

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

CASE NO: A30/ 2023

Court *a quo* Case Number: 468/2018

In the matter between:

L[...] M[...]

First Appellant

L[...] M[...] obo C[...]

Second Appellant

L[...] M[...] obo J[...]

Third Appellant

And

THE ROAD ACCIDENT FUND

Respondent

Heard: 21 July 2023

Delivered: 11 October 2023

JUDGMENT

LEKHULENI J

[1] This is an appeal against the whole judgment and order handed down by the trial court, in respect of a delictual claim in which the appellants sought loss of support

against the respondent arising from the death by suicide of the first appellant's husband, Mr V[...] M[...] ("the deceased") on 6 December 2016. On 21 June 2014, the deceased was involved in a motorcycle accident in which he collided with another vehicle driven by an insured driver in terms of the Road Accident Fund Act 56 of 1996. As a result of that collision, the deceased sustained multiple orthopaedic injuries to his body.

[2] Pursuant thereto, the deceased lodged a motor vehicle claim against the respondent for compensation for the bodily injuries he sustained in the accident and for his past loss of earnings. Before his claim was finalised against the respondent, the deceased committed suicide on 6 December 2016. The deceased's claim against the respondent was settled after his death on 16 November 2018.

[3] On 17 January 2018, the first appellant instituted a tortious claim for loss of support arising from the same accident against the respondent in her personal capacity and in her representative capacity of her minor children, namely, the second and the third respondents contending that the deceased's suicide and death were causally, factual, and legally related to the injuries the deceased suffered during the collision. The first appellant, the widow of the deceased, sought to hold the respondent liable for her claim for loss of support and for that of her minor children. The respondent defended the matter and disputed that any causation existed or could be proven by the first appellant. The matter then proceeded to trial before the court *a quo*.

[4] Thus, the only issue that the trial court had to determine was whether the suicide of the deceased was caused by or arose from the motor vehicle accident. In a

detailed judgment, the court *a quo* found that the appellants had failed to establish a causal connection between the injuries sustained by the deceased in the accident and the suicide. The court *a quo* also found that on a conspectus of all the facts placed before it, it could not accept that the evidence presented at the trial made it clear that the accident was the direct or proximate cause of the deceased's suicide. The trial court dismissed the appellants' claim and directed that each party pays its own costs. It is this order that the appellants seek to assail in this court.

[5] The first appellant thereafter applied for leave to appeal against the judgment of the court *a quo*. The trial court dismissed her application for leave to appeal on 22 August 2022 on the grounds that there were no prospects of success on appeal. Discontented by this decision, the appellants petitioned the Supreme Court of Appeal in terms of section 17(2)(b) of the Superior Court Act 10 of 2013. On 29 November 2022, the Supreme Court of Appeal granted the appellants leave to appeal to the full court of this division.

FACTUAL BACKGROUND

[6] To fully comprehend the pertinent issues that must be determined in this appeal and the view I take in this matter; it is necessary to outline a brief background of the facts underpinning the reasons that fortify my conclusion. Several witnesses testified at the trial, and various documentary evidence, including expert reports, were handed by agreement as exhibits. To the extent necessary, I will summarise the evidence led at the trial and not repeat the evidence verbatim.

[7] The first appellant was the first witness to testify. She testified that she met the deceased in 1991 while she was 16 years old and doing grade 11, and the deceased was 17 years old. After she finished school, they moved in together. They married in 1995. He was 23, and she was 22 years old at the time. The witness testified that two daughters were born from the marriage. The eldest, C[...], was born on 22 April 2004, and the youngest, J[...], was born on 18 August 2006. She described the deceased as her knight in shining armour prior to the accident. The deceased helped his mom's late husband, a plumber, and learned many skills from him. After the father passed away, the deceased worked for a company called Odd Jobs which did various work like roof-sealing, tree-felling, tiling, etc. There, the deceased learned a lot of new trades until he decided to go on his own and started his own business.

[8] The witness testified that, workwise, the deceased was one of the hardest workers that she had ever known. Everyone who met him couldn't believe what the deceased could do. In 1995, the deceased qualified as a plumber and obtained his Plumbing certificate from Olifantsfontein Training Centre. All along, they were based in Limpopo, and in 2000, they relocated to Cape Town. Upon arrival in Cape Town, she worked for Volvo Tygervally. The deceased built up a successful plumbing business in the Northern Suburbs, working mainly as a subcontractor to a company called Kwikot, a supplier of geysers. From 2002 until 2012, Kwikot essentially outsourced all their warranty work to outside plumbers. The deceased was the main contractor tasked to do the whole of the Northern Suburbs. The plumbing business grew such that the deceased had to buy six vans and employed 12 people, excluding the deceased and the witness. The witness assisted the deceased with the

bookkeeping of the growing business. At that stage, the deceased was doing 90 percent of his work from Kwikot and 10 percent a bit of private work.

[9] In 2012, Kwikok's Head Office in Johannesburg decided to employ its own plumbers instead of outsourcing work to subcontractors. The witness testified that they were devastated when they got the news that Kwikot would reduce the amount of jobs it outsourced. This significantly affected the deceased's business in that 60 percent of his income from Kwikot fell away, which he had to start covering again from doing other work. The deceased began restoring caravans in addition to his plumbing business to make up for the loss due to Kwikot reducing the amount of work outsourced. The caravan business did very well, and they had to move to a place with a big yard to have space to park all the caravans.

[10] The witnesses testified that they belonged to Tygerberg Caravan Club. Once a month, at the beginning of the year, they would go camping at different places. She testified that before the accident, the deceased was a good husband to her and an excellent father to their children. The deceased was the kind of man she respected and felt safe with, and she knew that no matter what happened, he would always have her back. He always looked after her and the children. He was a very loving father. He was the kind of dad who would crawl in the house with his hands and feet, carrying the children on his back like a horse.

