

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case Number: **18250/2020**

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

In the matter between:

M[...], P[...]

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

Coram: Horn AJ

Heard: 29 and 30 April 2025

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 10h00 on 5 May 2025.

JUDGMENT

HORN AJ

[1] The plaintiff has instituted action against the defendant, claiming damages in the form of loss of support as result of the passing of the late Mr Siphamandla Mlotshwa (“the deceased”). The plaintiff acts in her personal capacity and in her representative capacity as mother and natural guardian of her two minor children (“the minors”).

[2] The uncontroverted evidence established that the plaintiff and the deceased were married in terms of a customary union, that the minors were born of their marriage, that the deceased had no other children and that the deceased did, during his lifetime, support the plaintiff and the minors financially. His duty to support the plaintiff and the minors was also uncontested.

[3] The primary issue between the parties is the question of liability. In terms of section 17(1) of the Road Accident Fund Act 56 of 1996 (“the Act”), the defendant is obliged, subject to the Act, 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 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.

[4] In the plaintiff’s particulars of claim, she alleges that a motor vehicle collision occurred on 22 November 2018 between a vehicle with registration number D[...] (“the deceased’s vehicle”), driven by the deceased, and a motor vehicle with registration number D[...] (“the insured vehicle”), driven by Samuel Kuape Moleko (“the insured driver”).

[5] It is further alleged in the particulars of claim that the deceased passed away on 3 December 2018 as result of the injuries sustained during the collision and that the sole cause of the collision was the negligence of the insured driver.

[6] During a pre-trial conference held on 25 July 2023, the defendant admitted the date, time and place of the collision. It thus became common cause that the collision occurred at approximately 00h58 on the morning of 22 November 2018 on the N1 freeway in the vicinity of Bloemfontein.

[7] During her evidence, the plaintiff testified that she does not know how the collision occurred. She alleged that the deceased had contacted her telephonically shortly after the collision, only informing her that he had been injured. She visited him in hospital, but he was unable to converse and did not provide any information as to how the collision occurred.

[8] The plaintiff also called Mr Wiseman Mlotshwa ("Mr Mlotshwa"), the brother of the deceased, to testify. According to Mr Mlotshwa, the deceased was employed as a truck driver. Mr Mlotshwa was employed as a supervisor by the same employer who employed the deceased at the time of his death. Mr Mlotshwa testified that he was informed of the collision later during the morning of 22 November 2018. He testified that he also attended the hospital where the deceased had been admitted, but that the deceased was unable to converse, due to tubes having been inserted in his mouth. The deceased was only able to make hand gestures. Mr Mlotshwa also stated that the plaintiff was not in attendance when he visited the deceased at the hospital.

[9] Mr Mlotshwa expressly denied that the deceased offered any explanation as to how the collision occurred. But, says Mr Mlotshwa, he was informed by Mr John Sefatsa ("Mr Sefatsa") that he (Mr Sefatsa) attended the scene of the collision and spoke to the deceased. Mr Sefatsa is a general manager at the employer of Mr Mlotshwa and the deceased. According to Mr Mlotshwa, he was told by Mr Sefatsa that the deceased told Mr Sefatsa that he (the deceased) collided with the rear of the insured vehicle in circumstances where the insured vehicle was travelling on the N1 freeway without any lights. Mr Ngomana, who appeared for the defendant, objected to Mr Mlotshwa's evidence on the basis that it constitutes hearsay.

[10] The plaintiff's case was closed after the evidence of Mr Mlotshwa, whereupon the defendant also closed its case.

[11] In addition to the evidence of the plaintiff and Mr Mlotshwa, the plaintiff discovered a number of documents in terms of Rule 35(9) of the Uniform Rules of Court. This rule provides as follows:

"Any party proposing to prove documents or tape recordings at a trial may give notice to any other party requiring him within ten days after the receipt of such notice to admit that those documents or tape recordings were properly executed

and are what they purported to be. If the party receiving the said notice does not within the said period so admit, then as against such party the party giving the notice shall be entitled to produce the documents or tape recordings specified at the trial without proof other than proof (if it is disputed) that the documents or tape recordings are the documents or tape recordings referred to in the notice and that the notice was duly given. If the party receiving the notice states that the documents or tape recordings are not admitted as aforesaid, they shall be proved by the party giving the notice before being entitled to use them at the trial, but the party not admitting them may be ordered to pay the costs of their proof.”

