

SOUTH AFRICA / JUDGMENT

Nomnikelo v Road Accident Fund [2023] ZAGPPHC 552; 11869/2021 (11 July 2023)

[2023] ZAGPPHC 552

COURT

North Gauteng High Court, Pretoria

BEFORE

FHH Kehrhahn

CASE / FILE NUMBER

11869/2021

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Source record**REPUBLIC OF SOUTH
AFRICA****IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA****CASE NO: 11869/2021****NOT REPORTABLE****NOT OF INTEREST TO OTHER****JUDGES****11.07.23****In**

the matter between:

**BOLISH
NOMNIKELO
Plaintiff
and
THE
ROAD ACCIDENT FUND
Defendant**

Coram:

FHH KEHRHAHN (AJ)

Heard:

28 June 2023

Delivered:

This judgement is handed down electronically by circulation to the parties' representatives by e-mail and publication on Case Lines and released to SAFLII. The date for the hand down is deemed to be 11 July 2023 at 16h00.

Summary:

Practice-

Court pronouncing on merits and postponing only the issue of quantum-

Unless there is a clear intention by the parties to the

contrary,

asking the court to adjudicate the 'merits' and

postponing exclusively the issue of 'quantum'

sine

die, without more, has the effect that

the merits order disposes of everything bar the quantum of damages.

Damages-

Negligence or unlawful act- Third party compensation- The

driving over a stone the size of a fist, causing it to be flung into

the air and striking a passenger in the adjacent vehicle

does not

make the Road Accident Fund liable under section 17 of the Act. The

injuries suffered by Plaintiff was not caused by negligent

driving

nor did it arise from a wrongful act associated with the driving of a

motor vehicle.

ORDER

1.

I absolve the Defendant from the instance.

2.

Each party to pay their own costs.

JUDGEMENT

Coram: KEHRHAHN AJ

Introduction

3. The Plaintiff instituted action against the Defendant in terms of section 17 of the Road Accident Fund Act 56 of 1996, as amended ('the Act'), pursuant to injuries suffered by the Plaintiff in a motor vehicle accident which occurred on the 5th of January 2020.
4. The Defendant is the Road Accident Fund, a juristic person established in terms of the Act. In terms of Section 17(1) of the Act, as amended, and regulations promulgated thereunder, the defendant is liable to compensate victims of motor vehicle accidents arising from the driving of a motor vehicle where the identity of the owner or the driver thereof has been established

and/or subject to any regulation made under Section 26 where the identity of neither the owner nor the driver thereof has been established.

5. A road accident victim can claim for any loss or damage which such a road accident victim has suffered because of any bodily injury caused by or arising from the driving of a motor vehicle by any person at any place within the Republic, if the injury is due to the negligence or the wrongful act of the driver or of the owner of the motor vehicle.

Separating merits and quantum

6. The Plaintiff applied for a separation of the merits and the quantum in terms of Uniform Rule 33[4]. I granted the application and postponed quantum sine die.
7. The only issue which I must decide is the merits[1] of the Plaintiff's claim. Although terminology such as 'merits' and 'liability' are used interchangeably and loosely, unless there is a clear intention by the parties to the contrary, asking the court to adjudicate the 'merits' and postponing exclusively the issue of 'quantum' sine die, without more, would result in an order that disposes of everything bar the quantum of damages.[2]
8. To this end, Justice Gautschi (AJ) in Tolstrup N.O v Kwapa N.O 2002 (5) SA 73 (W) held at 77 held that:

Quantum would not include a consideration of defences on the merits, be they defences raised by way of special plea, such as lack of jurisdiction, non locus standi, prescription or the like, or substantive defences such as absence of negligence, mistaken identity, contributory negligence and so on,[3] all of which relate to whether damages are payable. Once that is out of the way, the parties can concern themselves with how much is payable. The special plea sought to be raised now seems to me to fall within what would generally be understood to be the merits. It is a defence which would logically have been dealt with prior to the parties embarking on an extensive enquiry into the quantum of damages.

The Plaintiff's claim

9. The Plaintiff pleaded that on 5 January 2020 at approximately 15h00 at Kilarney Mall, an accident occurred when the motor vehicle [a bus bearing registration number IVG 803 GP] in which the Plaintiff was a passenger was struck by a rock driven over by an unknown motor vehicle, which rock broke the window of the vehicle in which she was a passenger.
10. The Plaintiff alleges in her particulars of claim that the sole cause of the accident was the vehicle in which she was a passenger. To this end, the Plaintiff pleaded numerous generic grounds of negligence including that the bus driver drove too fast, failed to keep a proper lookout, failed to control the bus, suddenly applied brakes and failed to exercise reasonable care. In addition, it is alleged that the bus driver suddenly moved onto the side of the road.
11. In the alternative, the Plaintiff pleads that the unidentified vehicle which allegedly drove over a stone, causing the stone to become airborne, was the sole cause of the accident, mainly on the same generic grounds as pleaded in relation to the driver of the bus. In addition, and perhaps more relevant, the Plaintiff pleaded that the unknown driver could have avoided driving over a rock that was on the road.

