



IN THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION, MIDDELBURG (LOCAL SEAT)

CASE NO. A41/2025

COURT A QUO CASE NO. 2760/2020

(1) REPORTABLE: **NO/YES**

(2) OF INTEREST TO OTHER JUDGES: **NO/YES**

(3) REVISED

DATE **30/04/2026**

SIGNATURE.

In the matter between:

DUDUZILE JOHANNA SHONGWE

APPELLANT

And

ROAD ACCIDENT FUND

RESPONDENT

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time of hand-down is deemed to be 30 April 2026

JUDGMENT

This appeal was before the full court of this Division and this is the majority judgment, our brother Phahlamohlaka J having decided to write a dissenting judgment that appears hereunder.

Bam, AJ, et Mankge J concurring (Phahlamohlaka J dissenting)

- [1] On 9 December 2024, the court *a quo* dismissed the appellant's action against the Respondent with costs on a party and party scale. The appellant had instituted a delictual damages claim against the Road Accident Fund ("the RAF") in terms of Section 17(1) of the Road Accident Fund Act 56 of 1996; which provides for compensation to a claimant injured in a motor vehicle accident caused by the negligence of the driver or owner thereof. Separation of issues in terms of Rule 33(4) was granted and only the merits were to be adjudicated.
- [2] The court *a quo* dismissed the action, based on its finding that the appellant had failed to prove negligence on the part of the insured driver and thus no liability could attach to the RAF. The court found that she had placed three different versions before it regarding how the accident happened; which made it difficult to reconcile her testimony with other available evidence such as the sketch on the accident report and the physical damage to her own vehicle. The Appeal serves before this full court with the leave of the court *a quo*.
- [3] The crux of the appellant's argument is that the court *a quo* erred and misdirected itself in finding that the appellant failed to prove negligence and that the damage to her vehicle was inconsistent with the alleged rear-ending impact described by the appellant. Her case was premised on the maxim *res ipsa loquitur*
- [4] In the heads of argument, the plaintiff's counsel, Advocate Tshavhungwe, submits that the appellant's testimony of how the accident happened which is also corroborated in her section 19(f) affidavit as well as by the accident report, is uncontroverted. The respondent had led no evidence and did not

challenge the appellant's version in cross-examination. In view of this, the court ought to have accepted the appellant's evidence as correct and ruled 100 percent in her favour on the merits.

THE RECORD

- [5] On page 2 of the accident report,¹ there is a sketch and a brief description of the accident. The appellant is described therein as Driver B while the insured driver is Driver A, and their vehicles depicted on the sketch as "B" and "A" respectively. The narrative reads:

"Driver A alleges that he was driving straight out of town, the traffic light was green for him. Then Driver B make a turn in front of him.

Driver B alleges that she was turning on her left-hand side, then she heard a big bag (bang). Her vehicle span (spun) around.

Both vehicles got damaged."

- [6] The Particulars of Claim in paragraph 4 describe the accident as follows:

"On or about the 24th May 2018 at or near CNR Church and Camden Lane road Ermelo, the plaintiff was a driver of a motor vehicle with registration number and letters D[...] 3[...] M[...] when turning to the left collided with motor vehicle with registration letters and numbers J[...] 3[...] M[...] there and then driven by Mazibuko Progress Vusi."

- [7] The appellant also signed a warning statement in connection with an investigation concerning a suspected offence of Reckless Driving under case reference: *Ermelo Case No. 313/05/2018*. She chose to make a statement after being advised of her rights. According to the statement, on the date of the accident she was parked next to the road and when she decided to rejoin the road *"I checked on the mirror for coming traffic in the back and front. I discovered that there was no vehicle coming at the back. I drove towards the road. Suddenly I hear a big bang on my vehicle. My vehicle started spinning around the road for many time until it stop in the road..... and my vehicle was damage around on the sides....."* This statement is the Exhibit B which in

¹ Caselines 078-14

paragraph 6 of the judgment, the court *a quo* described as “her police warning statement for reckless and negligent driving charges that were under investigation at the time.” She was asked by her counsel to confirm whether the contents of the statement were true and correct, and she said “yes”. Further that she stated that “*suddenly I hear a big bang on my vehicle.*”² She was thus examined on the contents of the accident report and the warning statement which were both subsequently admitted into evidence by the court *a quo*.

