REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

CASE NO: 952/2024
CASE NO: 5644/2023

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO THE JUDGES: YES/NO
(3) REVISED.

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DATE 18/3/25 SIGNATURE [redacted]

In the matter between:

JEREMIAH LESEDI MAROGA	**1ST PLAINTIFF**
MERIAM MACHETE	**2ND PLAINTIFF**
and	
ROAD ACCIDENT FUND	**DEFENDANT**

JUDGMENT

MULLER J:

[1] The plaintiffs in these two matters instituted action against the Road Accident Fund[1] to recover damages for personal injuries that they sustained in motor vehicle collisions, being pedestrians at the time. Both the matters were properly set down for default judgment.[2] As has become customary after the summonses were duly served upon it, the RAF delivered no notices of appearance to defend. In *Road Accident Fund and Others v Hlatswayo and Others*[3] reference is made of the attempt by the RAF to re-evaluate the existing processes and the implementation of more effective efficient and effective processes to deal with claims. The experience of this court to date is that nothing has come of this. This court is faced, on a weekly basis, with an overwhelming number of applications for default judgment where no notices of appearance to defend were delivered and, if notices of appearance of defend and pleas were delivered, no appearance on behalf of the defendant on the date of trial, is the order of the day.

[2] The court required oral evidence to be adduced. Both the plaintiffs testified. No other witnesses testified.

[3] Counsel for the first plaintiff (Mr Maroga) contended that in an application for default judgment, the defendant must be held to be 100% liable for the proven or

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[1] Hereinafter called "the RAF".
[2] Both the notices of set down were delivered to the RAF who placed a date stamp on each of the documents as proof of acceptance thereof.
[3] [2025] ZASCA 17 (5 March 2025) par 45.

agreed damages sustained by the plaintiff. The basis for the proposition is that the court is obliged to find that the defendant is 100% liable because contributory negligence has not been placed in issue. He placed reliance on the *dictum* in *AA Mutual Insurance Association Ltd v Nomeka.*[4] In addition, he also relied on the judgments in *Ndaba v Purchase*[5] and *Harwood v Road Accident Fund* [6] both of which held that the parties have to place negligence in issue in their respective pleadings in trial proceedings.

[4] Counsel for the second plaintiff (advocate Tshitamba) advanced substantially a similar argument. He referred to *Nontsele v Road Accident Fund* [7]and *Fox v Road Accident Fund*[8] as well as *Maleshane v Road Accident Fund*[9] as authority for the proposition that the defendant bears the onus to prove contributory negligence on the part of the plaintiff. He reiterated that the *dictum* in *Fox* was approved in *Maleshane* which states:

> "It is trite that the onus then rests on the plaintiff to prove the defendant's negligence which caused the damages suffered on a balance of probabilities. In order to avoid liability, the defendant must produce evidence to disprove the inference of negligence on his part. Failing which he/she risks the possibility of being found to be liable for damages suffered by the plaintiff."

[5] In *AA Mutual Insurance Association Ltd supra* it had to be decided whether it was competent or obligatory for a court to apply the provisions of the Apportionment of Damages Act.[10] The plaintiff alleged in his particulars of claim that the defendant was negligent. The defendant pleaded that the plaintiff was negligent without making any

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[4] 1976 (3) SA 45 (A).
[5] 1991 (3) SA 640 (N) 641H-642B.
[6] 2019 JDR 1768 (GP).
[7] [2023] ZAECMHC 28 (2 May 2023) par 34.
[8] [2018] ZAGPPHC (26 April 2018).
[9] [2022] ZGPPHC (25 November 2022) par 8-9.
[10] Act 34 of 1956. (Hereinafter called "the Act").

averment in terms of the Act that the damages should be reduced, if the court finds that the plaintiff was also negligent. After a review of the authorities, the court concluded that the applicability of the principles set out in section 1(1)(a) of the Act need not be specifically pleaded to invoke the provisions of the said Act.[11] It was held that:

