

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

CASE NO: 7923/22, 35944/20 and 7920/22

REPORTABLE: NO

OF INTEREST TO OTHERS JUDGES: NO

REVISED

DATE 27 August 2025

SIGNATURE

In the matter between:

In the matter between:

T[...] N[...]

1st Plaintiff

F[...] M[...] N[...]

2nd Plaintiff

TUMELO GAETSEWE

3rd Plaintiff

And

THE ROAD ACCIDENT FUND

Defendant

JUDGMENT

MOGALE, AJ

Introduction

[1] The Plaintiff is T[...] N[...], an adult female who instituted legal proceedings against the defendant in her official capacity as the wife, the mother, and natural guardian of minor children. The claim pertains to loss of support incurred as a result

of the motor vehicle accident that occurred on 4th October 2019 along N4 Road, which resulted in the death of their father, N[...] N[...] (referred to as the deceased).

[2] The deceased was the driver of a Harley-Davidson motorcycle, bearing registration number H[...].

[3] On 4th July 2025, an application was submitted for the consolidation of three matters. The first Plaintiff, T[...] N[...], under case number 7923/22; the second Plaintiff, F[...] M[...] N[...], under case number 35922/20; and the third Plaintiff, under case number 7920/22, were consolidated.

[4] The order was granted on 4th July 2025 by Justice Tsautse AJ, consolidating cases 7923/2020, 7920/2020, and 35944/2022. It was ordered that the proceedings continue under case number 7923/2020.

[5] The court was required to determine both the merits and the loss of support; however, it ruled on the separation of the issues. The court decided to deal with the issue of the defendant's liability. The issue relating to the quantum of the plaintiff's claim is postponed *sine die* pending the outcome of the merits portion of the claim.

[6] In supporting their case, both parties presented *viva voce* evidence. The plaintiff called an expert witness in support of their application, and the defendant's evidence was supported by a witness who was a driver involved in a collision.

[7] The expert witness, Mr. Johan Joubert, a traffic accident reconstruction specialist, considered the sketch plan and witness statements when forming his conclusions regarding the accident. As a result, the sketch plan played a crucial role in establishing the facts of the common cause in this matter.

Relief Sought

[8] The plaintiff argued that the insured driver was the sole cause of the accident; therefore, the defendant is liable for 100% of the plaintiff's claim as required in terms of the Road Accident Fund Act, 56 of 1996. The defendant denied liability and opposed the application.

Background

[9] The factual basis upon which the plaintiff instituted the action proceedings against the Road Accident Fund is set out in the particulars of the claim as follows:

“On or about 4 October 2019, along the N4 Road (De Kroon), an accident occurred involving a motor vehicle (Harley Davidson) with registration plates H[...], driven by Mr. N[...] N[...] (hereinafter referred to as the Deceased); which collided with a motor vehicle (Mercedes Benz Astros) with registration plates: F[...] (hereinafter referred to as the First Insured Motor Vehicle), then driven by Jury Mpetha (hereinafter referred to as the First Insured Driver); and a motor vehicle (Silver Polo Vivo) bearing registration plates: J[...] (hereinafter referred to as the Second Insured Motor Vehicle), driven by Given Mpudi (hereinafter referred to as the Second Insured Driver).”

[10] *“In light of the above, the deceased died at the scene. The accident was caused by the negligent driving of the insured drivers, who were negligent in one or more of the following aspects:*

- 10.1. They failed to keep a proper lookout, or they drove too fast under the circumstances;*
- 10.2. They ignored the conditions of the road; or*
- 10.3. They failed to prevent the accident when they were driving with the exercise of reasonable care, as he was in a position to do so.*

Issues To Be Determined

[11] This court is required to determine whether the plaintiff holds contributory negligence that contributed to the damages suffered or whether the negligence of the insured driver is linked to the damages incurred by the plaintiff. The court must also determine whether the plaintiff has proven 1% liability.

Plaintiff's Case

[12] The expert witness, Mr. Johan Joubert, a traffic accident reconstruction specialist, considered the sketch plan and witness statements when forming his conclusions regarding the accident. As a result, the sketch plan and the witnesses' statements played a crucial role in establishing the facts of the common cause in this matter.

