



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

**Not Reportable**

Case no: 9644/2024

In the matter between:

**ANELISA NDUNGANE**

**PLAINTIFF**

and

**THE ROAD ACCIDENT FUND**

**DEFENDANT**

**Coram: COOKE AJ**

**Heard: 12 and 15 May 2026**

**Judgment: 28 May 2026**

**Summary: No proof that negligent driving caused injuries – hit and  
run - inferential reasoning - hearsay**

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## **ORDER**

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[1] The claim is dismissed.

[2] Each party shall pay their own costs.

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## **JUDGMENT**

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[1] On 21 August 2020, the plaintiff (“Mr. Ndungane”) was involved in an incident that occurred on Kloof Street, outside an establishment known as Yours Truly. At the time he was a 32-year-old student at City Varsity, enrolled for the second year of an arts degree. As a result of the incident, Mr. Ndungane suffered significant head injuries and was hospitalised for several months. He now seeks to recover compensation for his injuries from the defendant.

[2] Section 17(1) of the Road Accident Fund Act 56 of 1996 (the “Act”) provides in relevant part that ‘the fund or an agent shall - ... be obliged to compensate any person (the third party) for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself or the death of or any bodily injury to any other person, caused by or arising

from the driving of a motor vehicle by any person at any place within the Republic, if the injury or death is due to the negligence or other wrongful act of the driver or of the owner of the motor vehicle or of his or her employee in the performance of the employee's duties as employee...'. It follows that Mr. Ndungane is required to prove, amongst other things, that his injuries were caused by the negligent driving of a motor vehicle.

[3] On 15 April 2026, I granted a separation order in terms of which certain issues were separated and were to be determined before the other issues. At the hearing, the defendant's counsel advised that some of the separated issues were no longer contested by the defendant. In the result, the essential issue that remained for preliminary determination was whether the incident had been caused by the negligent driving of a motor vehicle, as required by section 17(1) of the Act. If this issue is determined against Mr. Ndungane, the claim will fall to be dismissed and there will be no need to determine the balance of the issues.

### **The evidence**

[4] The plaintiff called three witnesses. The first witness was Captain Adolf Carstens, the Cape Town Sector Manager – Crime Prevention at the South African Police Services (the “police”). The evidence of Captain Carstens was of little value. He was not involved in the taking of the statements in relation to the incident, he did not investigate the incident, and he appeared not to have meaningfully discussed the matter with the police officers who were so involved. Furthermore, the subpoena had only been

given to him on the morning of the trial, and he had not had an opportunity to check the police records in relation to the incident.

[5] Captain Carstens testified that the relevant officers, Sergeants Neti and Rhode, had not been employed by the police for a few years. He indicated further under cross-examination that they had left the police with a case of theft hanging over them. He also conceded that it was possible that, notwithstanding an affidavit by Sergeant Neti suggesting he had attended at the scene of the incident, in fact, he did not do so.

[6] Captain Carstens described the usual method by which dockets are opened and statements are taken. He was unable, however, to explain under cross-examination, why the accident report, and Sergeant Neti's affidavit, were dated 26 August 2020, in circumstances where the incident occurred five days earlier, on 21 August 2020.

[7] The plaintiff also gave evidence. He advised that he currently lives in the Eastern Cape and is unemployed, although he is helping with community projects relating to the maintenance of sidewalks. When asked what he recalled about the incident, he said that he remembered being in Kloof Street and needing to use an Automated Teller Machine ("ATM"). He apparently went to the First National Bank ATM near the Spar at the bottom of Kloof Street, where he withdrew money. He testified that on his return to Yours Truly he was crossing Kloof Street when a car hit him and he lost consciousness. According to Mr. Ndungane, this was at about 9pm. He did not recall any details regarding the vehicle. His next recollection is being in an ambulance, several weeks later, on the way to the Eastern Cape. It

appears that he had no independent recollection of being struck by a vehicle, and his understanding in this regard was gathered from other people.

[8] Under cross-examination, Mr. Ndungane admitted that he had gone out for lunch that day and had probably had drinks at the lunch. When questioned in re-examination, he said that he started drinking at his house at about 4pm and that he thought that he had drunk about four Savanna dumpies.

[9] The defendant's counsel put certain medical records to Mr. Ndungane. These records suggest that there may have been substance abuse by Mr. Ndungane, and that the injuries were attributable to a 'fall'. Given that Mr. Ndungane's friends were not allowed into the hospital (see below), the source of this information is unclear – his friend, Mr. Athi Ntwakumba, speculated that it may have been the police. Furthermore, the authors of the records were not called, and no proof of their authenticity was adduced. In my view, these records were not proved and are therefore inadmissible. The portions relied upon are, in addition, probably double or triple hearsay. In the circumstances, I have not had regard to the contents of these records. In any event, the charge of substance abuse was denied by Mr. Ndungane, and by Mr. Ntwakumba.

