

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

**CASE NO: 17796/2022**

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

In the matter between: -

**A\_F\_M**

**obo Minors**

Plaintiff

and

**ROAD ACCIDENT FUND**

Defendant

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| <b>JUDGMENT</b> |
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**Mfenyana J**

**Introduction**

[1] The plaintiff instituted proceedings both in her personal capacity as the widow of the deceased K\_S\_M, and in her representative capacity as the mother and natural guardian of her two minor children, O\_W\_M and U\_M\_M (the minor children). She claims damages for loss of support which she and the minor children suffered as a result of a motor vehicle accident which resulted in the death of the deceased, who was her husband, and the father of the minor children. At the time of the death

of the deceased, the minor children were 11 and 3 years old, respectively.

[2] In the particulars of claim, the plaintiff alleges that on or about 4 April 2021, while driving along the R41 near Rietvallei Ext. 2, Kagiso Gauteng province, the deceased, driving a blue BMW with registration D[...], collided with a truck, the registration numbers and further details of which are unknown to the plaintiff.

### Pleadings

[3] The plaintiff contends that the truck driver was the sole cause of the accident in that he failed to keep a proper lookout, drove at excessive speed, failed to give due regard to other road users, failed to apply his brakes timeously or at all, failed to keep his vehicle under proper control, and failed to avoid the collision.

[4] The plaintiff asserts that at the time of his death, the deceased was employed and would have continued to provide support for the plaintiff and minor children. She claims an amount of R6 012 000.00, covering both past and future loss of support, as well as funeral expenses.

[5] The defendant has defended the action and has raised a special plea that the plaintiff does not have the *locus standi* to institute the proceedings. The defendant contends that the plaintiff has failed to prove that the deceased had a duty to support her and the minor children, as she had not provided any documentary proof of her marriage to the deceased and that he was the father of the minor children.

[6] Before dealing with the merits of this case, it is necessary to deal with the issue of *locus standi* outright. It is common cause that subsequent to the defendant's challenge to the plaintiff's *locus standi*, the plaintiff tendered unabridged birth certificates for the minor children as well as a marriage certificate issued by the Department of Home Affairs on 9 September 2021 and 7 March 2022, respectively. The marriage certificate indicates that the marriage between the plaintiff and the deceased was concluded on 26 December 2020. According to the plaintiff, this serves as confirmation of the customary marriage concluded between the deceased

and herself on 26 December 2020. The plaintiff also refers to affidavits from her family members, as well as the deceased's family members, confirming the customary marriage.

[7] In *Paixão v RAF*<sup>1</sup>, the court noted that, “the proper question to ask is whether the facts establish a legally enforceable duty of support arising out of a relationship akin to a marriage.” Thus, a duty of support is case-specific and is established from the circumstances of each case, which show that a ‘binding duty of support has been assumed.’<sup>2</sup>

[8] The undisputed facts of this case are that the plaintiff and the deceased were married by customary rites, and that the minor children were born of that relationship. On these facts and the evidence before this court, I am of the view that the plaintiff has established a legally enforceable right of support both for herself and the minor children.

[9] In its plea-over, the defendant denies that there was any other motor vehicle involved in the accident with the deceased and contends that the deceased was the sole cause of the accident. The defendant, thus, denies that it is liable to compensate the plaintiff. In the alternative, the defendant pleads that in the event that the court finds that a second vehicle was involved, the collision was caused by the sole negligence of the deceased.

[10] It is common cause that the accident was reported at the Kagiso police station and registered under CAS 67/04/2021. Constable Malevu responded to the accident complaint and completed an accident report.

[11] In terms of section 17(1)(a) of the Road Accident Fund Act (RAF Act)<sup>3</sup>, the RAF is obliged to compensate a third party for any loss or damage which such 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

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<sup>1</sup> 2012 (6) SA 377 (SCA).

<sup>2</sup> *JT v RAF* 2015 (1) SA 609 (GJ).

<sup>3</sup> Act 56 of 1996.

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 owner of a motor vehicle.

[12] What this court is called on to determine is the liability of the defendant to the plaintiff, and if so, the quantum of damages suffered.