- [8] When Advocate Tshavhungwe asked the appellant to describe how the accident happened during examination, she testified that she had pulled off the road to change her shoes as the ones she was wearing were making her uncomfortable. She continued:

“Then after doing that My Lord, for me to move back to the road, I checked on my mirrors and then it was safe. It is then I moved back to the road. So just when I was driving, I heard big bang on the car from behind. So after they..... the car was spinning around on the road several times My Lord. And it also came to a standstill right in the middle of the road”.

- [9] She described the road surface as tarred; the road itself straight and flat with clear signage. According to her observation it is a busy road. But she could see clearly ahead for two blocks. She remembered having made a statement to the police, the contents of which she also confirmed.

THE JUDGMENT

- [10] The court *a quo* in its judgment of the main action, made the following findings:

“[27] It is incorrect that the plaintiff’s evidence was consistent, as she had three different versions that were all under oath; they are not corroborated and the discrepancy was never cleared. Although she alleged that the road had one lane going in each direction at the point of impact, the sketch plan in the accident report does not support her evidence, as it reflected that the road

² See Case lines pages 078-134 to 136

had two lanes in the direction she was travelling, and her vehicle came to a standstill in the second lane on the left. In her own version, the plaintiff has contributed to the cause of the accident, if not the sole cause.

“[28] The onus is on the plaintiff to prove negligence on the part of the insured driver. In her version in court, she collided with a motor vehicle that was travelling in the same direction as her, whilst in the process of rejoining the traffic. Surely, she had a duty to first ensure that it was safe to do so, which was not the case, as she could not explain where the vehicle came from. This version is inconsistent with the damage on her vehicle, which is on the side, not at the back. The only logical conclusion is that she did not keep a proper lookout to ensure that it was safe to rejoin the flow of traffic.” (emphasis added).

[11] It is noteworthy that although the court had hinted at a possible contributory negligence, in the end it was convinced that the appellant had been solely responsible for the accident, hence its dismissal of the claim.

[12] In its judgment on the application for leave to appeal, the court *a quo* reiterated its stance and the correctness of its findings which resulted in the dismissal of the appellant’s claim. In paragraph 9 of that judgment, it held that:

“The applicant failed to put before the court a case that is consistent with her pleadings and failed to give any reason for such an action. It is an established principle of our law that party stands or falls by its pleadings, which is not the case here”.

[13] However, in paragraph 14, the court *a quo* mentions the fact that it failed to follow the four steps in *M S v Road Accident Fund [2019] 3 A11 SA 474(SCA)* and that this justified the granting of leave to appeal. The court’s concession is however, even then, made begrudgingly because it states that the matter had been “sufficiently considered”.

ARGUMENT

- [14] In his heads of argument, Mr Tshavhungwe maintained that in the absence of any evidence to contradict the appellant's version, or of an alternative explanation from the defendant, the court should have accepted the appellant's evidence. He insists that the appellant's vehicle was hit from behind (rear-ended) by the insured vehicle and thus *res ipsa loquitur*. He, however, does not address the question raised by the court regarding the reported damage on the body of the appellant's vehicle, namely the left rear, right front and right mid-front. It was not the appellant's case that there were multiple impacts between the vehicles or that her vehicle hit anything else while spinning. She testified about one bang which caused her vehicle to spin several times. That is the reason why the court rejected the application of the *res ipsa loquitur* principle, correctly so in my view.
- [15] The respondent's pleaded case, at the outset, is that the appellant was solely negligent for the accident. However, as is normally the practice, it also pleaded contributory negligence, and "sudden emergency" in the alternative. Amongst other aspects of negligence pleaded is that the appellant failed to keep a proper lookout and to take adequate steps to avoid the accident through the exercise of reasonable care and diligence.
- [16] In his heads of argument, counsel for the respondent, Advocate Magagula, notes that the appellant, in her section 19(f) affidavit, did not mention that her vehicle was rear-ended. She says that she just heard a big bang when she was turning left. This corroborates her version in the accident report that she was turning left. The statement of the insured driver also mentions that she turned in front of his vehicle. These versions differ with her warning statement to the police as well as her testimony before court. Counsel submitted that the appellant's versions were mutually exclusive, irreconcilable, and ought to be rejected.
- [17] Section 17(1)(a) of the Superior Court Act No. 10 of 2013 provides that:
- (1) *Leave to appeal may only be given where the judge or judges concerned are of the opinion that:-*
- (a) (i) *the appeal would have a reasonable prospect of success; or*

