THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 584/2023

In the matter between:

AMORÉ VAN DER MERWE **APPELLANT**

and

ROAD ACCIDENT FUND **RESPONDENT**

Neutral citation: *Van der Merwe v Road Accident Fund* (584/2023) 2025 ZASCA 28 (28 March 2025)

Coram: NICHOLLS, MABINDLA-BOQWANA and MOLEFE JJA

Heard: 12 November 2024

Delivered: 28 March 2025

Summary: Damages claim – motor vehicle accident – orthopaedic injuries – liability conceded – undertaking for future medical and hospital expenses – general

damages not disputed – loss of earnings and loss of earning capacity only issue in dispute.

Causation – *novus actus interveniens* – inappropriately raised and not supported by evidence.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Van der Westhuizen, Phahlane JJ and De Vos AJ, sitting as court of appeal):

1 The application to introduce new evidence is dismissed with costs including the costs of two counsel, where so employed.

2 The appeal is upheld with costs including the cost of two counsel, where so employed.

3 The order of the full court is set aside and replaced with the following order:

‘ 1 The appeal is upheld with costs including the costs of two counsel, where so employed.

2 The order of the trial court is set aside and replaced with the following order:

“1. The defendant is liable for 100% of the plaintiff's agreed or proven damages.

2. The defendant shall furnish the plaintiff with a written undertaking in terms of section 17(4)(*a*) of the Road Accident Fund Act 56 of 1996, as agreed with the plaintiff.

3. The defendant shall pay to the plaintiff the sum of R 800 000 in general damages.

4. The defendant shall pay the plaintiff’s costs.”

3 The quantification of loss of earnings is remitted to the trial court for determination.'

JUDGMENT

Mabindla-Boqwana JA (Nicholls and Molefe JJA concurring):

[1] The appellant, Ms Amoré van der Merwe instituted action in the Gauteng Division of the High Court, Pretoria against the respondent, the Road Accident Fund, for damages she suffered as a result of injuries she sustained in a motor vehicle accident. She claimed past hospital/medical and related expenses; past loss of earnings; future loss of earnings; estimated future medical expenses; and general damages. I shall henceforth refer to the parties as the plaintiff and the defendant, as in the action.

[2] The stated motor vehicle accident occurred on 27 October 2012, near Modimolle in Nylstroom. The plaintiff was then 19 years old. She was a passenger seated on the back of a 'bakkie' which capsized and rolled over her. As a result, she suffered severe orthopaedic injuries, namely:

(a) a fracture of the femur on the right lower limb;
(b) dislocation of the right hip;
(c) bilateral superior and inferior pubic rami fractures;
(d) soft tissue injury of the right arm and shoulder joint; and
(e) an injury to the lumbar spine.

In August 2014 she received a total hip replacement.

[3] At the pre-trial conference held on 3 October 2017, the defendant recorded its previous concession that it was fully liable on the merits and only issues pertaining to the quantum had to be determined at the trial. Further, in a letter dated 6 October 2017, the defendant's attorney admitted (on behalf of her client) the defendant's liability for general damages as follows:

'the [p]laintiff sustained orthopaedic injuries (pelvic fracture, fracture dislocation right hip and blunt trauma both knees) and *is entitled to compensation for general damages*.' (Emphasis added.)

[4] At the trial, the defendant's counsel confirmed that the defendant did not have an issue with the amount claimed for general damages. The amount claimed was R800 000. In addition, the defendant's to give a written undertaking in terms of s 17(4)(*a*) of the Road Accident Fund Act 56 of 1996 (the RAF Act) was confirmed. This is also recorded in the minutes of the pre-trial conference held on 3 October 2017. It was clear that the issue for determination at the trial was loss of earnings/earning capacity.

[5] The plaintiff testified from Auckland, New Zealand via Skype because her physical condition impeded her travelling to South Africa. She also called two expert witnesses, Ms Eleanor Bubb, a Clinical and Educational Psychologist and Ms Susanna Maree, an Occupational Therapist.

[6] The plaintiff's testimony was brief. She was asked to confirm whether the information in various expert reports was relayed by her to the experts, which she did. She then testified about her medical condition since the accident. She stated that she was immobile, and her medical condition had made it impossible for her to obtain gainful employment. She could not drive a motor vehicle and found it hard to work.

[7] She expressed her hope that one day when she was better and had gained confidence and strength, she would like 'to better herself' by studying and working. The defendant's counsel did not cross-examine the plaintiff.

