

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 2019/5932

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

DATE: 14/3/2025 SIGNATURE

In the matter between-

KEITH EDWARD FERNANDES HAY

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

WEIDEMAN AJ

[1] When this matter was called on 11 March 2025 in the Road Accident Fund default judgment trial court, adv Mulligan commenced by moving an application in terms of Rule 33(4) on behalf of the plaintiff to separate the aspects of liability and

quantum and to postpone the quantum aspect of the matter *sine die*. This application was granted.

- [2] Counsel then proceeded to move an application to lead evidence by way of affidavit in terms of Rule 38(2) and for such other documentation as may be relevant to be admitted as hearsay evidence in terms of Section 3(1)(c) of the Law of Evidence Amendment Act. This application was also granted.

- [3] The defendant's defence had been struck out and the matter proceeded on the submissions and evidence of the plaintiff only. In a default judgment application, it is the duty and obligation of counsel to place before court all evidence which supports the plaintiff's case as well as evidence which may undermine it.

- [4] In this matter a document had been uploaded to CaseLines at 25-16, Pocket 25 which purports to be an affidavit which is required in terms of Section 19(f)(i) of the Road Accident Fund Act, Act 56 of 1996 (the Act). Pocket 25 carries the heading "*Merits*". The name, designation and address of the commissioner of oaths is not legible on the copy of the document uploaded to CaseLines but, much more importantly, the document has not been signed by the plaintiff or for that matter by any deponent. The implication is that this document is not and cannot be an affidavit as is envisioned in Section 19 of the Act and can at most be presented as a statement, but one which has not been signed by the plaintiff. This should have been brought to the court's attention.

In paragraph 13 of his Particulars of Claim the plaintiff makes the averment that he has complied with the requirements of Section 24 of the Act. Section 24(6)(b) of the Act reads as follows:

"No claim shall be enforceable by legal proceedings commenced by a summons served on the Fund or an agent – (b) before all requirements contemplated in section 19(f) have been complied with".

Section 19(f)(i) of the Act is peremptory and requires the plaintiff to submit an affidavit in which the particulars of the accident are fully set out. Based on the

document on CaseLines at 25-16 the plaintiff has not submitted an affidavit and accordingly has not proven compliance with Section 24 of the Act.

- [5] The aforementioned statement contains the following version of events:

“on or about 28 June 2017 and at approximately 10h00, I was involved in a motor vehicle accident in which I sustained personal injuries.

I was the driver of a motor vehicle which registration letters and numbers are unknown to me but which is owned by Jimmy Hay, travelling on the N3 Highway before the N17 split.

Whilst travelling as aforementioned, the motor vehicle which was travelling in front of me, and which registration letters and numbers are unknown to me, suddenly pulled off to the right hand lane of travel.

I immediately noticed a truck in front of me, which registration letters and numbers are unknown to me, and swerved to my left hand side in order to avoid a collision. My right hand door connected with the rear of the truck.”

- [6] The plaintiff did submit an affidavit in support of his application for default judgment, which appears in CaseLines at 004-14 to 004-20 and again at 004-42 to 004-48. This affidavit was deposed to on or about 26 June 2024.

- [7] The relevant part of this affidavit, insofar as it relates to negligence, is the following:

“AD MERITS

On or about 28 June 2017 at 10h00, I was travelling in the second lane of travel on the N3 Highway, and I was approaching the N17 split, near Germiston. The highway has 4 (four) lanes of travel in my direction of travel and there is further an emergency lane to the left.

Whilst travelling aforesaid, I noticed, in the distance, that the insured motor vehicle referred to was travelling at a slow pace but was a long distance ahead of me. I continued to travel at a normal speed with a vehicle in front of me. Whilst travelling as aforesaid the vehicle in front of me suddenly swerved to the right and I immediately noticed that the insured motor vehicle referred to had now come to a complete standstill further down the road from where I had last noticed him in the distance.

I immediately tried to take evasive action to avoid the collision and I braked hard and swerved to my left. There was however not enough time to react, and my vehicle clipped the side of the insured motor vehicle referred to, and I lost control and then was hit from behind by another vehicle, whose full and further particulars are to me unknown.

There was a policeman who had witnessed the insured motor vehicle with mechanical issues, and he was reversing backwards in the emergency lane, to warn the truck driver to pull into the emergency lane because he was posing a danger to other road users. Unfortunately, he was not able to prevent the collision.

The insured motor vehicle had time, from when I initially saw him in the distance, to the point where the accident happened, to move onto the left shoulder of the road and into the emergency lane. I am unsure why the truck did not do so.

There was nothing I could do to avoid the accident.

The area where the collision occurred is on a slight incline, and the road is straight.

At the time of the accident the weather was clear, visibility was good, and the road surface was tarred and dry."

- [8] Given the content of the affidavit and in particular the reference to a Police Officer I searched through CaseLines for the Officer's Accident Report Form, a Docket or any other SAPS documentation but could not find any such documentation. On the plaintiff's version, as per his affidavit, at least three vehicles were involved in the

accident while a Police Officer was also on the scene, yet no official record of the accident seems to exist.