[13] According to the accident report, it was nighttime, with no lights. The weather conditions were overcast. The road surface was tarmac, dry and in good condition. The visibility of the road markings was adequate. There were no obstructions. There was no overtaking control in place. The road signs were clearly visible and well-maintained. The roadway was straight and level. The incident was classified as a sideswipe collision occurring in opposite directions.

[14] The accident occurred between two motor vehicles (a Mercedes-Benz truck and a VW Polo), and a motorbike (a *Harley Davidson*) was involved in the accident.

[15] The Mercedes-Benz truck and semi-trailer combination was travelling eastward towards Brits/Pretoria along the N4 highway from Rustenburg. The VW Polo was moving westward toward Rustenburg on the same route. Additionally, two motorcycles, a Suzuki and a Harley Davidson, were also heading westward towards Rustenburg, following the VW Polo.

[16] The affidavit of the witnesses summarising how the accident occurred states the following:

16.1. Mr Jurry Mishack Mphepja was a driver of a Mercedes-Benz truck with a semi-trailer driving on the N4 road from Rustenburg to Pretoria. He saw two motorbikes following each other. One managed to overtake the vehicle, and the other one collided with its right tire. He lost control of the truck, which turned and faced in the direction from which he had come.

16.2. Lawrence Mokgalaka was driving his Suzuki motorcycle, accompanied by the deceased individual. They were travelling in the same direction,

with the deceased behind him, on N4 heading towards Rustenburg. A truck was approaching and was travelling in their lane. He then signalled to the deceased to move to the left to prevent a collision. Suddenly, the truck hits them. He felt the impact on his rear motorcycle tyre and immediately brought his motorcycle to a stop.

- 16.3. Mr. Priven Mphuthi was driving his VW Polo while travelling from Pretoria to Rustenburg along the N4 highway. He was following two trucks, which he was unable to overtake. Abruptly, two motorbikes approached and overtook him. His view was obstructed, preventing him from seeing what was occurring ahead. Suddenly, he observed an oncoming truck approaching his vehicle. In response, he swerved to the left, resulting in the truck colliding with the rear of his vehicle. This collision caused damage to the rear window on the right side and the boot.

[17] Mr. Joubert, after reviewing the statements and comparing them with the physical evidence, including the marks on the road and the damage profiles of the involved vehicles, opined that the accident could only have occurred as follows:

- 17.1. The Suzuki motorcycle, the Harley Davidson motorcycle, and the VW Polo were all proceeding westward towards Rustenburg before the incident. The Suzuki motorcycle was positioned ahead of the Harley-Davidson motorcycle. The Mercedes-Benz truck and semi-trailer combination was travelling eastward from Brits /Pretoria before the incident.
- 17.2. The driver of the Suzuki motorcycle overtook the VW Polo in the face of the oncoming Mercedes-Benz truck, and the driver had to cut in front of the VW Polo. The VW Polo then made contact with the rear of the Suzuki motorcycle (hit it from behind). The driver of the Volkswagen Polo likely responded to this situation by abruptly braking. This incident

resulted in the Harley-Davidson colliding with the right rear corner of the VW Polo.

- 17.3. Subsequently, the Harley-Davidson motorcycle was deflected to the right. The front right corner of the Mercedes-Benz truck then collided with the Harley-Davidson motorcycle, causing it to fall over. Finally, the front right wheel of the Mercedes-Benz drove over the Harley Davidson motorcycle, resulting in it breaking into two pieces.

[18] According to his initial analyses, he mentioned that the action of the driver of the Suzuki motorcycle, therefore, caused the above accident with contributing negligence on the side of the driver of the Harley Davidson motorcycle that also tried to overtake the VW Polo in the face of the oncoming Mercedes Benz truck and semi-trailer combination.

[19] Mr. Joubert, in his testimony, confirmed that there were no damages on the Suzuki, and he was unable to obtain any further information from Mr. Mokgalaka to clarify his allegations that the truck struck his bike and the impact he felt on his rear motorcycle. He confirmed that the truck did not hit the Suzuki, nor did it hit the VW Polo. He further confirmed that, according to the point of impact on a sketch plan, the truck was travelling on its correct lane before the accident.