[8] The second witness for the plaintiff, Ms Bubb was asked whether the plaintiff would in future be able to obtain and sustain any employment of a sedentary nature, in an administrative role as had been previously suggested. Her response was that the latest medical evidence which had shown a worsened condition, presented the plaintiff with even fewer chances of being able to find and sustain work in a sedentary position. She, in any event, had previously made findings that the plaintiff's chances of being employed were not probable. This was so considering the neurocognitive and neuropsychological deficits as well as the plaintiff's academic and scholastic challenges. These deficits added to the difficulties that were noted by the doctors before, namely, the plaintiff's ongoing severe pain, and her difficulty with sitting, standing or walking for long periods. Ms Bubb was also not cross-examined.

[9] The third witness, Ms Maree, referred to her initial report in which she had stated that the plaintiff would be capable of doing less strenuous work in a more sedentary office setting. She testified that Ms Bubb's report caused her to alter the opinion she had previously expressed. With reference to the new documentary evidence, her opinion was that the plaintiff would not be able to succeed in any administrative type of work, with a high level of cognitive involvement. This was due to the chronic traumatic stress and the major depressive disorders that she was diagnosed with. The plaintiff also had problems with sustained attention, slow work speed and fluctuating moods combined with her chronic pain.

[10] Yet again, no meaningful questions were asked by the defendant's counsel from this witness, save for seeking clarity about whether Ms Maree had changed her mind from her original opinion. Neither was she cross-examined nor was any objection raised to her testimony.

[11] After the completion of the plaintiff's case, the defendant closed its case without calling any witnesses. Surprisingly, and for the first time in closing argument, the defendant's counsel raised 'an event' which he argued constituted a *novus actus interveniens* [new intervening cause]. He was referring to a statement recorded in the plaintiff's Industrial Psychologist's report dated 1 March 2017, which said:

'Post-morbid, on 8 October 2015, she fell from stairs, and she sustained an injury to her right knee and to her lower back.'

[12] He, however, did not read the paragraph that followed, where the following was recorded:

'According to Ms van der Merwe she sustained the following injuries *during the accident*:

. . .

- Injury to the right knee' (Emphasis added.)

This is significant because it records that the injury to the right knee was sustained before the fall on the stairs.

[13] The defendant's counsel's contention at the trial was that all the experts had examined the plaintiff after the incident where she fell from the stairs, but that she had fallen, was only mentioned in her Industrial Psychologist's report. He further argued that the plaintiff did not distinguish between the injuries sustained in the

motor vehicle accident and those she sustained as a result of the fall. As such, it could not be ascertained which parts of the plaintiff's loss of earning capacity could be ascribed to the initial injuries, ie those she suffered in the motor vehicle accident, and those suffered during the fall. Because of that, so he contended, it would not be possible for the trial court to make a finding, in this regard.

[14] The last string to his bow was that, for any cognitive deficits to have occurred, there would have had to be brain injury as a *conditio sine qua non.* This, he argued, did not happen in this case. He contended that, regard could not be had to the plaintiff's qualifications, career history and the future aspirations. This last submission is odd, since the defendant's own Industrial Psychologist took these factors into account, in her report. Furthermore, the submissions were not based on any expert opinion but remained counsel's own, which is not helpful.

[15] Driven by this line of argument, the defendant's counsel suggested postponement of the trial for the plaintiff's experts to rewrite their reports, in which they would quantify the loss of earning capacity afresh by excluding the alleged *novus actus interveniens.* In the alternative he sought absolution from the instance.

[16] The trial court embraced the defendant's counsel's argument. Its judgment was entirely devoted to the *novus actus* point. The court made, inter alia, the following findings:

'[14] . . . Firstly, the fact that the plaintiff sustained further injuries almost three years after the motor vehicle accident was peculiarly within her knowledge. It appears that she had been to orthopaedic surgeon Dr Malan on 13 November 2015 about three weeks after she fell on 8 October 2015 yet no mention is made of the fall down the stairs to him. One can only assume that she did not mention it to Dr Malan. The same can be said about her visits to the other experts. She consulted Mr P. C. Diedericks on 4 November 2015; neurosurgeon Dr Earle on 3 November 2015; Dr E.F.

Gordon (plastic surgeon) on 13 November 2015; the occupational therapist, Ms Maree on 14 November 2015; neuropsychologist Mr Leon Roper on 3 June 2016 and Ms Bubb on 22 February 2017. None of them, except Mr Deidericks, indicate that the plaintiff had told them about the fall on 8 October 2015.

[15] The result is that all the plaintiff's experts took the injuries she sustained in the fall from the stairs into account when compiling their reports and forming their opinions. The defendant could not have been expected to do anything about that.

[16] The onus is on the plaintiff to prove causation, which, in my view, given that it was peculiarly within the plaintiff's knowledge that she fell down the stairs and sustained injuries, also means to exclude any interruption of causation. The various experts should have been briefed to exclude later injuries from their opinions.'

