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**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)
JUDGMENT**

**Reportable
Case No: 3194/2014**

In the matter between:

PHINDISWA STALI

Plaintiff

and

**ROAD
Defendant**

ACCIDENT

FUND

Coram: ANDREWS AJ

Heard: 15 November 2024; 6 December 2024; 04 & 7 April 2025; 30 September
– 3 October 2025; 17 February 2026.

Delivered: 15 April 2026

Summary: Motor vehicle accident — Road Accident Fund — Identity of driver in dispute — Mutually destructive versions — Plaintiff alleged to be rear seat passenger and deceased alleged to be driver — Defendant contended plaintiff was driver — Extensive factual evidence, including independent eyewitness testimony,

and competing expert evidence considered — Unchallenged evidence that plaintiff could not drive at time of accident — Expert injury-pattern evidence — Deceased's injuries consistent with driver position in right-hand-drive vehicle without airbags — Plaintiff's injuries consistent with rear seat passenger — Credibility, reliability and inherent probabilities assessed in accordance with *Stellenbosch Farmers' Winery* — Unexplained single-vehicle rollover — Permissible inference of negligence drawn from unexplained loss of control — Defendant held liable for 100% of plaintiff's proven or agreed damages — Costs awarded on Scale B — Quantum postponed.

ORDER

1. The defendant is declared liable to compensate the plaintiff for 100% of her proven or agreed damages arising from the motor vehicle collision which occurred on 28 January 2012 on the N2 near Macassar.
 2. The defendant is ordered to pay the plaintiff's costs of suit to date, such costs to be taxed or agreed on the party-and-party scale on Scale B.
 3. The issue of quantum is postponed sine die.
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JUDGMENT

ANDREWS, AJ:

Introduction

[1] The plaintiff instituted an action against the defendant, the Road Accident Fund, for damages arising from a motor vehicle accident which occurred on 28 January 2012 on the N2 highway near Macassar in the Western Cape. The plaintiff alleged that she sustained injuries while travelling as a passenger in a Ford Ikon motor vehicle that overturned during the incident.

[2] The plaintiff's case is that the accident occurred either as a result of an unidentified motor vehicle colliding with the Ford Ikon driven by Ms Busisiwe Nkosinaye ("the deceased"), or alternatively when the deceased lost control of the vehicle. The defendant disputes liability and contends that the plaintiff herself was the driver, that the accident was a single-vehicle collision caused by a tyre burst, and that no unidentified vehicle was involved.

Factual Background

[3] At the time of the accident, the plaintiff was travelling in a Ford Ikon together with three other women, namely Ms Busisiwe Nkosinaye, Ms Aphiwe Mbengashe and Ms Nomveliso Gxamsa. The plaintiff's evidence is that she was seated in the right rear passenger seat and that the deceased was driving the vehicle. According to this version, the deceased lost control of the vehicle while travelling along the N2, causing it to veer off the roadway and overturn, whereupon all occupants were ejected.

[4] The defendant denies this account. It alleges that the plaintiff was the driver of the vehicle and that the accident was caused by a sudden tyre burst, resulting in a single-vehicle rollover. The defendant consequently disputes both the plaintiff's status as a passenger and any negligence on the part of the deceased.

[5] The identity of the driver at the time of the accident is the central factual dispute between the parties. If the plaintiff was the driver, her claim cannot succeed. If, however, she was a passenger and the deceased drove the vehicle negligently, the defendant's liability follows.

Issues for Determination

[6] The parties advanced mutually destructive factual versions. The dispute turns primarily on the identity of the driver of the Ford Ikon at the time of the accident and, depending on that determination, whether negligence on the part of the insured driver has been established.

[7] The following issues accordingly fall to be determined:

- (a) Whether the plaintiff has proved, on a balance of probabilities, that she was a passenger and not the driver of the Ford Ikon at the time of the accident.
- (b) If the plaintiff was a passenger, whether Ms Busisiwe Nkosinaye (“the deceased”) was the driver of the vehicle.
- (c) If the deceased was the driver, whether she was negligent in losing control of the vehicle.
- (d) Whether such negligence, if established, caused the vehicle to leave the roadway and overturn, resulting in the plaintiff’s injuries.

[8] The determination of the first issue is dispositive of the claim. If the plaintiff was the driver, her claim must fail. If she was a passenger and the deceased drove negligently, the defendant is liable subject to proof of causation.

The Legal Framework

The Onus and Standard of Proof

[9] The plaintiff bears the overall onus of establishing, on a balance of probabilities, the elements of delict necessary to sustain liability.¹ In the present matter, this requires proof that she was a passenger and not the driver of the insured vehicle, that the insured driver was negligent, that such negligence was causally linked to the accident, and that she sustained injuries as a result thereof. There is no onus on the defendant to disprove the plaintiff’s case.²

[10] The civil standard requires only that the court be satisfied that the plaintiff’s version is more probable than not. As Lord Denning put it, the burden is discharged once the tribunal can say ‘we think it more probable than not’; if the probabilities are equal, it is not discharged.³ *Miller v Minister of Pensions*⁴, crystallises that the onus is discharged once the court concludes that the plaintiff’s version is more probable than the opposing one. If the probabilities are evenly balanced, the plaintiff cannot succeed. This Court adopts that standard.

¹ See *Pillay v Krishna* 1946 AD 946 at 952 – 3.

² *Ninteretse v Road Accident Fund* [2018] ZAGPPHC 439 at para 28.

³ See *Miller v Minister of Pensions* 1947 2 All ER 372 (KB) at 374; *Ocean Accident and Guarantee Corporation Ltd v Koch* 1963 (4) SA 147 (A) at 159D; See also *South African Bank of Athens v 24 Hour Cash CC* (A3027/2016) [2016] ZAGPJHC 217 (11 August 2016) at para 9.

⁴ *Miller v Minister of Pensions* [1947] 2 All ER 372 (KB).

[11] Where parties advance mutually destructive factual versions, the Court must resolve the dispute by applying the approach articulated in *Stellenbosch Farmers' Winery Group Ltd v Martell et Cie* ("*Stellenbosch Farmers' Winery*")⁵. This requires an assessment of the credibility of the witnesses, the reliability of their evidence, and the inherent probabilities. These considerations are interrelated and must be weighed together in determining whether the party bearing the onus has discharged it.

[12] It is a fundamental principle of trial fairness that where material evidence is not challenged in cross-examination, the party calling the witness is ordinarily entitled to assume that such evidence is accepted. As held in *President of the Republic of South Africa v SARFU*⁶, unchallenged evidence generally stands unless it is inherently improbable. This principle is particularly relevant where a party's case depends on factual assertions inconsistent with evidence left undisputed at trial.

[13] Both parties relied on expert medical evidence to determine the identity of the driver. The evaluation of expert testimony is governed by well-established principles. In *Michael & Another v Linksfeld Park Clinic* ("*Linksfeld*")⁷, the Supreme Court of Appeal held that expert opinion does not bind the Court. The Court must evaluate whether the opinion is based on facts proved in evidence and whether the reasoning process is logical, coherent, and scientifically defensible⁸.

[14] An expert opinion founded on assumptions or unproven facts carries little or no weight. As reaffirmed in *PriceWaterhouseCoopers Inc v National Potato Co-operative Ltd* ("*PWC v NPC*")⁹, the more an expert relies on facts not established

⁵ *Stellenbosch Farmers' Winery Group Ltd v Martell et Cie and Others* 2003 (1) SA 11 (SCA) at para 5.

⁶ *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC).

⁷ *Michael and Another v Linksfeld Park Clinic (Pty) Ltd and Another* 2001 (3) SA 1188 (SCA).

⁸ *Ibid* at para 39.

⁹ *PriceWaterhouseCoopers Inc and Others v National Potato Co-operative Ltd* 2015 (2) SA 403 (SCA).

in evidence, the less weight the opinion attracts. Similarly, in *JA obo DA v MEC for Health, Eastern Cape*¹⁰, the court stressed that expert reasoning must be anchored in proved facts and that shortcomings in factual foundation or methodology materially diminish probative value.¹¹ Thus, expert reasoning must be clearly distinguished from speculation.

[15] It is further trite that expert opinion involves the drawing of inferences from established facts. As explained in *AM and Another v MEC for Health, Western Cape*¹², and earlier in *Caswell v Powell Duffryn Associated Collieries Ltd*¹³, inference must be grounded in objective facts. Where such facts are absent, the reasoning process collapses into conjecture.

[16] Experts are required to assist the Court impartially. It has been repeatedly held by our courts that selective engagement with evidence, reliance on litigation-driven assumptions, departure from the expert's field of competence, or advocacy in place of objective analysis undermine credibility and diminish evidential value.¹⁴

[17] Where direct evidence of how an accident occurred is lacking, the Court may rely on inferential reasoning, provided the inference drawn is consistent with the proven facts and represents the most plausible and probable explanation. As held in *Ocean Accident and Guarantee Corporation Ltd v Koch*¹⁵, where more than one inference is possible, the Court must select the one that accords best with the totality of the evidence and the inherent probabilities.

Negligence and Causation

[18] Once the identity of the driver is established, the plaintiff must prove negligence and causation. Negligence is determined with reference to whether the

¹⁰ *JA obo DA v MEC for Health, Eastern Cape* 2019 (3) SA 221 (SCA).