12. At the hearing of the matter the Plaintiff no longer persisted with the alleged negligence on the part of the bus driver.
13. The Plaintiff seek an order that the Defendant be liable for 100% of her proven or agreed damages and costs.

The Defendant's default

14. The Defendant did not defend the action and the matter was enrolled on the default judgement roll. On 17 October 2022, Justice Molopa-Sethosa (J) ordered that the matter proceed by default, owing the Defendant's wilful default.

The issue

15. I am satisfied that I have jurisdiction to adjudicate the matter and that the Plaintiff has the necessary locus standi^[4] to prosecute the action. I was also mindful of the Plaintiff's requirements to prove substantive compliance with the Road Accident Fund Act,^[5] which the Plaintiff duly did.
16. The remaining contentious issues in respect of the merits which I am to decide is:
 - 16.1. Was the unknown driver of the unidentified vehicle negligent in one or more of the grounds pleaded.
 - 16.2. If so, was this negligence the cause of the Plaintiff's injuries.

The evidence

17. The Plaintiff, at the commencement of the hearing, relied on the evidence on affidavit.^[6] The evidence which was before me was the Plaintiff's section 19(f) affidavit, the Plaintiff's founding affidavit in the default judgement application and an affidavit deposed to by the bus driver, Mr Thinavhuyo Nemakhavani. After exercising my discretion, I admitted the evidence by way of affidavit as contemplated by Section 34(2) of the Civil Proceedings Evidence Act 25 of 1965 read with Uniform Rule 38(2).
18. I debated with counsel whether negligence on the part of the unidentified insured driver had been established at which stage the Plaintiff elected to supplement the evidence on affidavit with the Plaintiff's viva voce evidence.
19. The Plaintiff testified that she was a passenger on an Inter-Cape bus, travelling from East London to Pretoria. She was seated towards the right side of the bus, next to the right-hand side window, somewhere between the middle and back rows of the bus. As the bus approached the road between Johannesburg and Pretoria, the bus proceeded past Kilarney Mall. The Plaintiff was of the opinion that the bus driver was speeding. The bus was driving in the second lane to the right. A white unknown car driven by an unknown driver was travelling next to the bus in the far-right hand lane (the proverbial fast lane). The Plaintiff then felt that something struck her in the face and she lost consciousness. When she woke up, she realized that the object that struck her in the face was a stone the size of an open fist.

20. The Plaintiff drew an inference that because a car was driving next to the bus, that this vehicle must have driven over a rock, causing the rock to be flung into the air. In the Plaintiff's section 19(f) affidavit that Plaintiff deposed to the fact that the accident happened after passing the Oxford off ramp. The driver was 'racing' another car in the right lane. This car drove over a rock which hit the window of the bus. The rock then struck the Plaintiff in the face.
21. The Plaintiff's viva voce evidence was to the effect that she felt something hit her in the face and she later realized it was a stone.
22. Before me was also an affidavit by the bus driver. The driver of the bus deposed to the fact that on Sunday, 5 January 2020, he was driving on the M1 highway, between Graystone and Malboro drive, on the north bound. His co-driver, Mr Lubi advised him that one of the passengers were struck in the face by a stone. He stopped at the Samrand Shell garage and went to investigate. He noted

that a lady was injured. He saw the stone on the bus and the window that was smashed with a hole in it. He deposed to the fact that he does not know the person who threw the stone and that he did not see anyone next to the road who was trying to throw the stone.

23. The driver of the bus clearly formed the impression that the stone was thrown by a person rather than it being flung upwards as a result of being driven over by the unidentified insured driver.

The law relevant to the issue

24. The Plaintiff, to succeed with her claim, must establish negligence on the part of the unidentified insured driver. The court in *Ntsala v Mutual & Federal Ins Co Ltd*[7] held that:

'I am satisfied that the onus rests throughout on the plaintiff to prove negligence on the part of the defendant. Once the plaintiff proves an occurrence giving rise to an inference of negligence on the part of the defendant, the latter must produce evidence to the contrary: he must tell the remainder of the story, or take a risk that judgment be given against him.'

25. In *Arthur v Bezuidenhout & Mieny* 1962 (2) SA 566 (A) this principle was formulated as follows:

'There is in my opinion, only one enquiry, namely: has the Plaintiff having regard to all the evidence in the case, discharged the onus of proving on balance of probabilities the negligence he has averred against the Defendant?'

