



**IN THE HIGH COURT OF SOUTH AFRICA**  
**FREE STATE PROVINCIAL DIVISION**

Reportable:	YES/NO
Of interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

**Case No.: 4603/2015**

In the matter between:

**GARTH WAYNE SHEFFRYK**

**Applicant/Plaintiff<sup>1</sup>**

and

**MEC FOR POLICE, ROADS AND TRANSPORT:  
FREE STATE PROVINCE**

**Respondent/Defendant<sup>2</sup>**

**Coram:** Opperman, J

**Date of hearing:** 10 March 2022

**Judgment Delivered:** 3 June 2022

**Reasons for Judgment:** The reasons for judgment were handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII on 3 June 2022. The date and time for hand-down is deemed to be 3 June 2022 at 15h00.

**Summary:** Hearsay evidence - admissibility of hearsay evidence and opinion evidence that was adduced by way of discovered

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<sup>1</sup> The applicant is the plaintiff in the trial that is in progress and will be referred to in this interlocutory application as "the plaintiff" to avoid confusion.

<sup>2</sup> The respondent will be referred to as "the defendant".

documentary evidence and not *viva voce* - none of the parties willing to call or consult the witnesses/authors of the documents

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## JUDGMENT

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[1] “Two wrongs do not make a right.” A document is a document and hearsay evidence is hearsay evidence; opinion evidence is opinion evidence. The Law of Evidence on the admissibility of the evidence prevails.

It is said that a document only proves what is written in it, but not the truth of what is written. Before the contents of a document may be presented as the truth, the admissibility requirement must be fulfilled. The contents must not be irrelevant, the document must not contain an inadmissible confession, etc. Because a document usually reflects somebody’s knowledge and thoughts, particular care must be taken to ensure that it does not infringe the hearsay rule and perhaps the opinion rule.<sup>3</sup>

[2] The muddle of the case is that neither the plaintiff nor the defendant wants to call the authors of documents that might play a pivotal role in the adjudication of the case. They do not, for that matter, want to consult with the witnesses to establish the relevance, probative value and veracity of the evidence of these witnesses. This is the wrong. They want to ploy and manoeuvre the process and Rule of Law to serve their case but in effect undermine the administration of justice and the constitutional decree of a fair trial. Adjudication of a case may not ensue on evidence that is inadmissible

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<sup>3</sup> Schmidt *et al* with reference to *Da Mata v Otto NO 1971 1 SA 763 (T)* at 769D-E, *The Law of Evidence*, <https://www.mylexisnexis.co.za/Index.aspx> on 31 May 2022, last updated: June 2021 at 11.5.

and lacks veracity. The credibility of the judicial process will suffer and fall into disrepute if this is permitted.

- [3] Roland Sutherland, Deputy Judge President of the Gauteng Local Division of the High Court<sup>4</sup> wrote in December 2021 that:

The primary duty of legal practitioners is to the court rather than to the client and thus legal practitioners are obliged to actively support the efficacy of the court process. One aspect of this dependence is illustrated in this article: the duty of legal practitioners to respect and support the process of court by making proper disclosure and not mislead the court. It is argued that the culture of contemporary litigation must be more respectful of this interrelationship between the judge and the legal practitioner to produce efficient and fair litigation.

- [4] The plaintiff acknowledged the above responsibility to the Court:

3.9 On the Defendant's side, on the other hand, the only reason that I can think of why the Defendant has chosen not to call the two witnesses (and the Defendant is on record as saying that it won't) is because of the inconvenient fact that the two witnesses' investigation results don't suit the Defendant - which is, I suggest, a cynical reason aimed at avoiding liability and not aimed at the Defendant's meeting his responsibilities to the public. (Accentuation added)

3.10.3 If my suspicion in this regard that the Defendant's legal team hasn't even bothered to consult with Messrs Moloi and Gaba is correct, what does that tell one? Did the Defendant have any conceivable reason to doubt that his employees will have told them the truth? If so, what could that reason have been? And if, as I also venture to suggest, there is no conceivable reason why either Mr Moloi or Mr Gaba will have sought to mislead the Defendant or his legal department as to the facts, why has the Defendant and his legal team studiously refrained from even finding out

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<sup>4</sup> *The Dependence of Judges on Ethical Conduct by Legal Practitioners: The Ethical Duties of Disclosure and Non-Disclosure*, SOUTH AFRICAN JUDICIAL EDUCATION JOURNAL, (2021) 4 (1) at page 47, ISSN: 2616-7999.

from the two why they said what they did in their letters? After all, it was *their job* to investigate and report.<sup>5</sup>

- [5] The plaintiff also refuses to consult with or consider calling the witnesses that could promote their case. They fear, without having consulted with the witnesses or having investigated the possibility; that the witnesses would turn hostile and contaminate their case. They want to rely on the evidence of the witnesses as depicted in the documents but in the same breath strongly suggests a possibility of dishonest and loyalist conduct if they were to testify. The question mark that was hung over the reliability of the evidence of Moloï and Gaba, on the argument of the applicant/plaintiff, is severe.