[11] The witness further described the deceased as a loving and hands-on father who always made sure that his daughters enjoyed their childhood lives. He was a hardworking father, and according to her, there was a time when he earned much

more than people with degrees because he was so hardworking. He would always find another way to do something and make an income. The witness described the deceased as very loving and caring. He carried her in his hands. Everyone always said that they were this perfect couple. From the date she met him, she felt safe and knew she would be safe with him, and no matter what they went through in life, they would get through together. She stated that the deceased was sociable and loved riding motorbikes with his friends on Saturdays. He loved braais and having people to his house or go to them for braais.

[12] The first appellant testified that in June 2014, the deceased was involved in a motor vehicle accident while riding his friend's motorbike alongside the beach road in Bloubergstrand. As a result of that accident, the deceased sustained severe bodily injuries. The accident profoundly affected him psychologically, particularly in his profession as a plumber and handyman. It messed up his knee. The witness testified that the deceased also had other injuries, but the knee was the worst. The deceased feared losing his leg. He also feared how he would manage to do his work as a handyman/plumber without a leg. He was distraught about his business. The treating doctor told them he would save the leg but that it was going to be tricky, that it was going to be an arduous healing process, and that he might suffer pain after that. After his discharge from the hospital, the healing process at home took many months before the deceased could eventually walk with crutches. Thereafter, when he could walk again without crutches, it was with difficulty.

[13] The witness testified that the injuries left the deceased significantly physically impaired. He walked with a limp, and he could no longer walk for long distances and

could no longer sit on a hard surface for long period. He was hampered in that he could no longer pick up and carry heavy weights, which was one of the reasons he could no longer install geysers. He also struggled to control his bowel movement. He suffered from ongoing pain after the accident. He had pain medication prescribed for him by the doctor, which he used but said was ineffective. After a day's work, he would complain that he was tired and in pain. He would have supper and sleep, knowing he would also suffer from pain at night.

[14] She testified that it was tough for him. His mood changed. He was frustrated at times. He lost some of his joy in life. He missed doing the things that he used to be able to do, whether it was work-wise or social activities. At home, he was not playing with his children as he used to. He couldn't go on a bike ride with them. He had a mountain bike that he could not use anymore as he could not cycle. He couldn't pick up his children as he used to, and it was very difficult for her and the children. The deceased complained to the witness that if he was already experiencing so much pain at such a young age, what would happen if he is older.

[15] The deceased was no longer the man she married and not the dad he used to be. He became frustrated and sad. He kept asking why this must have happened that day. His mood was low. This had a problematic effect on their relationship both emotionally and physically. The deceased told her that he did not feel like a man anymore because he couldn't do what he needed to do as a man. His injuries weaned down his business a bit.

[16] However, there was a time when he said he felt very positive and knew everything would work out for the good. Notwithstanding the pain, the deceased still tried to give his best. He still tried to restore the caravan, but it was not easy. The most challenging part was buying a caravan, as he had to climb a ladder and look for leaks. Later, he started weaning off the caravan business and started doing wellpoint installations. He did wellpoint installations up to his death. On the date of his death, he was busy with a big project of wellpoint installation in an estate.

[17] She testified that after the accident, the deceased never stopped earning money. Their income was reduced, but there was always an income. However, he was no longer the same as before the accident. As hard as he tried, he couldn't do everything he needed. As a result, they had to reduce their standard of living. They relocated from Durbanville and moved to a more affordable house in Brackenfell. They moved their children to a cheaper school. They also cancelled their DSTV subscription or anything that could lessen their expenses. She had to find a job to make ends meet. The deceased was remorseful that the witness had to look for a job.

[18] She testified that after the accident, there were times when she could see that the deceased's mood was low, which she never experienced before the accident. The deceased was not the type of person that would tell you I don't feel well. He tried to push through always. He did not want to believe that he was depressed or that depression existed. He did not believe in psychologists. Instead, he would say I had a hard day. After the accident, there were times when she was concerned about his mental health and that he was not feeling good.

[19] She testified that a weekend before the Tuesday on which the deceased committed suicide, she discussed with the deceased his mental health, which she was concerned about. Her late brother who passed away in January 2022 due to Covid-19 complications, and the deceased's mother also spoke to the deceased about his mental health. They were all concerned about his mental health and asked him to seek professional help. On the day that the deceased committed suicide, she dropped the children at school and went to see a Christian counsellor in their neighbourhood about the deceased's mental health.

[20] Later that fateful day, while she was still at the counsellor's house, she spoke to her late brother, who had a very close relationship with the deceased. Her late brother was also very concerned about the deceased's mental health. The late brother told the witness that he was apprehensive about the deceased and would like to go to the house to speak to him. Indeed, her brother went to the deceased's house, and upon arrival, he, unfortunately, discovered that the deceased had committed suicide.

[21] The deceased' mother, Ms S[...] B[...], also came to testify. She testified that she had a special relationship with the deceased. The deceased was the eldest of her three sons. She was always in contact with the deceased. They went to the same church and spent much time together as a family over the weekend. The deceased went to a technical school as he wanted to work with his hands. The deceased went to learn different skills and not plumbing only. Everything he did with his hands went well. Ms B[...] testified that the deceased was a go-getter and would do anything for his wife and children. She described him as a really, really good father.

[22] Before the accident, he was an outgoing person. He enjoyed camping and was a social person. He did things for his children that his dad never did to him and his brothers. He did not mind spending money on his family, particularly his children. After the accident, Ms B[...] testified that the deceased's moods had changed. He became withdrawn in himself and by himself at home. He always looked like he was absent-minded. He was physically impaired and could no longer perform certain mundane physical activities. He did not play with his daughters as before because he was always in pain.

[23] She testified that the deceased was worried because he could not give everything he could do to his daughters and wife that he provided in the past. He was always in pain and also stopped socialising. The deceased told her he does not believe in people getting depression. If something is bothering him, he works it out and finds a solution. She did not expect the deceased to commit suicide because she never thought he would reach a place where he just couldn't handle it. She was concerned about his wellbeing because he was in pain every day from the day of the accident. The Monday preceding the day the deceased committed suicide, she spoke to him on the phone, and the deceased said to her I *effin* (expletive) can't handle this anymore.