[10] The third and final witness called by Mr. Ndungane was Mr. Ntwakumba. He was at Yours Truly with Mr. Ndungane prior to the incident. According to Mr. Ntwakumba, their group of friends arrived at the restaurant after 5pm. He testified that everyone had consumed wine at the supper, as well as tequila. Under cross-examination, Mr. Ntwakumba

elaborated that the group consisted of about eight friends, and they had drunk about six bottles of wine at Yours Truly, and in addition had one or two rounds of tequila. He recalls that the incident occurred at or after 9pm, when Yours Truly was closing. The group planned to relocate to another establishment that sells beverages. At the time that the incident occurred, Mr. Ntwakumba was inside Yours Truly. Mr. Ndungane had left a bit earlier. Mr. Ntwakumba then heard screams outside and went out to check what had happened. According to Mr. Ntwakumba, when he got there, bystanders explained that a white car had been driving fast and had ‘bumped’ Mr. Ndungane. He was also told that after the collision, the vehicle slowed down and it appeared that the vehicle was going to stop, but it then drove off. Mr. Ntwakumba called an ambulance which arrived and took Mr. Ndungane to the Christiaan Barnard Hospital.

[11] It appeared from his evidence that he had been provided information regarding the incident, in particular, by a young woman who was a medical student. The medical student was giving first aid to Mr. Ndungane and was checking his pulse while they were waiting for the ambulance. It was this medical student that apparently told Mr. Ntwakumba that the car ‘came speeding’. Mr. Ntwakumba did not obtain her contact details. Understandably, his focus was on arranging an ambulance and ensuring that his friend was properly cared for.

[12] Mr. Ntwakumba and some other friends were taken by the police to Christiaan Barnard Hospital, although when they arrived at the hospital they were not permitted to enter. It seems that this was on account of Covid-19 restrictions. Thereafter, Mr. Ntwakumba went to the police station to give a

statement. He recounts that at the police station the officer took out a form and asked him what happened and requested that he draw a sketch to explain the incident. He also described what he knew about the incident to the police officers and they wrote it down. He was not sure if the police officers who took his statement also attended at the scene of the incident.

[13] The accident report states that ‘As B was about to cross the road, he tripped and fell in the road after the pavement where A drove over him... I am Athi Ntwakumba, a friend who was at the scene. B is in ICU at Christiaan Barnard Hospital.’ (B is a reference to Mr. Ndungane, while A is a reference to the unknown driver.) Mr. Ntwakumba signed his name below this statement. Like Captain Carstens, Mr. Ntwakumba was unable to explain why the accident report was dated five days later, on 26 August 2020.

[14] The sketch that accompanied the statement in the accident report, shows that Mr. Ndungane had been struck by the vehicle on the side of the road closest to Yours Truly. In evidence, Mr. Ntwakumba indicated that when he saw him, he was lying on the side of the road next to the pavement which runs between Yours Truly and Kloof Street. The sketch also shows that the incident occurred just after the vehicle passed the pedestrian crossing on Kloof Street, as it was heading up the road towards Kloof Nek. This pedestrian crossing is controlled by traffic lights. Mr. Ntwakumba doubted that Mr. Ndungane was returning from the ATM when the incident occurred. He pointed out that the ATM is quite far down Kloof Street and expressed the view that Mr. Ndungane was probably on his way to the ATM rather than returning.

[15] Mr. Ntwakumba testified that when Mr. Ndungane's family came to Cape Town a few months later, in November 2020, it was necessary for him to give another accident report so that a docket could be opened. According to Mr. Ntwakumba, he had to make the second statement because the police did not have a case number in relation to the first statement that was given. The relevant part of the November 2020 statement provides as follows: '... I got up to go check what was going on. When I got there, I saw that it was my friend laying on the street who was bumped on the head. I was told by the people he walked out with that a car bumped him as he fell and rode away...'. According to Mr. Ntwakumba, the reference to being 'told by the people he walked out with' is a reference to the medical student. It appears, however, that the accident report placed before me was the accident report prepared at the time of the incident.

[16] The defendant did not call any witnesses.