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;

[18] The issue for determination before the court *a quo* was that of merits as they pertain to liability. It was whether the insured driver was negligent and if so, whether his negligence caused the accident. In the case of *MEC for Health, Gauteng v de Lange [2024] ZASCA 38*, the court clarified the concept of “merits” as it applies to negligence and to causation. In paragraph 14 the court stated that:

“The difficulty arose in this matter because the parties and trial court did not observe the cautionary words of Nugent JA in *Denel*. He explained why that was the case in *Bernert*: ‘*In some cases it might be appropriate to order the separation of the merits and the quantum of the claim. But to use that terminology when the causative link between the wrongful act and the damage is a contested element of the claim, as it was in this case, is bound to create uncertainty.*’ That is clearly what happened in this matter.”

[19] The court continues in paragraph 15 to say:

“In summary, the ‘liability’ determination was restricted to establishing if the defendant’s negligence caused the death itself. It did not extend to causation of the various damages allegedly flowing from that death, such as loss of support, medical costs, or emotional trauma.” (own emphasis)

[20] I cite the above case in a bid to demonstrate the error made by the court *a quo*, which despite a clear and well-reasoned finding on liability, misdirected itself by referring to issues pertaining to causation. The court in *M S v Road Accident Fund* supra, per Fischer J, stated that the enquiry into delictual claims against the RAF should ideally follow a four-step inquiry:

1. Did the negligence of the third-party driver cause the accident?
2. Did the plaintiff sustain the pleaded injuries in the accident?
3. How have these proven injuries affected the plaintiff?

4. How should the plaintiff be remunerated?

- [21] The learned Judge continued to explain that the first step is concerned with the establishment of negligence, that is, finding out who is to blame for the accident. At this stage it might be that both the insured driver and the claimant are to blame in differing degrees; hence a finding of contributory negligence might result. The other steps are concerned with causation – proof of injuries, effect of injuries, and compensation based on that effect. The second and third steps relate to legal causation which, once proven, will lead to the fourth step regarding compensation.
- [22] The appellant's argument that the court *a quo* failed to apply the four-step inquiry therefore is to be rejected. This is for the simple reason that on the date of trial, it was made clear to the court that the issue to be adjudicated was the one pertaining to liability, and that was the only issue on which evidence was presented before court.
- [23] In the appellant's own words, she was turning left or joining the road when "suddenly" she heard a big bang as her vehicle was hit. Irrespective of whether her vehicle was rear-ended or side-swept, or even T-boned, the fact that the collision happened as soon as she joined the road or executed the left turn, is indicative of the fact that she did not check for traffic before entering the lane or turning. She struggled to give an estimation of how long or how far she had been inside the road when the collision occurred, telling the court that she is not good with estimations. It is highly probable that she was in fact turning left because this is what she allegedly told the police officer who completed the accident report at a time when the incident was still fresh in her mind. That a criminal investigation was instituted concerning her driving lends credence to the respondent's argument that she was suspected of having caused the accident. Secondly, the fact that she was not charged with or convicted of reckless driving at the end of the investigation is neither here nor there.
- [24] In conclusion, the appellant has failed to satisfy this court that the court *a quo* erred or misdirected itself in dealing with the evidence concerning liability. The principle of *res ipsa loquitur*, the crux of which is circumstantial inference,

does not mean that rear-ending another vehicle is always the fault of the rear driver. There are key exceptions such as sudden and unexpected stopping by the front driver, chain reaction crashes, malfunctioning brake lights or indicators, hazardous road conditions or obstructions, extreme weather conditions, and front driver's reckless or illegal actions. [(See *RAF v Mehlomakulu 2009 (5) SA 390 (E)*].

[25] Whether the appellant was joining the road or making a left turn, she failed to keep a proper lookout, and her statements that she checked her mirrors before venturing into the road appear to be an afterthought. As the court *a quo* noted, her story appeared to change as she went along. In response to my Sister Mankge J's observation regarding the inconsistencies between the contents of her section 19(f) affidavit and the appellant's testimony in court, Mr Tshavhungwe insisted that whether his client was turning left or joining the road is not relevant as she has premised her case on the principle of *res ipsa loquitur*.