[24] Dr Steyn, the orthopaedic surgeon who examined the deceased, also testified. He examined the deceased on 30 November 2015, almost a year and a half after the accident and about a year before the deceased committed suicide. Dr Steyn confirmed his report and the injuries the deceased sustained in the accident. According to him, the deceased suffered a concussion, fracture of the pelvis left interior pubic ramus, as well as fracture of the ala of the sacrum. The deceased also suffered fracture of the

right tibial plateau, which meant that it was broken into several small pieces. He testified that the deceased also suffered a ligamentous injury to the right thumb. His evidence was that getting a good result was very difficult, not impossible, in those cases. After the accident, the deceased walked with a limp due to right knee pain. He testified that the deceased could not crouch on his haunches due to severe pain that he experienced in the right knee. He experienced pain in the lumbar spine due to ligament injuries. Dr Steyn also stated in his report that the deceased also complained of right shoulder pain, which commenced subsequent to the injury and was caused by having to manipulate a wheelchair and crutches for an extended period of time.

[25] Dr Steyn also testified that the deceased complained of pain in his right thumb, where he had sustained a ligament injury. With the type of fracture that the deceased suffered to his tibial plateau, it was a given that it would develop arthritis in the knee joint. At the time of examination, the deceased was already showing signs of early arthritis, which indicated a poor long-term prognosis. He testified that the deceased's pain was all concordant with the nature of the injury sustained and the clinical and radiological findings. According to Dr Steyn, due to the injuries the deceased suffered in the accident, he would not be able to perform work of a physically demanding nature because of the pain he experienced in his knee joint. He would have been suited for light work only. That would mean that activities such as carrying heavy weights, crouching, especially in confined spaces, and climbing ladders, would elicit pain in the knee joint.

[26] Ms Benita Crouse, an occupational therapist, also testified. Her testimony was that she assessed the deceased on 23 February 2016. She confirmed her report and

testified that the deceased told her he worked as a handyman. He took different jobs to stay afloat financially. The witness testified that the deceased's ability to do work was affected because he struggled, especially with his knee, as he struggled to work bending down to ground level to do the heavier components of the job. The deceased reported to her that he experienced pain in his right shoulder, hip, right hand, and right knee. She testified that the deceased's complaints in her report correlated with his injuries in the accident. She agreed with Dr Steyn that the deceased was only suited to do light work after the accident due to his injuries.

[27] Esther Lydia Auret-Besselaar, an industrial psychologist in human resources, also came to testify. She assessed the deceased on 21 June 2016. During her assessment of the deceased, the latter was frustrated, agitated, and emotionally distressed. The witness testified that it was a challenging consultation because of the deceased's distress. The deceased informed her that he couldn't do what he used to do. He couldn't earn what he used to, and the doctors could not fix him, and he was in pain every day. The deceased further reported to her that he couldn't rely on his workers and felt trapped.

[28] At the end of the assessment, the deceased shouted that he was so frustrated that he wanted to rip the plates out of his leg - "ek gaan self hierdie penne uit my been iut ruk". It was a frightening display of emotions. The deceased struck her as this big, brawny tradesman who was just trying his best but not succeeding. After the assessment, she emailed the deceased's attorneys to inform them that the deceased was irate and despondent and should see a clinical psychologist.

[29] In her contemporaneous notes during the consultation, she reported that the deceased was distressed and frustrated, struggling and in pain, a very despondent man, very angry and distressed. She also reported that the deceased was anxious and angry, struggling to survive, and felt like a failure. She described the deceased as angry and despondent - kwaad and moedeloos. In her opinion, the suicide resulted from the injuries the deceased suffered in the accident and their sequelae. She also interviewed the first appellant after the incident, who thought the accident had caused the suicide.

[30] She admitted during cross-examination that she did not explain to the deceased to seek psychological help besides Mignon Coetzee. According to her, the deceased was too distressed as he wanted his business back. She conceded, in cross-examination, that the deceased did not present having mental health problems. However, in re-examination, she testified that everything presented to her looked like the deceased was in severe psychological distress. He was upset, angry, and frustrated. He was despondent and felt hopeless and helpless.

[31] The Clinical Psychologist who interviewed the deceased, Ms Mignon Coetzee, also came to testify. She interviewed the deceased on 16 November 2016, three weeks before the deceased committed suicide. She interviewed the deceased for approximately three hours and the first appellant for another half an hour to forty-five minutes. After the deceased passed away and before she could complete her report, she had a telephonic interview again with the first appellant. The witness testified that the deceased did not have a solid academic aptitude but was much more practical.

The deceased took great pride in providing stability for his wife and children, contrary to what his biological father did to him.

[32] In her opinion, the deceased's self-esteem was rooted in his practical skills and entrepreneurial spirit. The deceased was deeply invested in and proud of his care and financial success. She testified that the deceased did not display weakness or vulnerability. He mostly kept his feelings bottled up. The deceased had no prior history of mental illness or suicidal ideation. During the consultation, the deceased dwelled on frustration, humiliation, and dependence on people for basic things like physical care and hygiene. He felt like a failure because he could no longer provide for his family or provide them with a secure lifestyle and financial independence.

[33] The witness testified that the deceased steered clear of any talk of psychological vulnerability or mental dysfunction, and his language of distress was frustration with physical pain. She described the deceased as a stereotypical man of action, not of expressed emotion. The only emotion the deceased willingly admitted to her was irritability and aggression, providing her with an example of how abusive he was towards his workers and the general labourers he sometimes used. Ms Coetzee testified that on questioning, the deceased provided insight into more psychologically orientated complaints, including anxiety, defence driving, and road rage.