¹¹ *Ibid* at paras 11 – 17.

¹² *AM and Another v MEC for Health, Western Cape* 2019 (5) SA 113 (CC) at para 21.

¹³ *Caswell v Powell Duffryn Associated Collieries Ltd* [1940] A.C 152 (HL).

¹⁴ See *National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer)* [1993] 2 Lloyd's Rep 68 (QB); *Stock v Stock* 1981 (3) SA 1280 (A).

¹⁵ *Ocean Accident and Guarantee Corporation Ltd v Koch* 1963 (4) SA 147 (A) at para 159D.

insured driver failed to exercise the degree of care expected of a reasonable driver in the circumstances. Factual causation is established by enquiring whether, but for the negligent conduct, the harm would have occurred, while legal causation requires that the negligent conduct be sufficiently closely connected to the harm for liability to attach.

[19] In claims arising from single-vehicle rollover accidents, courts have recognised that an unexplained loss of control of a vehicle may give rise to a permissible inference of negligence, unless an adequate explanation consistent with reasonable care is shown.¹⁶

[20] The Court is therefore required to resolve conflicting eyewitness accounts, delayed and unchallenged evidence, and competing expert opinions in order to determine the identity of the driver and, if necessary, whether the accident resulted from negligent driving causally linked to the plaintiff's injuries. These principles guide the assessment that follows.

The Evidence

[21] The following witnesses testified on behalf of the plaintiff:

- (a) Ms Phindiswa Stali, the plaintiff;
- (b) Mr Ibrahim Drame, the plaintiff's husband;
- (c) Ms Thombikhaya Sitayo, the plaintiff's sister;
- (d) Ms Asanda Matshele, host of the birthday gathering; and
- (e) Dr Jeremy John Plaskett, specialist general surgeon and medico-legal expert.

[22] The following witnesses testified on behalf of the defendant:

- (a) Sergeant E.Y. Fortuin;
- (b) Ms Aphiwe Mbengashe, an occupant of the insured vehicle;
- (c) Ms Nomveliso Gxamsa, an occupant of the insured vehicle;

¹⁶ See also *Arthur v Bezuidenhout and Mieny* 1962 (2) SA 566 (A) at 573H–574B; *Ocean Accident and Guarantee Corporation Ltd v Koch* 1963 (4) SA 147 (A) at 159D–H).

- (d) Captain Mahumi Victor Vibebe April, owner of the insured vehicle; and
- (e) Dr Yateen Bhupandra Natvarlal Bhagwan, specialist general surgeon and medico-legal expert.

[23] In addition to the oral evidence, the parties relied on documentary evidence, much of which was common cause. This included, inter alia, the Official Accident Report (“OAR”) and related police documentation; ambulance and emergency services reports; Tygerberg Hospital clinical records; medico-legal and post-mortem reports pertaining to the deceased; and the respective expert reports prepared for purposes of the litigation. The relevance and weight of this documentary evidence are addressed where appropriate in the evaluation that follows.

Procedural History

[24] Prior to the conclusion of the viva voce evidence, the plaintiff launched two interlocutory applications. The first sought the admission of the post-mortem affidavit of Dr Sairita Maistry, who performed a medico-legal post mortem examination on the body of Ms Busisiwe Nkosinaye, in terms of section 34(1) of the Civil Proceedings Evidence Act 25 of 1965. The second concerned condonation for non-compliance with Rule 36(9)(a) and (b) in respect of the expert report of Dr Jeremy Plaskett, together with leave to call him to testify.

[25] The applications were opposed. Having heard argument, I delivered an *ex tempore* judgment on 7 April 2025 in which the post-mortem affidavit was admitted into evidence. Condonation was granted subject to defined safeguards. In particular, the evidence of Dr Plaskett was circumscribed so as not to introduce a new or altered case, and the Defendant was afforded the opportunity to appoint its own expert and to engage fully with the evidence.

[26] I expressly considered the degree of non-compliance, the explanation advanced, the potential prejudice to the parties, and the interests of justice. The ruling was directed at ensuring that the court was properly assisted on the central issue in dispute, namely, the probable seating position and identity of the driver, while preserving procedural fairness and avoiding trial-by-ambush.

[27] The matter thereafter proceeded on that basis, with both parties leading expert evidence. In adjudicating the merits, I have evaluated the expert testimony within the constraints imposed by the interlocutory ruling and in conjunction with the totality of the evidence. The subsequent presentation of expert and lay evidence, including evidence received by way of virtual proceedings, was conducted under conditions directed at ensuring fairness, transparency, and proper forensic testing of the issues.

The Plaintiff's Evidence

[28] The plaintiff, Ms Phindiswa Stali, testified that on 28 January 2012 she travelled with her two children to a child's birthday celebration in Philippi at the home of Ms Asanda Matshele, arriving by taxi earlier that morning. The arrangement was that the children would be transported in a microbus driven by acquaintances of Ms Matshele, while four adult women comprising the plaintiff, Ms Busisiwe Nkosinaye (the deceased), Ms Aphiwe Mbengashe, and Ms Nomveliso Gxamsa, would travel separately in a white Ford Ikon bearing registration number C[...].

[29] She testified that she had not previously met the other three occupants. Upon entering the vehicle, she was instructed where to sit and took the right rear passenger seat directly behind the driver. According to her evidence, Ms Nkosinaye drove the vehicle from the outset. Ms Mbengashe occupied the front passenger seat, and Ms Gxamsa the left rear seat. The microbus followed the Ford Ikon to Somerset West, where they arrived at the Spur restaurant near Somerset Mall.

[30] The plaintiff testified that the two vehicles parked adjacent to each other at the Spur. She again observed Ms Nkosinaye alight from the driver's seat and later resume that position when the group departed. No alcohol was consumed. The seating arrangements remained unchanged for the return journey.

[31] While travelling back towards Cape Town along the N2 in the right-hand lane, the plaintiff observed a truck travelling in the left-hand lane drifting or encroaching towards their vehicle. She testified that Ms Nkosinaye reacted by

shouting and attempting to swerve, whereafter the vehicle veered to the right, entered the centre median, and overturned. The plaintiff lost consciousness during the rollover.

[32] Her next recollection was regaining consciousness the following morning at Tygerberg Hospital. She testified that she did not inform any medical personnel, police officer or emergency worker that she had been driving, and denied providing any information recorded in the OAR. She stated that she was unconscious at the scene and unable to communicate.

[33] Under cross-examination, the plaintiff was confronted with an affidavit dated April 2012, certain medical records recording her as the driver, and expert reports prepared on the basis that she had been driving. She denied having provided such information, explaining that she was traumatised and unconscious and that any such entries were erroneous. She testified consistently that she could not drive in 2012, held neither a learner's nor a driver's licence at the time, and only began learning to drive in 2023.

[34] Mr Ibrahim Drame who was married to the plaintiff since 2001, corroborated her testimony that she could not drive at the time of the accident. He testified that she only began learning to drive in early 2023, with him teaching her over a period of six to seven months, after which she obtained her driver's licence in February 2024.

[35] Under cross-examination, he was shown certain expert reports indicating that the plaintiff was divorced or living separately from him. He disputed these, explaining that they went through a difficult period, but never divorced. He remained firm that the plaintiff had not been able to drive before 2023. This evidence was never disputed.

[36] Ms Thombikhaya Sitayo, the plaintiff's sister, testified that she travelled in the microbus with the children. She witnessed the plaintiff get into the right-rear seat of the Ford both in Phillippi and upon leaving the Spur. She stated that Ms

Busisiwe Nkosinaye was the driver on both legs of the journey. She had a direct line of sight when the vehicles departed and stated that the microbus followed at a close but safe distance, approximately the length of one to two motor vehicles.

[37] On the N2, she observed a vehicle (described variously as a truck or delivery vehicle) approaching from the left-hand lane toward the Ford. She saw the Ford move sharply, lose control, and roll multiple times toward the median. She stated that all occupants were ejected. When they passed the scene, she saw the Ford lying on its side and the occupants lying outside the vehicle.

[38] Under cross-examination, she was confronted with her written statement in which she recorded that the truck collided from behind. In court, she could not confirm actual impact, attributing this to the speed at which events unfolded. She stated that she 'thought' the truck made contact. Her viva voce evidence was consistent, though her earlier affidavit had stronger language.

[39] She was also questioned on her vantage point. She maintained that the microbus was close enough behind the Ford to see who entered which seat and to observe the Ford's movement leading up to the rollover. She conceded that bystanders were already assisting when the microbus arrived at the scene but maintained that they were still close enough to have seen the rollover itself.

[40] Ms Asanda Matshele, the host of the party, confirmed that she travelled in the microbus and saw the plaintiff enter the right-rear seat and Ms Busisiwe Nkosinaye enter the driver's seat when leaving Somerset West. She observed the Ford rolling ahead. She agreed that by the time they reached the accident scene, bystanders were already assisting, which meant she did not witness the exact moment of ejection.

[41] Under cross-examination, she conceded that she could not comment on the cause of the rollover and did not see whether a truck or tyre burst was involved. She identified Ms Aphiwe Mbengashe in the front passenger seat and Ms

Nomveliso Gxamsa behind her, consistent with the plaintiff's version and inconsistent with the defendant's.