## PLAINTIFF'S CASE

### Plaintiff's affidavit

[13] In support of her claim, the plaintiff deposed to an affidavit in terms of section 19(f) of the Act. In it, she states that she was not with the deceased when the accident occurred. She was informed of the accident after it had occurred, and that the deceased had died at the scene of the accident. The plaintiff further states that she does not know the full details surrounding the accident as they were not provided to her, given her emotional state at the time. She accordingly states that she has no further details on how the accident occurred.

[14] The defendant avers in this regard that the plaintiff's affidavit, although signed by both the plaintiff and the commissioner of oaths, it is undated. I consider it necessary to dispose of this issue at the outset. The law is established that if there has been substantial compliance with the legislation and regulations governing the commissioning of affidavits, the court enjoys a discretion to condone minor irregularities. I consider the discrepancy regarding the date to be such minor irregularity. It is therefore excused.

[15] The matter proceeded on both merits and quantum. At the hearing of the matter, two witnesses testified on behalf of the plaintiff; Constable Daniel Pheelo Sesinye (Sesinye) and Mr Ernesta Cornelius Stapelberg (Stapelberg).

### Evidence of Cornelius Stapelberg

[16] Stapelberg relied on his report, which he submitted in accordance with the provisions of Rule 36(9)(b) of the Uniform Rules. He testified that he is a qualified

aircraft technician. Relevant to the present action, he testified that he completed the artisans' course, a forensic traffic collision investigation course, a driver's tyre care and maintenance course, brake fundamentals, and an electronic brakes course. He was a traffic officer for 20 years and an accident and permits officer for 3 years. In addition, Stapelberg possesses other qualifications, including first aid, as a police reservist, court procedure training, and NHBRC, to name a few.

[17] In compiling his report, Stapelberg testified that he had regard to the instruction letter from the plaintiff's attorneys, the accident report, the contents of the docket in Kagiso CAS 67/04/2021, and the report from the Krugersdorp Local Criminal Record Centre (LCRC). He also had regard to written statements from Mr Mfanafuthi Malevu (Malevu), Mr Elton Sholwe (Sholwe), an independent eyewitness, and Sesinye.

[18] With reference to his report, Stapelberg testified that he visited the scene of the accident on 29 September 2024, which was pointed out to him by Sesinye. He further testified that the accident scene had changed as vegetation has grown and water erosion, and poor maintenance have affected the road, especially on the shoulder. He further testified that the deceased's car hit two solid concrete poles and split in half. He referred the court to photographs of the accident scene and the condition of the deceased's motor vehicle following the accident.

[19] Importantly, Stapelberg testified that in his opinion the accident involved a collision between two vehicles. He explained that the deceased's vehicle was travelling on the R41, in a westerly direction, when an unknown truck collided with it, causing the deceased's vehicle to veer off the road and collide with two lamp poles next to the road, splitting the deceased's vehicle into two and fatally wounding the deceased. Stapelberg explained that the bending of the right rear door of the deceased's vehicle indicates that the deceased's vehicle collided with a metal object which caused it to sling-shot to the side. He testified that in his opinion this explains how the vehicle was split in half when it struck the concrete lamp poles.

[20] He further testified that this version of events was confirmed by an independent eyewitness who witnessed the deceased's vehicle collide with a truck

and saw the truck fleeing the scene. He further testified that according to the independent eyewitness, an unknown driver stopped at the scene and called the police, who attended the scene and completed an accident report.

[21] Stapelberg further testified that the photographs of the deceased's vehicle he inspected show scrape marks from the front of the deceased's vehicle to the back, as well as rubber residue on the front and rear sides of the vehicle. He explained that the bending of the metal backwards indicates that the impact was from a vehicle larger than the deceased's vehicle.