[34] She noted in her report that at the time of assessment, the deceased suffered from depression. However, she did not formally diagnose him because the deceased did not meet all the diagnostic criteria. However, she described the personality dynamics and the tremendous distress the deceased was experiencing as a

tremendous difficulty adjusting to his altered physical state. The witness noted that the drop in the deceased's physical functioning resulted in a decline in work performance, which reduced his capacity to provide for his family. She further described the psychological sequelae of the accident as significant distress associated with his physical injuries.

[35] She testified that the significant distress suffered by the deceased manifested as frustration, anger, aggression, reduced self-esteem, crisis of identity, feelings of hopelessness, and depression. The deceased's psychological distress stemmed from his physical injuries. Then it filtered into his personal life, his relationship with others, and his relationship with himself. It filtered through his work life with hopelessness, anger, and aggression. The extent was that it spanned all facets of his life.

[36] She asked the deceased whether he had received any psychological or psychiatric intervention since the accident, and he had not. The deceased was dismissive of mental illness, and at the time of assessment, he denied suicidal ideation. The witness testified that the deceased started with a more hopeful attitude immediately after the accident. However, over time his body began to show wear and tear. The deceased started to be confronted with long-term irreversible, permanent damage. He became more despairing, frustrated, and hopeless, hence his decision on that Tuesday morning to commit suicide.

[37] During cross-examination, she was quizzed whether, in her view, the deceased suffered from impaired judgment. In response, she testified that the deceased was significantly distressed and he was in pain. She stressed the fact that the deceased

was not mentally well. She emphasised that the deceased may not have met the diagnosable mental illness diagnostic criteria. However, he was not mentally well. Therefore, there must have been a degree of not thinking clearly about everything. Her clinical opinion was that the deceased was mentally ill and had an impaired clarity of mind for him to have taken such drastic action. It was not in his makeup before the accident to give up, abandon his family and devastate his children. She testified that she gave the deceased feedback at the end of the assessment and recommended psychotherapy and possibly pharmacotherapy intervention.

[38] When it was further put to her during cross-examination that the defence witness, Mr Loebenstein, would testify that suffering from a mental disorder was the most probable cause of suicide, she disagreed and stated that 50 percent of people who commit suicide do not have a mental illness. In her opinion, physical illness, injury, and dysfunction are other primary causes of suicide. In her opinion, the deceased's suicide was a direct consequence of the accident's impact on his life. That concluded the evidence for the plaintiff.

[39] The defendant called Larry Loebenstein to testify. He is a qualified clinical psychologist. At the hearing of this appeal, the court was advised that Mr Loebenstein has since passed away. Mr Loebenstein was requested a report summarising his findings regarding the deceased's functioning in general, particularly after his motor vehicle accident on 21 June 2014 up until the time of his suicide on 6 December 2016. He never interviewed the deceased or any of the deceased's family members. He only had regard to the medico-legal reports filed in the matter and the raw data of Ms Aurret-Besselaar and Ms Coetzee.

[40] He believed the deceased did not suffer from any recognised mental disorder. According to him, the deceased displayed many symptoms consistent with the injuries that he sustained in the accident, particularly his pain and his significantly decreased physical ability to continue in the position that he held, although he was self-employed before the accident. When he was asked about the deceased not having sought help for his difficulties, the witness conceded that the deceased might have been, as Ms Coetzee concluded, a do person rather than a thinking person who would have felt that he should take on the burden of whatever he was suffering from.

[41] On the appropriateness of retrospective assessment, he testified that this is difficult, and the primary reason for that is that the person assessed is not available due to death. In his opinion, forming an opinion when you cannot interview the individual makes for a hazardous enterprise. He further stated that the second aspect is that it is unethical to comment and form an opinion about somebody whom you have not examined. He disagreed with Ms Coetzee and averred that based on the evidence presented, it cannot be said that the deceased died due to the motor vehicle accident. According to him, there was no sufficient data to make that suggestion.

[42] However, he did not dispute the evidence of Ms Coetzee that, in her opinion, the deceased suffered from depression, although she did not formally diagnose him as suffering from major depressive disorder since the deceased did not meet all the criteria for such a diagnosis. When he was asked about Ms Coetzee's conclusion that the suicide was a direct result of the accident, Mr Loebenstein answered that if the deceased had said, I can't take it anymore, I have heard enough, I can't see a future

for myself because of what the accident has done to me, or variations of that, one would draw that conclusion, but otherwise, not. In his view, there were no objective facts to support that conclusion.

[43] During cross-examination, he conceded that Ms Coetzee was in a much better position than he to form an opinion about the deceased's state of mind. He testified during cross-examination that there were enough averments by the deceased to warrant an evaluation of major depressive disorder. The fact that the deceased did not show enough symptoms of depression did not suggest that the deceased was psychologically well. He also conceded during cross-examination that the accident injuries could have been the cause of the suicide. That concluded the evidence led before the trial court.

THE DISPUTED ISSUES

[44] This court is enjoined to determine whether the court *a quo* was correct in finding that the appellants had failed to establish a causal connection between the injuries sustained by the deceased in the accident and the suicide. Further, whether the court *a quo* was correct in finding that on a conspectus of all the facts placed before it, it could not accept that the evidence presented at the trial made it clear that the accident was the direct or proximate cause of the deceased's suicide.

APPLICABLE LEGAL PRINCIPLES AND DISCUSSION

[45] The first appellant bore the onus to prove her case. The first appellant had to prove on a preponderance of probabilities that the deceased's suicide on 6 December 2016 was a direct or proximate result of the accident which occurred on 21 June 2014. In an endeavour to prove her case, the first appellant testified and called expert witnesses to support and corroborate her case. The first appellant implored the trial court to find on a balance of probabilities that the deceased took her life due to the injuries he sustained in the motor vehicle accident that occurred on 21 June 2014. The trial court dismissed the first appellant's claim based on factual causation and found that the evidence of the first appellant and her witnesses was deficient to hold the respondent liable. Pursuant thereto, I turn to consider the complex problem of causation.