Defendant's Factual Witnesses

[42] Sergeant E.Y. Fortuin made her investigator's statement six years after the accident. She had no independent memory of the details, including how the plaintiff came to be listed as "driver" on the OAR. She testified that she did not make or supervise the OAR.

[43] She stated that attempts were made to contact the plaintiff, but she could not recall specific details. Importantly, she accepted that she could not dispute the plaintiff's version.

[44] Ms Aphiwe Mbengashe testified that she was an occupant of the Ford Ikon on 28 January 2012, together with the plaintiff (Ms Stali), Ms Nomveliso Gxamsa, and the deceased, Ms Busisiwe Nkosinaye. She described herself as a close friend of both the deceased and Ms Gxamsa, while stating that she was acquainted with the plaintiff through extended family connections.

[45] According to her evidence, the group travelled from Philippi to Somerset West to attend a child's birthday gathering, which she stated took place at McDonald's. She testified that the plaintiff drove the vehicle on both the outward and return journeys. She recounted that she occupied the front passenger seat, that Ms Gxamsa sat behind her in the left rear seat, and that the deceased sat behind the plaintiff in the right rear seat.

[46] She testified that shortly before the accident she and Ms Gxamsa noticed a smell resembling a burning tyre. She stated that she raised this with the plaintiff but received no response. According to her, the vehicle was travelling at speed when it lost control, moved from the left-hand lane towards the right, and

rolled. She stated that none of the occupants were wearing seatbelts and that all were ejected from the vehicle.

[47] Ms Mbengashe testified that she regained consciousness at Tygerberg Hospital the following day and remained hospitalised for approximately four months as a result of her injuries. She confirmed that she made a police statement on 8 June 2015, more than three years after the accident. She stated that this was done at the request of the deceased's sister, who wished to pursue a claim with the Road Accident Fund. She further testified that she attempted to lodge her own RAF claim, but was unable to do so due to prescription. She confirmed that her written statement did not identify the plaintiff as the driver. She explained that she was not specifically asked to record who had been driving.

[48] Under cross-examination, Ms Mbengashe stated that she had previously seen the plaintiff driving on other occasions and was therefore surprised by the plaintiff's evidence that she could not drive in 2012. She further testified that the deceased did not drive on the day of the accident because she was eight months pregnant and had swollen feet, although she accepted that pregnancy does not necessarily prevent a person from driving.

[49] She maintained that the accident was a single-vehicle rollover caused by a tyre problem and denied that any unidentified vehicle was involved. She acknowledged that her version differed from that of the plaintiff, Ms Sitayo, and Ms Matshela in several respects, including the point of departure, the venue of the birthday gathering, the seating arrangements, the lane of travel, and the cause of the accident.

[50] Despite these discrepancies, Ms Mbengashe adhered to her version that the plaintiff was the driver at the time of the collision and denied that her evidence was influenced by her relationship with the deceased or by the pursuit of Road Accident Fund claims.

[51] Ms Nomveliso Gxamsa testified virtually from the Road Accident Fund's offices in East London with the assistance of an interpreter. She stated that she resided in Cape Town at the time of the accident in January 2012, and currently resides in Mdantsane. She confirmed that she made a written police statement and explained that the surname "Chandana" appearing therein was her maiden surname, her current surname being Gxamsa.

[52] According to her evidence, the Ford Ikon carried four women on the day of the accident, namely the plaintiff (whom she identified as the driver), Ms Aphiwe Mbengashe in the front passenger seat, herself in the left rear seat, and the deceased, Ms Busisiwe Nkosinaye, in the right rear seat. She stated that she met the plaintiff for the first time that day, having known the deceased as her best friend and Ms Mbengashe as a close friend for approximately two years.

[53] She testified that none of the occupants wore seatbelts, and that the same seating configuration applied on both the outward and return journeys to Somerset West.

[54] Ms Gxamsa stated that shortly before the collision she heard a loud bang, smelled burning tyre rubber, and thereafter the plaintiff lost control of the vehicle. According to her version, the Ford Ikon veered from the left-hand lane towards the right, rolled multiple times, and all occupants were ejected.

[55] She testified that she was conscious at the scene, that the deceased was badly injured and unresponsive, and that all occupants received medical assistance. She stated that she conveyed to police and emergency personnel that the collision was caused by a tyre burst, that the vehicle rolled, and where each occupant had been seated.

[56] She further testified that she attended the Road Accident Fund offices with the deceased's father shortly after the funeral. She stated that she was informed

she did not qualify for compensation due to the minor nature of her injuries, and that only funeral expenses could be considered on behalf of the deceased's family.

[57] Under cross-examination, Ms Gxamsa maintained that the plaintiff had been the driver of the vehicle and stated that, in her view, the deceased would not have driven on the day of the accident because she was eight months pregnant. She confirmed that the deceased held a valid driver's licence and that she had previously been a passenger while the deceased was driving.

[58] She disputed the 2015 date reflected on her police statement and denied that she attended the police station together with Ms Mbengashe on that occasion. When confronted with the plaintiff's subsequent driving licence and with expert evidence suggesting that the deceased's injuries were consistent with a driver position, she rejected those propositions and adhered to her version.

[59] Despite being confronted with contrary versions put by the plaintiff, Ms Sitayo, and Ms Matshela, Ms Gxamsa remained firm that the plaintiff was the driver at the time of the accident and denied that her evidence was motivated by bias or by the pursuit of Road Accident Fund claims.

[60] Captain Mahumi Victor Vibeke April testified via the virtual platform. He is employed by the South African National Defence Force and is currently stationed at Lohatla in the Northern Cape. He confirmed that he was the owner of the white Ford Ikon motor vehicle bearing registration number C[...], which was involved in the accident on 28 January 2012.

[61] He stated that on the day of the accident he lent the vehicle to his then-girlfriend, Ms Asanda Matshela, for purposes of transporting children and other attendees to a birthday celebration in Somerset West. He testified that Ms Asanda Matshela and her friends had hired a taxi, but the taxi could not accommodate all the intended passengers. They therefore requested the use of his vehicle.

[62] He narrated that he was told that Phindiswa Stali, the plaintiff, would be the driver of the Ford Ikon, as Ms Asanda Matshele herself could not drive. On this basis, he handed the vehicle over at Ms Asanda Matshele's home earlier that day. He did not accompany the group to Somerset West. He stated that after leaving the vehicle with them, he departed to attend to other commitments and did not witness their departure or observe who got into which seat.

[63] Captain April testified that he received a telephone call later that same day, shortly after the accident occurred, from a person he believed to be a police officer. The caller informed him that his vehicle had overturned on the N2 near Somerset West. He immediately proceeded to the accident scene with a friend. Upon arrival, he observed the heavily damaged vehicle, which he described as 'a wreck', and believed irreparable. He noted that emergency personnel were already on site and were attending to all four occupants, who were still present at the scene.

[64] He testified that the deceased, Ms Busisiwe Nkosinaye, was alive at the scene and receiving assistance from paramedics inside the ambulance. All other occupants were present as well. He did not see any evidence of another vehicle being involved in the collision. He stated that he did not observe any other damaged vehicle or debris suggesting a second vehicle.

[65] He did not give a statement to the police, as officers were already present taking statements and completing the accident report. He said no police officer approached him for information. He arranged for the vehicle to be removed from the scene by a tow truck to a yard in Somerset West, as he had no means to transport it himself.

[66] During cross-examination, he confirmed that he did not witness who actually drove the vehicle and did not observe who sat where in the vehicle. Neither did he see how the accident occurred. He did not know whether the vehicle's airbags deployed. He stated that he could not clearly recall whether the vehicle had airbags, though he believed it may have had a driver-side airbag, but he was not certain.

[67] He reiterated that his knowledge of the events preceding the accident was based solely on what he had been told, and not on anything he personally observed.

Expert Evidence

[68] Dr Jeremy John Plaskett testified as an expert general surgeon. He holds an MBChB from the University of Cape Town, has extensive experience in managing blunt and penetrating trauma, completed specialist surgical training at UCT, and since 2017 has served as Head of the Department of Surgery at Victoria Hospital. He also teaches registrars and medical students. His qualifications and practical trauma exposure were not disputed.

[69] In formulating his opinion, Dr Plaskett relied on a body of uncontested contemporaneous medical and investigative material. This included the SAPS mortuary report and related investigator documentation, the medico-legal post-mortem examination conducted by Dr Maistry, the EMS (Metro) report, and the Tygerberg Hospital clinical records pertaining to the plaintiff. He also had regard to the defendant's expert reports prepared by Dr Bhagwan, as well as to available photographic material and soft-tissue documentation.

[70] He emphasised that the vehicle was never inspected, there were no photographs of the interior, and crash dynamics were unknown. Accordingly, the only reliable and objective basis for determining seating position was injury pattern analysis.

[71] Based directly on the post-mortem report, Dr Plaskett testified that the deceased sustained extensive high-energy polytrauma involving several anatomical regions. The injuries included severe blunt chest trauma in the form of a sternal fracture, multiple bilateral rib fractures, bilateral haemothoraces, lung contusions, and cardiac contusions. In addition, the deceased sustained significant abdominal injuries comprising a splenic laceration, renal contusions, intra-abdominal

haemorrhage, and subendocardial haemorrhages. The lower limbs were also severely injured, with fractures of both femurs recorded. The post-mortem further documented extensive soft-tissue trauma, characterised by predominantly right-sided abrasions and lacerations affecting the peri-orbital region, scalp, ear, shoulder, arm, forearm, hand, and flank, together with additional bilateral abrasions.