> "The weight of the decisions is, therefore, that provided the plaintiff's fault is put in issue, an apportionment need not be specifically pleaded or claimed. This is the correct view, in my opinion.
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> The Act has become part of our law of delict. It has supplanted the former all-or-nothing effect of the common law in this respect. I agree, with respect, with O'Hagan J that upon determination of issues properly raised in the pleadings the Court must give judgment in accordance with the imperative direction of sec 1 of the Act.
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> In order to decide whether issues have been properly raised in the present matter it is necessary to have regard to the substantive law. In *South British Insurance Co Ltd v Smit* 1962 (3) SA 826 (AD) at p 835, Ogilvie Thompson JA interpret the word "fault" in sec 1 as meaning negligence casually linked with the damage. The following *dictum* appears on the same and following page:
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> "In all cases falling within para 1(a) the damages recoverable by the claimant shall be reduced by the court to such extent as the court may deem just and equitable having regard to the degree in which the claimant was at fault in relation to the damage'. Although the paragraph thus refers only to the claimant, it is, I think, plain from a consideration of the section as a whole that what the Court has to measure is the conduct of all parties whose fault caused the damage. Postulating a single defendant, the determination of the 'degree in which the claimant was at fault in relation to the damage' will also automatically determine the degree in which the defendant was at fault in relation to the damage.

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[11] Section 1(1)(a) provides: "Where any person suffers damage which is caused partly by his own fault and partly by the fault of another person, a claim in respect of that damage shall not be defeated by reason of the fault of the claimant but the damages recoverable in respect thereof shall be reduced by the court to such extent as the court my deem just and equitable having regard to the degree in which the claimant was at fault in relation to the damage."

> It follows from all the foregoing that, when the Court reaches the stage of apportionment, it is *ex hypothesi* dealing with 'fault' – that is to say, a negligent act or omission – which is causally linked with the damage in issue. In so far, therefore, as any view has hitherto been expressed that the question of causation has nothing whatever to do with the apportionment of damages, I find myself unable to agree with it."
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> Provided, therefore, it is clearly put in issue that the plaintiff was at fault, either completely or to a certain degree, the Court has to apply the provisions of Act. If the determination of the degree in which the plaintiff was at fault in relation to the damage will automatically determine the degree in which the defendant was at fault in relation to the damage, I fail to see why it should be necessary specifically to plead and claim apportionment."[12]

[6] Williamson JA in *Jones NO v SANTAM Bpk*[13] elucidated what the *dictum* in *South British Insurance Co Ltd v Smit supra,* which has set out what the provisions of section 1(1)(a) requires:

> "What the Court is required to do is to determine, having regard to the circumstances of the particular case, the respective degrees of negligence of the parties. In assessing 'the degree' in which the claimant was at fault in relation to the damage' the Court must determine in how far the claimant's acts or omissions, causally linked with the damage in issue, deviated from the norm of the *bonus paterfamilias*. In thus assessing the position, the Court will, as explained above, determine the respective degrees of negligence, as reflected by the acts and omissions of the parties, which have together combined to bring about the damage in issue."[14]

[7] The learned judge of appeal then proceeded to expound how the degrees of fault of parties should be assessed:

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[12] 55C-56A.
[13] 1965 (2) SA 542 (A).
[14] 554G-H.

"I concurred in the judgment of Ogilvie Thompson JA in *Smit's* case, but on further consideration I have come to the conclusion that the last sentence of this quotation does not make clear my view as to how the respective degrees of fault of the different parties must be assessed. A determination of the degrees of fault on the part of the claimant does not by itself

"automatically determine the degree in which the defendant was at fault in relation to the damage."

