IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED
DATE: **28 November 2024**
SIGNATURE:……

CASE NO: A154/2023

In the matter between:

BOTHA, MIKE **APPELLANT**

and

ROAD ACCIDENT FUND **RESPONDENT**

Coram: Millar *et* Hassim JJ *et* Engelbrecht AJ

Heard 8 October 2024

on:

Delivered: 28 November 2024 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 10H00 on 28 November 2024.

ORDER

It is Ordered:

[1] The appeal is upheld with costs which costs are on scale C.

[2] The order of the court *a quo* is set aside and replaced with the following:

"[1] The defendant is ordered to pay 100% of the plaintiff's agreed or proven damages arising out of the injuries suffered by him in a motor vehicle collision on 29 October 2016.

[2] The determination of the quantum of damages is postponed sine die.

[3] The costs are to be costs in the cause."

JUDGMENT

ENGELBRECHT AJ (MILLAR *et* HASSIM JJ CONCURRING)

[1] The appellant instituted an action against the respondent, the Road Accident Fund (the RAF) for compensation for bodily injuries sustained by him in a motor vehicle collision which occurred on 29 October 2016.

[2] After the institution of the action, the RAF gave notice of intention to defend and subsequently filed a plea. Thereafter, in consequence of a failure to comply with the rules of court with regards to advancing the case to trial readiness, the RAF's defence was struck out.[1]

[3] The action was enrolled for hearing on 6 February 2022. The RAF did not appear at the trial.[2] The action proceeded on the basis of a judgment by default. After hearing the plaintiff's evidence on the occurrence of the collision, the court *a quo* dismissed the action *inter alia* on the basis that the appellant had failed to establish either the involvement of another vehicle or the negligence of the driver of such vehicle. Leave to appeal to this court was granted by the court *a quo*.

[4] The only witness who testified at the trial was the appellant. He testified that he was employed as a supervisor of Security Officers at Loftus Versfeld Stadium ("Loftus"). On 28 October 2016 there was a music festival at Loftus. At approximately 22h30 he was *en route* from Loftus to his son's house at Pretoria Gardens driving his Nissan 1400 bakkie with registration No. J[…].

[5] He travelled through the Daspoort tunnel. He stopped at a stop sign. The road on which he was driving, had two lanes in each direction. He was driving in the right-hand lane. A Volkswagen Golf/ Polo motor vehicle ("the VW") with four "well built" men stopped in the left-hand lane next to his vehicle. The driver of the VW made a threatening sign indicating that he was going to cut the appellant's throat.

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1 The defence was struck out because the RAF failed to attend a pre-trial conference when called upon to do so.

2 The only contribution made by the RAF to the trial was a letter sent to the appellant's attorney the week before in which it communicated a belated repudiation of the claim. It was the contents of this letter that informed the court a quo's questioning of the appellant.

[6] The appellant interpreted the sign as an indication of the VW's occupants' intention to harm or hijack him. He drove off in the direction of the Police Station. On the way, there was a speed hump on the road for which he slowed down. It was at this point, that the VW bumped into the rear of his Nissan bakkie. It caused him to lose control of his vehicle and he only regained consciousness some three days later when he awoke in the Kalafong Hospital.

[7] The appellant knew neither the driver of the VW nor its occupants and could not identify them or the vehicle they were driving save by describing them as he had in evidence.

[8] The appellant was seriously injured and for approximately eight months after the collision, he was unable to walk without the assistance of a walking frame. He had tried unsuccessfully, after his discharge from hospital and when he was able to walk, to report the collision to the police but was told that they would not take a report because too much time had passed since the incident.

[9] At the conclusion of his evidence, the appellant was questioned at some length by the court. He was asked the following questions and gave the answers reflected:

[9.1] *". . . describe this, the vehicle colliding into you, describe it further to the court."* To which he answered, *"I lost control of my vehicle, your ladyship. And my vehicle ended up on the extreme right hand side of the road. I cannot recall accurately, but I think I hit a pole or a tree."*

[9.2] *"Alright, is there any evidence of your motor vehicle being hit at the back?"* to which he answered "*my bakkie had a tow bar at the back. They hit the tow bar and then I lost control of my vehicle."*

[9.3] *"So was there any damage to your vehicle?"* to which he answered *"upon being discharged from the hospital, I then discovered that my vehicle was a complete write off."*

[9.4] *"So who then attended to your vehicle, the wreckage of your vehicle?"* to which he answered *"My son organised some, the breakdown to come remove the vehicle from the scene."*

[10] The exchange between the appellant and the court continued. The court enquired from the appellant whether or not he could as a fact, state whether or not his vehicle had been damaged at the back. He attempted to explain that in all likelihood his vehicle must have been damaged on the tow bar. The court then went on to ask *"Do you have photographs depicting that damage?"* - to which he responded that he did not.

[11] Upon enquiry from the court whether the only evidence he was to present was his version, he answered in the affirmative. This was the extent of the evidence that was considered by the court *a quo*.

[12] It is important at the outset, to recognise that the present appeal does not turn on different or mutually destructive versions as to an occurrence or even on contradictory evidence of a version elicited in cross examination which would call in to question the veracity or truthfulness of the evidence of a witness. In this matter, only the appellant testified and his evidence stands unchallenged.

[13] While the court *a quo* directed enquires to him, and he answered these fully, the question is not whether there was further and better evidence that could and should have been presented but rather whether or not the evidence that was presented was, in the circumstances, sufficient to discharge the onus upon him.