3.7 As was outlined when this matter was argued from the bar before the bringing of this substantive application, the Plaintiff has no intention of consulting with, or calling, either of Mr Moloï or Mr Gaba.

This is because both are (or, at least, at the material time were) in the Defendant's employ, with the result that they clearly owe a certain degree of allegiance to the Defendant. The Defendant is vigorously contesting this matter. Even if this isn't so in fact (this is in the nature of things something that would likely only emerge in testimony; which is why it would be so risky for the Plaintiff), Messrs Moloï and Gaba might well be (indeed, are likely to be) of the view that their job security and their promotion prospects wouldn't be aided by their becoming witnesses for the Plaintiff against their employer, the Defendant. Thus, even if they should in consultation confirm the content of their letters, that is no guarantee whatsoever that they would do so in the witness box. As was outlined in argument, it would be very risky indeed for the Plaintiff to call the two and hope that valour succeeds over discretion with candour as the result. And, as was also outlined in argument, the law is clearly to the effect that the mere fact that a witness who one calls doesn't give evidence that is favourable to one is not of itself a basis on which one can have the witness declared as a hostile witness,

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<sup>5</sup> Founding affidavit: M. Barnard.

entitling the Plaintiff to cross-examine. The law is to the effect that the witness must exhibit some form of clear hostility. Thus, the reality is that if the Plaintiff calls either Mr Moloi or Mr Gaba as a witness, he would thereby become a hostage to the fortune of their attitude; they might choose to find reason to retract the content of their letters, without the Plaintiff's being entitled to cross-examine them on the retraction.<sup>6</sup>

[6] The above should be enough to dismiss the application and rebuke the parties on their conduct. I will however go further and apply fact to law to test whether any of the exceptions to the non-admissibility of hearsay evidence, and as a fact, opinion evidence and documentary evidence, applies. Schmidt<sup>7</sup> said it best with reference to case law when he stated that evidence can be both admissible and inadmissible:

Before evidence can be admitted for any purpose it must comply with all the requirements set for that purpose. If, for example, a document is presented in order to prove through its content one of the points in issue in the case, and it is relevant for that purpose, is primary evidence, and is shown to be authentic but contains hearsay, it is inadmissible in principle.

If the evidence complies with all the requirements of the purpose for which it is applied, it is admitted regardless of the fact that it would be inadmissible for another purpose.

Evidence that is relevant in one respect but irrelevant in another, is thus admissible if for the rest it complies with the requirements of admissibility.

It is certainly possible that evidence that is admissible for one purpose and not for another, may be used just for the one purpose. As Botha J stated in *Lornadawn Investments (Pty) Ltd v Minister van Landbou* 1977 3 SA 618 (T) 622H: “gebruikmaking van die getuienis bly beperk tot die besondere doel op grond waarvan dit toegelaat word” (“use of the evidence remains restricted to the particular purpose for which it is admitted”). Evidence of a statement that is relevant but would be inadmissible hearsay if

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<sup>6</sup> Founding affidavit: M. Barnard.

<sup>7</sup> *Supra* at 13.1.5 page 13 -19.

it were adduced as the truth, is admitted if it is not adduced as the truth – it does not become admissible hearsay at the same time.

A document containing both admissible and inadmissible evidence is not necessarily inadmissible in its totality. The admissible parts may be presented in evidence, subject to the other party's right to prove the rest of the document where this is feasible. (Accentuation added)

- [7] I regress for a moment to introduce the case suitably. This is a substantive interlocutory application for hearsay evidence to be admitted as evidence on the merits of the case in a civil trial. The submission of the plaintiff to court during argument was that the evidence might also be relied upon when costs are argued in the end.<sup>8</sup>
- [8] The hearsay comes to the court by way of documents. The issue is that the defendant has been in possession of two letters since the beginning of the litigation. The letters contain said hearsay evidence and some opinion that might sway the case in favour of the plaintiff and would have had an effect on the finalisation and costs implications of the case.
- [9] The dilemma of the plaintiff for the admissibility is that the letters are documents; the truth and authenticity of the content must be proven if they want to rely thereon. Otherwise, the letter is just a piece of paper and real evidence. In addition, there are opinions and some hearsay also contained in the letters that must pass muster and come up to standard with the Law of Evidence.

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<sup>8</sup> I will deal with this proposition later and separately.