[17] The court isolated what it termed as 'two injuries' (right knee and lower back). These, the court said, were sustained from the fall down the stairs. It concluded that the plaintiff had proved all the orthopaedic injuries contained in the expert reports including these 'two injuries' which it found constituted the *novus actus*. In the court's view, there was no 'primary fact' evidence by the plaintiff to link the 'two injuries' constituting the *novus actus* to the motor vehicle accident.

[18] The trial court, thus, found itself unable to determine the quantum and granted absolution from the instance with costs. It, however, gave leave to appeal its judgment to the full court of the same Division. The full court confirmed the reasoning and order of the trial court and dismissed the appeal. The plaintiff subsequently approached this Court seeking special leave to appeal, which was granted on 24 May 2023.

[19] In this Court, counsel for the plaintiff argued that the trial court had erred in law and had misdirected itself by finding that the fall from the stairs constituted a

novus actus interveniens. He further submitted that the trial court erred by concluding that the defendant was not required to plead the *novus actus interveniens* as a substantial defence and cross-examine the plaintiff.

[20] As the point of departure, the defendant conceded liability for the payment of the damages suffered by the plaintiff arising from injuries occasioned by her in the motor vehicle accident. As a result of that, the element of causation could no longer be an issue. Moreover, the parties specifically agreed that the only issue for determination at the trial was the award of quantum in respect of loss of earnings and/or earning capacity.

[21] Not only was the fall from the stairs not canvassed with the plaintiff and her expert witnesses during her evidence but it was also not pleaded. The plaintiff was not given an opportunity while in the witness box to provide an explanation on the issue that led to the dismissal of her case. Counsel for the plaintiff in the trial was entitled to assume that her and her experts' unchallenged testimonies were accepted as correct.

[22] It is trite that a party cannot be allowed to plead one case and attempt to present another case at the trial. By entertaining the issue, the trial court impermissibly went beyond the dispute identified by the parties as that which it was called to determine. It was manifestly unjust for the plaintiff to be required to rebut a case which she was never called to meet, and which was referred to for the first time in closing argument. This is a classic case of trial by ambush, and it cannot be countenanced.

[23] Assuming the point was properly raised as a defence, it lacks merit, for the following reasons. A *novus actus interveniens* 'is an independent event which, after

the wrongdoer's act has been concluded, either caused or contributed to the consequence concerned'.[1] The extent to which the intervening event affects the liability of the wrongdoer is an important issue. It relates to causation, specifically legal causation.

[24] Causation involves two distinct enquiries. The first, is factual causation, expressed as follows – 'but for' the wrongful conduct of the defendant, the plaintiff would not have suffered the loss. The second inquiry of legal causation examines 'whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue; or whether the loss is too remote'.[2]

[25] A *novus actus* may neutralise the causative potency of the defendant's original conduct. It may break the causal chain between the initial conduct and the liability attributed to the wrongdoer. To constitute a *novus actus*, the secondary act must not be reasonably foreseeable. If it is reasonably foreseeable that it may occur, at the time of the initial wrongful act, the secondary act cannot be considered as a *novus actus.*

[26] In *OK Bazaars (1929) Ltd v Standard Bank of South Africa Ltd*[3]*,* this Court said:

'When directed specifically to whether a new intervening cause should be regarded as having interrupted the chain of causation (at least as a matter of law if not a matter of fact), the foreseeability of the new act occurring will clearly play a prominent role. . . If the new intervening cause is neither unusual nor unexpected, and it was reasonably foreseeable that it might occur, the original actor can have no reason to complain if it does not relieve him of liability.'

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[1] J Neetling, JM Potgieter, *Law of Delict*, 8th Edition at 250.
[2] *MEC for Health, Eastern Cape v Mkhitha* (91221/2015) [2016] ZASCA 176 para 13.
[3] *Ok Bazaars (1929) Ltd v Standard Bank of South Africa Ltd* 2002 (3) SA 688 (SCA) para 33.

[27] In the present matter, the expert opinion as well as the undisputed documentary evidence before the trial court clearly indicated that the plaintiff had suffered serious mobility restrictions and had balance problems since the motor vehicle accident. These occurred before the fall on 8 October 2015. The defendant has not provided expert opinion as to why these restrictions and balance problems were not consistent with the vehicle having rolled over the plaintiff and crushed her pelvis.

[28] It would have been reasonably foreseeable that given the nature of the accident, the plaintiff may be prone to lose her balance and fall. It is instructive that the defendant's Occupational Therapist had noted in the report that the plaintiff had 'indicated that the stairs at the door of her home are slippery. Adjustments to her current accommodations are recommended to prevent further injuries.' This recommendation most certainly proved the reasonable foreseeability of the risk posed by the slippery floor posed to the plaintiff post-morbid.