The Court must first also determine in how far the defendant's

"acts or omissions, causally linked with the damage in issue, deviated from the norm of the *bonus paterfamilias.*"

It is on this basis of comparison between the respective degrees of negligence of the two parties (or several parties if there be more than one claimant or defendant) that the Court can determine in how far the fault or negligence of each combined with the other to bring about the damage in issue."[15]

[8] The learned judge of appeal was at pains to point out that the determination of the degree in which the plaintiff was at fault does not automatically, as suggested in *Smit's* case, determine the degree in which the defendant was at fault in relation to the damage.

[9] The mere fact that the plaintiff was 30% negligent does not automatically lead to the conclusion that the defendant was 70% negligent. Various methods have been employed by judges to express their conclusions as to the respective degrees of fault of the two parties. A judge has a discretion to decide in a particular case which method is the best in which to determine the respective degrees of fault of each of the parties.

[10] The judgment in *AA Mutual Insurance Association Ltd v Nomeka* returned the position enunciated in *South British Insurance Co Ltd v Smit supra,* without any reference to the *Jones* case, which evoked criticism by academic writers.[16]

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[15] 555A-D.

[11] The judgments to which reference have been made earlier, save for the judgment in *Maleshane v Road Accident Fund,* which was an application for default judgment, were all decided on the basis of the pleadings and the evidence adduced by both the parties at trials.

[12] The present two matters are applications for default judgment in terms of rule 31(2)(a). No pleadings have been delivered. The question to be answered is whether the provisions of section 1(1)(a) are applicable and may be invoked in an application for default judgment. Rule 31(2)(a) provides that:

> "Whenever in an action the claim or, if there is more than one claim, any of the claims is not for a debt or liquidated demand and a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff may set the action down as provided in subrule (4) for default judgment and the court may after hearing evidence, grant judgment against the defendant or make such order as to it seems meet."

[13] It was held in *Mashifane v Suliman and Another,*[17] long before the Act came into operation, that when a plaintiff applies for default judgment, the court has a discretion to require proof of the plaintiff's cause of action, or the material parts thereof for the following reason:

> "That as far as I know, has been the practice in our court for very many years – that in any action under Rule 42,[18] if the claim is for unliquidated damages, you must prove your damages – and the

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[16] 555D-H; Neethling J *"AA Mutual Insurance Association Ltd v Nomeka 1976 3 SA 45 (A)"* 4 THRHR (1976) 412; Van der Merwe NJ and Olivier PJJ *Die Onregmatige Daad in die Suid-Afrikaanse Reg* 4th ed (1980) 164-5.

[17] 1931 TPD 328, 331; In *Marais v Mdowen* 1919 OPD 34, 36 was stated: "Now, this Court would never dream of giving a judgment in a matter of damages for an assault without hearing some evidence to show what was the nature of the assault." *Grosvenor Motors (Cape) Ltd v Samson* 1956 (3) SA 169 (C) 174E.

[18] Rule 42 was a forerunner to Rule 18 which was a forerunner to the present rule 31(2)(a).

cases quoted by Mr Niemeyer, in my opinion, go no further. They certainly do not say that in no case under Rule 42 need you prove your cause of action."

[14] In *Knight NO v Harris*[19] Beadle CJ held that it is necessary, as a general rule, for a court to hear evidence, for purposes of default judgment in claims for damages arising out of motor vehicle accidents. The learned chief justice explained that:

"Rule 9 does not suggest that the invariable practice of the Court should be to dispense with hearing of evidence, on the cause of action and hear evidence only on the quantum of damages. It is the duty of the Court in every specific case to decide whether or it will exercise its discretion and dispense with hearing of evidence and this is the way in which I approach the instant case. Claims for damages arising out of motor vehicle accidents are by no means simple and straightforward, as complex issues such as whether or not the plaintiff was himself guilty of contributory negligence often arise. In the normal course, therefore, I am inclined to the view that it would be unwise for a court to dispense with the hearing of evidence in claims such as this. I note that in the Transvaal, where there is no obligation on the Court to hear evidence, the practice is, in claims of this sort, to insist on evidence being given, establishing the cause of action, see *Mashifane v Suliman and Another* 1931 TPD 328."[20]

