Reportable:	YES/NO
Circulate to Judges:	YES/NO
Circulate to Magistrates:	YES/NO
Circulate to Regional Magistrates:	YES/NO

IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST PROVINCIAL DIVISION, MAHIKENG

CASE NO.: RAF339/2019

In the matter between:

MQOCWA MAHLODI APPOLONIA **PLAINTIFF**

And

ROAD ACCIDENT FUND **DEFENDANT**

JUDGMENT

MASIKE AJ

INTRODUCTION:

[1] On the morning of 21 January 2019, at the robot – control intersection near Garankuwa Complex, a motor vehicular collision occurred between a motor vehicle driven there and then by the plaintiff and motor vehicle, a quantum

minibus, driven by a person whose names and further particulars are to the plaintiff unknown ("the insured driver").

[2] As a result of the motor vehicular collision, the plaintiff allegedly suffered bodily injuries and resultantly instituted action against the defendant. It is alleged by the plaintiff that the motor vehicular collision occurred as a result of the insured driver having failed to:

1.1 keep a proper control of his motor vehicle;

1.2 performed an illegal maneuver;

1.3 Failed to avoid the accident when by exercise of reasonable care and skill should and could have done so;

1.4 Failed to take the rights of other road users, more in particular those of the plaintiff into account; and / or

1.5 Failed to keep a proper lookout.

[3] The defendant is sued in the proceedings as the responsible entity by virtue of the provisions of Section 21 read with Section 17 of the Road Accident Fund, Act 56 of 1996 ("the Act"). The defendant defended the matter and filed a special plea and pleaded over on the merits.

[4] Ms. Appolonia Mahlodi Mqocwa ("the plaintiff") was represented by Advocate K Mongwe ("counsel for the plaintiff"). There was no appearance for the defendant

at 15H13 when the matter was called. On 22 April 2024, the matter was heard by Petersen ADJP and postponed to 31 July 2024, Mr. Setati on that occasion appeared for the defendant. I am accordingly satisfied that the defendant is aware of the date of hearing of 31 July 2024.

[5] There was an application in terms of Rule 38(2) brought by counsel for the plaintiff. On perusal of the application, it was apparent that same had not been competently served on the defendant. Counsel for the plaintiff sought to rely on service by electronic mail but was unable to satisfy the Court that the Rule 38(2) application had been received by the defendant or that the defendant had consented to being served with applications and notices in the proceedings by way of electronic mail. On this basis, the Court was unable to consider the substance of the Rule 38(2) application.

[6] I interpose to address a disconcerting practice which seems to be gaining momentum in this division of the High Court. Attorneys, usually for the plaintiff have taken to serving applications and notices on the defendant, usually the Road Accident Fund, by way of electronic mail. The reliance of service in this manner is based on the reading of Rule 4A(1). Rule 4A(1) reads as follows: "*Service of all subsequent documents and notices, not falling under rule 4(1)(a), in any proceedings of any other party to the litigation may be effected by one or more of the following manners to the address or addresses provided by that party under rule 6(5)(b), 6(5)(d)(i), 17(3), 19(3) or 34(8), by –*

(a) hand at the physical address for service provided, or

(b) registered post to the postal address provided, or

(c) facsimile or electronic mail to the respective addresses provided." (my underlining)

[7] Rule 19(3)(a) and (b) read as follows: "*19(3)(a) When the defendant delivers notice of intention to defend, defendant shall therein give defendant's full residential or business address, postal address and where available, facsimile address and shall also appoint an address, not being a post office box or poste restante, within 25 kilometers of the office of the registrar and an electronic mail address where available, for service on defendant at either address of all documents in such action, and service thereof at the address so given shall be valid and effectual, except where by any order or practice of the court personal service is required.*

(b) The defendant may indicate in the notice of intention to defend whether the defendant is prepared to accept service of all subsequent documents and notices in the suit through any manner other than the physical address or postal address and, if so, shall state such preferred manner of service." (my underlining)

[8] In the absence of written proof that the defendant has consented to receive applications and notices by any manner other than physical delivery at the

chosen physical address for service, such service is not proper service. This practice must be depreciated.

