IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION (MIDDELBURG LOCAL SEAT)

CASE NO: 689/21

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

10/06/2024
DATE

[redacted]
SIGNATURE

In the matter between:

CHIBWE PARDON **PLAINTIFF**

And

ROAD ACCIDENT FUND **DEFENDANT**

JUDGMENT

Langa J

Introduction and Concise Facts

[1] The Plaintiff instituted an action for damages against the Road Accident Fund for personal injuries sustained as a result of a motor vehicle accident which occurred on the 15th of September 2019 apparently on the Stofberg Road. The Plaintiff is claiming damages for *inter alia* the loss of earnings resulting from the said motor vehicle accident. Although the Defendant's attorney was present at the hearing, the matter was, however, essentially undefended as no appearance to defend and plea were not filed. The parties however agreed on proceeding with the matter.

[2] When the matter came before court on the 03rd of June 2024, the Plaintiff brought an application in terms of Rule 38(2) to adduce expert evidence by way of affidavits. When the application was refused, the *quantum* and merits were separated by agreement between the parties in terms of Rule 33(4). The matter consequently proceeded on merits only. The Plaintiff was the only witness called while the Defendant called no witnesses.

The evidence

[3] The plaintiff, Mr Pardon Chibwe, in a nutshell testified that the accident happened on the 15th of September 2019 at around 05h00 on the Stofberg road, Mpumalanga Province. He was travelling from work in his Ford Bantam bakkie when an oncoming truck with bright lights encroached into his lane of travel. He then tried to avoid the truck by swerving to the left. His motor vehicle however overturned as he tried to avoid the truck. He woke up in hospital but does not know how he was taken to hospital. He cannot recall what happened after the accident. After he was discharged from the hospital, he discovered that his motor vehicle was damaged beyond repair.

[4] When asked if there was a collision between his vehicle and the truck as alleged in the particulars of claim, the Plaintiff stated that he could not tell whether the trailer of the truck collided with his vehicle. He also could not remember telling his legal representative that he was hit by a trailer of the truck as stated in the particulars of claim as well as his affidavit made in terms of section 19 (f) of the Road Accident Fund Act of 56 of 1996.

[5] He further stated that he sustained injuries as a result of this accident. He sustained a serious head injury as a result of which his left eye cannot open properly. He also lost teeth. After his discharge he apparently tried to report the accident to the Middleburg Police Station on the 07th of January 2020 but was told it cannot be done at that late stage

and all that could be done is to record in the Occurrence Book/Register that he reported the accident on the 07th of January 2020.

The applicable legal principles

[6] It is trite that a defendant does not bear the onus to prove that he was not negligent. As stated in *Ntsala and Others v Mutual & Federal Insurance Co. Ltd* 1996 (2) SA 184 (T) the onus rests on the Plaintiff to prove negligence. See also *Fox v RAF* (A548/16) [2018] ZAGPPHC 285 (26 April 2018). In order to succeed with the claim, the Plaintiff therefore had to show that the Defendant was guilty of conduct which was negligent, wrongful and was the cause of the injuries suffered by the Plaintiff. In *Telematrix (Pty) Ltd v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) para [12], the Supreme Court of Appeal stated the following basic rule.

> *'The first principle of the law of delict, which is so easily forgotten and hardly appears in any local text on the subject is, as the Dutch author Asser points out, that everyone has to bear the loss he or she suffers. The Afrikaans aphorism is that "skade rus waar dit val". Aquilian liability provides for an exception to the rule and, in order to be liable for the loss of someone else, the act or omission of the defendant must have been wrongful and negligent and have caused the loss. But the fact that an act is negligent does not make it wrongful ...'*

[7] The test for negligence was neatly captured in *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E-G as follows.

> *'For the purposes of liability culpa arises if –*
>
> *(a) A diligens paterfamilias in the position of the defendant –*
>
> *(i) Would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and*

(ii) Would take reasonable steps to guard against such occurrence; and

(b) The defendant failed to take such steps.

… Requirement (a)(ii) is sometimes overlooked. Whether a diligens paterfamilias in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend upon the particular circumstances of each case…'

Discussion

[8] The Plaintiff's counsel argued that the driver of the unknown truck was negligent and caused the accident as he drove his motor vehicle in the incorrect lane. He argued further that the Plaintiff was not negligent and did cause the accident. He contended further that the Plaintiff was driving his motor vehicle in the correct lane of the road at the time of the accident and was forced to swerve to the left to try to avoid the truck. It was further argued that as the Defendant did not file any papers to defend the matter or call even witnesses, the merits of this case should be decided based on the Plaintiff's version. Counsel for the Plaintiff contended that based on the Plaintiff's version, the driver of the truck caused the accident.