Causation

[46] It is trite that whether an act can be identifiable as a cause depends on a conclusion drawn from available facts and relevant probabilities. In other words, it must be established whether the injuries sustained by the deceased in the collision were a *sine qua non* of his eventual suicide, in the sense that had he not sustained such injuries, he probably would not have committed suicide. The complex problem of causation involves a consideration of two different questions: *First*, whether any factual relation exists between the defendant's conduct and the harm sustained by the plaintiff. The diagnostic tool is 'the but for test', often referred to as the *conditio sine qua non* theory, which involves a hypothetical enquiry as to what probably would have happened but for the defendant's wrongful conduct.¹ The courts have recognised that

¹ *Guardrisk Insurance v Café Chameleon* 2021 (2) SA 323 para 37.

a rigid application of the 'but for test' may sometimes yield unpalatable and unfair results, and have thus cautioned against applying rigid deductive logic.² This common law test is thus applied flexibly, recognising that common sense may have to prevail over strict logic.

[47] *Secondly*, whether or to what extent the defendant should be held legally responsible for the consequences factually induced by his or her conduct. This is referred to as legal causation. The enquiry into legal causation usually follows factual causation. It asks whether a sufficiently close relationship exists between the factual cause and the consequent loss to give rise to legal liability.³ Put differently, the question is whether the loss is too remote for the factual cause to also be the legal cause. If not, no legal liability may arise. In delictual matters, policy considerations are applied to guard against attaching liability in an indeterminate amount for an indeterminate time to an indeterminate class.⁴

[48] That causation represents a dual problem on different levels of inquiry was authoritatively enunciated by the Appellate Division, as it then was, in the leading case of *Minister of Police v Skosana*,⁵ where the court stated that causation in the law of delict gives rise to two rather distinct problems. The first is a factual one and relates to the question as to whether the negligent act or omission in question caused or materially contributed to the harm giving rise to the claim.⁶ If it did not, then no legal

² *Lee v Minister for Correctional Services* 2013 (2) SA 144 (CC) paras 44 and 47.

³ *Napier v Collect and Another* 1995 (3) SA 140 (A) at 144D-F.

⁴ *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2015 (1) SA 1 (CC) para 24; *Guardrisk Insurance v Café Chameleon* 2021 (2) SA 323 para 42.

⁵ 1977 (1) SA 31 (A) at 34 – 35.

⁶ *Silva's Fishing Corporation (Pty.) Ltd. v Maweza* 1957(2) SA 256 AD at 264; *Kakamas Bestuusraad v Louw* 1960 (2) SA 202 (AD) at 222).

liability can arise. If it did, then the second problem becomes relevant, viz. whether the negligent act or omission is linked to the harm sufficiently closely or directly for legal liability to ensue or whether, as it is said, the harm is too remote.⁷

Was factual and legal causation established in this matter?

[49] The present case, in my view, turns on the first of these problems, that is, causation in fact, for it could hardly be contended that if the collision and the subsequent injuries caused or contributed to the death of the deceased, this was too remote a consequence to give rise to legal liability.

[50] Before I can consider the issue of causation vis-à-vis this matter, I must emphasise that this appeal is based mainly on facts. It is trite law that a court of appeal should be slow to interfere with the findings of fact of the trial court in the absence of material misdirection.⁸ An appeal court's powers to interfere on appeal with the findings of fact of a trial court are limited.⁹ Without demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct. They will only be disregarded if the recorded evidence shows they are clearly wrong. It is also settled that when an appeal is lodged against the trial court's findings of fact, the appeal court should take into account the fact that the trial court was in a more favourable position than itself to form a judgment because it was able to observe the witnesses during their questioning and was absorbed in the atmosphere of the trial.¹⁰

⁷ See *International Shipping Co (Pty) Ltd Bently* 1990 (1) SA 680 (A) at 700.

⁸ *R v Dhlumayo and Another* 1948 (2) SA 677 (A) at 705-706.

⁹ *S v Francis* 1991 (1) SACR 198 (A) at 204E.

¹⁰ *S v Monyane and Others* 2008 (1) SACR 543 (SCA); *R v Dhlumayo* 1948 (2) SA 677 (AD).

[51] The Supreme Court of Appeal in *S v Naidoo and Others*,¹¹ reiterated this principle as follows:

‘In the final analysis, a court of appeal does not overturn a trial court’s findings of fact unless they are shown to be vitiated by material misdirection or are shown by the record to be wrong.’

[52] However, it must be stressed that when applying the abovementioned principle which underlies the well-defined approach of a court of appeal to such factual findings, over-emphasis of the advantages which the trial court enjoyed is to be avoided, lest the appellant’s right of appeal becomes illusory.¹²

[53] In the present matter, it is common cause that the deceased suffered severe bodily injuries due to the collision, which significantly impaired him physically. Although he was positive initially, he later lost his joy in life. The first appellant’s uncontested evidence was that the injuries sustained by the deceased in the accident had a profound physical, emotional, and psychological effect on him. The deceased told the first appellant that he does not feel like a man anymore because he couldn’t do what he needed to do. He felt less of a man.

[54] The injuries devastated the deceased so much so that he was at some point scared that he would lose his leg. He was also anxious about how he would manage his type of business without a leg. The first appellant also presented uncontested evidence before the trial court that the accident affected the deceased such that he

¹¹ 2003 (1) SACR 347 (SCA) at para 26.

¹² *Protea assurance Ltd v Casey* 1970 (2) SA 643 (A) at 648E.

could no longer sit on a hard surface for a long time, he could not walk for a long distance, he struggled to use his right thumb when having to use a power tool or hammer, he had great difficulty bending down and kneeling, he could no longer run, he could no longer sleep well, he had trouble negotiating stairs, he could no longer pick up or carry heavy weights, he also realised that he would not be able to apply for a position as a plumber as nobody would hire him with his difficulties. He suffered ongoing pain after the accident. Importantly, he could not control his bowel movements.