[15] In *Dorfling v Coetzee*[21] the court relied on both the judgments in *Mashifane* and *Knight NO supra,* to hold that:

"Where application is made for judgment by default for damages suffered in a motor collision it is essential that evidence of the cause of action should be led so that it can be determined (1) whether the defendant was negligent; (ii) whether the plaintiff was contributorily negligent and (iii), in the last instance the measure of the plaintiff's contribution to the damage. It is only thereafter, when all the facts which have been laid before the Court as proof of the cause of action have been considered,

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[19] 1962 (1) SA 317 (SR).
[20] 318G-H.
[21] 1979 (2) SA 632 (NC) 635D-F.

> that the Court can decide whether the full amount of the proved damages should be awarded or whether there should be an apportionment of damages in terms if s 1 of Act 34 of 1956."[22]

[16] In *Abraham v City of Cape Town*[23] it was accepted that a court has the power to apportion damages where contributory negligence is proved in applications for default judgment in respect of cases concerning motor vehicle collisions. The court, however, was of the view that it is not incumbent upon the court to hear oral evidence in all cases based on delict, but that the presiding judge has a discretion to determine, depending on the facts before him/her, whether to hear oral evidence on all or any of the issues required to be decided to determine whether to grant the relief claimed. The court reasoned that:

> "The logic of not requiring any evidence where default judgment is sought in the case of a debt or liquidated demand, seems to me to be related principally to the ability of the Court to determine the quantum of damages due to a plaintiff without an evidential enquiry into and a discretionary determination as to the amount due. However, in such cases there are numerous defences open to a defendant which could be raised to defeat the action or curtail the claim ad which would be analogous to the raising of contributory negligence and a consequent apportionment of damages in an action based on delict. Therefore it does not seem to me to be right to insist on oral evidence on the merits of a plaintiff's claim being led merely because a defence such as contributory negligence, which could result in the abatement of the claim, could be raised but has not been pleaded or otherwise invoked by a defendant."[24]

[17] From these cases, it is clear, in my view, that it has been accepted for many years that a court has a discretion in applications for default judgment in respect of claims for damages which are based on delict to hear oral evidence or not, and, that oral evidence should be adduced in cases of motor vehicle collisions to prove the plaintiff's cause of

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[22] Quoted from the translation of the headnote provided at p 632. Approved by Majiedt J in *Bens v Sam and Another* Case No 479/06 [2008] ZANCHC 10 (29 February 2008) par 10.
[23] 1995 (2) SA 319 (C)
[24] 325C-E.

action,[25] mainly, because contributory negligence may be attributed to the plaintiff by the evidence and to assess his contribution to his personal damages.

[18] The *dictum* in *South British Insurance Co Ltd v Smit supra* which states that: 'all cases falling within para 1(a) the damages recoverable by the claimant shall be reduced by the court to such extent as the court may deem just and equitable having regard to the degree in which the claimant was at fault in relation to the damage' encompass, as a matter of substantive law, also applications for default judgment under rule 31(2)(a).[26]

[19] A similar result may also be achieved, albeit along a different route, by the application of rule 39(1). The said rule requires that:

> "If when a trial is called, the plaintiff appears and the defendant does not appear, the plaintiff may prove his claim so far as the burden of proof lies upon him and judgment shall be given accordingly, in so far as he has discharged such burden. Provided that where the claim is for a debt or liquidated demand no evidence shall be necessary unless the court otherwise orders."