[10] The content of the letters is claimed to support the evidence of the direct *viva voce* evidence tendered in the case for the plaintiff by at least seven witnesses, completely independent of each other, that observed the state of affairs at the scene of the accident and directly so. Or, as may be argued the other way round; the *viva voce* evidence of at least seven eyewitnesses attest to and confirm the truth of the content of the documents that amounts to hearsay and opinion evidence.

[11] The authors of the letters will not be called to testify. The calamity and catastrophe of the case lie in this aspect.

[12] The evidence, broadly put, is that the road between Memel and Vrede was littered with potholes and in a very poor condition at the time of the accident. The defendant denies this. The facts of the case on which the plaintiff bases their application are:

3.5 As the court will be aware, the essential issue in this matter relates to the existence or otherwise of potholes on the stretch of road in question on the day of the accident. In this regard:

3.5.1 The Plaintiff and the witnesses called by the Plaintiff who observed the scene on the day of the accident (in the order in which they were called, Mr Spies, Constable Tsotetsi, Mr Viljoen, Mr Beukes, Mr Du Toit and Mr Ackerman) all testified to the road's being littered with potholes.

3.5.2 The Defendant's case, on the other hand, appears to be based on the twin allegations (yet to be proven; the Plaintiff will close his case after this application has been argued) firstly that a certain Mr Makappa (then in the employ of the project engineers employed by the Defendant's department, Miletus Consulting (Pty) Ltd) (sic) took photographs of the road (Contained in Bundle J, and to which I will refer as the "Miletus photographs") on 29 July 2014, 15 days after the accident which show no

potholes, and secondly that, at most, the only repairs that were effected to that stretch of road between the date of the accident 14 July 2014 and the 29<sup>th</sup> were temporary gravel repairs on 24 July 2014 (see D201; the reason why I say “at most”, is because the temporary gravel repairs recorded on D201 for 24 July 2014 extended from km 45 to km 50, where as the parties appear to be agreed that the accident occurred approximately at km 50.247, i.e. closer to Memel than the 50 km mark. If the repairs of the 24<sup>th</sup> stopped at exactly km 50, then that would not have extended to the collision area), which couldn’t explain how potholes on the 14<sup>th</sup> (as per the evidence) could have become asphalt patches on the 29<sup>th</sup> (as per the Miletus photographs).

3.5.3 On the strength of these two points, the Defendant argues that by process of reasoning, if the Miletus photographs were indeed taken on the 29<sup>th</sup>, then it follows that the road could not have been potholed on the 14<sup>th</sup>. This application is not the place to argue the logic of that thinking, and I do not do so – I simply outline what I understand to be the essence of the Defendants case.

3.6 In these circumstances, it stands to reason that the fact that two employees of the Defendant (whose job titles clearly suggest that this was part of their function) appear to have investigated the matter pursuant to their duty to do so and to have concluded that the road was indeed potholed, is highly relevant.

[13] As is law, the parties to a civil action are on a more equal footing; thus, both parties must discover all documents on which they rely. Even documents that may be detrimental to the discoverer’s case must be discovered.

[14] The two documents that became known as “D208” and “D209” were properly discovered and emanate from the defendant.



- [15] The defendant does not intend to use the evidence in their case. They have not, inexplicably so, consulted with the witnesses/authors of the letters to ascertain the value and veracity of the evidence so contained in the documents, nor do they intent to do so. They will not and refuse to call the witnesses.
- [16] The defendant has made the witnesses available to the plaintiff to use in their case as they deem fit.
- [17] The witnesses are available.
- [18] Their input might be valuable to the Court in the search for the truth and reality. The interest of justice might be served.
- [19] This application of the plaintiff is in total disregard of the constitutional decree that the opponent has the right to test the veracity of evidence under oath by cross-examination. The fact that neither the plaintiff nor the defendant wants to call the witnesses to tender their evidence *intra curial*, under oath and to be tested by cross-examination does not change the status of the evidence as to be documents, hearsay and opinion. The Law of Evidence applies and may not be plied to fit the notions of the litigants.<sup>9</sup>

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<sup>9</sup> Schmidt *et al*, *The Law of Evidence*, <https://www.mylexisnexis.co.za/Index.aspx> on 31 May 2022, last Updated: June 2021 at Chapters 11, 17 & 18. Du Toit *et al*: *Commentary on the Criminal Procedure Act* at RS 62, 2019 ch24-p42A to RS 56, 2016 ch24-p50Q, CD-ROM & Intranet: ISSN 1819-7655 Internet: ISSN 1819-8775, Jutastat e-publications, <https://jutastat.juta.co.za/nxt/gateway.dll?f=templates&fn=default.htm&vid=Publish:10.1048/Enu>, Legislation: The legislation section is updated to 31 March 2022. Commentary: Corresponds with Revision Service 67, 2021 of the loose-leaf publication, updated to 31 January 2022. Herbstein and Van Winsen: *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa*, III Affidavits in application proceedings, 5th Ed, 2009 ch14-p444 to 5th Ed, 2009 ch14-p445, <https://jutastat.juta.co.za/nxt/gateway.dll?f=templates&fn=default.htm&vid=Publish:10.1048/Enu>. Zeffertt *et al*, *Essential Evidence*, <https://www.mylexisnexis.co.za/Index.aspx>, Last Updated: 2nd Edition 2020 at Part III, Chapters 7, 10 & 13.