[25] In addressing Mr Tshavhungwe's contention regarding the absence of evidence from the defendant, it is my considered view that the appellant, on her own, failed to place credible evidence before the court *a quo* and thus failed to discharge the onus resting upon her to prove her case on a balance of probabilities. Even if the contents of the accident report and the warning statement were to be ignored, as her counsel now says they do not constitute evidence, the appellant's own evidence given under oath points to her negligence, making it unnecessary for the defendant to give any contradicting evidence or explanation under the circumstances. Thus, even if this case was heard in default of the respondent's appearance, it is my considered view that the court would have made the same findings, hence I believe the order is correct and should not be interfered with by this court. The appeal cannot succeed.

COSTS

[26] When it comes to the issue of costs, this court is aware that the judgment of the court *a quo*, when dismissing the appellant's claim, included a costs order.

It is my considered view that the application for leave to appeal should have been refused considering the court *a quo*'s findings. The dismissal of this appeal means that the order of the court *a quo* takes effect and I do not believe it will be in the interest of justice for the appellant to be further mulcted with costs.

[27] In the result, the following order is made:

1. The appeal is dismissed.
2. There is no order as to costs.

L J BAM
ACTING JUDGE OF THE HIGH COURT
MPUMALANGA DIVISION (MIDDELBURG)

I agree, and it is so ordered

M T MANKGE
JUDGE OF THE HIGH COURT
MPUMALANGA DIVISION (MIDDELBURG)

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DATE OF HEARING: 24 November 2025

DATE OF JUDGMENT: 30 April 2026

Phahlamohlaka J

I have read the main judgment of my sister Bam J, and I respectfully do not agree with the reasoning and the order. Hereunder is my dissenting judgment.

[1] This is an appeal against the whole of the judgment and order of the court *a quo*, which dismissed the Appellant's claim with costs.

[2] The appeal concerns the merits only, arising from a motor vehicle collision that occurred on 24 March 2018.

[3] The central issue on appeal is whether the court *a quo* erred in finding that the Appellant failed to discharge the onus of proving negligence on the part of the

[4] It is common cause that the Appellant was the driver of a motor vehicle that was involved in a collision with a motor vehicle insured by the Respondent. The Appellant's version, in essence, is that:

- 4.1 She had pulled her vehicle to the side of the road;
- 4.2 Thereafter re-entered the roadway; and
- 4.3 Was struck from the rear by the insured driver.

[5] The Respondent did not call the insured driver or any witnesses to rebut the Appellant's version.

[6] The appellant raises a number of grounds which are prolix in nature and therefore I am not intending to deal with each ground individually. However, the main complaint is that the court *a quo* erred in rejecting the evidence of the appellant in its totality, although the defendant proffered no evidence at all.

[7] The issues for determination in this appeal are essentially whether the court *a quo* misdirected itself by finding that the appellant failed to discharge the onus of proving its case on the balance of probabilities.

[8] The court *a quo* found contradictions in the appellant's version. The question is whether the court *a quo* was correct in finding that those contradictions are so material to justify the rejection of the Appellant's version in its totality.

[9] Whether the court *a quo* misdirected itself in its evaluation of the evidence.

[10] It is trite that a court must evaluate evidence holistically, having regard to credibility, reliability and probabilities. The court *a quo* correctly found that there were contradictions in the evidence of the plaintiff. However, contradictions in a witness's evidence do not necessarily justify rejection of the entire testimony, particularly where such contradictions are not material to the core issue.

[11] It is a well-established principle of our law that the appeal court can only interfere with the trial court's finding of fact under exceptional circumstances. This principle was stressed by the Supreme Court of Appeal in *HAL obo MML v MEC for Health, Free State*³, where the court held as follows:

'The presumption is that a trial courts factual findings are correct in the absence of demonstrable error. To overcome this presumption, an appellant must convince the appellate court on adequate grounds that the trial court's factual findings are plainly wrong. If the appellant court is merely left doubt as to the correctness of effectual findings, then it will uphold that finding. It is only in exceptional circumstances that an appellate court will interfere with a child's evaluation of oral evidence, in the light of the advantages enjoyed by the town quarter of seeing, hearing and appraising the witness. See *Sanlam Bpk v Biddulph* 2004 (5) SA 586 (SCA) para 5; *Roux v Hattingh* [2012] ZASCA 132; 2012 (6) SA 428 (SCA) para 12.'