[72] Dr Plaskett testified that this constellation of injuries is characteristic of an unrestrained right front occupant in a motor vehicle not equipped with airbags, and is classically associated with the injury pattern sustained by a driver occupying the right front seat.

[73] Dr Plaskett explained that a sternal fracture is a particularly significant marker of direct steering-wheel impact, as it requires the application of substantial anterior chest force. He further testified that bilateral femur fractures are strongly correlated with impact against the dashboard or steering column and are well recognised in trauma literature as characteristic driver-position injuries. In addition, he stated that the absence of airbags in older Ford Ikon models materially increased the likelihood of direct chest contact with the steering wheel during a high-energy collision.

[74] The deceased's predominantly right-sided soft-tissue injuries correlate with the A-pillar, the driver-side window, and rigid right-side interior structures of a right-hand-drive vehicle. This laterality-by-structure relationship was drawn from the peer-reviewed article by Curtin (2007).

[75] In contrast, the plaintiff sustained a right ankle fracture; a foot laceration; no significant chest, abdominal, or femur injury. He regarded these as consistent with a rear-seat occupant subjected to rotational forces, and fundamentally inconsistent with driver-specific trauma.

[76] The deceased was 32 weeks pregnant at the time of the collision. Dr Plaskett addressed the relevance of the pregnancy in detail. He testified that

pregnancy, even in late gestation, does not prevent a person from driving and does not, in itself, determine an occupant's seating position within a vehicle. He further explained that uterine rupture in traumatic events is extremely rare, occurring in less than one per cent of cases. Importantly, the post-mortem report did not include any examination of the placenta, rendering any conclusions regarding placental integrity speculative. Dr Plaskett also noted that, owing to the deceased's short stature, the steering wheel in a right-hand-drive vehicle would have aligned with the chest rather than the abdomen, thereby explaining the absence of uterine injury even if the deceased had been seated in the driver position.

[77] This evidence directly undermined the defendant's reliance on the deceased's pregnancy as a determinative factor in assessing either her seating position or the mechanism of injury.

[78] He relied on accepted, medically peer-reviewed trauma studies, including:

- (a) *Smith & Cummings (2002)*: front-seat occupants have a 39% higher risk of death and 33% higher risk of injury¹⁷;
- (b) *Newgard (2005)*: thoracic injuries and steering-wheel associations¹⁸;
- (c) *Curtin (2007)*: distinguishing driver vs front-passenger patterns in right-hand-drive vehicles¹⁹;
- (d) *Parenteau (1996)*: ankle injuries do not reliably distinguish seating position²⁰.

[79] Counsel for the plaintiff submitted in argument that the trauma studies relied upon by Dr Plaskett are directed specifically at older vehicles not equipped

¹⁷ Kathleen M. Smith, Peter Cummings 'Passenger seating position and the risk of passenger death or injury in traffic crashes' – Accident Analysis and Prevention 36 (2004) 257 – 260.

¹⁸ Newgard, Lewis and Kraus 'Steering Wheel Deformity and Serious Thoracic or Abdominal Injury Among Drivers and Passengers Involved in Motor Vehicle Crashes' – Annals of Emergency Medicine – Volume 45, No. 1: January 2005.

¹⁹ Curtin E, Langlios N 'Predicting driver from front passenger using only the post-mortem pattern of injury following a motor vehicle collision' - Med. Sci. Law (2007) Vol 47, No. 4.

²⁰ Parenteau CS, Viano DC, Lövsund P, Tingvall C. 'Foot-ankle injuries: Influence of crash location, seating position and age' - Accident Analysis & Prevention, 1996; 28(5): 607–617.

with airbags and are therefore of particular relevance to the factual context of this matter.

[80] Dr Plaskett provided a detailed critique of the defendant's expert. He noted that Dr Bhagwan had shifted the deceased's alleged seating position between his first and second report (from front-left to rear-right), doing so solely on the basis of belated hearsay that the deceased was pregnant and supposedly seated at the rear. He further observed that Dr Bhagwan relied on non-medical, non-peer-reviewed, and incomplete article extracts, including materials outside his expertise such as crash-mechanics and airbag-system literature. In addition, Dr Bhagwan employed an unrecognised "probability scoring system" (assigning figures such as 10%, 30%, 70% and 90%), which is unsupported by any validated biomechanical methodology.

[81] Dr Plaskett highlighted that the first report omitted crucial right-sided soft-tissue injuries, and that the reasoning rested on assumed "broader anterior and lateral impact patterns" despite an absence of proven facts about the actual crash sequence. He pointed out that Dr Bhagwan was unable to explain why none of the deceased's injuries excluded her from the driver position, and that pregnancy had been invoked as a "forensic differentiator" even though this approach is not supported by trauma literature and was contradicted by the absence of any placental examination.

[82] Counsel for the plaintiff submitted in argument that these deficiencies reflect selective engagement with the evidence, methodological overreach, and a departure from the principles governing expert opinion as articulated in *Linksfeld* and *PWC v NPC*.

[83] No joint minute was completed because he repeatedly attempted to engage; received delayed and incomplete communications. Discussions were relayed through the defendant expert's secretary. This lack of collaboration is

consistent with the plaintiff's submission that Dr Bhagwan approached the matter in a litigation-driven, non-scientific manner.

[84] The defendant, both in cross-examination and in its Heads of Argument, emphasised that there was no evidence of steering-wheel deformation, that the restraint status of the occupants was unknown, and that the dynamics of a rollover may produce mixed and overlapping injury patterns. It further contended that several confounding variables referenced in the Smith & Cummings studies; including speed, lack of restraint, and the fact of a rollover, were present in this case, and therefore argued that the deceased's injuries were "compatible" with trauma sustained by a rear-seat passenger rather than a driver.

[85] However, Dr Plaskett maintained, and the plaintiff submitted, that the constellation of injuries sustained by the deceased, namely the combination of a sternal fracture, bilateral femur fractures, and a predominantly right-sided distribution of soft-tissue trauma, has a far stronger correlation with a driver position in a right-hand-drive vehicle than with any rear-seat mechanism. He emphasised that a rollover, on its own, does not explain driver specific anterior chest injuries of this nature, and that no peer-reviewed literature supports the defendant's proposition that such injuries could mimic the patterns expected of an unrestrained rear-seat occupant in a rollover event

[86] When questioned by the court, Dr Plaskett emphasised that the speed of the vehicle, the sequence of rolls, the initial point of impact, whether the occupants were ejected or extracted, and the precise interior configuration of the vehicle were all unknown. In light of these uncertainties, he stated that the only defensible scientific method was to rely on objective injury-pattern analysis rather than engage in speculative reconstructions of the accident dynamics. Proceeding on that basis, he concluded, on a balance of probabilities, that the deceased most likely occupied the right-front driver position and that the plaintiff was seated in the right-rear seat. In circumstances of such uncertainty, and consonant with *Linksfeld*, the Court must prefer expert reasoning that remains anchored to proven facts rather than hypotheses about unproven accident dynamics.

[87] Dr Yateen Bhupandra Natvarlal Bhagwan testified for the defendant. He is a general surgeon in private practice, with a clinical focus on metabolic surgery, and is currently the Chief of Surgical Oncology at Greys and Edendale Hospitals in KwaZulu-Natal. He has approximately ten years of medico-legal consulting experience, predominantly for the Road Accident Fund and the State in medico-legal matters.

[88] He prepared two reports in this matter, one in June 2025 and a revised report dated 7 July 2025. He explained that the second report was generated after he became aware, during a meeting with the RAF Forensic Department, that the deceased was 32 weeks pregnant at the time of the accident, and after updated information suggested that she may have been seated in the right-rear position. He stated that this new information had not been highlighted in the materials he initially considered, and that the pregnancy was, in his view, a potentially relevant factor for trauma interpretation. He therefore issued a supplementary report.

[89] He confirmed that he reviewed the medico-legal post-mortem report of Ms Busisiwe Nkosinaye, as well as the additional documents listed in his report. He accepted that the post-mortem report was the primary source for determining the deceased's documented injuries.

[90] Dr Bhagwan described the deceased's injuries as constituting fatal polytrauma, by which he meant the presence of multiple severe injuries affecting several anatomical regions. He testified that the documented injuries included a sternal fracture with bilateral rib fractures, accompanying cardiac and pulmonary contusions, a splenic laceration and renal contusions, fractures of both femurs, and extensive soft-tissue trauma. The latter was predominantly right-sided, involving the face, head, shoulder, arm, forearm, flank, and hand, together with additional superficial and deep lacerations. He confirmed that this pattern of injuries was consistent with a high-energy traumatic event.

[91] Dr Bhagwan provided a biomechanical interpretation for each category of injury. In relation to the sternal and bilateral rib fractures, he explained that these are common in high frontal impacts and may be sustained by both front-seat occupants and unrestrained rear-seat passengers, depending on the mechanism. They may arise from direct steering-wheel contact, chest compression, or ejection-related ground impact.