[9] The Court having indicated that it was not inclined to hear the Rule 38(2) application, counsel for the plaintiff then from the bar, moved an application for separation of liability and *quantum* as provided in Rule 33(4). The entitlement to seek the separation of issues was created in the Rules so that an alleged *lacuna* in the plaintiff's case can be tested or simply so that a factual issue can be determined which can give direction to the rest of the case and, in particular, to obviate the leading of evidence. The purpose is to determine the fate of the plaintiff's claim (or one of the claims) without the costs and delays of a full trial. (See: **Rauff v Standard Bank Properties (A Division of Standard Bank of SA Ltd) and Another** 2002 (6) SA 693 (W) at page 703F – G.

[10] It has been held that this procedure is so important that an attorney should as soon as pleadings have closed make a strategic assessment of the real trial needs of the case bearing in mind the duty to eliminate avoidable delays and costs. (See: **Rauff v Standard Bank Properties (A Division of Standard Bank of SA Ltd) and Another** *supra* at page 703H – I

[11] The purpose of Rule 33(4) is to facilitate the convenient and expeditious disposal of litigation. In making a determination the Court must consider whether the separation will curtail proceedings and dispose of the matter expeditiously. The Court must assess the convenience to itself and to the parties as well as any

potential prejudice either party may suffer if the separation is granted. The Court is obliged to order separation unless it determines that the issue cannot be conveniently separated. (See: **CC v CM (2014 (2) SA 430 (GJ)** at paragraph 25.

12. Having considered the application against the backdrop of trite legal principles, the Court found that a proper case had been made for separation as evinced in Rule 33(4) and accordingly ordered same.

THE CASE OF THE PLAINTIFF:

[13] On 21 January 2019 at about 7h00, the plaintiff, the holder of a valid drivers license, code 11, was driving her motor vehicle from where she was employed as a nurse on route to her abode. As she approached a robot – controlled intersection near Garankuwa Complex, the robot signaled green in her direction of travel which provided her with the right of way. She engaged the indicator function in her motor vehicle to forewarn of her intention to execute a right at this intersection. In the opposite direction she noticed a quantum minibus ("the minibus"), approaching the robot – controlled intersection at a high speed and also indicating to execute a right turn. Assuming that the driver of the minibus would turn right as indicated, she executed a right turn in the face of the minibus.

[14] Notwithstanding the driver of the minibus's clear indication to execute a right turn, the driver proceeded directly across the intersection which resulted in a collision between her motor vehicle and the minibus. The plaintiff contended that she

could not avoid the collision. The point of impact was on the left side of her motor vehicle. Simultaneously, she lost consciousness. When the plaintiff regained consciousness, she was unable to move. She realized that she was admitted into the high care unit of a hospital. It was then she noticed that her neck had been placed in a brace and her head had been bandaged.

This constituted the plaintiff's case.

DEFENDANT'S PLEA:

[15] The defendant raised two special pleas; both special pleas read that the plaintiff failed to comply with Regulation 3 of the 2008 Regulations of the Road Accident Fund Act, Act No, 56 of 1996, as amended by Act No. 19 of 2005 and its regulations. As a consequence of the non compliance the Court does not have jurisdiction to make a finding as to whether the injury to the plaintiff is a serious injury and does not have the jurisdiction to make a finding regarding whether the plaintiff is entitled to claim non – pecuniary loss against the defendant. The consequence of non-compliance as per the second special plea reads the defendant is not obliged to compensate the plaintiff for non – pecuniary loss as alleged or at all.

[16] In the plea on the merits, the defendant denied having incurred any liability in respect of the claim of the plaintiff and in respect of the accidents that occurred on 21 January 2019. The defendant went on to deny that the collision occurred, pleaded that it is denied that the insured driver was negligent as alleged or at all

and in the alternative if the Court found that a collision occurred as alleged by the plaintiff and the insured driver was negligent in one or more or all of the respects alleged by the plaintiff, the defendant pleaded that the negligent driving of the insured driver did not contribute to the collision as alleged by the plaintiff.

[17] The defendant further pleaded that in the event the Court finding that the insured driver was negligent in one or more or all of the respects alleged by the plaintiff and the negligent driving of the insured driver did contribute to the collision as alleged by the plaintiff, the defendant pleaded that the plaintiff negligently contributed to the collision in one or more of the following respects:

17.1 the plaintiff failed to keep a proper lookout;

17.2 the plaintiff drove at a excessive speed;

17.3 the plaintiff failed to apply the breaks timeously or at all;

17.4 the plaintiff failed to avoid a collision when by the exercise of skill and care she could and should have done so;

17.5 she failed to have any *alternatively* adequate regard to vehicles on the road, in particular to the vehicle driven by the insured driver.

