Motor Way – then driver A came reversing straight onto (sic) his car – he tried to avoid the collision – but they collided."

[75] Under cross-examination by Ms. Makhathini, the Plaintiff confirmed that in the Affidavit that he deposed to on 10th August 2017 he described the collision as head-on, whereas in his evidence-in-chief he said the unidentified vehicle had reversed into the vehicle he was driving.

[76] This undoubtedly profound contradiction was compounded by several other serious anomalies in the Plaintiff's evidence.

[77] In evidence-in-chief, the Plaintiff testified to having been hospitalized for one and a half months because of the collision,

whereas the hospital records included in the RAF1 Form lodged with the Fund by the Plaintiff's attorney disclose that he was hospitalized for ten days after the collision.

[78] In contrast to the final diagnosis of concussion suffered by the Plaintiff because of the collision, the Plaintiff testified in examination-in-chief that he suffered injuries to his head, his spine and his knee.

- [79] Except for the contradiction between the Plaintiff's version of a head on collision in the Affidavit dated 10th August 2017 and his evidence in Court of a rear end collision with the 1st insured vehicle, which is not insignificant in the assessment of his credibility, the Court regards the contradictions regarding the length of stay in hospital and his injuries resulting from the collision as manifesting transparent over zealotry to boost the quantum of his claim and insignificant in the assessment of his credibility on the merits.
- [80] The impression formed by the Court of the Plaintiff based on his testimony and demeanour was that he was exaggerating the consequences of the accident for him at every opportunity, which will be an issue for the Trial Court seized with assessment of the quantum of damages suffered by the Plaintiff because of the collision.
- [81] The Court will refrain from indulging in illegitimate speculation to try to resolve the contradiction between the Plaintiff's evidence in his Affidavit dated 10th August 2017 of a head on collision and his evidence in Court of a rear end collision. Suffice to say that the evidence in Court prevails, and that the Court only need consider whether the contradiction so tarnishes the Plaintiff's credibility and cogency of his evidence on the merits that he fails the test to qualify as a single witness in support of a judgment in a civil suit.
- [82] The answer to this question is revealed in a consideration of the earlier question I raised of whether there is scope for the drawing of any adverse inferences against the Plaintiff for not having called his Uncle Qule to corroborate his version or the driver of the 1st insured vehicle, and against the Fund for not having called the driver of the 1st insured vehicle.
- [83] Had the Fund through cross-examination or otherwise shown that the Plaintiff's Uncle Qule was available to testify at the Trial, there may have been an argument for the drawing of an adverse inference against the Plaintiff for a failure to call him, at the very least for the reason that Qule may have been able to eclipse any residual doubt on the Plaintiff's credibility on the merits created by his anomalous description of the collision in the Affidavit dated 10th August 2017.
- [84] It would certainly have been helpful to the Court had either the Plaintiff or the Fund elected to call the driver of the 1st insured vehicle to testify. The Plaintiff's silence on the question of why the 1st insured vehicle is referred to as unidentified in the Particulars Of Claims (sic) and the absence of any reaction by the Fund, which would have an obvious interest in the identity of the 1st insured driver in its opposition to the Plaintiff's claim, is a mystery to the Court, but one it need not resolve.
- [85] Suffice to say that neither party laid a basis for contending that an adverse inference should be drawn against the other for failing to call the driver of the 1st insured vehicle, which could only be achieved through revealing his identity and availability to testify.

[86] The Plaintiff emerges from this consideration as the only available witness to testify on the merits of his claim. Any doubt for his suitability for that role is removed by Ms. Makhathini's opening remark to her cross-examination of the Plaintiff, directed more to the Court than to the Plaintiff, that

"We [the Fund] do not have a witness to dispute the Plaintiff's version, I am just going to question the Plaintiff on clarification."

[87] It remains for me to consider whether the evidence, including the statement by Ms. Makhathini that the Fund does not have a witness to dispute the Plaintiff's version, discloses negligence on the part of the 1st insured vehicle, and if yes, the degree thereof.

[88] Ms. Makhathini by her opening statement to cross-examination of the Plaintiff unequivocally expressed the Fund's acceptance of the Plaintiff's evidence of his vehicle colliding with the 1st insured's vehicle as it was reversing at high-speed swerving left and right which the Plaintiff tried but was unable to avoid

because everything happened so quickly.

[89] The brief description of the collision by the 1st insured driver, Tsakane Ernest Shilenge, in the Accident Report (AR) Form corroborates the Plaintiff's version of a front/rear collision. This of course eclipses any doubt concerning the Plaintiff's credibility that existed because of his version of a head on collision in the Affidavit dated 10th August 2017.

[90] The plain meaning of the recorded words of the driver of the 1st insured vehicle, Ernest Shilenge, in the Accident Report (AR) Form that "he did not notice that there was a vehicle coming – he then collided with [it]" constitutes an admission that he did not keep a proper lookout.

[91] The duty of care required of the Plaintiff to keep a watchful eye on the reversing 1st insured vehicle and to take evasive action when it became apparent that a collision was imminent needs to be measured against the

erratic reversing of the 1st insured vehicle that the Plaintiff testified to having observed (see *Wessels v. Johannesburg Municipality*[8]) and not against the milder version of the 1st insured driver in the Accident Report (AR) Form.

[92] Significantly, it was never put to the Plaintiff under cross examination that he could have taken evasive action to avoid the collision, which leaves his version that he was unable to take evasive action to avoid the collision intact.