26. Although the slightest degree of negligence is sufficient to satisfy the requirements of negligence under section 17(1) of the Act and consequently to render the Defendant liable, [8] the Plaintiff did not place any evidence before me to substantiate a claim of negligence.
27. The Plaintiff must still satisfy the court that the unidentified insured driver was negligent in some way.

28. The Plaintiff's counsel submitted that had the driver of the unknown vehicle kept a proper lookout, he/she could and would have seen the stone on the road surface and would then have been in a position to avoid driving over the stone. But this submission was not supported by any evidence. In fact, the Plaintiff's evidence was that she felt something hitting her in the face and when she woke up, she realized that it was a stone. On this evidence there is hardly a case made out for negligence on the part of the unidentified insured driver.
29. For negligence on the part of the unidentified insured driver, I must be in a position to find that the unknown driver could have observed the stone had a proper lookout been kept and that he/she would then have had enough time and space in the circumstances, given the proximity of other vehicle and barriers on the side of the road, to take evasive action and failed to do so.
30. On these questions the Plaintiff had not given any direct evidence. The Plaintiff in effect asked me to draw an inference that the stone was indeed on the road surface and flung up after the unknown vehicle drove over the stone, owing to the fact the the unknown driver drove too fast, did not keep a proper lookout, because the Plaintiff have made no direct assertions regarding these facts in issue. Moreover, the unidentified driver must have reasonably foreseen that driving over the stone would cause the injuries and that a reasonable person would have and could have taken steps to avoid the harm and he failed to take such steps.[9]
31. In order for me to draw this inference, the fact that the stone was flung up by an unknown vehicle must be the more natural, or plausible, conclusion from amongst several conceivable ones.[10]
32. Lord WRIGHT in *Caswell v Powell Duffryn Associated Collieries Ltd* [1939] 3 All ER 722 at 733E:[11]

"Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish... But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture."

33. I cannot find, on the evidence advanced, that the injuries suffered by the Plaintiff was owing to negligent driving or an unlawful act associated with driving, on the part of the unidentified insured driver.
34. There is no evidence regarding the speed at which the insured driver was driving, the distance that he was away from the stone when he first saw the stone (if he saw it at all), if a reasonable driver in his/her position would have been able to see the stone and whether there was ample space and time to avoid the rock.

35. In support of his argument that there is negligence on the part of the unidentified insured driver, counsel for the Plaintiff relied on *Jones v Road Accident Fund 2020 (2) SA 83 (SCA)*. In that case, where the RAF was found liable to compensate the Plaintiff, a chunk of gold ore fell from a moving vehicle and penetrated the windshield and struck that Plaintiff on the forehead.[12] *Jones (supra)* is distinguishable from the matter before me as the rock in *Jones (supra)* was part of cargo on a truck which was not properly secured. It is trite law that failing to secure a load allows an injured victim to claim from the RAF on the premise on a wrongful act associated with driving.[13]
36. In *casu*, it is the Plaintiff's case that a vehicle drover over a stone which was laying on the road surface. This situation is completely different from a failure to secure cargo on a vehicle.
37. A case which more readily resemble the facts in *casu*, is *Roos v AA Mutual*[14] where justice Winsen (J) held the Fund liable after a tractor cutting grass ejected a stone and injured a pedestrian passing by, but this case is also distinguishable from the matter before me. The court in *Roos (supra)* held[15] that the responsibility of the defendant for such injury turns upon the culpability of the driver or owner or his servant. The cutter ejected stones in the grass under circumstances where there were no warning signs erected and the plot had not been cleared of hard objects and stones. The court held that the happening of the event itself, i.e. the ejection of the stone or hard object by the cutter, raise a *prima facie*, a case of negligence on the part of the driver who drove the insured vehicle.[16]
38. The same cannot be said in *casu*. Cutting grass with a cutter would obviously cause stones to eject from the cutter if the plot is not cleared. Harm is clearly foreseeable by any reasonable person. Given such a foreseeability, there is a duty on the driver to warn bystanders and keep them out of reach of the danger zone and to warn people in close proximity to the cutter. Encountering a stone on the road surface on the M1 highway is simply not comparable and clearly distinguishable.
39. In *General Accident Insurance Co South Africa Ltd v Xhego and Others*
- [1991] ZASCA 189; 1992 (1) SA 580 (A), the court upheld a decision by the Cape Provincial Division (as it then was) to the effect that the RAF was liable to compensate passengers on a bus after the bus belonging to City Tramways, despite warnings, followed a dangerous route and was thrown with two petrol bombs. The court held that the injuries suffered by the bus passengers arose out of the driving of the bus and was owing to the negligent driving of the bus driver. This decision was upheld on appeal.
40. It was not the Plaintiff's case that she was the victim of some attack on the bus and the *Xhego (supra)* case does not assist the Plaintiff.
41. I find on the evidence before me, that there is nothing to suggest that the unidentified insured driver drove negligently in

any way. I absolve the Defendant from the instance.