[14] In *Baliso v First Rand Bank Ltd t/a Wesbank*,[3] it was held by the Constitutional Court that:

> *"[12] In terms of our civil procedure, default judgment for a debt or liquidated demand is granted on an acceptance of the allegations as set out in the summons, without any evidence. Where the claim is not for a debt or liquidated demand, the court may, after hearing evidence, grant judgment. This is usually only evidence on the amount of unliquidated damages. The reason for not hearing evidence on the other factual allegations made in the summons or particulars of claim is that, because the claim is not opposed, it may be accepted that those allegations are admitted or not disputed."*

[15] In *South Cape Corporation (Pty) Ltd v Engineering Management Services*,[4] the Supreme Court of Appeal held in this regard, that:

> *"… the word onus has often been used to denote, inter alia, two distinct concepts: (i) the duty which is cast upon the particular litigant, in order to be successful, of finally satisfying the Court, that he is entitled to succeed on his claim or defence, as the case may be; and (ii) the duty cast upon a litigant to adduce evidence in order to combat a prime facie case made by his opponent. Only the first of these concepts represents onus in its true and original sense. In Brand v Minister of Justice and Another 1959 (4) SA 712 (AD) at p. 715, Ogilvie Thompson JA, called it 'the overall onus'. In this sense, the onus can never shift from the party upon whom it originally rested. The second concept may be termed, in order to avoid confusion, the burden of adducing evidence in rebuttal ("weerleggingslas"). This may shift or be*

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3 2017 (1) SA 292 (CC) at para [12].
4 1977 (3) SA 534 (A) at 548A-C.

transferred in the course of the case, depending upon the measure of proof furnished by the one party or the other."

[16] In *Ntsala v Mutual and Federal Insurance Co Ltd,*[5] it was held that while:

"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 the risk that judgment be given against him."

[17] The court *a quo* was not satisfied that the appellant had discharged the onus upon him of proving that a collision had occurred. In this regard the court a *quo*, found:

" - The nexus of the collision and him losing control is questionable.
- *There is no evidence collaborating the plaintiff's evidence.*
- *There is no accident report, neither has the Plaintiffs son testified in collaborating his evidence.*
- *There is no evidence relating to the damage of the back of the 1400 bakkie that the Plaintiff was driving.*
- *He informs the Court that his son had his vehicle towed away. He does not inform us of any further detail to collaborate his version."*

[18] In *McDonald v Young*[6] it was held that:

"It is settled that uncontradicted evidence is not necessarily acceptable or sufficient to discharge an onus. In Kentz (Pty) Ltd v Power Cloete J undertook a careful review of relevant cases where this principle was endorsed and applied. The learned judge pointed out that the most

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5 1996 (2) SA 184 (T) at 190E-F.
6 2012 (3) SA 1 (SCA) at para [6].

succinct statement of the law in this regard is to be found in Stiffman v Kriel, where Innes CJ said: "… It does not follow, because evidence is uncontradicted, that therefor is true… The story told by the person on whom the onus rests may be so improbable as to not discharge it".

[19] The evidence of the appellant in the present case, established the pleaded case that an unidentified vehicle driven by an unidentified person, collided with the rear of his vehicle, causing him to lose control. This evidence is clear and unequivocal.

[20] The questions raised by the court *a quo*, went, in my view, impermissibly beyond being merely for purposes of clarification. The questions sought to elicit or establish evidence favourable to the RAF and were consonant with the belated reasons given by the RAF for its repudiation of the claim. The consequence of this was that in the absence of corroborative evidence for his version, the court *a quo*, found that he had not discharged the onus upon him.

[21] Additionally, having regard to paragraph 12 of the judgment of the court *a quo*, in which it was held that *"Mr. Botha has failed to disclose material facts"* is a credibility finding made based on inferences drawn by the court *a quo* from its questions. The appellant was never informed that any such credibility finding would be made against him by the court in consequence of his responses to those questions or that the responses would form the foundation of the court's decision to non-suit him. In this regard his fair trial right was impinged.

[22] The evidence of the appellant established the pleaded case. It is not improbable that the driver of a motor vehicle, with which another motor vehicle collided from the rear, in the circumstances testified to by the appellant, would lose control of his vehicle. In the circumstances, the evidence of the appellant established not only that a collision in fact occurred, but also the negligence of the driver of the VW vehicle in its causation.

[23] Since the appellant's action proceeded for judgment by default only upon the issue of negligence, it is appropriate, given the order that is to be proposed, that the costs in the court *a quo,* be costs in the cause. In regard to the appeal, since this appeal was argued after the amendment to Rule 69, this court has a discretion with regards to the scale of costs to be awarded for the appeal. Having regard to the nature of the appeal and its importance to the appellant, it is appropriate for an order to be made on scale C for the costs of the appeal.

[24] For the reasons set out above, I propose the order that I do as follows:

[24.1] The appeal is upheld with costs which costs are on scale C.

[24.2] The order of the court *a quo* is set aside and replaced with the following:

"[1] The defendant is ordered to pay 100% of the plaintiff's agreed or proven damages arising out of the injuries suffered by him in a motor vehicle collision on 29 October 2016.

[2] The determination of the quantum of damages is postponed sine die.

[3] The costs are to be costs in the cause."

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N A ENGELBRECHT
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I AGREE AND IT IS SO ORDERED

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A MILLAR
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I AGREE

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S HASSIM
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

HEARD ON:	7 OCTOBER 2024
JUDGMENT DELIVERED ON:	28 NOVEMBER 2024

COUNSEL FOR THE APPELLANT:	ADV. MCC DE KLERK
INSTRUCTED BY:	GERT NEL ATTORNEYS
REFERENCE:	MR. B WATKINS

NO APPEARANCE FOR THE RESPONDENT