[22] Concerning the condition of the road, Stapelberg testified that the road is poorly maintained and the lane on the left-hand side of the road (where the deceased was driving) is worn out and is half its normal size. He further testified that the poles that were dislodged in the accident were still on site and had not been repaired. The carriageway is not lit and has no road signs to indicate speed restrictions. As such, the speed limit could be estimated to be 100km/hour. Notably, he testified that the left shoulder of the westbound carriageway is eroded and has self-proclaimed entrances which pose a threat to road users travelling on that portion of the road, which is where the collision occurred, as it is on a blind curve for traffic travelling in a western direction (as the deceased was). Stapelberg records in his report that vehicles travelling eastbound cross the roadway onto the incorrect side of the road to enter at these entrances.

[23] During cross-examination, Stapelberg was asked where he obtained the information that there were two vehicles involved in the accident. He responded that he got the information from the affidavit of the independent eyewitness. It was put to Stapelberg that such information was hearsay, and that the affidavit of the independent eyewitness was defective as it was not signed by the deponent. It is common cause that Sholwe was not called to testify. I deal with this issue later in this judgment.

[24] When further challenged on his findings concerning the existence of a second motor vehicle or a truck, Stapelberg responded that based on his expertise and the damage to the deceased's vehicle, as he observed it, he concluded that such

damage was consistent with impact caused by a collision with a vehicle higher than the deceased's vehicle. He was further questioned about the existence of an eyewitness, as the accident report makes no mention of it. A discussion ensued between counsel for the defendant and Stapelberg on the admissibility of the statement of the eyewitness. Ultimately, the decision on the admissibility, validity, or otherwise of any affidavit or evidence is a matter which falls within the province of the court.

[25] Stapelberg was further questioned about the discrepancies between his conclusions and the statement of the eyewitness (albeit invalid) that the deceased's vehicle overturned and hit the lamp. In his report, Stapelberg states that an unknown truck collided with the deceased's vehicle, causing it to veer off the road and collide with lamp poles. He was further challenged in cross-examination about the fact that in his assessment, he did not consider whether the speed of the deceased's vehicle could have been the cause of the accident. Stapelberg explained that, as there were no road signs indicating the speed limit, and in those circumstances, a general speed limit of 100km/hour should be applied.

[26] Stapelberg could not explain the discrepancy between the statement of the eyewitness that the accident took place at 01:30 and the accident report which indicates that it occurred at 03:00.

[27] A further discrepancy which was pointed out to Stapelberg relates to the signing of his own report which appears to have been compiled on 25 April 2024 whereas Stapelberg testified that he visited the accident scene on 29 September 2024. The affidavit certifying the contents of the report itself was signed on 7 October 2024 whereas the commissioner of oaths appears to have commissioned the affidavit on 8 October 2024. The defendant's contention is that it does not appear that Stapelberg signed the affidavit in the presence of the commissioner of oaths, which renders it fatally defective. Despite the discrepancy in the affidavit Stapelberg explained that the discrepancies and confirmed that the date pertaining to the compilation of the affidavit is merely an error as he could not have compiled the report before visiting the scene. He confirmed that his affidavit was signed in the presence of the commissioner of oaths. In my view, Stapelberg's evidence in is

sufficiently demonstrated that the affidavit was properly commissioned. To the extent that there may have been any error in respect thereof, it is not substantial and is condoned.

[28] Other discrepancies relate to the existence or otherwise of street lights. Stapelberg states that there were no street lights whereas the accident report indicates that there were street lights. It is worth noting that Stapelberg visited the accident scene over three years from the date it occurred.

#### Evidence of Constable Daniel Pheelo Sesinye

[29] The next witness to testify on behalf of the plaintiff is Sesinye. He testified that he was on duty on the day of the accident. His only role at the scene of the accident was to divert traffic. He further testified that in September 2024, he accompanied Stapelberg to the scene of the accident.

[30] It is necessary to consider the statements made by Malevu and Sholwe which were in Stapelberg's possession, and which formed the basis of some of the conclusions and opinions by Stapelberg.

#### Statement by Mfanafuthi Malevu

[31] Malevu is the police officer who was first to arrive at the accident scene and completed the accident report. In his written statement, he states that he received the complaint about the accident via radio control at approximately 03h00 on 4 April 2021 (5 April 2021). On his arrival at the scene, he found the deceased's car, which had been involved in an accident, split in half, with two light poles lying on the road. He found the body of the deceased. He was declared dead at the scene and taken to a government mortuary in Roodepoort. He found the deceased's identity document inside the motor vehicle which assisted him in identifying the deceased.