[18] Counsel for the plaintiff submitted written heads of argument. In his oral submissions he emphasized that the driver of the minibus was the sole cause of the collision and urged this Court to find that the defendant was hundred per cent (100%) liable for the plaintiff's proven damages.

THE LAW:

[19] Section 21 of the Act reads as follows: *"21; When a third party is entitled under section 17 to claim from the Fund or an agent any compensation in respect of any loss or damage resulting from any bodily injury to 25 or death of any person caused by or arising from the driving of a motor vehicle by the owner thereof or by any other person with the consent of the owner, that third party may not claim compensation in respect of that loss or damage from the owner or from the person who so drove the vehicle, or if that person drove the vehicle as an employee in the performance of his or her duties, from his or her employer, unless the Fund or such 30 agent is unable to pay the compensation."*

[20] Section 17(1)(a) and (b) of the Act reads as follows: "*17. (I) The Fund or an agent shall-*

(a) subject to this Act, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of the owner or the driver thereof has been established;

(b) subject to any regulation made under section 26,' in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of neither the owner nor the driver thereof has been established,

be obliged to compensate any person (the third party) for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself or the death 30 of or any bodily injury to any other person, caused by or arising from the driving of a motor vehicle by any person at any place within the Republic, if the injury or death is due to the negligence or other wrongful act of the driver or of the owner' of the· motor vehicle or of his or her employee in the performance of the employee's duties as employee."

[21] Our jurisprudence on delict is settled. The defendant's liability is conditional upon the injury having resulted from the negligence or wrongful act of the insured driver. See: MP Olivier, Social Security: Core Elements', LAWSA (LexisNexis, Vol 13(3) 2ed, July 2013), at paragraph 163.). This means that the plaintiff is required to prove such negligence. The basic standard of proof in civil cases was expressed in the following terms by the learned writer Schwikkard PJ (et al) in *Principles of Evidence*, 4th Ed, 2016 ch32 at page 628: "*In civil cases the burden of proof is discharged as a matter of probability. This standard is often expressed as requiring proof on a "balance of probabilities "but that should not be understood as requiring that the probabilities should do no more than favour one party in preference to the other. What is required is that the probabilities in the*

case be such that on a preponderance, it is probable that the particular state of affairs existed."

[22] In ***National Employers' General Insurance Co Ltd v Jagers*** [1984] 4 All SA 622 (E), where Eksteen AJP, for a full bench, held as follows, at 624-5:

> *"...in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as in a criminal case, but nevertheless where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If, however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false."*

[23] For purposes of delictual liability the conduct must take the form of a positive, voluntary act (*commissio*) or an omission (*omissio*) in the sense of a failure to act or to take precautionary measures with a view to avoiding or preventing harm to another. An omission is regarded somewhat more leniently or benevolently than

a commission since liability for an omission is generally more restricted than liability arising from a commission. (See: ***Transnet Ltd t/a Metrorail v Harrington*** **NO** 2008 JDR 1387 (C) at paragraphs 28 and 29)

[24] The defendant's conduct, in the form of a voluntary act or omission, must be negligent and wrongful. There must be a causative link between such conduct and the harm, in the sense of damage, loss or injury, suffered by the plaintiff. This means that, for liability in delict to be established, the defendant must reasonably foresee that his conduct would cause the plaintiff harm unless appropriate reasonable evasive action be taken. What would be reasonably foreseeable and what would constitute appropriate avoiding action will, of course, depend entirely on the facts and circumstances of the case. (See: **Kruger v Coetzee** 1966 (2) SA 428 (A) at page 430E – H)

ANALYSIS:

[25] In the assessment of the evidence of the plaintiff brings into sharp focus the question of credibility. I have no misgivings as to the honesty of the plaintiff, it is the reliability of her evidence which results in the implosion of her version. The plaintiff asserted that the insured driver was travelling at a high speed. She was unable to provide the peripheral facts that formed this conclusion. The plaintiff's powers of observation were undoubtedly inadequate. She was unable to indicate the number of lanes that existed on the road that she travelled on and more pertinently in which lane of travel the insured driver travelled prior to the collision.

