IN THE SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)

CASE NUMBER A3039/2009

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: NO	
(2) OF INTEREST TO OTHER JUDGES: NO	
(3) REVISED.	
.....	.....
DATE	SIGNATURE

In the matter between

MPHO ELIZABETH MATLADI **APPELLANT**

and

ROAD ACCIDENT FUND **RESPONDENT**

J U D G M E N T

VAN OOSTEN J:

[1] This is an appeal against the order of the court *a quo* made at the close of the appellant's case, dismissing the appellant's claim against the respondent with costs. There was no appearance for the respondent at the hearing of the appeal.

[2] The appellant on behalf of her minor child, Hodisang Matladi (Matladi), instituted action in the court *a quo* against the respondent as statutory insurer for damages arising from the injuries he sustained in an alleged collision. Matladi, who was 20 years old at the time of testifying, was the only witness called to testify for the plaintiff. It is only necessary to refer to his evidence concerning the incident in which he was injured. He testified that he alighted from a taxi which had come to a standstill as it was obliged to do, at a red traffic light in Vermeulen street, at the intersection with Van der Walt street, Pretoria at 19h00 on the day of the incident. He proceeded to cross the road to the other side by as he referred to it in his evidence, 'jogging' around the taxi at its rear. The next he remembered was waking up on the sidewalk and thereafter being taken to hospital having sustained an injury to the right hip.

[3] Matladi was unable to offer any explanation as to how the incident did or could have happened. His evidence was replete with inferences he admittedly based on hearsay information furnished to him by bystanders when he was lying on the sidewalk. He conceded that he did not at any time observe another vehicle approaching in his direction as he was crossing the street which is in accordance with an earlier written statement he had made, which on this aspect reads as follows:

> *I was leaving the main campus in a taxi on my way to my residence. The last thing that I remember is that the taxi stopped at the intersection of Van der Walt. I got out of the taxi and the rest I cannot remember what happened. I woke up in hospital.*

[4] At the close of the plaintiff's case the Magistrate *mero motu* raised with the plaintiff's legal representative whether on the evidence of Matladi any negligence had been shown to exist. A debate ensued at the end of which, and without calling on the defendant's legal representative, the Magistrate went ahead and dismissed the plaintiff's claim with costs. In his subsequent reasons the Magistrate explained that to the best of his memory the dismissal followed upon an application for absolution from the instance, which of course is clearly wrong. Be that as it may, nothing in my view turns on this.

[5] Magistrate's Court Rule 29 deals with the trial in civil proceedings in the magistrate's court. Sub-rule (7) provides that the plaintiff shall first adduce evidence if on the pleadings the burden of proof is on the plaintiff and that 'if absolution from the instance is not then decreed, the defendant shall then adduce evidence'. Section 48 of the Magistrates' Courts Act 32 of 1944 provides that the court may, as a result of the trial of an action, grant absolution from the instance 'if it appears to the court that the evidence does not justify the court in giving judgment for either party'. The overriding consideration for granting absolution from the instance at the end of the plaintiff's case is that it is considered unnecessary in the interests of justice to allow the case to continue any longer in the absence of a *prima facie* case having been made out against the defendant (see *Putter v Provincial Insurance Co Ltd and Another* 1963 (4) SA 771 (W)*.* The Act and Rules are silent on whether the court can *mero motu* decree absolution at the end of the plaintiff's case. Provided the principles of *audi alteram partem* are observed I can see no reason why the court cannot *mero motu* at the end of a plaintiff's case, raise the question of the adequacy of the evidence led on behalf of the plaintiff. In the instant matter there was clearly no evidence whatsoever either of another vehicle having collided with Matladi or the negligence of the driver of another vehicle. Nor was his evidence sufficient to raise a *res ipsa loquitur*. The Magistrate quite obviously was alive to these difficulties when the evidence on behalf of the plaintiff had been led, and they were put to plaintiff's legal representative in argument. It was accordingly in the interests of justice to dispose of the matter there and then. Having heard argument on behalf of the plaintiff the Magistrate proceeded to dismiss the claim. The Magistrate was vested with a discretionary power to grant absolution (see *Ardecor (Pty) Ltd v Quality Caterers (Pty) Ltd* 1978 (3) SA 1037 (N) 1076F). The absence of a formal application for absolution can not and did not deprive the court of the power *mero motu* to raise the adequacy of proof at that stage of the proceedings. Should I however be wrong in my conclusion and on the assumption that the procedure followed by the Magistrate was flawed, it would undoubtedly in any event not serve any purpose to refer the matter back to the court *a quo*, in the face of the evidence of Matladi, which did not reach the minimum threshold of making out a *prima facie* case which was necessary to

escape absolution from the instance (see *De Klerk v Absa Bank and Others* 2003 (4) SA 315 (SCA) para [10]).

[5] Counsel for the appellant submitted correctly in my view, that the correct order of the court below should have been one absolving the defendant from the instance as opposed to the order dismissing the plaintiff's claim. To this limited extent the appeal must succeed. This however was not the basis of the appellant's appeal, the appellant was accordingly not successful on appeal and it follows that the appellant is not entitled to the costs of the appeal. Neither is the respondent entitled to the costs of the appeal, as it did not oppose the appeal. I therefore propose not to make any order as to the costs of the appeal.

[6] In the result the appeal is upheld to the extent only that the order of the Magistrate in the court *a quo* is substituted with the following:

> *The defendant is absolved from the instance and the plaintiff is ordered to pay the costs of this action.*

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FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

I agree.

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MP TSOKA
JUDGE OF THE HIGH COURT

COUNSEL FOR THE APPELLANT	***ADV EJ FEREIRA***
APPELLANT'S ATTORNEYS	***LEON JJ VAN RENSBURG***
DATE OF HEARING	***3 SEPTEMBER 2009***
DATE OF JUDGMENT	***3 SEPTEMBER 2009***