[92] These reflect blunt chest trauma. He testified that such injuries may arise through either direct steering-wheel impact, or through high-energy compressive forces during rollover or ejection. In relation to the splenic and renal injuries he stated that these are consistent with lateral compressive forces, whether sustained in a front-seat occupant during a lateral impact, or a rear-seat occupant in a rollover or ejection pattern. He noted that the deceased's splenic injury was significantly severe, suggesting substantial lateral force.

[93] He explained that bilateral femur fractures may arise from dashboard impact but may also occur in ejection-type mechanisms where an individual lands in a "jack-knife" position with knees or thighs striking the ground or another surface. He interpreted the right-sided soft-tissue injuries as reflective of lateral compressive or ejection trauma, consistent with right-sided impact against the vehicle interior (window or pillar) or ground contact during ejection.

[94] Dr Bhagwan regarded the deceased's 32-week pregnancy as relevant for two related reasons. First, he considered that late-term pregnancy alters normal anatomy by displacing abdominal organs, such as the liver and spleen, into a higher position, which he suggested may affect the distribution and interpretation of traumatic injuries. Second, he relied on the absence of recorded placental or uterine injury in the post-mortem report. He testified that placental abruption is commonly associated with direct frontal abdominal trauma in pregnant patients and, on that basis, inferred that the lack of such findings militated against a significant direct frontal abdominal impact, such as contact with a steering wheel. He accepted that uterine rupture is rare in trauma but maintained that placental injury would typically be expected with direct frontal compression.

[95] His report included numerical probability values for various seating positions (driver, front passenger, right-rear passenger). He testified that these values were derived from a set of trauma studies, primarily Smith & Cummings (2002, 2006, 2010), which he regarded as providing population-level probability distributions for injury patterns relative to occupant position. He accepted, under questioning, that these articles were not contained in the bundle before Court.

[96] He stated that, based on the total injury pattern, he considered it 'highly probable (60–70%)' that the deceased was a right-rear passenger. He explained that this probability weighting drew on:

- (a) The predominance of right-sided injuries;
- (b) The lack of documented placental or uterine injury;
- (c) The rollover mechanism;
- (d) The possibility of ejection;
- (e) The absence of what he viewed as "driver-specific" injuries.

[97] In relation to driver-specific marker analysis, he stated that certain injuries are more commonly associated with drivers, including pedal-related ankle/foot injuries; cervical spine injuries from acceleration–deceleration; steering-wheel imprint injuries and forearm/wrist abrasions due to bracing. He testified that these were not present in the deceased, and that this decreased the likelihood of her having been the driver.

[98] He described the plaintiff's injuries, including a cervical teardrop fracture and a right medial malleolus fracture, as more consistent with an impact scenario involving acceleration, deceleration forces affecting the driver's braced foot and neck. He indicated that such injuries could theoretically occur in a rear-end collision or other impact where the driver's foot is pressing against the pedal or floorboard.

[99] He repeatedly emphasised that the exact accident dynamics were unknown, explaining that there was no evidence establishing whether the collision involved a frontal impact, whether any steering-wheel deformation occurred, whether the occupants were restrained, what the point or sequence of impacts during the rollover had been, or whether the occupants had been ejected or extracted. In the absence of these specifics, he stated that injury-pattern analysis must rely on generalised biomechanical principles.

[100] He confirmed that the injuries could also be produced by ejection onto a hard surface, such as when an occupant strikes the ground or another object; by lateral compressive forces generated during a rollover; and by high-energy side impacts, all of which constitute alternative mechanisms capable of producing the injury pattern observed. He testified that such mechanisms could equally produce significant chest trauma without the involvement of a steering wheel.

[101] He accepted several areas of agreement between himself and Dr Plaskett, acknowledging the presence of severe chest trauma, the significance of the bilateral femur fractures in assessing the severity and direction of impact, the rarity of uterine rupture in traumatic events, and the general difficulty inherent in determining an occupant's seating position in rollover crashes.

[102] He disagreed, however, with the conclusion that the deceased was "most likely" the driver, stating that the injury pattern was non-specific and could be produced under multiple configurations.

[103] Under cross-examination he confirmed that, in his first report, he had placed the deceased in the front-left passenger seat, but he altered this conclusion in his second report after receiving what he described as new information. He accepted that the post-mortem report did not expressly record any placental examination, and he further acknowledged that several of the articles he referenced dealt with specific crash configurations, such as restrained occupants and frontal impacts, that were not definitively established in this matter.

[104] He agreed that the deceased's injuries did not exclude the possibility that she had been the driver, although he maintained that, in his view, they were less consistent with a driver position. He also agreed that the deceased's short stature might have influenced her proximity to the steering wheel but emphasised that a 32-week gravid uterus would limit how far forward she could have positioned herself. He accepted that front-seat occupants in older vehicles generally tend to sustain more severe injuries than rear-seat occupants, and finally, he acknowledged that he could not definitively exclude the deceased as the driver.

[105] In re-examination he clarified that his report had not proceeded on the basis of a rear-end impact by a truck and that he had referred to such a scenario only when it was posed to him hypothetically. He explained that his analysis throughout was based on the documented injuries themselves rather than on any particular version of how the accident was alleged to have occurred. He further indicated that the level of chest trauma observed in the deceased could equally have been caused by ejection onto a hard surface and was therefore not limited to, nor necessarily indicative of, an impact with the steering wheel.

The Nature of the Dispute

[106] Both experts were asked to address the core issue in dispute, namely whether, on an assessment of the injury patterns documented in the post-mortem report and their biomechanical significance, the deceased, Ms Busisiwe Nkosinaye, was more likely to have been the driver or a passenger at the time of the accident.

[107] Neither expert could rely on vehicle inspection, scene photographs, information on restraint use, evidence of steering-wheel deformation or reliable eyewitness accounts of impact sequence. The factual substrate is limited to the documented injuries of the deceased and the plaintiff, the absence of airbags, the right-hand-drive configuration of the vehicle, and the rollover with ejection of all occupants.

[108] Dr Plaskett relied exclusively on objective, contemporaneously recorded facts, namely the post-mortem findings, EMS records, and clinical notes. He expressly refrained from speculating about unknown crash dynamics. His methodology focused on the constellation of injuries and well-recognised correlations in trauma literature.

[109] He identified three categories of injuries of significance. First, the combination of the sternal fracture, rib fractures, bilateral haemothoraces, and cardiac and lung contusions reflected a classical steering-wheel or chest-impact pattern. Second, the bilateral femur fractures were indicative of dashboard or steering-column loading. Third, the predominantly right-sided distribution of soft-tissue injuries was consistent with the anatomical adjacency of a right-front occupant to the A-pillar and window.

[110] His reasoning was supported throughout by recognised, peer-reviewed trauma literature, including the studies of Smith and Cummings (2002 and 2006), Newgard (2005), Curtin and colleagues (2007), and Parenteau and co-authors (1996), which specifically analyse injury-pattern correlations in motor-vehicle collisions and provide the scientific foundation for the conclusions he drew.

[111] These studies specifically evaluate the distinguishing features between driver and passenger injury patterns, including the recognised thoracic injury associations with steering-wheel impact; the significance of laterality markers observed in right-hand-drive vehicles; and the injury distributions typically found in older vehicles that were not equipped with airbags.

[112] He assessed the relevance of the deceased's pregnancy within accepted medical parameters, noting that uterine rupture is rare (occurring in less than 1%), that the absence of any placental findings in the post-mortem renders any inference of direct abdominal force speculative, and that the deceased's short stature would have positioned the steering wheel closer to her chest in a right-hand-drive vehicle. He therefore treated pregnancy as a contextual factor rather than a determinative one and avoided overstating its significance in the analysis.

[113] He candidly acknowledged the limits of what could be known (no scene reconstruction) and expressly confined his opinion to the only objective evidence available, namely the injury pattern. His report reflects no tendency toward advocacy. He did not alter or tailor his conclusions based on information extraneous to the medical record. His analysis remained within his professional expertise.

[114] Dr Bhagwan produced two reports. In his initial report, he placed the deceased in the front-left passenger position, but in his revised report he moved her to the right-rear position after receiving information that the deceased was 32 weeks pregnant and that she may have been seated in the right-rear seat. This revised conclusion rested on “new information” that did not emanate from proven evidence before the Court, and his reliance on such unestablished assumptions raises concerns, in terms of *PWC v NPC*, about the adequacy of the factual foundation underpinning his opinion and the extent to which his conclusions were influenced by information not established in evidence.

[115] Unlike Dr Plaskett, Dr Bhagwan relied on incomplete article extracts, non-peer-reviewed engineering documents, and literature dealing with airbag and seatbelt mechanics that extended beyond his core clinical trauma expertise, as well as foreign studies based on left-hand-drive vehicle data and articles confined to frontal impacts, restrained occupants, or narrowly defined crash-mechanics scenarios. Many of these materials were not applicable to the factual matrix of this case, which involved unrestrained occupants in an older vehicle without airbags, a rollover event with ejection, and a right-hand-drive configuration.

[116] His numeric probability tiers (“10%”, “60–70%”, “>90%”) were not based on a validated scoring system. No such model exists in peer-reviewed trauma literature. The absence of a recognised methodology diminishes the weight of these probabilistic assertions.

[117] He assigned pregnancy a significant weight as a “forensic differentiator”, reasoning that the absence of placental injury suggested a lack of

frontal abdominal impact. However, the post-mortem report did not record any placental examination, and the mere absence of documentation does not equate to the absence of injury. Moreover, pregnancy, whether in relation to the position of the uterus or the risk of placental disruption, cannot reliably be used to determine an occupant's seating position.