Costs

42. This matter became before me on the basis of a default judgement. The Defendant failed to defend the action. Given this failure to participate in the litigation there can be no legal costs incurred by the Defendant.
43. In the result, it would be fair and reasonable to order that each party pay their own costs.

The order

44. I absolve the Defendant from the instance.
45. Each party to pay their own costs.

FHH Kehrhahn

Acting Judge of the High Court

Gauteng Division, Pretoria

For the Plaintiff: Adv Z Dyonase

Instructed by: Ntozake Attorneys

Date of the hearing: 28 June 2023

Date of judgment: 11 July 2023

[1] As the issue of liability is more commonly known: See *RAF v Sauls* 2002

(2) SA 55 (SCA) at para 4; *Tolstrup NO v Kwapa NO* 2002

(5) SA 73 (W) at 77.

[2] In my respectful view it is not correct that the term ‘merits’ without more ‘cannot, unless otherwise specifically agreed, denote anything more than ...the negligence of the insured driver’ as held in *M S v Road Accident Fund* [2019] 3 All SA 626 (GJ) at para 13. Instead the deciding question is what were the intention of the parties (in an agreement) or the court (in a judgement): See *Schmidt Plant Hire (Pty) Ltd v Pedrelli* 1990 (1) SA 398 (D) at 408H-I and 408B-C; *SA Eagle Versekeringsmaatskappy Bpk v Harford*

[1992] ZASCA 42; 1992 (2) SA 786 (A) at 789B and 792C--H); *Marsay v Dilley*

[1992] ZASCA 114; 1992 (3) SA 944 (A) at 962C-H; *David Hersch Organisation (PTY) LTD and Another v ABSA Insurance Brokers (PTY) LTD* 1998 (4) SA 783 (T) at 787.

[3] Added to this list is a plea of absent nexus: See *Lewis v Road Accident Fund* (17441/2009) [2023] ZAWCHC 120 (18 May 2023) para 20-24.

[4] *Madalane v Van Wyk* (87/2015) [2016] ZASCA 25 (18 March 2016) at para 5 and 7.

[5] RAF v Busuku (1013/19)

[2020] ZASCA 158 (1 December 2020) at para 9; Pithey v RAF 2014 (4) SA 112 (SCA) at para 19 at 120; Sithebe v Road Accident Fund (33165/17)

[2021] ZAGPPHC 133 (11 March 2021) at para 8.

[6] As for evidence on affidavit generally see: New Zealand Insurance Co Ltd v Du Toit 1965

(4) SA 136 (T); Havenga v Parker 1993

(3) SA 724 (T); Abraham v City of Cape Town 1995

(2) SA 319 (C); Colarrosi v Gerber ECG 613/03 (29 July 2004); Mapule Kekana v Road Accident Fund (21056/2004) Transvaal Provincial Division (6 January 2005); Madibeng Local Municipality v Public Investment Corporation Ltd 2018

(6) SA 55 (SCA); Nedbank Ltd v Fraser and another and four other cases 2011

(4) SA 363 (GSJ).

[7] 1996 (2) SA 184 (T) at 190. Also see Lourens v Road Accident Fund (31816/2017)

[2018] ZAGPPHC 621 (23 August 2018) at para 17-20.

[8] Ntaka v Road Accident Fund (19868/13) [2018] ZAGPPHC 536 (6 February 2018) at para 27.

[9] Kruger v Coetzee 1966

(2) SA 428 (A) at 430.

[10] Ocean Accident and Guarantee Corporation Ltd v Koch 1963

(4) SA 147 (A) at 159C-D; AA Onderlinge Assuransie-Assosiasie Bpk v De Beer 1982

(2) SA 603 (A) 614H-615B.

[11] S v Naik 1969 (2) SA 231 (N) at 234C-E; AA Onderlinge Assuransie-Assosiasie Bpk v De Beer supra n10 at 620E-G.

[12] Para 3.

[13] Also see Kemp v Santam Insurance Co Ltd and Another 1975 (2) SA 329 (C) where part of the mechanism or the equipment or the accessories to a motor vehicle become detached while the vehicle is being driven and cause injury to a third party. In Mkhonza v Road Accident Fund (2012/22193) [2013] ZAGPJHC 317 (10 October 2013) the Plaintiff collided into a tyre that had fallen off a truck in the opposite

direction.

[14] 1974

(4) SA 295 (C).

[15] At 2993

[16] At 301.

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