[32] In the accident report which he completed at 07h48 on the day of the accident, Malevu gives the following description of the accident:

*“It is alleged that m/v (motor vehicle) A reg. D[...] was travelling on R41 from east to west near Rietvallei ext 2. m/v A lost control and hit the electric poles and overturned and a body of an adult African male was found near the vehicle”.*

*Affidavit by Elton Sholwe (Independent eyewitness)*

[33] In his statement, Sholwe states that at approximately 01h30 on 4 April 2021, he witnessed an accident in which a truck collided with the deceased’s motor vehicle and fled. The deceased’s motor vehicle *“rolled and hit two pedestal poles. ... another motorist stop and I went to see what happen the driver of that motor vehicle called police and the police officer came to the scene”*, (so the statement reads). The document itself is not signed by Sholwe and reflects a stamp presumably by a commissioner of oaths, Sergeant B.N Moloinyane, and is dated 5 May 2021.

[34] The defendant objected to the admission of Sholwe’s affidavit on the basis that it does not comply with the requirements for an affidavit as stipulated in the Justices of Peace and Commissioners of Oaths Act (Commissioner of Oaths Act)<sup>4</sup> and the Regulations thereto, in that it is not signed by Sholwe, as the person who allegedly deposed to the affidavit.

DEFENDANT’S CASE

*Evidence of Captain Samuel Sammy Motsepe*

[35] One witness testified on behalf of the defendant, Captain Samuel Sammy Motsepe (Motsepe). He testified that he is employed at the Kagiso police station as the Group Commander. He further testified that he was not personally involved in dealing with the accident in any way. As the Commander, he was responsible for managing the station and its resources, including human resources. Part of his duties was to assign cases to police officers. He explained how he managed the police officials under him. He testified that the station maintained a work register in

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<sup>4</sup> Act 16 of 1963.

which police officers were required to indicate their whereabouts. Accordingly, each month they would indicate if they were either on sick leave, annual leave, or attending a courses.

[36] Regarding Sholwe's statement, Motsepe testified that he recognises the name of the officer who commissioned the affidavit as Sgt Moloinyane, who was working under his command at the time. He added that according to the records at his disposal, the said Moloinyane was not on sick leave on 5 May 2021 (3 to 12 May 2021), the day the affidavit was allegedly commissioned. He further testified that Moloinyane is no longer in the employ of the SAPS as he was discharged from service. He further stated that the Moloinyane's initials are "KA", and not "TB" as indicated in the commissioner's stamp. He concluded that Moloinyane was later discharged from service.

[37] Under cross-examination, Motsepe was questioned about the veracity of the information contained in the work register he relied on, as well as the fact that the said register does not form part of the documents discovered by the defendant. He responded that although there were certain discrepancies in the register, there was no discrepancy concerning Moloinyane. He confirmed that he could vouch for the authenticity and accuracy of the register, as all errors were reflected and corrected. He testified that he last consulted the work register a week before the hearing, as he was preparing for the hearing. The fact of the matter is that whether or not the document relied upon by Motsepe is considered, his evidence about the whereabouts of Moloinyane on the day the affidavit was signed, was not seriously challenged.

[38] When asked whether it was possible that Moloinyane could have been at work on 5 May 2021 and fallen ill later in the day, he testified that he was not sure. He, however, expressed doubt that it could have been Moloinyane who signed the affidavit, as the format used in the commissioner's stamp was different from the format used at the station, which includes a service number and the rank of the official commissioning the affidavit. He questioned how the affidavit could have been commissioned without the deponent's signature. Motsepe, however, conceded under cross-examination that the authenticity of the work register was questionable as it

reflected two different dates (the 3<sup>rd</sup> and the 5<sup>th</sup> of May 2021) from which Moloinyane was supposedly on leave. Finally, Motsepe testified that he was not the only person who was managing the register.