Moreover, the plaintiff was unable to indicate if the insured driver was positioned in a lane reserved for the execution of a right turn. Her evidence lacks detail as the flow of traffic in this intersection. It is unclear and to the type of intersection and the number of robots that controlled same. Closely allied to this, the plaintiff was inept in justifying her decision to execute her right turn which she had not reasonably satisfied herself that the insured driver was indeed to execute a right turn.

[26] On the issue of the minibus approaching the intersection at a high speed from the opposite direction of the motor vehicle of the plaintiff and indicating to the right. Two issues arise from this. The First; A reasonable person would expect the motor vehicle coming from the opposite direction indicating its intention to turn to the right, to reduce its speed as it approaches the intersection, from the evidence of the plaintiff, this was not the case, the minibus did not reduce its speed as it was approaching the intersection.

[27] The second: As the holder of a driver's license, the plaintiff would be aware that in terms of the rules of the road, at a control intersection the vehicle intending to turn to the right, shall yield the right of way to all vehicular traffic approaching from his or her right within such junction. The minibus accordingly had the right of way, and the plaintiff should have waited for the quantum minibus to enter the roadway as it had been indicating its intention to turn right. It is a none issue that the minibus did not turn right and drove straight, the plaintiff in terms of the rules of the road was expected to give the quantum minibus the right of way.

[28] The probabilities of the plaintiff's version were anchored on her credibility. On the plaintiff's own version, she had driven her motor vehicle negligently in executing the right turn in the face of oncoming traffic when it was not safe to do so.

[29] The defendant pleaded if it is found that the collision occurred, that the plaintiff negligently contributed to the collision. I have dealt with what is to be expected of a reasonable person and the probabilities of the plaintiff's version above. The collision occurred as a result of the plaintiff executing the right turn on the face of oncoming traffic when it was not safe to do so. It follows from what I have stated herein above that the collision occurred as a result of the negligent driving of the plaintiff. The plaintiff's claim must accordingly fail

COSTS:

[30] I was not addressed on costs and counsel for the plaintiff's written heads of argument are silent as the grave on the issue of costs.

[31] The general rule in matters of costs is that the successful party should be given his or her costs and this rule should not be departed from except where there be good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. (See: **Union Government v Gass** 1959 (4) SA 401 (A) at page 413C – D).

[32] A court should not be astute to deprive a successful litigant of any of his or her costs. (See: **Feinstein v Taylor** 1962 (2) SA 54 (W) at 56.).

[33] The award of costs is in the Court's discretion. In awarding costs, the Court has a discretion to be exercised judicially upon consideration of the facts in each case, and that in essence the decision is a matter of fairness to both sides. In leaving the Court a discretion, the law contemplates that it should take into consideration the circumstances of each case, carefully weighing the issues in the case, the conduct of the parties and any other circumstances which may have a bearing on the issue of costs and then make such order as to costs as would be fair and just between the parties. (See: **Ideal Trading 199 CC v Polokwane Local Municipality** (unreported, LP case no 3087/2021 dated 15 August 2023).

[34] The conduct of the defendant in the litigation of this matter is disappointing. The less said about it the better. The defendant despite being aware of the date of hearing of the trial, failed to take part in the trial. The defendant, despite not having taken part in the trial is successful in its defense of the matter. In exercising my discretion, I find it will be fair to deny the defendant its costs.

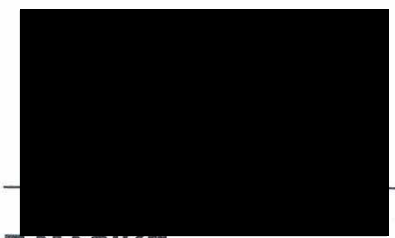
ORDER:

[35] Resultantly, the following order is made: -

(i) The issues relating to liability are separated from those relating to quantum in terms of Rule 33(4) of the Uniform Rules of the Honourable Court;

(ii) The plaintiff's claim is dismissed;

(iii) Each party to pay its own costs.



T MASIKE

ACTING JUDGE OF THE HIGH COURT

NORTH WEST DIVISION, MAHIKENG

APPEARANCES

Date of Hearing:	**31 July 2024**
Date of Judgment:	**30 August 2024**
For the Plaintiff:	**Adv K. Mongwe**
Instructed by:	**Nkulu Inc.** **c/o Zisiwe Attorneys** **No.5 Shasons Centre** **43 Shippard Street** **MAHIKENG**
For the Defendant:	**No appearance**
Instructed by:	**State Attorney** **MAHIKENG**