[55] According to the first appellant, the deceased took pain medication, which was ineffective. The ongoing pain the deceased suffered was corroborated by Dr Steyn, who testified that the deceased was experiencing pain, particularly from his right knee and right shoulder joint. Dr Steyn also noted that the deceased complained of pain in his right thumb. He also confirmed that the deceased's various complaints referred to in evidence by the first appellant and Ms B[...] were concordant with the nature and injuries suffered by the deceased.

[56] It must be stressed that when Dr Steyn examined the deceased, it was almost a year and a half after the accident. Notwithstanding, the deceased was still experiencing excruciating pain from his injuries. This evidence corroborated the evidence of the first appellant, her expert witnesses, and the evidence of Ms B[...] on the pain the deceased was experiencing immediately before his death. Due to the ongoing pain, the deceased became dejected, and his ability to practice his profession as a plumber and handyman was diminished. The injuries and pains had a tremendous knock-on effect on his quality of life, his feeling of happiness, and his mental and

emotional health. The accident impaired him physically such that he was trapped in a body aching with pain daily.

[57] This evidence was not challenged nor contradicted at all at the court *a quo*. During the cross-examination of the plaintiff and Ms B[...], the emphasis was on the fact that the deceased did not seek medical treatment or consult a pain specialist. However, that the injuries impaired him physically was unchallenged. Importantly, the trial court did not consider this evidence or the depth thereof in its judgment. Instead, the court *a quo* concentrated on the evidence of the expert witnesses (Ms Coetzee and Aurret-Besselaar) and their reliability. The court *a quo* did not consider the evidence of Ms Crouse, the occupational therapist, the first appellant and Ms B[...] on the physical and psychological impact that the injuries caused the deceased. In my opinion, the court *a quo* erred in failing to account for all the evidence adduced before it.

[58] I must emphasise that two basic principles should be kept in mind whenever evidence is evaluated namely: evidence must be weighed in its totality and not on a piece-meal basis, and that probabilities must be distinguished from conjecture or speculation. An appraisal of all the evidence is required. Evidence that is reliable should be weighed alongside such evidence as may be found to be false. Independently verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered.¹³

¹³ *S v Trainor* 2003 (1) SACR 35 (SCA) para 9.

[59] Crucially, the trial court found that the appellant had the onus to prove that the injuries sustained by the deceased triggered a mental condition which mental condition caused the deceased to act irrationally and with uncontrollable impulse, i.e., that it must be proven that the suicide was a direct result of a diagnosable psychiatric condition. Simply put, the court *a quo* evaluated the evidence against this backdrop of the need for proof of some form of psychiatric injury that led the deceased to commit suicide. It based its reasoning throughout its judgment that a psychiatric condition had to be proved. It found that because there was no psychiatric diagnosis in this matter, it is rather difficult to elucidate the deceased's conduct on the morning he died by suicide. In my view, this is where the court *a quo* went wrong. This error, in my view, affected the correctness of its judgment in its entirety.

[60] As correctly pointed out by Mr Roux, the first appellant did not need to prove that the deceased suffered from a psychiatric condition at the time of the suicide. All that the appellants were required to prove was a sufficient causal link between the sequelae of the injuries and the ultimate suicide of the deceased. In other words, the court *a quo* had to look at the conspectus of all the evidence and determine with reference to all the evidence that was presented at the trial whether the deceased had an impairment of judgment when he committed suicide pursuant to his injuries.

[61] In any event, Ms Coetzee, the Clinical Psychologist, described the level of distress of the deceased and stated that he was not mentally well. She asserted that there was a degree of impairment of mind and that the deceased's state of mind was not within the norm. She stressed the fact that the way the deceased spoke about frustrations and distress suggested something more significant. The fact that he felt

disheartened and hopeless and did not know which way to turn to spoke to the severity of his psychological symptoms. In addition, Ms Coetzee asseverated that the deceased's thinking ability was compromised and that he was not thinking with clarity about everything.

[62] Meanwhile, the first appellant's uncontested evidence was that the injuries sustained by the deceased in the accident had a profound psychological effect on him, so much so that she was very much concerned about his mental health and had urged him to seek help. This was the weekend before the Tuesday on which the deceased committed suicide. In fact, on that fateful day, she went to a Christian counsellor in her neighbourhood to seek assistance. The first appellant's brother, who was very close to the deceased, was also concerned and worried about his mental health, so much so that he wanted to speak to him. Unfortunately, on the day that he went to talk to the deceased, upon arrival at the deceased's house, he discovered that the latter had committed suicide, and he notified the first appellant accordingly. In my view, this important piece of evidence was not given sufficient attention by the trial court.

[63] Instead, the court *a quo* found that there was no tangible evidence to explain why the deceased committed suicide. In my view, the court *a quo* erred in this regard. The cumulative effect of the evidence the first appellant and her witnesses presented points to the vulnerability of the deceased. The evidence presented at the trial reveals that the deceased was a man who kept his card close to his chest. He would not easily open up. He was not a robust sort of personality. He was a manly man. He took great pride in providing for his family. Despite his physical challenges, he kept to himself. Those around him saw that he was struggling miserably and were very concerned.

[64] It was argued on behalf of the respondent before the trial court and in this appeal that the deceased did not seek professional help and that this is indicative of a person who could not commit suicide. This argument, in my view, is mistaken and misses the point. People are different and respond differently to situations and circumstances. The fact that the deceased did not go for medical help is inconsequential. When Mr Loebenstein, the respondent's witness, was asked about the deceased not having sought help for his difficulties, he stated that the deceased might have been, as Ms Coetzee concluded, a do person rather than a thinking person who would have felt that he should take on the burden of whatever he was suffering from.