[12] There was no response by the defendant to the plaintiff’s Rule 35(9) notices. Accordingly, the authenticity of the documents so discovered is not in issue. However, admission of documents in this way does not amount to an admission of the contents of the documents in question.¹ The contents of the documents remain hearsay evidence and, unless admitted as true, are inadmissible for that reason, unless they qualify for admission under an exception to the hearsay rule.²

[13] Amongst the documents discovered by the plaintiff under Rule 35(9), were the “Accident Report (AR) Form” (“the accident report”) apparently completed by Constable M Chaka of the South African Police Service, an affidavit by the plaintiff and an affidavit by Mr Mlotshwa.

[14] Mr Ngomana, on behalf of the defendant, admitted the accident report. Its contents therefore became admissible under section 3(1)(b) of the Law of Evidence Amendment Act 45 of 1988 (“the Act”).

[15] The accident report confirms the time and place of the collision as set out above. According to the accident report, the deceased was driving a Scania truck (described as vehicle A) and the insured driver was driving a Mercedes-Benz truck (described as vehicle B). The accident report describes the collision as a rear end collision and alleges that both vehicles were travelling in the same direction, when the deceased’s

¹ *Selero (Pty) Ltd v Chauvier* 1982 (2) SA 208 (T) at 216.

² *Visser v 1 Life Direct Insurance Ltd* 2015 (3) SA 69 (SCA) at 80H–81A.

vehicle collided with the rear of the insured vehicle. The deceased's vehicle thereafter overturned.

[16] In the plaintiff's affidavit, she alleges that she visited the deceased at the hospital with Mr Mlotshwa. She further states that the deceased had informed her and Mr Mlotshwa that the truck driving in front of him suddenly applied its brakes and changed lanes (to the lane in which the deceased was travelling). Apparently the deceased tried to avoid the collision, but it was too late.

[17] Mr Mlotshwa's affidavit also states that he accompanied the plaintiff when she visited the deceased in hospital. Mr Mlotshwa also claims that the deceased explained to them the cause of the collision. The explanation is a verbatim copy of the explanation contained in the plaintiff's affidavit.

[18] Thus, all that the admissible evidence establishes is that the deceased's vehicle collided with the rear of the insured vehicle and overturned. A driver who collides with the rear of a vehicle in front of him or her is *prima facie* negligent. Such a driver can escape the inference of negligence by showing that the collision occurred as result of the negligence of the other vehicle or some other intervening cause.³

[19] The question here is whether evidence has been presented to establish negligence on the part of the insured driver. To this end, Mr Matshidza, who appeared for the plaintiff, sought to have the evidence of Mr Mlotshwa admitted under section 3(1)(c) of the Act. The request related to Mr Mlotshwa's oral evidence, not to his affidavit.

[20] Section 3(1) of the Act provides as follows:

"3. Hearsay evidence

(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless -

(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;

³ *Van der Berg v Road Accident Fund* 2013 JDR 0919 (GSJ) at para [14] and [15].

- (b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or
 - (c) the court having regard to -
 - (i) the nature of the proceedings;
 - (ii) the nature of the evidence;
 - (iii) the purpose for which the evidence is tendered;
 - (iv) the probative value of the evidence;
 - (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
 - (vi) any prejudice to a party which the admission of such evidence might entail; and
 - (vii) any other factor which should in the opinion of the court be taken into account,
- is of the opinion that such evidence should be admitted in the interests of justice.”

[21] Section 3(4) of the Act defines hearsay evidence as evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence.