[20] It cannot be expected from a court to simply close its eyes to evidence proving contributory negligence (if any) on the part of the plaintiff in respect of a claim for compensation in terms of the RAF Act in an application for default judgment under rule 31(2)(a), and then, at the same token, in proceedings in terms of rule 39(1), determine the contributory negligence of the plaintiff when defendant is in default of appearance because a plea has been delivered in terms whereof the negligence of the plaintiff has been put in issue. In the latter instance the defendant is also in default.[27] To require that contributory negligence of the plaintiff be ignored in applications for default judgment puts form above substance and negates the main purpose and effect of the provisions of section 1(1)(a) in

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[25] Also to prove the plaintiffs quantum of damages.
[26] And cases under rule 39(1).
[27] *Katritsis v De Macedo* 1966 (1) SA 613 (A) 617D-618E.

respect of claims for damages. I am in respectful agreement with the judgments that held that the court is empowered to determine the contributory negligence of the plaintiff in applications under rule 31(2)(a). The court must examine and evaluate the evidence properly placed before it in terms of rule 31(2)(a) and 39(1). If the evidence does not support the claim set out in the particulars of claim, the court is perfectly entitled to reduce the damages, in the exercise of its discretion, to such extent as the court may deem just and equitable having regard to the degree in which the claimant was at fault in relation to the damage or to dismiss the application for default judgment, if no *prima facie* case in support of the claim has been made out.

[21] I now turn to the cases presented by the respective plaintiffs in the present matter. Both plaintiffs presented evidence to prove their causes of action.

THE FIRST PLAINTIFF: JEREMIAH LESEDI MAROGA.

[22] In the particulars of claim the plaintiff avers that he was a pedestrian on 21 December 2022 on the R36 road near Ga-Mathipa village when an unidentified vehicle driven by an unidentified person collided with him and caused him personal injuries. The driver of the vehicle was negligent. Liability and quantum were separated in terms of rule 33(4).

[23] The plaintiff testified that on the day in question he proceeded home by bus after work at Maroela Mine at 17h00. The journey took until 19h30. Where he alighted from the bus were no street lights. Construction work was ongoing on the road which caused vehicles to use only one lane. When he alighted from the bus he was on the side of his home and on the side of the road of vehicles going to Burgersfort. Nature called. He crossed the road to the other side. When he returned, he walked back across the road and was knocked down

by vehicle going towards Burgersfort which he did not observe. He said that he checked for oncoming vehicles before he proceeded to cross the road. The reason why he failed to observe the vehicle was because there were heaps of soil from the construction that obstructed his view. He did not see the vehicle until he was knocked down. He did not see the lights of the approaching vehicle because of the soil heaps that obstructed his view. He was injured and was detained in hospital for a period of six months. Counsel argued that the defendant should be held liable for all the damages sustained by the plaintiff.

[24] The plaintiff was a single witness. His version why he needed to cross the road to answer the call of nature whilst he was on the side of the road where his home is situated seems suspect. He travels on that road on a daily basis. To my mind, his version that he was unable to see the lights of the approaching vehicle in the dark where there are no street lights is improbable and false. The lights of the approaching vehicle would have illuminated the area ahead of the vehicle. The heaps of soil could not totally have blocked out the lights of the approaching vehicle. In *Singh v New India Assurance Co Ltd*[28] Friedman J quoted with approval a passage from *Beech and Another v Setzkorn and Another:* [29]

> "A pedestrian who wishes to cross a street which is being used by motor-cars must, in my opinion, use his senses to ascertain whether a motor-car is approaching. If he steps into the street without looking, he is, in my opinion negligent, because it is as much his duty to take care to avoid being injured as it is that of the driver of a motor-car to avoid running him over. If he steps straight into the path of an oncoming car which he would have seen if he kept a proper look-out, then he has himself to blame if he is run over. The duty of looking to see whether a vehicle is approaching is greater when the pedestrian steps on to the street next to some object like a bus or a tram which obstructs that

[28] 1966 (4) SA 154 (N).
[29] 1928 CPD 500, 504.

> view, because he must know that there is a part of the road upon which vehicles may be travelling which he cannot see and his act in stepping on to the street is invisible to the driver of the oncoming vehicle because of that obstruction."[30]

[25] The court is of the view that the plaintiff failed to keep a proper lookout before he crossed the road. He was negligent in doing so and is responsible for 70% of the injuries he sustained in the collision. There is no suggestion that the driver of the vehicle attempted to avoid the collision with the plaintiff who must have come into view prior to the collision. I hold that the defendant is liable for 30% of the plaintiff's proven or agreed damages.