[29] In the report compiled by Ms Bubb dated 22 February 2017, it is reported of the plaintiff's interview on 11 November 2015:

'She is very clumsy and walks into things and drops things . . . walks sideways like a crab, *falls easily* and is full of blue marks'. (Emphasis added.)

[30] The remark that she falls easily may be an answer as to why she did not mention the fall from the stairs as an unusual event to the experts other than the Industrial Psychologist. This unfortunately was not explored with her at the trial, since she was not asked any questions regarding this issue. The trial court simply drew a negative inference about her alleged failure to report the incident.

Additionally, there was no evidence, factual or expert, to support the view that the fall from the stairs was outside the ordinary course of events that could be construed as a totally unforeseen or a surprising intervening event, to such an extent that it disturbed the ordinary causal flow and *sequelae* subsequent to the injuries sustained in the motor vehicle accident.

[31] None of the experts referred to any symptoms that could not be attributed to the sequelae of injuries sustained in the motor vehicle accident. In the end, the mere fact that the plaintiff fell subsequent to the accident and sustained injuries as a result thereof, did not establish that there had been a new intervening cause which broke the chain of causation. It cannot be said that the fall was an unconnected and peripheral causative factor or event,[4] which was not foreseeable, and which broke the causal chain between the wrongful conduct of the insured driver and the plaintiff's damages. While it is not necessary to go any further on this issue, it is instructive that the medical and hospital records dated before the alleged fall from the stairs, recorded the right knee and lower back pain as having been present after the accident. Consequently, the trial court erred in accepting the contention by the defendant's counsel.

[32] The plaintiff also brought an application seeking to introduce further evidence by Dr Preddy, to put it beyond doubt that the injury on the right knee was causally linked to the motor vehicle accident. The evidence sought to be introduced takes the matter no further. The application must accordingly fail.

[4] See *Tuck v Commissioner for inland Revenue* 1988 (3) SA 819 (A) at 833A, where a *novus actus interveniens* was described as an '. . . unconnected and extraneous causative factor or event'.

[33] It remains to determine whether this Court should itself determine the quantum or refer the matter back to the trial court for the determination of the quantum. Due to the premise of its findings, the trial court did not award any damages. Matters that the defendant had conceded, ie general damages and the undertaking made in terms of s 17(4)(*a*) of the RAF Act became of little count.

[34] During the proceedings in the trial court, the defendant's counsel confirmed that the defendant did not have an issue with the amount of R800 000 claimed for general damages. For this reason, the plaintiff is entitled to the general damages as claimed. This is consistent with the admission in the letter from the defendant's attorney referred to in paragraph 3 above. The plaintiff's counsel requested this Court to make orders in respect of issues that were agreed upon but never awarded. He further sought the Court to determine the outstanding issue of loss of earnings.

[35] This request was made based on the extensive period that had passed since the accident, the admissions made by the defendant and the prejudice suffered by the plaintiff because of the prolonged litigation. We requested counsel to file further supplementary papers to address this issue. Having carefully considered the submissions and the proposals made by the parties, the manner in which the calculations are presented in the plaintiff's actuarial report, which the submissions were based on, it is evident that further interrogation of these issues is required, which this Court, as the appeal court, is constrained from engaging in. The further difficulty is that the trial court did not determine the issue. We accordingly do not have the benefit of its view on the figures provided as well as the contingencies that may be applied. For these reasons, it seems appropriate that the determination of the

loss of earnings be remitted to the trial court. It is, however, appropriate to make an order on those aspects of the claim the parties agreed upon.

[36] As to the issue of costs, the plaintiff was represented by two counsel from the trial through to the appeals in the full court and in this Court. Appearance of two counsel at the trial stage, in an instance where the merits were conceded and most of the heads of damages had been agreed to, was not warranted. On appeal, however, the *novus actus* point had arisen due to the trial court's judgment, which would justify the employment of two counsel. As regards costs for the application to adduce further evidence on appeal, the plaintiff must bear those.

[37] In the result, the following order is made:

1 The application to introduce new evidence is dismissed with costs including the costs of two counsel, where so employed.

2 The appeal is upheld with costs including the cost of two counsel, where so employed.

3 The order of the full court is set aside and replaced with the following order:

> ' 1 The appeal is upheld with costs including the costs of two counsel, where so employed.
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> 2 The order of the trial court is set aside and replaced with the following order:
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4. The defendant shall pay the plaintiff's costs."

3 The quantification of loss of earnings is remitted to the trial court for determination.'

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NP MABINDLA-BOQWANA
JUDGE OF APPEAL

Appearances

For the appellant:	G Lubbe with HR du Toit
Instructed by:	Ackerman Swart Inc, Pretoria
	Lovius Block, Bloemfontein
For the respondent:	S Gundelphenning with M H Mokale
Instructed by:	State Attorney, Pretoria
	State Attorney, Bloemfontein.