[22] The correct approach is to first determine whether the evidence in question falls within the statutory definition of hearsay and, if it does, to measure the evidence against the requirements of section 3(1)(c) of the Act. If statements in question pass muster, they will be admitted. The purpose of the Act is to allow the admission of hearsay evidence in circumstances where justice dictates its reception.⁴

[23] The factors set out in section 3(1)(c) should not be approached in isolation. One should approach them on the basis that they are interrelated.⁵

[24] The probative value of the evidence about what the deceased may have told Mr Sefatsa, depends on the credibility of Mr Sefatsa. The evidence, therefore, constitutes hearsay evidence.

⁴ *Makhathini v Road Accident Fund* 2002 (1) SA 511 (SCA) at para [22] and [27].

⁵ *Makhathini v Road Accident Fund* above at para [28].

[25] In the present case the hearsay evidence is tendered to establish negligence on the part of the insured driver. The nature of the evidence is double hearsay: Mr Mlotshwa testified about what Mr Sefatsa says the deceased had told him about the collision. There is no reason why double hearsay cannot be admitted under section 3(1)(c) of the Act, but as cautioned by the Supreme Court of Appeal in *Makhathini v Road Accident Fund*,⁶ the more hearsay is piled onto hearsay, the more unreliable it becomes.

[26] Counsel for the plaintiff confirmed that the plaintiff's attorney did not serve a subpoena to secure Mr Sefatsa's attendance at court. His absence is entirely unexplained.

[27] There is, of course, another person who could shed light on the events of the fateful morning of 22 November 2018. It is the insured driver, whose name and telephone number appear in the accident report. Plaintiff's counsel criticised the defendant for not having presented the evidence of the insured driver so as to give the court "a clear picture" and to show that there was no negligence on the part of the insured driver.

[28] This criticism is unwarranted. The only admissible evidence establishes negligence on the part of the deceased. It was for the plaintiff to prove that the insured driver was also negligent. There is no onus on the defendant to prove that he was not.

[29] In my view, a factor which I ought to take into account under section 3(1)(c)(vii) of the Act is the affidavits of the plaintiff and Mr Mlotshwa. I do not accept the affidavits for the truth of their contents, but I accept the fact that the affidavits have been deposed to by the plaintiff and Mr Mlotshwa and that the affidavits state what is contained therein.

[30] The affidavits contradict the witnesses' oral testimony. Both witnesses were emphatic in their oral evidence that the deceased did not tell either of them how the collision occurred. They also denied having visited the deceased in hospital together. The affidavits, on the other hand, claim the contrary on both issues. The witnesses state

⁶ Note 4 above at para [25].

in their affidavits that they did visit the deceased in hospital together, and that he did provide them with an explanation as to how the accident happened.

[31] Critically, the explanation contained in the affidavits differs from the one allegedly provided by Mr Sefatsa to Mr Mlotshwa. According to the explanation in the affidavits, the deceased allegedly said that the insured vehicle suddenly swerved into the deceased's lane of travel and applied brakes, resulting in the deceased's vehicle colliding with the insured vehicle. On the other hand, according to Mr Mlotshwa's oral evidence, the deceased collided with the rear of the insured vehicle because its lights were off.

[32] In light of these contradictions and the unexplained absence of Mr Sefatsa, I am not persuaded that it is in the interest of justice to admit the hearsay evidence tendered by Mr Mlotswa. That being so, the plaintiff has not established a basis upon which I can hold that the insured driver was negligent.

[33] As for the quantum of the plaintiff's claim, no evidence was presented. A salary advice of the deceased was discovered in terms of Rule 35(9), with no response from the defendant. The content of the document has not been proved, although this could probably have been done with relative ease by Mr Mlotshwa, who is employed by the same entity. The salary advice refers to a period simply described as "10". It is unclear from the document whether it speaks to weekly or monthly remuneration (or perhaps some other period).

[34] For these reasons, the inescapable conclusion is that the plaintiff has not proved her claim. There is no reason why costs should not follow the result. I therefore make the following order:

1. The defendant is absolved from the instance.
2. The plaintiff is ordered to pay the defendant's costs.

N J HORN
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Date of hearing: 29 and 30 April 2025

Date of judgment: 5 May 2025

Counsel for the Plaintiff: L R Matshidza
Rabumbulu Attorneys

Counsel for the Defendant: T H Ngomana
State Attorney