## LEGAL FRAMEWORK AND ANALYSIS OF EVIDENCE

[39] The evidence of Sesinye has little significance to the issues to be determined, as he did not witness the accident and made no observations at the scene. It is therefore of no assistance to this court. As regards the expert evidence by Stapelberg, he, *inter alia*, relies on the information contained in a document purported to be Sholwe's affidavit. Having found that the said document does not constitute an affidavit within the meaning and contemplation of the Commissioners of Oaths Act and its regulations and is invalid. That evidence could not be tested, as neither Stapelberg nor Sholwe could not be cross-examined regarding the the veracity of the statement made by Sholwe.

[40] It therefore follows that to the extent that Stapelberg defers to the document by Sholwe, his evidence should similarly be rejected out of hand. The remainder of his evidence, in as far that it is based on his expertise, his assessment, and observations, it should be admitted, provided it is grounded on proven and admissible facts

[41] In *Glen Marc Bee v The Road Accident Fund* (093/2017) [2018] ZASCA 52 (29 March 2018) the SCA had the following to say about expert witnesses:

*"[22] It is trite that an expert witness is required to assist the court and not to usurp the function of the court. Expert witnesses are required to lay a factual basis for their conclusions and explain their reasoning to the court. The court must satisfy itself as to the correctness of the expert's reasoning. In *Masstores (Pty) Ltd v Pick 'n Pay Retailers (Pty) Ltd* [2015] ZASCA 164; 2016 (2) SA 586 (SCA) para 15, this court said'[I]astly, the expert evidence lacked any reasoning. An expert's opinion must be underpinned by proper reasoning in order for a court to assess the cogency of that opinion. Absent any reasoning the opinion is inadmissible'. In *Road Accident Appeal Tribunal &**

*others v Gouws & another [2017] ZASCA 188; [2018] 1 ALL SA 701 (SCA) para 33, this court said '[c]ourts are not bound by the view of any expert. They make the ultimate decision on issues on which experts provide an opinion'. (See also Michael & another v Linksfield Park Clinic (Pty) Ltd & another [2002] 1 All SA 384 (A) para 34.)*

[23] The facts on which the expert witness expresses an opinion must be capable of being reconciled with all other evidence in the case. For an opinion to be underpinned by proper reasoning, it must be based on correct facts. Incorrect facts militate against proper reasoning and the correct analysis of the facts is paramount for proper reasoning, failing which the court will not be able to properly assess the cogency of that opinion. An expert opinion which lacks proper reasoning is not helpful to the court. (See also *Jacobs v Transnet Ltd t/a Metrorail* [2014] ZASCA 113; 2015 (1) SA 139 (SCA) paras 15 and 16; see also *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft Für Schädlingsbekämpfung mbH* 1976 (3) SA 352 (A) at 371F.

[42] There is also the misconception that if there is no opposing view, the expressed view is deemed correct. Stapelberg also shares this understanding as he states in his report that in the absence of any statements to the contrary, the available evidence should be regarded as true. This is not correct. Any view and all evidence, including expert evidence, should be evaluated against legal principles, reasoning, and available evidence.

[43] In the present case, the facts relied on by Stapelberg regarding the cause of the accident emanate from Sholwe. He also made certain observations from the photographs about markings on the deceased's vehicle. Thus, his observations and assumptions are, and ought to be linked to the facts stated by Sholwe, which facts are not before this court as Sholwe's statement has been rejected. Stapelberg states in his report that he compared his observations with the statements he received. I am aware that as an expert in his field, Stapelberg is entitled to offer an opinion based on his observations. However, such observations cannot happen in a vacuum. They must be connected to the facts of the matter and the evidence. Without a factual basis and the benefit of an account from an eyewitness, Stapelberg's opinion

is mere speculation and has no probative value. The veracity and authenticity of the photographs was put into question as the defendant's counsel argued that the plaintiff, and Stapelberg do not state who took the photographs.

[44] Motsepe, who testified for the defendant, cast aspersions on the document ascribed to Sholwe. This exacerbates the plaintiff's case as the purported commissioner of oaths was not called to testify. Thus, Motsepe's evidence that the commissioner's stamp does not accord with the format utilized in his environment remains unchallenged.