- [9] Given the fact that the only version of the accident is that of the plaintiff, it is indeed disappointing that the OAR and (possibly) sketch of the scene or witness statements are not available. Such documents would no doubt have contained the details of the truck driver, the driver of the vehicle which collided with the plaintiff from behind and the details of the officer that was reversing in the emergency lane.
- [10] The question arises whether the failure to provide any SAPS documentation, the production of which is standard procedure in claims against the Road Accident Fund, is simply an oversight or whether it was left out because it does not support the plaintiff's narrative? I am loath to draw an adverse inference but the lack of an explanation by the plaintiff in his statement or affidavit makes it difficult not to do so.
- [11] Based on the plaintiff's affidavit, the averred facts are as follows:
- 11.1 *"Whilst travelling aforesaid, I noticed, in the distance, that the insured motor vehicle referred to was travelling at a slow pace but was a long distance ahead of me."* The plaintiff saw the truck, was aware of the truck in front of him and was aware that it was travelling at a slow pace, ergo – he as well as the vehicle in front of him were travelling faster than the truck;
 - 11.2 *"I continued to travel at a normal speed with a vehicle in front of me."* This statement confirms that plaintiff took no action despite being aware of the slow moving vehicle in front of him.
 - 11.3 *"the vehicle in front of me suddenly swerved to the right and I immediately noticed that the insured motor vehicle referred to had now come to a complete standstill further down the road from where I had last noticed him in the distance."* Despite being aware of the fact that the truck was moving slower than his vehicle and while he should have appreciated / foreseen that, by not adapting his speed, he is catching up to the slower moving truck,

he did not keep the truck in his vision and was surprised by the sudden swerving manoeuvre of the vehicle in front of him.

11.3.1 *"I immediately tried to take evasive action to avoid the collision, and I braked hard and swerved to my left. There was however not enough time to react, and my vehicle clipped the side of the insured motor vehicle referred to..."* The plaintiff horns of a dilemma, he was either travelling too close to the vehicle in front of him or was travelling too fast.

11.4 *"There was a policeman who had witnessed the insured motor vehicle with mechanical issues, and he was reversing backwards in the emergency lane, to warn the truck driver to pull into the emergency lane because he was posing a danger to other road users."* In his affidavit the plaintiff states that the vehicle was travelling slowly when he saw it in the distance in front of him. He then states that the truck had come to a complete stop and that the Police Officer was reversing backwards to instruct the truck driver to move into the emergency lane. If the plaintiff had time to observe all of the above occurring, surely there was sufficient opportunity for him to take more effective measures to avoid colliding with the truck.

11.5 *"... he was reversing backwards in the emergency lane..."* The vehicle in front of the plaintiff swerved to the right into the fast lane, the plaintiff attempted to swerve to the left into the emergency lane. If he had not hit the truck, would he have collided with the police vehicle? Again, had the SAPS documentation been available one could have determined where exactly the police vehicle was.

- [12] In my view the correct approach to the above facts was set out in *Reemers v A.A. Mutual Insurance Association Ltd* 1962 (3) SA 823 (W.L.D.) at 825 E, which stated that:

"A driver of a car following another car should not travel either so closely behind or at such a speed that he is unable to pull up or swerve in the

event of a sudden stoppage or movement on the part of the driver of the car in front."

- [13] The following extract from *Ditsela v Road Accident Fund (59582/18) [2019] ZAGPPHC 531* is equally applicable to the matter in casu:

"There have been a number of cases dealing with vehicles colliding with obstructions in the road. The problem faced by such a driver has been described as "the horns of a dilemma". The problem is this: If the driver had been keeping a proper lookout and had been driving at a reasonable speed, he would have been able to pull up before the vehicles collided (See: Manderson v Century Insurance Co Ltd 1951 (1) SA 533 (A) at 537 H). Since the driver could not do so, he must either have been driving too fast, or he did not keep a proper lookout. This is, in my view, even more applicable where the accident happens in daytime in good visibility. The question must be asked: Why could plaintiff not have avoided the collision? In my view he was either travelling too fast, or he did not keep a proper lookout, and he only realized that the truck was travelling slower than he was when it was too late to avoid the collision. There is no doubt that plaintiff was negligent."

- [14] I am in agreement with the above sentiments expressed in *Ditsela*. There is no doubt that the plaintiff was negligent in colliding with the truck.
- [15] The only remaining question is whether any negligence can be attributed to the driver of the truck. To answer this question requires more information than what has been presented and could be deduced from the plaintiff's affidavit. All that could be extracted from the plaintiff's affidavit relating to the actions of the driver of the truck is that the truck was still moving when he first saw it. Considering his limited view of the truck, on his own version, just before the car in front of his swerved, the truck might either have been stationary or still moving slowly at the time when he collided with it.

Based on what is known there is no evidence available as to what the truck driver could have done to minimize the risk that he might have posed to other traffic. The

plaintiff's statement that a Police Officer was reversing in the emergency lane to tell the truck driver to move his vehicle out of the way goes further than what is acceptable under Section 3(1)(c) of the Law of Evidence Amendment Act. There is no evidence before court as to when and under which circumstances the plaintiff discussed the matter with the unknown Police Officer to ascertain what his intentions were.

Conclusion:

[16] The only evidence before court in respect of negligence is the plaintiff's version of the accident. Based on his version the plaintiff was clearly negligent in colliding with the truck from behind and there is no evidence before court on which a finding of negligence on the part of the truck driver could be made.

[17] In these circumstances I have no other alternative but to dismiss the action.

Order

The plaintiff's claim is dismissed.

A handwritten signature in black ink, appearing to be 'AJ Weideman', is written over a solid black rectangular redaction box. A horizontal line extends from the right side of the signature.

WEIDEMAN AJ

**JUDGE OF THE HIGH COURT
JOHANNESBURG**

This Judgment was handed down electronically by circulation to the parties/their legal representatives by email and by uploading to the electronic file on Case Lines. The date for hand-down is deemed to be 14 March 2025.

Heard: 11 March 2025

Delivered: 14 March 2025

APPEARANCES:

Applicant's counsel:

Adv. S Mulligan

Applicant's Attorneys:

Levin Titans

Respondent:

No appearance