[20] Based on his evaluation, the collision involved the driver of a Harley-Davidson motorcycle, who collided with the rear corner of the Volkswagen Polo and also made contact with the right front corner of a Mercedes-Benz truck. Subsequently, the front wheel of the truck ran over the Harley-Davidson, causing it to be shattered into two pieces and killing the deceased.

[21] It is essential to note that during evidence in chief, Mr Joubert changed his initial findings, stating that the driver of the Suzuki caused the aforementioned accident with contributing negligence on the part of the driver of the Harley, who also attempted to overtake the VW Polo in the face of the oncoming truck. In his new evaluation, he opined that had the Suzuki not overtaken, the accident could not have

happened. Suzuki is the cause of the accident, and there is no contributory negligence on the part of Harley-Davidson.

[22] His findings were based on the following reasons:

“Looking at the actions of the VW Polo, he observed that the Suzuki was overtaking while the truck was approaching. He should have anticipated that the Suzuki’s overtaking could cause an accident. The driver of the VW Polo took time to slow down and gave the Suzuki space to overtake, but he did not. Suzuki overtook the VW Polo and then saw the truck approaching; the driver then cut in front of the Polo. The Polo applied brakes, Harley then bumped the back of the VW Polo, reflected to the right, and hit the right tyre of the truck. The truck driver was driving in the correct lane, and there is no negligence on his part. The VW Polo was driving in its correct lane, and there is no negligence on its part. The Suzuki driver caused the accident”

[23] During cross-examination, Mr. Joubert conceded that he did not measure the speed at which the motorcycles were travelling and that he did not conduct interviews with the witnesses, but instead relied solely on their statements. He stated that the initial point of impact was when the VW Polo made contact with the Suzuki. The second point of impact involved the Harley colliding with the rear corner of the VW Polo. The third impact occurred when Harley was deflected to the right and subsequently collided with the oncoming truck.

[24] He was adamant that he had changed his initial findings that there was a contributory negligence on the part of the deceased. He maintained that Harley was still in the process of overtaking, having not yet completed the manoeuvre, which was the reason for the collision with the rear corner of the VW. As a result, Harley was not negligent.

Defendant’s Case

[25] Mishack Jerry Mphepja was driving a Mercedes-Benz truck with a semi-trailer. He saw two motorcycles and a VW Polo approaching from the front, it was at a distance of 6 meters. The first motorcycle overtook the Polo, and the second

motorcycle tried to overtake the VW Polo but collided with the left front tyre of the truck. Before the collision, he attempted to avoid it by swerving towards the yellow line, but the motorcycle followed him and collided with him.

[26] The truck's tire burst, causing him to lose control of the vehicle. The truck jack-knifed and faced in the direction from which it was approaching. The trailer of the truck (Till Gate) collided with the rear of the VW Polo, resulting in damage to the rear and the windscreen.

[27] He maintained that the accident was attributable to the two motorcyclists who attempted to overtake when it was not safe to do so. The incident would not have occurred if the deceased motorcycle had not collided with the right tire of his truck.

[28] During cross-examination, the witness was confronted with his statement that he had failed to mention that the truck's till gate had collided with the VW Polo. He did not see the motorcycle hitting the VW Polo.

[29] Following the conclusion of the defence case, both parties were requested to submit their written heads of argument in support of their respective applications. Counsel are commended for their diligent work and the manner in which they adhered to the prescribed submission deadlines.

Expert evidence

[30] It is trite that an expert witness is required to assist the court, rather than usurp its function. Expert witnesses must 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.

[31] In ***Masstores (Pty) Ltd v Pick 'n Pay Retailers (Pty) Ltd***¹, the court said the expert evidence must not lack any reasoning. An expert's opinion must be underpinned by a proper rationale for a court to assess the cogency of that opinion.