[118] Under cross-examination, Dr Bhagwan accepted that none of the deceased's injuries excluded the possibility that she had been the driver. He further accepted that drivers in older vehicles commonly sustain severe chest and thoracic injuries, and he acknowledged that a person of short stature would ordinarily sit closer to the steering wheel. He also agreed that front-seat occupants in older, unrestrained vehicles generally sustain more severe injuries than those seated in the rear. In addition, he accepted that rollover dynamics introduce complexity rather than certainty when interpreting injury patterns. Ultimately, he conceded that he could not exclude the possibility that the deceased was the driver.

[119] His analysis repeatedly relied on unproven assumptions concerning the accident mechanism, namely whether the impact was frontal, rear end, lateral, or related to rollover dynamics; together with assumptions about seating positions based on untested external information, and speculative reliance on pregnancy as a meaningful forensic indicator despite the absence of any placental data. He further proceeded on the basis of uncertainty regarding whether the occupants had been ejected or extracted. This approach is inconsistent with the principles articulated in *Linksfeld* and *JA obo DA*, which require expert reasoning to be grounded in objectively established and proven facts.

Assessment of the Expert Evidence

[120] Dr Plaskett's reasoning proceeds in a logically coherent manner. He begins with the objective injuries documented in the post-mortem and clinical records, relates those injuries to established biomechanical correlations, and from there draws a probabilistic inference regarding the most likely seating positions of the occupants.

[121] By contrast, Dr Bhagwan's reasoning is significantly qualified by the number of unknown variables, by his reliance on external assumptions, and by his use of literature not tailored to the particular circumstances of this case, including the age of the vehicle, its right-hand-drive configuration, and the absence of restraints.

[122] The plaintiff's expert consistently used peer-reviewed, medically accepted trauma literature. The defendant's expert relied on mixed-quality sources, some non-medical and many not applicable to this scenario.

[123] Dr Plaskett's opinion is grounded entirely in facts established through the post-mortem findings, whereas Dr Bhagwan's opinion relies in part on matters not proven in evidence, including an alleged seating position conveyed informally, unsubstantiated assumptions about the crash mechanism, and unverified inferences relating to pregnancy.

[124] The deceased sustained classic steering-wheel-type chest injuries, bilateral femur fractures consistent with dashboard loading, and a predominantly right-sided distribution of soft-tissue trauma correlating with the anatomical position of a right-front occupant adjacent to the A-pillar and window. Taken together, these features constitute objective markers that favour the plaintiff's version regarding the allocation of seating positions.

[125] Dr Plaskett avoided speculation on unknown dynamics. Dr Bhagwan repeatedly resorted to multiple hypothetical mechanisms (ejection, lateral compression, rear-end whiplash, jack-knife landing) without factual foundation.

[126] Having regard to the logical basis of each opinion, the extent to which each rests on proven facts, the applicability and reliability of the literature on which the experts relied, the internal consistency of their respective reasoning, and the degree of speculation each approach required, the Court is satisfied that Dr Plaskett's evidence is to be preferred. His opinion is methodologically sound,

scientifically defensible, based on peer-reviewed trauma literature relevant to the circumstances of this case, and grounded in the only objective evidence available.

[127] Conversely, the defendant's expert evidence is significantly qualified, relies on unproven assumptions, invokes probability estimates unsupported by any known scientific model, and is based on literature not applicable to the factual matrix. Consequently, on a balance of probabilities, the expert evidence supports the conclusion that the deceased most likely occupied the right-front driver position, and the plaintiff the right-rear passenger position.

Credibility, Reliability and the Stellenbosch test

[128] The evaluation of credibility and reliability is undertaken in accordance with the well-established approach articulated in *Stellenbosch Farmers' Winery (supra)*. In that assessment, the Court is required to consider, first, the credibility of the witness, which entails an examination of the witness's candour and demeanour, the internal consistency of their evidence, the presence or absence of bias, and whether their version was properly challenged. Secondly, the Court must assess the reliability of the evidence, having regard to the witness's opportunity for observation, the accuracy of their recollection, and the possible impact of delay or traumatic experience. Finally, the Court must consider the probabilities, including whether the version advanced accords with the objective facts, common sense, and the inherent likelihood of the events described. Where material evidence is not challenged, the *SARFU* rule applies: such evidence must generally be accepted unless it is inherently improbable.

Assessment of Factual Evidence

[129] Although the defendant pleaded that the plaintiff was the driver of the insured vehicle at the time of the collision, it is of significance that the plaintiff's evidence that she was unable to drive in 2012, that she was not in possession of either a learner's licence or a driver's licence at the time, and that she had never driven a motor vehicle prior to 2023, was not meaningfully challenged in cross-examination. These facts were clearly placed on record, were directly relevant to the disputed issue of driver identity and constituted an important factual foundation

for the plaintiff's version. The defendant's failure to test or contradict this evidence is a consideration to which weight must be given in assessing its reliability and in evaluating the probabilities, in accordance with the principle articulated in *President of the Republic of South Africa v SARFU*.

[130] The defendant placed considerable emphasis on alleged contradictions in the plaintiff's earlier affidavit, hospital records, and certain contemporaneous documents in which the plaintiff was recorded as having been the driver of the vehicle. These inconsistencies were not ignored. They were assessed in the context in which such records were generated, including the plaintiff's state of consciousness, the acute trauma following the accident, and the absence of any evidence that the plaintiff personally furnished the information recorded therein. Importantly, none of these documentary entries were corroborated by reliable direct evidence, nor were they put to the plaintiff in a manner that meaningfully displaced her consistent viva voce testimony. When evaluated against the totality of the evidence, including unchallenged testimony, independent eyewitness accounts, and objective injury pattern analysis, such contradictions do not undermine the reliability of the plaintiff's version.

[131] The plaintiff's further evidence that Ms Busisiwe Nkosinaye was the driver when the vehicles departed from Philippi and again when they left Somerset West must be assessed in the light of the totality of the evidence, including such corroboration as exists, the inherent probabilities, and the evaluation of the competing versions.

[132] Her version was corroborated by both familial witnesses and independent eyewitnesses with no financial interest in the outcome on all material points such as the seating positions, the identity of the driver, and the sequence of events. She had a clear and direct vantage point for matters within her knowledge, and her inability to recall peripheral details (owing to loss of consciousness) enhances rather than detracts from reliability.

[133] Mr Drame was a calm, measured witness who readily corrected misunderstandings. He maintained, without hesitation, that the plaintiff could not drive in 2012, and only began learning in 2023 under his supervision. This evidence was never contradicted or challenged. He had intimate personal knowledge of the plaintiff's driving history. His evidence was internally consistent and aligned with the plaintiff's version and her licence documentation.

[134] Ms Sitayo was a satisfactory witness. She consistently described seeing the plaintiff seated in the right-rear position on both the outward and return journeys, and seeing Ms Busisiwe Nkosinaye driving. She had no motive to fabricate.

[135] She made a minor concession regarding an earlier affidavit where she used stronger language about a truck impact. She explained the inconsistency as an error in recollection in a fast-moving event. Her candour enhances her credibility. Not every inconsistency necessarily detracts from credibility; the nature and materiality of the discrepancy must be assessed in context.

[136] She was travelling directly behind the Ford in a microbus. Her vantage point was sound, and her observations were plausible given the close following distance. Her evidence dovetails with the host, Ms Asanda Matshele.

[137] Ms Asanda Matshele was an independent witness with no financial interest. She consistently identified Ms Busisiwe Nkosinaye as the driver when the vehicles departed Somerset West, and the plaintiff as the right-rear passenger. Her evidence was limited to what she saw from the microbus and she did not purport to testify about matters beyond her observation, an indicator of a careful and reliable witness.

[138] Ms Mbengashe's evidence was characterised by numerous material contradictions, both internally and when measured against external evidence. These included inconsistencies with the plaintiff's witnesses regarding the point of

departure (car wash versus Philippi), the sequence of the route travelled, the seating arrangements, the lane in which the vehicle was travelling, the cause of the collision (a tyre burst as opposed to truck encroachment), the activities allegedly undertaken in Somerset West, as well as contradictions with her own statement made in 2015, in which she did not identify the plaintiff as the driver.

[139] She made her statement three years after the accident, on the same date, before the same commissioner, in the same handwriting as Ms Nomveliso Gxamsa's, raising concerns about coordination. She acknowledged being close friends with Ms Busisiwe Nkosinaye and Ms Nomveliso Gxamsa and was directly involved in assisting the family with potential RAF claims. Her memory was impaired by trauma, multiple surgeries, and a lengthy hospitalisation. Delay in making her statement and her alignment with the deceased's family diminish reliability.

[140] Ms Gxamsa's evidence was emotionally charged and exhibited strong protectiveness over Ms Busisiwe Nkosinaye's reputation. She expressly stated she felt it was "speaking badly" about Ms Busisiwe Nkosinaye to say she was driving. This degree of emotional involvement bears on the objectivity of her evidence. She disputed the date of her own statement, despite her signature appearing under the 2015 date and despite three linked statements appearing together. Her insistence that the police date was "wrong" is improbable.