[12] The court *a quo* summarised the appellant's uncontroverted oral testimony as follows⁴:

"The plaintiff gave evidence that could be summarized as follows. On 24 May 2018, she was traveling along Church street and stopped on the side of the road after crossing over the traffic light-controlled intersection with Camden Lane to change into comfortable shoes. Once done, she checked her rear-view mirror before entering the roadway to ensure that there were no motor vehicles traveling in the same direction. After ensuring that it was clear, she entered the roadway, only to hear a huge bang as someone collided with her motor vehicle from the rear side. Her motor vehicle spun around and ended up on the right-hand side of the road, facing the direction she was coming from. She further stated that the speed limit in the area was 60 kilometers per hour as it was built up area. At the time of the accident from which she was travelling at 60 kilometers per hour. The road surface was tarmac, with a single lane in each direction, separated by the broken line. Another lane merged with the side she was travelling in from the left, making it two lanes. The road surface was dry, flat, straight and free of potholes. She could see far in each direction. She denied executing a u-turn, stating that she was traveling straight."

³ (Case no 1021/2019) [2021] ZASCA 149 (22 October 2021) at para 72

⁴ Caselines 045-2 para [5] of the judgment

[13] The court *a quo* accepted a warning statement that the appellant made to the police when a case of negligent driving was investigated against her. The warning statement was accepted by the court *a quo* without the police officer who took the warning statement being called to testify. Based on the contradictions in the warning statement, the statement by the appellant in terms of section 19(f) of the Road Accident Fund Act⁵ as well as the oral evidence she gave in court, the court *a quo* found that the appellant gave three versions of how the accident occurred and thus dismissed her claim on that basis.

[14] I have difficulty with the manner in which the warning statement was accepted by the court *a quo* as an exhibit. The court did this *mero motu* without application from either of the parties. The following engagements appear from the record leading to the court *a quo* admitting the warning statement as an exhibit⁶:

“Court: Ms Nefolovhodwe. And then what happens with the documents that you have been using?”

Mr Tshavhungwa: M’Lord I do not think that it will be necessary for them to be handed in as exhibits as they are contained in the index and paginated documents M’Lord.

Court: Since when does it operate like that? Because exhibits are they the same thing?”

[15] In my view the court *a quo* misdirected itself by accepting the warning statement as an exhibit although the appellant made it clear that they did not want to hand up the statement as an exhibit. Worse, the warning statement was used as a catalyst to reject the appellant’s version. The court *a quo* ought not to have accepted the exhibits without application from any of the parties. In essence the court *a quo* assisted the respondent to the prejudice of the appellant.

[16] Absent the exhibits that the court *a quo* accepted without any application, the only evidence available is that of the appellant.

[17] In my view, the evidence of the appellant, albeit with some contradictions, is not controverted. In the absence of any evidence to gainsay the evidence of the appellant, the court *a quo* misdirected itself by rejecting it.

[18] The Respondent’s failure to call the insured driver is a significant factor in the evaluation of probabilities. In the absence of any evidence for the defendant the court is confronted only with the evidence of the appellant. I am mindful of the fact that the onus does not shift because the defendant has not presented any evidence. Still, it is the duty of the appellant to discharge its onus of proving that the accident occurred as a result of the negligent driving of the insured driver.

⁵ Act 56 of 1996

⁶ Caseline 078-137

[19] Applying the *res ipsa loquitur* maxim, it is my considered view that had it not been for the negligence of the insured driver, the accident could not have occurred. The only evidence regarding how the accident occurred is that of the appellant.

[20] Considering the evidence presented in the court *a quo* by the appellant, which is uncontroverted, it is my considered view that the court *a quo* erred by not accepting the version put forth by the plaintiff. Consequently, the appeal must succeed.

[21] In the result I would propose the following order:

(a) The appeal is upheld with costs including costs of counsel to be taxed on scale B.

(b) The order of the court *a quo* is set aside and replaced with the following:

- “1. The defendant is ordered to pay 100% of the plaintiff’s proved or agreed damages arising from a motor vehicle accident that occurred on 24 March 2018.
2. The defendant is ordered to pay costs including costs of counsel to be taxed on scale B.”

Judge of the High Court