## **Discussion**

[17] Counsel for Mr. Ndungane accepted that there was no direct evidence that the incident was caused by the negligence of the driver. In argument, she relied upon two facts and one hearsay statement in support of the allegation of causative negligence. The facts relied upon were first, the location where Mr. Ndungane was lying after the incident, and second the conduct of the driver in failing to stop and return to the scene of the incident. The hearsay statement relied upon is that of the medical student who,

according to Mr. Ntwakumba, used the word ‘speeding’ to describe the vehicle.<sup>1</sup>

[18] At the outset, it is convenient to set out the general principle in relation to inferential reasoning. In the *De Lacy* case<sup>2</sup> it was held that ‘[t]he process of inferential reasoning calls for an evaluation of all the evidence and not merely selected parts. The inference that is sought to be drawn must be “consistent with all the proved facts: If it is not, then the inference cannot be drawn” and it must be the “more natural, or plausible, conclusion from amongst several conceivable ones” when measured against the probabilities’.

[19] Turning then to the facts relied upon by Mr. Ndungane, is the fact that after the incident he was lying on the side of the road near the pavement outside Yours Truly, just beyond the pedestrian crossing, a fact from which one may draw an inference that the incident had been caused by the driver’s negligence? Put differently, is this the more natural or plausible conclusion, when measured against the probabilities? Or is there another possible conclusion that is equally, or more, probable?

[20] In this matter, there is a competing conclusion relied upon by the defendant. In the defendant’s heads of argument, counsel submitted that an

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<sup>1</sup> I was not requested to make a ruling on the admissibility of the hearsay during the trial. At the hearing of argument and having regard to *Giesecke & Devrient Southern Africa (Pty) Ltd v Minister of Safety and Security* 2012 (2) SA 137 (SCA) para 24, I asked if either party wished me to make a preliminary ruling on the admissibility of the hearsay evidence. Neither party accepted the offer, seemingly because neither party was able to call any further witnesses. The timing of the admissibility ruling was therefore of no moment, and neither party is prejudiced in so far as the admissibility of the hearsay is determined in this judgment, and no ruling was made before Mr. Ndungane’s case was closed.

<sup>2</sup> *South African Post Office v De Lacy and Another* 2009 (5) SA 255 (SCA) para 35.

inference can be drawn that Mr. Ndungane tripped and fell into the path of a passing motor vehicle, and that the driver was faced with a sudden emergency.

[21] The contemporaneous description of the accident provided by Mr. Ntwakumba in the accident report refers to Mr. Ndungane tripping and falling in the road. It is therefore possible that Mr. Ndungane emerged from Yours Truly, having enjoyed either several Savannas or several glasses of wine and a couple of shots of tequila, depending on which version one accepts, and then stumbled on the pavement, falling into the path of the oncoming vehicle. It is possible also that the traffic light at the pedestrian crossing was green and the timing of the fall was such that there was no opportunity for the driver to avoid colliding with Mr. Ndungane. This possibility is consistent with the November 2020 statement that ‘a car bumped him as he fell’.

[22] The position of Mr. Ndungane after the incident, lying on the side of Kloof Street just beyond the pedestrian crossing, is compatible with the competing conclusion, as well as the conclusion that the driver was negligent. In my view, it cannot be said that the allegation of causative negligence on the part of the driver is a more natural, or plausible conclusion than the conclusion that Mr. Ndungane fell in the path of the vehicle, and the incident was caused without any fault on the part of the driver.

[23] As to the second fact, namely that this was a ‘hit and run’, it is unfortunate that the driver did not stop and return to the scene of the incident. Indeed, the driver was obliged to do so in terms of section 61 of the

National Road Traffic Act 93 of 1996. In terms of section 89(4) of the former, this failure could constitute an offence. Nonetheless, in my view, there are many reasons that may explain why a driver does not return to the scene of an accident. It may be that the driver panicked. Or perhaps the driver did not have a driver's licence, or had been drinking alcohol, and was worried that he would be fined or arrested. Furthermore, it does appear from the evidence that there was a large group of people outside Yours Truly at the time of the incident. Mr. Ntwakumba's affidavit suggests that there was screaming. No doubt, most of these people had been drinking. The driver may well have slowed down, seen a large group of animated people, and, out of a concern for safety, decided to drive on. This also presents a plausible counter-explanation.

[24] In my view, the fact that the driver did not return is not necessarily proof that the driver was negligent or that the driver's negligence caused the incident. I am also not persuaded that it is the more natural, or plausible conclusion from amongst the conceivable conclusions. I have not been able to find any authority in terms of which an inference of negligence was drawn from the fact of a hit and run, nor did counsel refer me to any.<sup>3</sup>

[25] In the circumstances, I am not persuaded that the two facts relied upon support an inference that the negligence of the driver caused the incident.