¹ (2015) ZASCA 164; 2016 (2) SA 586 (SCA) par 15

In the absence of any reasoning, the opinion is inadmissible. In **Road Accident Appeal Tribunal & others v Gouws & another**², this court said the view of any expert does not bind courts. They make the ultimate decision on issues on which experts provide an opinion. (See also **Michael & another v Linksfield Park Clinic (Pty) Ltd & another**.³

[32] In **R v Jacobs**⁴, Ramsbottom J said:

“Expert witnesses are witnesses who are allowed to speak as to their opinion, but they are not the judges of the fact in relation to which they express an opinion, the court... is the judge of the fact.... In cases of this sort, it is of the greatest importance that the value of the opinion should be capable of being tested. Unless the expert witness states the grounds upon which he bases his opinion, it is impossible to test its correctness to form a proper judgment upon it.”

[32] It is clear from the evidence presented that Mr. Joubert formulated his report using incomplete and unreliable information. He stated that the initial impact was between the Suzuki motorcycle and the VW Polo. He confirmed that there are no damages to the front of the VW Polo, and even Mr. Priven Mphuthi did not mention that he collided with a Suzuki. The driver of the Suzuki, in his statement, mentioned that he was hit by the truck, not a VW Polo. Whether the report is formulated based on incomplete and unreliable information or not is irrelevant; what is essential for this court to consider is whether the opinion is based on incorrect facts, incorrect assumptions, or unconvincing evidence.

Mutually destructive evidence

[34] In **Stellenbosch Farmers' Winery Group Ltd and Another v Martell and Others**⁵ the court held that:

“To conclude the disputed issues, a court must make findings on: (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probability or improbability of each party's version on each of the disputed issues. In light of the assessment of (a), (b) & (c), the court will, as a final step, determine whether the

² (2017) ZASCA 188; (2018) 1 ALL SA 701 par 33

³ (2001) 1 ALL SA 384 (A) par 34

⁴ 1940 TPD 142 at 14-7

⁵ 2003 (1) SA (SCA) 1 at [5]

party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be a rare one, occurs when a court's credibility findings compel it in one direction and its observations and evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised, probabilities prevail".

[35] In the matter of ***The National Employers' General Insurance v Jagers***⁶, the court held as follows:

"It seems to me, with respect, that in ail 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 not as heavy as in criminal cases. Still, 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 the evidence is true, the Court will weigh 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. If the balance of probabilities favours the Plaintiff, then the Court will accept his version as 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".

[36] It is prudent to mention that the plaintiff provided three different versions regarding who was the negligent driver, and this court is faced with mutually constructive evidence. Firstly, in their particulars of claim, they alleged that the

⁶ 1984(4) SA 437 (ECD) at 440D-441A

accident was caused by the negligent driving of the first insured driver, Mr. Mpetja (the truck driver), and the second driver, Mr. Mphuthi (the driver of the VW Polo).

[37] Mr. Joubert compiled his expert report and concluded that the Suzuki driver (Mr. Mokyalaka) caused the accident with contributing negligence on the part of the Harley driver (the deceased). During his evidence in chief, he altered his previous conclusion. He opined that there was no contributing negligence on the part of the Harley driver, but instead that the Suzuki was the cause of the accident.

It is prudent to note that the plaintiff failed to amend their pleadings in terms of Rule 28(10) of the Superior Act to support their new cause of action.

[38] The defendant's version is that the accident was caused by the negligence of Harley (the deceased)

[39] Having concluded that there are two mutually destructive evidence, the court is not in an informed position to determine whether or not the plaintiff holds contributory negligence that contributed to the damages suffered or whether the negligence of the insured driver is linked to the damages incurred by the plaintiff. This court cannot reconcile the two destructive versions because the plaintiff is deceased in this case, making it impossible to prove 1% liability.

[40] As a result, I am not satisfied that the evidence adduced by the plaintiff on the issue of liability is enough to constitute a prima facie case against the defendant. The plaintiff has failed to prove their case on a balance of probability, and this court is of the view that absolution from the instant order should be granted.

ORDER

[41] I, therefore, make the following order:

1. Absolution from the instant is granted
2. The plaintiff is ordered to pay the wasted costs.

K J MOGALE

**ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, PRETORIA**

Date of hearing: 28 July 2025

Date of judgment: 27 August 2025

APPEARANCES

Applicants' council: B Kubeka-Manyelo

Instructed by: Senne Attorneys

Respondents' council: C Mothata

Instructed by: State Attorneys