THE SECOND PLAINTIFF: MERRIAM MACHETE

[26] The plaintiff avers in the particulars of claim that she was a pedestrian on 28 March 2020 on the Morutji road near Tzaneen when a vehicle driven by Lucky Ratlabala Ntswako collided with her when he suddenly lost control of his vehicle. Liability and quantum were also separated in terms of rule 33(4).

[27] She testified that on that day she alighted from a taxi on the side of the road opposite her homestead. She had to cross the road to get to her home. She placed her baby on her back after she alighted from the taxi whilst standing next to the tar road. She looked to both sides of the road. There were no oncoming cars. The road is straight and there are no other roads joining that road near where the incident happened. She stepped onto the tar road with a view to crossing the road to enter her home. From there she is unable to say what happened. The accident report was handed in as an exhibit. The sketch plan indicates that the vehicle collided with her in the lane on side of the road from where she proceeded. It is clear that the vehicle of the insured driver travelled along a straight road. There are no

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[30] 157B-D.

roads that join that road in the vicinity. It is inconceivable that the plaintiff was unable to see the approaching vehicle if she looked in both directions before she started to cross the road. It is for the very same reason also inconceivable that the driver of the vehicle did not observe her standing very close to the road as he approached her. However, the vehicle must have been very close to her when she stepped in front of it because, her version is that she was knocked down as soon as she stepped onto the road.

[28] There is no evidence presented by the plaintiff to prove, as foreshadowed in the particulars of claim, that the insured driver lost control of his vehicle before he collided with her. The evidence of the plaintiff (as a single witness) that she looked to both sides and that the road was clear of traffic, is wholly improbable and cannot be accepted. There is no doubt that the plaintiff was negligent when she proceeded to cross the road without a proper look-out for oncoming vehicles for the same reason set out in *Singh v New India Assurance Co Ltd* above. Failing to look if it is safe to cross a road where fast-moving vehicles are driving constitutes negligence.

[29] The driver of a vehicle must have regard to the rights of pedestrians to cross roads at any given place. This collision occurred in broad daylight. A driver of a motor vehicle must have regard to possible sudden movements from pedestrians close to the road. The driver should have exercised caution and should have adjusted his speed and the line of travel not to pass too close to the plaintiff who was standing at the edge of the road. He must also keep a proper look-out at all times. The plaintiff was negligent when she stepped in front of the oncoming motor vehicle and is responsible for 50% the personal injuries that she sustained. The defendant is liable for 50% of the proven or agreed damages sustained by the plaintiff.

ORDER

DEFAULT JUDGEMENT IS GRANTED AGAINST THE DEFENDANT AS FOLLWS:

THE FIRST PLAINTIFF: JEREMIAH LESEDI MAROGA. CASE No. 952/2024

1. **The defendant is liable for 30% of the plaintiff's proven or agreed damages.**
2. **Quantum is postponed *sine die*.**
3. **The defendant is ordered to pay the costs.**

THE SECOND PLAINTIFF: MERRIAM MACHETE. CASE No. 5644/2023

1. **The defendant is liable for 50% of the plaintiff's proven or agreed damages.**
2. **Quantum is postponed *sine die*.**
3. **The defendant is ordered to pay the costs.**

[redacted]

G.C MULLER
JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION: POLOKWANE

APPEARANCES

FOR THE 1ST PLAINTIFF	: ADV MOSENYEHI.
INSTRUCTED BY	: RUNGWANE MATHEBA ATTORNEYS.
FOR THE 2ND PLANTIFF	: ADV TSHITAMBA.
INSTRUCTED BY	: MULALO SADIKI ATTORNEYS.
DATE OF HEARING	: 21 FEBRUARY 2025.
DATE OF JUDGMENT	: 18 MARCH 2025.

LKAELIHORT