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<sup>3</sup> During argument, I invited counsel to submit a post-hearing note if they were able to find any such authority. No notes were provided to me and I therefore infer that counsel likewise could not find any authority on point.

[26] As regards the hearsay evidence of the vehicle supposedly ‘speeding’, reliance was placed on section 3 of the Law of Evidence Amendment Act 45 of 1998 which provides that hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless the court, having regard to various factors, is of the opinion that such evidence should be admitted in the interest of justice.

[27] In my view, the following factors weigh against the admission of the hearsay evidence:

(a) There was no evidence as to the location of the medical student at the time of the incident. I am therefore unable to assess whether she was able to properly observe the vehicle that struck Mr. Ndungane, and there is no guarantee that her statement regarding speeding is reliable.

(b) The statement is not corroborated by other evidence. In particular, the contemporaneous statement given by Mr. Ntwakumba, as well as his affidavit deposed to a couple of months later, do not mention that the vehicle was speeding.

(c) The defendant has also not located any witnesses, so it is unable to counter the effect of the hearsay evidence by other means.<sup>4</sup>

(d) The defendant would be enormously prejudiced if the hearsay evidence were to be allowed. It would be deprived of the opportunity to cross-examine the medical student and explore, for instance, what exactly she meant by the word ‘speeding’ and whether she may have any possible motive to contend that the driver was negligent.<sup>5</sup> The prejudice is aggravated by the fact that the case could turn on this piece of evidence.

[28] I am thus not persuaded that it would be in the interests of justice to admit the hearsay evidence regarding the ‘speeding’ vehicle.

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<sup>4</sup> *Makhathini v Road Accident Fund* 2002 (1) SA 511 (SCA) para 29.

<sup>5</sup> Compare *S v Kapa* 2023 (1) SACR 583 (CC) para 100.

[29] It follows that the evidence relied upon by Mr. Ndungane's counsel does not suffice to prove causative negligence on the part of the driver.

### **Conclusion and costs**

[30] Mr. Ndungane bears the onus of proving his case on a balance of probabilities. I accept that it is possible that the incident was caused by the negligence of the driver. However, on the evidence before me, I am unable to make a finding that this is probable. I therefore conclude that Mr. Ndungane has not proven that the driver of the unknown vehicle was negligent and that this caused the incident. This finding is dispositive of the separated issues. Having reached this conclusion on the separated issues, it follows that Mr. Ndungane's claim ought to be dismissed.

[31] As regards costs, it is not disputed that Mr. Ndungane suffered significant head injuries as a result of the incident. He spent about a month in the Christiaan Barnard Hospital, and then a further period in St Dominic's Hospital in East London. He had to stop his studies, and to date has not resumed them. The incident has therefore had serious adverse consequences for Mr Ndungane's life. As in the case of *Tywaku*,<sup>6</sup> Mr. Ndungane has suffered a personal calamity.

[32] In addition, Mr. Ndungane may, to my mind, have been let down by the police. The known facts suggest that at least one, and possibly more,

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<sup>6</sup> *Tywaku NO and Others v Member of the Executive Council, Western Cape Department of Education and Another* 2026 JDR 1481 (WCC) para 38 – no costs order was made against the plaintiffs even though their claim was unsuccessful.

offences were committed by the driver. These offences should have been thoroughly investigated by the police and reported to Mr. Ndungane. It is not clear to me why the police apparently did not take statements from the witnesses after the incident or at least obtained their contact details. The accident report<sup>7</sup> records the names of two persons as ‘independent eyewitnesses’, namely Mr. Tshotyana (a relative who only arrived on the scene after the incident) and Mr. Ntwakumba, although these persons did not witness the incident. It also appears that the police did not take steps to obtain CCTV footage that, presumably, was available. This footage could have revealed who was at fault. The absence of direct evidence is not, in my view, attributable to Mr. Ndungane.

[33] In all the circumstances, I am not persuaded that a costs order should be made against Mr. Ndungane.

[34] For all these reasons, I make the order set out above.

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**DJ COOKE**  
**ACTING JUDGE OF THE**  
**HIGH COURT**

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<sup>7</sup> The applicable section in the accident report notes that bystanders at a scene of an accident must not be chased away before a good attempt is made by an officer to find out whether anyone witnessed the accident and/or can give valuable information about circumstances relating to the accident.

## Appearances

For defendant:	Ms A Busakwe
Instructed by:	Kanise Jako Attorneys
For plaintiff:	Mr G Cerfontyne
Instructed by:	The State Attorney