[93] There was a break in cross examination of the Plaintiff between 11th July 2023 and the inspection in loco on 20th September 2023. At the inspection in loco, the Plaintiff confirmed that he first became aware of the roadblock from roughly 200 metres away at which point he was travelling on the extreme left side of the road at an estimated speed of about 90 to 100 kilometres per hour (verbatim as recorded by Mr. Fakude in the RECORD OF THE INSPECTION IN LOCO HELD BEFORE THE HONOURABLE ACTING JUDGE S. KATZEW ON

21 SEPTEMBER 2023). The Plaintiff stated further at the inspection in loco that he suddenly saw a motor vehicle reversing in front of him at approximately 200 metres from him simultaneously with when he became aware of the roadblock and that there were no other motor vehicles in front of him. The Plaintiff pointed out the point of impact in the middle lane, which it was agreed was approximately 75 metres from the roadblock and about 125 metres from where the Plaintiff first became aware of the roadblock. In response to the Court's question of the speed limit on the stretch of road at the time of the incident, Mr. Lukhele on behalf of the Plaintiff, obviously with knowledge of the roads in the area, said it was 60 kilometres per hour. No speed limit sign could be found in the identified vicinity of the collision. On the return journey to Court along the same stretch of Highway, the entourage attending the inspection in loco stopped to ask two metro police officers who were parked along the Highway for the speed limit at the point of collision. One of them stated that the speed limit between Eminkie bus station (Langlaagte) and Noordgesig bus station is 60 kilometres per hour because the area where the road passes through is considered an urban area.

[94] In resumption of cross examination of the Plaintiff on 21st September 2023, the Plaintiff admitted that he was travelling at a speed of 90 to 100 kilometres per hour at the point of impact. He gave no indication of having slowed down from where he observed the reversing vehicle at 200 metres away. He also stated that there were no vehicles in front of him when he observed the reversing vehicle from 200 metres, which means his vision of the reversing vehicle was unobscured.

[95] It is the view of the Court that failing to avoid a collision with a reversing vehicle 200 metres away with no obstructions and two of three lanes open for avoidance prima facie discloses an element of contributory fault, if not for excessive speed before observation of the reversing vehicle, then at the very least for not slowing down when the reversing vehicle came into view.

[96] Indeed, from the version of the Plaintiff after the inspection in loco in re-examination, where in answer to Mr. Lukhele's question

"From where you first saw roadblock to where collision occurred [measured at the inspection in loco as 125 metres], could you have done anything to avoid collision?"

whereto the Plaintiff answered

"Nothing."

the Court infers a probability that 125 metres was enough space on a three-lane highway to slow down and try and avoid the collision.

[97] However, bearing in mind Ms. Makhathini's statement that the Fund does not have a witness to dispute the version of the Plaintiff, which included that he was unable to avoid the collision, the Court makes a finding on the Plaintiff's evidence that the erratic and unconventional reversing of the 1st insured vehicle totally unexpected of a reasonable

person was the proximate cause of the collision and that the Plaintiff's concession of a speed that may have been excessive in the circumstances could be nothing more than a remote contributing factor to the force of impact of the collision, but not to the collision itself.

- [98] There is therefore scope for finding only the slightest degree of any contributory negligence on the part of the Plaintiff, which the Court estimates at 10%.
- [99] Finally, a word on the costs for when an Order is made thereon. Had this matter been trial ready on 28th February 2023 (which should have included the identity of the 1st insured vehicle by the Plaintiff in the Particulars Of Claims (sic)), and furthermore had the Plaintiff presented the evidence of the Accident Report (AR) Form which it ought to have done and which normally contains an Accident Sketch (although there is no accident sketch on the Accident Report (AR) Form in casu – it is noted thereon that the vehicles were removed from the scene, presumably before MPO Molotsi arrived on the scene), the trial would have lasted no more than 2 Days, and the inspection in loco would likely have been unnecessary.

WHEREFORE the following is ordered:

1. The Particulars Of Claims (sic) As Amended dated 18th May 2023 is declared of no force and effect due to the lapsing of the Notice Of Amendment dated 1st March 2023 on 31st March 2023.
2. The extant Particulars Of Plaintiff's Claims (sic) dated 27th February 2017 is mero motu amended by the Court to record the date "04 October 2014" in paragraph 3 and "4th day of October 2014" in paragraph 4 to read "03 October 2014" and "3rd day of October 2014" respectively.
3. The Defendant's special plea is dismissed.
4. It is declared that the Defendant is liable to compensate the Plaintiff for 90% of the damages suffered as a result of injuries sustained by the Plaintiff in the collision which occurred on 3rd October 2014.
5. The costs of the trial thus far incurred are reserved, save to state that the costs of 10th and 11th July 2023 and 20th, 21st and 22nd September 2023 (including the costs of the inspection in loco on 20th September 2023) are to be disallowed.

S M KATZEW

Acting Judge of the High Court of South Africa

DATE OF JUDGMENT: 7th March 2025

DATES OF HEARING: 28th February and 1st March 2023, 10th and 11th July 2023 and 20th (including inspection in loco), 21st and 22nd September 2023

APPEARANCES:

For Plaintiff:

Adv. B. Lukhele

Instructed by:

T W Mathebula Inc.

For Defendant: Ms P Makhathini

Instructed by:

Shereen Meersing & Associates

[1] 2024

(1) SA 272 (GJ) at paragraph [51]

[2] 1978

(3) SA 265 (E) at 267H-268B

[3] (supra) at paragraph [43]

[4] 1959

(4) SA 567 (T) at 574A-B

[5] [2002] 1 All SA 589(T) at 594c

[6] 1971

(3) SA 937 (T) at 940H

[7] 2002

(1) SA 511 (SCA)

[8] 1971

(1) SA 479 (AD) at 483E and 484C-E

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