[45] Concerning the affidavit by Sholwe, it is trite that if an affidavit is not properly signed and attested to in the presence of a commissioner of oaths, it is invalid. The Commissioner of Oaths Act and the regulations thereto outline the procedure for administering oaths and affirmations. A key feature thereof is that the deponent shall sign the affidavit in the presence of the commissioner of oaths, who shall authenticate the affidavit by certifying it under their signature.<sup>5</sup> If the deponent cannot write, they shall affix a mark at the foot of the declaration, in the presence of the commissioner of oaths. The courts, however, enjoy a discretion to condone minor irregularities, provided there is substantial compliance with the Act and the regulations.

[46] In the present case, Sholwe did not sign the document. No explanation has been provided by the plaintiff for this shortcoming, which cannot be regarded as a minor irregularity which would trigger the exercise of the court's discretion. There has not been any compliance, substantial or otherwise, with the Commissioner of Oaths Act and regulations demonstrated by the plaintiff as the party who seeks to rely on the document. What exacerbates the situation is that the commissioner of oaths who purportedly commissioned the document, is unknown. Neither Sholwe nor the said commissioner of oaths testified. Consequently, the document attributed to Sholwe does not constitute an affidavit and is invalid. Importantly, it has no evidential value.

[47] According to Stapelberg, the impact on the deceased's vehicle is consistent

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<sup>5</sup> Regulations 3 and 4- Regulations governing the administering of an oath or affirmation.

with the impact that occurred as a result of a collision with a vehicle from the opposite side, which transgressed into the carriageway of the deceased's car. Considering the position of the deceased's vehicle and the lamp poles struck by the vehicle, it is evident that the accident occurred on the deceased's side of the road, Stapelberg asserts. There is no dispute about this. However, this does not suggest another vehicle was involved or how the accident occurred, as the deceased was in any event, driving on that side of the road.

[48] An important component of Stapelberg's evidence is further that once a vehicle travelling in the western direction veers to the left side of the road into the gravel, it would be nearly impossible to maintain control of the vehicle due to the condition of the shoulder of the road. It is common cause that the accident occurred on the side of the road, which according to the accident report, was as a result of the deceased's vehicle losing control and colliding with the poles and overturned.

### Conclusion

[49] Having found that the plaintiff and the minor children were legally entitled to support by the deceased, what remains for determination is whether the plaintiff has discharged the onus which rests on her, to prove on a balance of probabilities that the accident was caused by the negligence of the insured driver, for which the defendant is liable. I am not persuaded by Stapelberg's opinion and reasoning in light of the available evidence. His opinion that the accident was caused by a truck or a vehicle travelling in the easterly direction, which encroached onto the carriageway of the deceased's vehicle to access the self-proclaimed entrances, is not supported by the evidence.

[50] There is no evidence that a truck collided with the deceased's vehicle. Furthermore, there is no allegation that the said truck, if any, was attempting to access the side entrances. Even more troubling is the reasoning by Stapelberg that vehicles travelling eastward would encroach into the carriageway of vehicles travelling westward, despite having testified that the road was eroded on the western carriageway. This suggests that vehicles travelling westbound would likely move to the centre of the road as the road narrows.

[51] On the totality of evidence before this court, I am of the view that the plaintiff has failed to prove that another vehicle involved in the accident and that accident was caused by the negligence of the insured driver of such vehicle. In those circumstances, the plaintiff's claim falls to be dismissed. That being the case, it is not necessary to deal with the issue of quantum

### Costs

[52] On the issue of costs, I am mindful of the circumstances in which the claim was instituted by the plaintiff. It appears to have been in the *bona fide* belief that a claim could be sustained and that someone else was to blame for the death of her husband. Taking into account this background and the financial circumstances of the plaintiff, I am of the view that the appropriate cost order is for each party to pay its own costs.

### Order

[53] In the result, I make the following order:

- a. The plaintiff's claim is dismissed.
- b. Each party shall pay its own costs.

S MFENYANA  
JUDGE OF THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

### **APPEARANCES**

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Date of hearing: 19 November & 3 December 2024

Date of judgment: 7 July 2025