[141] Her version was inconsistent when measured against the evidence of independent witnesses. These inconsistencies related, inter alia, to the point of departure, the sequence of movements, whether the Ford and the microbus departed Somerset West together, the seating arrangements, and the account she provided to the police. Her evidence was materially influenced by a number of factors, including her close friendship with the deceased and Ms Aphiwe Mbengashe, her active involvement in assisting the family with Road Accident Fund enquiries, the three-year delay before providing a written statement, and the trauma and emotional distress associated with the events. In addition, her recollection appeared to have been reconstructed over an extended period. Collectively, these considerations substantially undermine the reliability of her evidence.

[142] It is necessary to record that the evidence of Ms Gxamsa was received by way of virtual proceedings. This followed difficulties encountered by the Defendant in securing the attendance of the witness and an interpreter, despite prior directions of the Court. The proceedings on 2 and 3 October 2025 were managed with appropriate safeguards, including confirmation that the witness was alone, under oath, able to hear the proceedings clearly, and afforded adequate breaks. The Court is satisfied that the mode of hearing did not occasion any unfairness or prejudice to either party. In assessing the evidence, the Court remained mindful of the circumstances under which the testimony was given and is satisfied that this does not detract from the reliability or credibility findings ultimately made.

[143] Captain April was a neutral witness with no involvement in the accident itself. His evidence was straightforward and uncontradicted regarding ownership of the vehicle. He could not assist the Court on critical issues such as who drove, who sat where, or how the accident happened. His evidence was therefore of limited relevance.

[144] Dr Plaskett remained within his expertise, relied on peer-reviewed trauma literature, and limited his conclusions to objective injury patterns. His methodology was transparent and consistent.

[145] Dr Bhagwan shifted conclusions between reports based on unproven factual assumptions, relied on incomplete or non-medical literature, and used a non-validated probability system. His evidence was qualified and speculative.

[146] The evidence of the plaintiff and her witnesses was consistent, mutually corroborative, and reliable on all material issues relevant to the identity of the driver. They were aligned on the central issues, namely that the plaintiff was seated in the rear of the vehicle and that Ms Busisiwe Nkosinaye was the driver.

[147] The defendant's factual witnesses displayed strikingly aligned interests, delayed statements with suggestive similarities, material contradictions, and strong emotional or familial motivations.

[148] The Court is satisfied that the plaintiff and her witnesses are credible and reliable, whereas the defendant's factual witnesses are materially unreliable, and their versions fall to be rejected where they conflict with the plaintiff's case.

[149] Ms Aphiwe Mbengashe and Ms Nomveliso Gxamsa made statements three years after the accident, in identical handwriting, before the same commissioner. They were involved in attempts to lodge claims on behalf of the deceased's family. Delay, trauma, and vested interests weaken their reliability. The statements bear features consistent with reconstruction rather than contemporaneous recollection. They carry significantly reduced weight.

The Inherent Probabilities

[150] Having evaluated the credibility and reliability of the witnesses, the Court must now consider the inherent probabilities, viewed holistically and in light of the objective evidence. In cases involving mutually destructive versions, probabilities often provide the decisive factor. The question is not whether each piece of evidence is perfect, but which version is more consonant with common sense, objective indicators, and the proven facts.

[151] Although the defendant contended that the plaintiff was the driver of the vehicle, the plaintiff's evidence that she could not drive a motor vehicle in 2012, did not hold a learner's or driver's licence at the time, and only began learning to drive in 2023, was not challenged in cross-examination. This evidence therefore stands uncontroverted and falls to be accepted, in accordance with the principle articulated in *SARFU* unless it is inherently improbable.

[152] It is accordingly inherently improbable that she would have been entrusted with the task of transporting three strangers; that she would have

voluntarily driven a vehicle despite lacking the ability to do so; or that those familiar with her circumstances, including her cousin Ms Asanda Matshele, would have permitted her to drive. The plaintiff, her sister, and the host of the gathering all gave consistent evidence that, on both legs of the journey, the plaintiff was seated in the right rear seat and Ms Busisiwe Nkosingaye was the driver.

[153] The defendant's alternative version depends on the acceptance of a series of inherent improbabilities, including that a person who was only a first-time acquaintance, the plaintiff, would have driven the vehicle while more experienced drivers remained passengers; that Ms Busisiwe Nkosingaye, who was heavily pregnant and known to be a driver, did not drive at any stage by reason of her pregnancy, yet was able to occupy the right rear seat throughout the day; and that three separate women, namely the occupants of the microbus, each mis-observed the seating arrangements on two occasions, both at Philippi and in Somerset West.

[154] The injuries sustained by the deceased are characteristic of those typically associated with a front-seat occupant in a right-hand-drive vehicle. They include a sternal fracture, bilateral rib fractures, bilateral femur fractures, and extensive right-sided soft-tissue trauma.

[155] By contrast, the plaintiff's injuries (minor ankle injury and soft-tissue trauma) are strongly consistent with a rear-seat passenger. No driver specific injuries were recorded for her. While the defendant's witnesses emphasised rollover complexity, they accepted that no injury sustained by the deceased excluded her from having driven, and several supported that probability.

[156] The plaintiff's version was consistent from the outset. The defendant's supportive statements were made more than three years later, on the same day, before the same commissioner, and in materially similar handwriting. They were produced in the context of RAF enquiries, a circumstance naturally raising questions about reconstruction. Statements made contemporaneously or close in time to an event, such as the plaintiff's family's observations and the objective hospital and scene records, carry substantially more weight than delayed accounts.

[157] The plaintiff's witnesses had no financial interest or alignment in attributing fault to the deceased. The defendant's factual witnesses, all close friends of the deceased and involved in assisting her family with potential RAF claims, had an inherent emotional alignment which increases the probability of post-event reconstruction favouring a version that would not prejudice the deceased. The plaintiff, a stranger to these women, had no discernible motive to misrepresent who drove.

[158] The plaintiff was unconscious and unable to communicate at the scene of the incident. It is also noteworthy that the deceased was gravely injured. Neither could meaningfully influence the immediate narrative of "who drove." The only occupants capable of narrative reconstruction were those who were least injured, the defendant's witnesses, all sharing a close relationship with the deceased and involved in later RAF enquiries. This reduces the inherent probability of their independent recollection.

[159] When all the objective indicators are considered, including driving competence, the analysis of injury patterns, the seating observations of three independent witnesses, the plaintiff's lifelong inability to drive, the deceased's established driving ability, and the inherent improbabilities underpinning the defendant's version, the probabilities overwhelmingly favour the plaintiff's case.

[160] In my view, it is accordingly far more probable that Ms Busisiwe Nkosinaye was the driver; that the plaintiff occupied the right rear passenger seat, and that the vehicle overturned as a result of negligent loss of control. This evaluation is undertaken on the basis that, where versions are mutually destructive, the plaintiff was enjoined to satisfy the Court that her version is more probable than that advanced by the defendant.

[161] Having summarised the evidence and examined the legal principles applicable to the resolution of factual disputes, it is necessary to evaluate the

evidence holistically. This evaluation must consider the inherent probabilities, the quality of the respective witnesses, the reliability of their versions, the objective indicators furnished by the medical and biomechanical evidence, and the effect of procedural deficiencies in the defendant's conduct of its case.

[162] The plaintiff's version was consistent in all material respects. From the outset, she maintained that she was seated in the right rear of the vehicle and that Ms Busisiwe Nkosiwaye was the driver. This account was corroborated by multiple sources, including her sister, Ms Sitayo, who directly observed the seating arrangements both in Philippi and in Somerset West; Ms Matshele, an independent witness with no financial interest in the outcome of the litigation; and the plaintiff's husband, who confirmed her lifelong inability to drive. Further corroboration is provided by the objective injury patterns, which are consistent with a rear-seat passenger and inconsistent with those typically sustained by a driver.

[163] The plaintiff withstood extensive cross-examination without contradiction on any central aspect of her version. Notably, the defendant did not directly challenge her evidence that she was unable to drive in 2012, that she held neither a learner's nor a driver's licence, that she had never driven a motor vehicle at the relevant time, or that Ms Busisiwe Nkosiwaye drove the vehicle on both legs of the journey. In accordance with the principle articulated in *SARFU*, such unchallenged evidence may properly be accepted.

[164] The plaintiff's credibility was further enhanced by the candour with which she addressed an affidavit she could not recall, her frank concessions regarding gaps in memory resulting from periods of unconsciousness, and her consistency on matters about which she could reasonably be expected to be certain, namely that she was a passenger and that she could not physically have been the driver. By contrast, the defendant's version is marked by internal contradictions, unpleaded allegations, improbabilities, and evidence that demonstrates signs of post-event reconstruction.

[165] Both key witnesses Ms Aphiwe Mbengashe and Ms Nomveliso Gxamsa only provided statements three years after the accident. Those statements were made on the same date, in identical handwriting, before the same commissioner of oaths, and in the context of assisting the deceased's family in pursuing claims against the Road Accident Fund. These circumstances cast serious doubt on the independence and reliability of their recollections.

[166] Their respective versions are marked by material contradictions. They conflict with one another, with their own affidavits, with the pleaded case, with the objective medical evidence, and with the testimony of neutral witnesses. The inconsistencies in their evidence extended to the route allegedly taken, the point of departure, who was collected and where, the lane in which the Ford was travelling, who was conscious at the scene, the seating arrangements, and whether a truck featured in the incident at all. These discrepancies are not minor or peripheral. They strike at the core of the reliability of their evidence.