[9] The Defendant's counsel on the other hand pointed out that the Plaintiff's testimony regarding the description of the accident differs completely with the description contained in the Plaintiff's section 19(f) affidavit and the particulars of claim. He pointed out that while according to the latter documents the trailer of the oncoming truck collided with the Plaintiff's motor vehicle, the Plaintiff's evidence is, however, totally at odds with this version. He submitted that the Plaintiff's version must be found to be contradictory and therefore not credible.

[10] It is common cause that the Plaintiff gave two materially contradictory versions as to how the accident happened. In one version, he specifically and expressly alleged in the particulars of claim and section 19(f) affidavit that his vehicle collided with the trailer of the truck allegedly involved in the accident. However, in is *viva voc*e testimony he stated that his vehicle capsized after he swerved off the road in order to avoid the collision with the truck. However, most important he denied having made the allegation that the truck's trailer collided with his vehicle. This in my view constitutes a material contradiction to the extent that his two versions are irreconcilable. It is trite that a litigant falls or stands by the pleadings. If what it alleges in the pleadings in not proved by evidence, or, as is the case, is contrary to the evidence, the testimony of the Plaintiff stands to be dismissed.

[11] In my view the contradictions in the Plaintiff's version are glaring and irreconcilable. In a matter where contradictions and inconsistencies arise, the court's task is not to determine which version is correct but it must satisfy itself whether the witness could have erred because of a defective recollection or as a result of dishonesty. In this case the Plaintiff simply disavowed his previous statement under oath as well as the particulars of claim. The contradictions are not attributed to any error the witness could have made.

[12] In this matter I find that the contradiction is pertinent and material. It relates to the crux of the Plaintiff's case regarding how the accident took place. While the Plaintiff gave two irreconcilable versions, despite having been given sufficient opportunity to explain the contradiction, he could not give a reasonable explanation thereof. He instead insisted that the version in the particulars of claim and section 19(f) affidavit is incorrect and that his latest one is the correct one. The contradiction raises serious doubt about the credibility of the Plaintiff as well as the reliability of his evidence. This is so particularly when one considers that the version in the particulars of claim, which is corroborated by the section 19(f) affidavit, was made by the Plaintiff when the incident was supposed to be fresh in his

mind. The affidavit was made on the 22nd of October 2020 while the particulars of claim were drawn on the 22nd of February 2021. The Plaintiff's latest version was made *viva voce* on the 03rd of June 2024 and he insists that it is the correct version.

[13] I find that the Plaintiff's case is fatally contaminated by the contradiction referred to above. I am not persuaded, as the Plaintiff's counsel contended, that he has proven that the driver of the alleged truck was the cause of the accident and the Plaintiff's injuries. The evidence of the Plaintiff is not credible and leaves the question of how the accident occurred not satisfactorily explained. It can safely be accepted in these circumstances that one of the two versions presented by the Plaintiff is false.

[14] Further, the argument by the Plaintiff's counsel that his version must be accepted as it is the only version before court cannot assist the Plaintiff. It is trite that even if a matter is not defended, the Plaintiff still bears the onus to prove its case on a balance of probabilities.

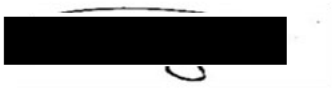
Conclusion

[15] In conclusion, I find that the Plaintiff has failed to establish evidence upon which the court, applying its mind reasonable thereto, could or might in his favour. See *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) AT 409G-H. As stated in *Ntsala and Others, above,* the onus in this case rests on the Plaintiff to prove negligence. In the light of the above and in particular the failure by the Plaintiff to establish how the incident took place, I find that the Plaintiff has failed to establish a *prima facie* case that the incident complained of did take place as alleged. Based on the above, I conclude that there is no evidence based on which a reasonable man might find in favour of the Plaintiff. I am accordingly satisfied that the appropriate order to made would be one of absolution from the instance.

Order

[16] In the result I make the following order:

Absolution from the instance is ordered with costs.



MBG LANGA

JUDGE OF THE HIGH COURT

Appearances:

For the Plaintiff:	Advocate PS Hopane
For the Defendant:	Mr N Mhlanga
Date heard:	06 June 2024
Date delivered:	10 June 2014

This judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be the 10 June 2024 at 14h00.