[65] What is vividly evident in the evidence is that the deceased was suffering excruciating pains arising from the motor vehicle accident. The pain he suffered was also corroborated by Dr Steyn, the orthopaedic surgeon who told the court that the type of fracture the deceased sustained to his tibial plateau was a given that it would develop arthritis in the knee joint. Importantly, at the time of examination, the deceased was already showing signs of early arthritis, which indicated a poor long-term prognosis. More so, according to Dr Steyn and Ms Crouse, the industrial psychologist, due to the injuries the deceased suffered in the accident, he would not be able to perform work of a physically demanding nature because of the pain he experienced in his knee joint.

[66] I have little doubt that the injuries and the pain that the deceased was going through affected him tremendously and compromised his thinking ability. The uncontroverted evidence was that the deceased was a man who loved his family and

wife. It was not his makeup to give up or to abandon his family and devastate his children. The deceased took great pride in providing stability for his wife and children, contrary to what his biological father did to him. The evidence suggests that he did not know which way to turn to. He couldn't handle the situation anymore, and hence he committed suicide. In my view, there is overwhelming evidence that the injuries sustained by the deceased led him to commit suicide. Surely, there was a degree of impaired judgment for him to have taken such drastic action.

[67] Furthermore, the respondent's witness Mr Loebenstein, a reputable clinical psychologist with many years of experience, conceded that his colleague Ms Coetzee was better positioned to comment on the deceased's state of mind since she consulted with him for three hours. He further acknowledged that the injuries arising from the accident could have been the cause of the suicide. Notably, Mr Loebenstein conceded that if there were objective facts that showed that the deceased was despondent, such that the deceased having said before the suicide that he could not take it anymore, then one could conclude that the suicide was due to the accident.

[68] Indeed, the evidence did show that there were such objective facts in the form of what the deceased relayed to his mother a day before the deceased committed suicide. The deceased's mother (Ms B[...]) testified about how the injuries and their sequelae affected the deceased. Ms B[...] testified before the court *a quo* that the day before the deceased committed suicide, the deceased had said to her over a telephone discussion, I *effin* (expletive) can't handle this anymore.

[69] Meanwhile, Ms Auret Besselaar, the industrial psychologist, testified that when she consulted with the deceased on 21 June 2016, the deceased was emotionally distressed and despondent to such an extent that she thought it prudent to send an email to the deceased's attorney to inform them that the deceased was very angry and dejected. She also recommended that he see a clinical psychologist. While Ms Coetzee asserted in her evidence that three weeks before the deceased committed suicide, she observed that the deceased was distressed and recommended psychotherapy, possibly pharmacotherapy intervention. She also stated that the deceased was depressed though he did not meet the criteria for major depression. She also observed that the judgment of the deceased was impaired and compromised due to his mental stress. Her evidence was consistent with the evidence of the first appellant, Ms Crouse, and Ms B[...].

[70] The court *a quo* criticised the evidence of the expert evidence of Ms Auret-Besselaar and Ms Coetzee on the basis that they were unreliable because their conclusions fell in the realm of personal belief or opinion, guesswork, and speculation. The trial court found no evidence connecting the symptoms observed by both Ms Auret-Besselaar and Ms Coetzee to suicide. The trial court noted further that neither Ms Coetzee nor Ms Auret-Besselaar testified that after assessing the deceased, they discovered that the symptoms the deceased exhibited increased his chances of committing suicide.

[71] I have some difficulty with this finding. It is important to note that in the contemporaneous notes she made when she consulted with the deceased, Ms Auret-Besselaar pointed out that the deceased was very "distressed, frustrated; very

despondent; traumatic, and in pain; struggling every day, can't struggle like this; anxious and angry; struggling to survive, feels like a failure". This witness further testified that after assessing the deceased, she observed that he needed psychological intervention because he presented as extremely distressed and intensely angry. She immediately wrote to the deceased's attorney and recommended that the deceased should seek psychological help. Her consultation with the deceased was very difficult because of the distress the deceased was suffering. The fact that she immediately recommended psychological intervention corroborates her conclusion that the deceased was distressed when she consulted with him.

[72] While Ms Coetzee, on the other hand, noted in her contemporaneous notes that the deceased was "vengeful; frustrated; felt like a failure; becomes despondent and angry". She diagnosed the deceased as suffering from depression, although not major depression. Ms Coetzee further noted that when she consulted with the deceased three weeks before the deceased committed suicide, the deceased was mentally not well, and this manifested through agitation, irritation, hopelessness, despondency, despair, and frustration. She said the deceased's psychological sequelae was significant distress associated with physical injuries.

[73] Mr Eia, who appeared for the respondent, argued that the two expert witnesses were trying to build a case for the deceased against the respondent and that their evidence should be viewed from that prism. I do not agree with this proposition. In my view, the evidence of the two expert witnesses (Ms Coetzee and Aurret-Besselaar) must not be pigeonholed, compartmentalised, and looked at in isolation. Their evidence should be assessed in one melting pot together with all the other evidence

that was tendered, particularly the uncontested evidence of the deceased's wife (the first appellant) and Ms B[...] – the deceased's mother on the physical and psychological impact the injuries had on the deceased.

[74] I am of the opinion that the evidence of the two expert witnesses viewed objectively, was of appreciable help to the trial court. I pause to emphasise that an expert opinion must accordingly be based on relevant facts disclosed by admissible evidence. A court must ascertain whether the opinion expressed by the expert is logically based upon those facts.¹⁴ The evidence of the experts, in particular Ms Coetzee, in my opinion was based on facts and logical reasoning. It was corroborated in all material respect by the evidence of the first appellant, Dr Steyn, and Ms B[...] on the continued pain and incessant discomfort the deceased suffered prior to his death.

[75] Notably, the anger and despondency that the deceased exhibited immediately before his death caused his wife - the first appellant, his mother and the appellant's brother to be concerned about his mental health and to recommend him seek medical help. Given these considerations, I am of the view that the opinion of Ms Coetzee, was not based on guesswork but had a logical basis and defensible conclusion of her finding.¹⁵

[76] A full conspectus of all the evidence points to one direction only, and that is, the deceased was depressed due to the serious orthopaedic injuries he sustained in the motor vehicle collision that took place on 21 June 2014. He was depressed,

¹⁴ *MV Pasquale Della Gatta* 2012 (1) SA 58 (SCA) at para 26.