[167] Sergeant Fortuin's evidence was essentially neutral. She was unable to explain how the plaintiff came to be recorded as the driver in the OAR, nor could she account for why the deceased, who sustained fatal injuries, was described therein as having been only "slightly injured". In these circumstances, the OAR is manifestly unreliable and cannot be accorded any evidential weight. Nothing in the defendant's version explains the deceased's driver-specific injuries, nor why the plaintiff, alleged to have been the driver, sustained only a minor ankle injury. Nor does it explain why two independent women in the microbus mistakenly observed the plaintiff in the rear seat if she had in fact been driving.

[168] Dr Bhagwan's evidence suffered from methodological inconsistencies, reliance on non-scientific sources, the use of an inadmissible "probability scoring system", and a material shift in his conclusions that was not prompted by new scientific data but rather by factual assertions provided by the Road Accident Fund. His concessions under cross-examination, particularly that none of the deceased's injuries were inconsistent with a driver position, were telling.

[169] On the totality of the evidence, Dr Plaskett's opinions are overwhelmingly more persuasive, coherent and supported by objective indicators. They align with the reliable eyewitness evidence and the inherent probabilities.

[170] The defendant's case is further weakened by its reliance on facts never pleaded and never put to the plaintiff's witnesses. This violates foundational procedural principles and eliminates any possibility of those alleged facts being accepted. Delayed statements, especially those bearing the hallmarks of coordination and produced in the context of a vested interest to shift liability, must be given reduced weight.

[171] At trial, the defendant sought to advance several factual allegations that did not form part of its pleaded case, including an alleged stop at Ms Gxamsa's home, departure from a car wash, and prior driving experience on the part of the plaintiff. These allegations were neither pleaded nor put to the plaintiff or her witnesses in cross-examination. In accordance with settled procedural principles, they cannot be relied upon in determining the issues in dispute.

Findings on Driver Identity and Negligence

[172] For the reasons already set out when dealing with credibility, reliability, and probabilities, the Court finds that the plaintiff has proved, on a balance of probabilities, that she was not the driver of the Ford Ikon at the time of the collision. The Court accepts the consistent and mutually corroborative evidence of the plaintiff, Ms Sitayo, and Ms Matshele that the deceased, Ms Busisiwe Nkosinaye, was the driver throughout the day.

[173] The defendant's version that the plaintiff was the driver is improbable and unsupported by objective evidence. It is incompatible with (i) the uncontested fact that the plaintiff could not drive in 2012, (ii) the objective injury patterns, and (iii) the contemporaneous and consistent observations of witnesses in the microbus. The defendant's version depended largely on delayed statements, internal contradictions, and testimony materially undermined by emotional alignment, post-event reconstruction, and objective inconsistency.

[174] Having determined that the deceased was the driver, the remaining issue is whether the plaintiff has established negligence on the part of the deceased. In claims of this nature, even minimal negligence suffices, and the plaintiff must show that the insured driver failed to exercise the degree of care expected of a reasonable driver in the circumstances.

[175] The Court accepts the plaintiff's evidence that the vehicle lost control while travelling along the N2, veered to the right, and overturned multiple times, resulting in the ejection of all occupants. In the absence of any mechanical defect or plausible explanation consistent with reasonable care, loss of control of a vehicle culminating in a rollover commonly raises an inference of negligence, particularly where all occupants were ejected, a scenario strongly associated with excessive speed, improper steering input, or inadequate vehicle control.

[176] No credible evidence was presented to establish a sudden, unavoidable, external cause of the rollover. The defendant's suggestion of a tyre burst rests on unreliable, inconsistent testimony and is unsupported by independent evidence. The probabilities favour the conclusion that the deceased failed to maintain proper control of the vehicle.

[177] Accordingly, the Court finds that the deceased was negligent in failing to keep the Ford Ikon under proper control and that such negligence caused the rollover and consequent injuries to the plaintiff.

[178] Even accepting the defendant's contention that the collision was a single-vehicle rollover accident, the unexplained loss of control of the vehicle, resulting in a rollover with the ejection of all occupants, gives rise to a permissible and compelling inference of negligence on the part of the driver. The defendant is therefore 100% liable for the plaintiff's proven or agreed damages.

Causation and Liability

[179] In order to succeed with her claim, the Plaintiff is required to establish, on a balance of probabilities, that she was a passenger in the insured vehicle, that the insured driver was negligent, that such negligence caused the collision, and that she sustained injuries as a result of that negligence.

[180] The first requirement, namely that the plaintiff was a passenger, has been satisfactorily proved. The defendant did not challenge the plaintiff's evidence that she was unable to drive in 2012 and that she did not possess either a learner's or a driver's licence at the time. This evidence therefore stands uncontested and, in accordance with the principle in *SARFU*, may be accepted. It is further corroborated by the testimony of two independent eyewitnesses and supported by the objective medical evidence relating to the plaintiff's injuries.

[181] The issue of negligence must be determined with reference to the probabilities. Established authority, recognises that where a vehicle loses control and overturns in the absence of any credible external cause, an inference of negligence is justified. This inference is strengthened in circumstances where occupants were unrestrained and ejected from the vehicle, an outcome commonly associated with excessive speed or a failure to maintain proper control.

[182] Although the defendant bore no onus to prove an alternative version, the plaintiff's case must be assessed against the totality of the evidence. The suggestion that a tyre burst caused the rollover is inadequately substantiated and stems from delayed, inconsistent, and contradictory accounts. In evaluating the quality of both the factual and expert evidence, the Court is entitled to prefer the version that is more coherent, objectively supported, and medically consistent. On the evidence as a whole, the plaintiff's explanation that the rollover resulted from negligent driving is more probable than the proposition that it was caused by an unavoidable mechanical failure.

[183] Consequently, I am satisfied that both factual and legal causation have been established. But for the deceased's negligent loss of control of the vehicle, the

rollover would not have occurred, and the occupants would not have been ejected. The harm that ensued falls squarely within the risk contemplated by the Road Accident Fund Act. In these circumstances, the negligent loss of control of the vehicle by the deceased was both a factual and legal cause of the plaintiff's injuries, as the rollover and consequent ejection were the direct and foreseeable consequences of that negligence.

[184] As regards damages, the contemporaneous clinical records confirm that the plaintiff sustained orthopaedic and soft tissue injuries consistent with those of a rear seat passenger who was ejected during a rollover accident. These injuries were caused directly by the negligent driving of the insured vehicle.

Conclusion

[185] I am therefore satisfied that the Plaintiff has discharged the burden of proof on a preponderance of the probabilities that she was a passenger and that Ms Busisiwe Nkosinaye was the driver for reasons already provided. In terms of Section 17 (1) (a) and (b) of the Road Accident Fund Act, Act 56 of 1996 as amended, the RAF has an obligation to compensate a plaintiff (third party) for loss or damages as a result of injuries sustained due to a motor vehicle accident. It is trite that the plaintiff is therefore required to prove 1% negligence on the part of the driver to succeed with her claim as articulated in *Prins v Road Accident Fund*,²¹ where Mojaelo DJP as he then was stated as follows:

‘It is common cause that a passenger needs only to prove the proverbial 1% negligence on the part of an insured driver in order to get 100 % of damages that he is entitled to recover from the Fund.’²²

[186] For all the reasons previously articulated, the plaintiff has overwhelmingly met the threshold for the court to conclude that the driver of the vehicle was negligent in causing the accident. It follows that all the statutory

²¹ (21261/08) [2013] ZAGPJHC 106.

²² See also *Mashego v Road Accident Fund* [2023] ZAGPPHC 296; 64934/2019 (4 May 2023) at paras 16 – 18 & 20.

requirements for liability have been met, and the defendant is accordingly liable to compensate the plaintiff for 100% of her proven damages.

Costs

[187] The question of costs falls to be determined in the exercise of the Court's discretion. The plaintiff has been substantially successful on the merits and is entitled to her costs.

[188] The matter was protracted and involved the resolution of sharply conflicting factual versions, extensive credibility findings, and the evaluation of expert medical evidence. It was accordingly more demanding than an ordinary personal injury trial. At the same time, the issues were neither novel nor of such an exceptional nature as to warrant a deviation to the highest costs scale. The matter involved the application of settled legal principles to a complex factual matrix.

[189] Having regard to the nature and complexity of the proceedings, the manner in which the case was conducted, and considerations of proportionality, I am satisfied that a costs order on the party-and-party scale is appropriate, and for purposes of Rule 67A read with Rule 69, such costs shall be on Scale B. This scale adequately reflects the complexity of the matter without overstating it.

[190] There is no basis for depriving the plaintiff of any portion of her costs, nor for awarding costs on any higher scale.

Order

[191] In the result:

- a) The defendant is declared liable to compensate the plaintiff for 100% of her proven or agreed damages arising from the motor vehicle collision which occurred on 28 January 2012 on the N2 near Macassar.
- b) The defendant is ordered to pay the plaintiff's costs of suit to date, such costs to be taxed or agreed on the party-and-party scale, on Scale B.
- c) The issue of quantum is postponed sine die.

P D ANDREWS AJ

Acting Judge of the High Court

APPEARANCES:

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This judgment was handed down electronically by circulation to the parties' representatives by email.