¹⁵ *Michael v Linksfield Park Clinic (Pty) Ltd* 2001 (3) SA 1188 (SCA) para 36 and 37.

experienced unending excruciating pain, and could not think clearly about everything. His ability to make an informed judgment was diminished and impaired, and hence he committed suicide on 6 December 2016. There is a clear causal connection between the injuries and the sequelae suffered by the deceased and the resultant suicide.

[77] The present case, in my view, is on all fours with *Road Accident Fund v Russell*,¹⁶ ("*the Russell matter*"). The facts in the present matter are in many respect similar to the facts in the *Russell* case. The court *a quo* distinguished this case from the *Russell* matter on the basis that in *Russell*, the deceased had brain damage. In contrast, the deceased did not suffer from brain injury in this case. The trial court also noted that in *Russell*, it was conceded that the deceased was suffering from depression, whereas in this case, there was no such concession. Mr Eia expressed similar sentiments during the argument in this appeal. For the reasons that follow, this argument is with respect erroneous and mistaken. Thus, the court *a quo* erred in reaching that conclusion.

[78] Unlike in *Russell*, the trial court was correct in finding that there was no brain injury in the present matter. However, this is neither here nor there. It must be stressed that it does not matter whether the impairment of judgment or whether the emotional effect thereof arises from a brain injury or from physical injuries. There is no logical reason to draw such a conclusion. The Supreme Court of Appeal in *Russell* certainly did not limit the issue in similar matters to brain injury. The critical question is whether, on the totality of the evidence, a finding can be made that there was an impairment of

¹⁶ 2001 (2) SA 34 (SCA).

judgment or an emotional issue that precipitated the suicide due to the injury sustained. I find the following reasoning from the *Russell* judgment apposite for present purposes. The court stated:

“[16] The trial court found that the suicide was not a *novus actus interveniens* but was causally connected to the negligence of the insured driver. It appears from a proper appraisal of the evidence that no factors extraneous to the injuries caused by the accident led to the suicide. Such inducing factors as there might have been, additional to the depression and loss of cognitive function, factors such as an inability to earn a living and being removed from his home environment, were all direct consequences of his injuries (My underlining).”

[79] I must emphasise that in the *Russell* matter, although the deceased was brain damaged, he was fairly able intellectually or cognitively to understand and appreciate his actions. He was not mentally or cognitively invalid. Prior to the collision, the deceased did not suffer from depression. However, after the collision, the deceased was found to suffer from depression and not severe depression. In the same way, in this matter, the deceased enjoyed a productive life and did not suffer from depression before the accident. After the accident, the deceased, in *casu*, suffered from depression but was not diagnosed with major depression. He was also not mentally or cognitively invalid.

[80] In the *Russell* matter, the expert witness gathered information from the nursing sister who looked after the deceased and took a backward glance to recover relevant information about a person who was already dead. The expert concluded that the

deceased suffered from depression. In this case, Ms Coetzee examined the deceased. She consulted with the deceased and the first appellant and concluded that the deceased was suffering from depression and not major depression. Ms B[...] confirmed that the injuries mentally affected the deceased, but he was not cognitively invalid.

[81] Importantly in the *Russell* matter, the court accepted the evidence of a prominent neuropsychologist, who did not examine the deceased at all but instead, conducted a psychological autopsy on the deceased, which he described as taking a backward glance to recover relevant information about a person who is already dead in an attempt to reconstruct the role which the deceased played in eventuating his demise. The expert witness concluded his assessment and found that the deceased suffered from depression, but not severe depression, based on information made available to him, primarily through interviews with the wife of the deceased and a nursing sister of the institution where the deceased was housed.

[82] In the *Russell* matter, the court found that the suicide was not a *novus actus interveniens* but was causally connected to the insured driver's negligence. The court found further that from a proper appraisal of the evidence, no factors extraneous to the injuries caused by the accident led to the suicide. Similarly, in *casu*, an assessment of the whole evidence reveals that there were no factors unrelated to the injuries suffered by the deceased in the accident which could have led to the deceased's suicide. Furthermore, no evidence was adduced to support a finding that a cause unrelated to the accident prompted the deceased to commit suicide. Therefore, I conclude that the deceased would not have committed suicide but for the accident.

[83] Even though the deceased's act of suicide may be said to have been deliberate, I am of the view that the weight of the evidence presented before the court *a quo* proves on the probabilities that the deceased's ability to make an informed judgment was compromised and impaired to a material degree by the unending excruciating pain, stress-related issues, and depression caused by the motor vehicle accident that occurred on 21 June 2014. Consequently, his ability to make a balanced decision was deleteriously affected. As the court found in *Russell*, though the suicide was deliberate, it did not amount to a *novus actus interveniens*.

[84] Consequently, in applying the flexible approach in determining the legal causation, I am of the opinion that it would be eminently reasonable, fair, and just to hold that the evidence presented at the trial established the requirements for such causation. Consequently, the appeal must succeed, and the respondent, in my view, is liable to compensate the first appellant for such damage as she may prove.

ORDER

[85] In the result, I would propose that the following order be granted:

85.1 The appeal is upheld with costs including the costs of 2 counsel.

85.2 The plaintiff's claim succeeds on the merits with costs of counsel.

85.3 The defendant shall pay the plaintiffs such amount as they may prove arising from their claim for loss of support as a consequence of the death of the deceased.

LEKHULENI JD

JUDGE OF THE HIGH COURT

I agree and it is so ordered:

ERASMUS N

JUDGE OF THE HIGH COURT

I agree:

SAMELA M

JUDGE OF THE HIGH COURT

Appearances:

For the appellant: Adv Roux SC

Instructed by: DSC Attorneys

For the Respondent: Adv Eia

Instructed by: The State Attorney