[20] It is the stance of the plaintiff that the mere fact that the documents were discovered causes it to be regarded as relevant and the content to be true and authentic; it is what it purports to be. This is not the law:<sup>10</sup>

3.1 D208 and D209 emanate from the Defendant.

3.2 By this I mean not just that the two letters were discovered by the Defendant. Primarily, the point is that the two letters are clearly, on their face (and it is worthwhile my mentioning at this point that the parties are agreed on the status of the relevant documents including D208 and D209, that they are what they purport to be, so that I am entitled to make reference to the letters on this basis), reports made by Messrs Moloï and Gaba to the Defendant's legal department in respect of their investigations of the Plaintiff's claim and, in particular, the state of the road in the area of the accident at the time of the accident. (Accentuation added)

[21] The above raises the issue regarding the admissibility of the contents of discovered documents, without the author having testified about the correctness of the contents thereof. Does the fact that a document was discovered cause it to be admissible and the content to be true, correct and authentic?

[22] In a unanimous judgment of *Rautini v Passenger Rail Agency of South Africa* (Case no. 853/2020) [2021] ZASCA 158 (8 November 2021), the Supreme Court of Appeal addressed the issue of reliance on the contents of discovered documents. The finding was that the inclusion of "all discovered documents are what they purport to be" is not unlawful. In fact, it serves a legitimate purpose: it allows the documents to be discovered as real evidence. However, parties should be vigilant and lead the evidence of the

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<sup>10</sup> Founding Affidavit: M Barnard.

authors of those documents if they intend to rely on the contents of the documents.<sup>11</sup>

[23] These are the letters:

**“D208”**

**POLICE ROADS & TRANSPORT**  
**DEPARTMENT OF**  
**POLICE, ROADS AND TRANSPORT; FREE STATE PROVINCE**  
**REF/TSHUPO/VERW: P51/5/193/P64/2**  
**ENQUIRIES/DIPATLISISO/NAVRAE: T.A. MOLOI**

**DIRECTOR: LEGAL SERVICES**  
**DEPARTMENT OF POLICE, ROADS AND TRANSPORT**  
**P.O. BOX 690**  
**BLOEMFONTEIN**  
**9300**

**CLAIM: CC20KLG**  
**ROAD P16/2 MEMEL-VREDE**

- Investigation was carried out, the following are my findings:
  1. The road had potholes because of life span of the road.
  2. Warning signs were erected.
  3. There was regular maintenance.
  4. Due to our departmental challenges, we could not manage to keep the road 100% safe.
  5. I hereby attach weekly sheets and photo for warning sign.
  6. I refer this matter to the Area for recommendation.

Thank you,

Signed on 11 December 2014

**T.A. MOLOI**  
**Phumelela**

**ROAD SUPERINTENDENT**  
**P O Box133, Vrede, 9835, Republic of South Africa**  
**Phone: (0)58 913 1035 Fax: (0) 58 913 1709 Email: [moloita@freetrans.gov.za](mailto:moloita@freetrans.gov.za)**

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<sup>11</sup> Hedda Schensema and Taigrine Jones, *Let the author speak: A reminder on admission of documentary evidence*, 15 November 2021, <https://www.cliffedekkerhofmeyr.com/en/news/publications/2021/Employment/employment-alert-15-november-Let-the-author-speak-A-reminder-on-admission-of-documentary-evidence-.html#:~:text=Documentary%20or%20hearsay%20evidence&text=Essentially%2C%20the%20High%20Court%20admitted,only%20qualify%20as%20hearsay%20evidence> on 31 May 2022.

**“D209”**

**POLICE ROADS & TRANSPORT**  
**DEPARTMENT OF**  
**POLICE, ROADS AND TRANSPORT; FREE STATE PROVINCE**  
**REF/TSHUPO: P51/5/193/P64/2**  
**ENQUIRIES/DIPATLISISO: S.Z. GABA**  
**17 December 2014**

**Director: LEGAL Services**  
**Att: Adv Molotsi**  
**P.O. BOX 690**  
**BLOEMFONTEIN**  
**9300**

**LETTER OF DEMAND: MR. G.W. SHEFFRYK REGISTRATION CC20KLGP N  
ROAD P16/2 (VREDE-MEMEL)**

1. The abovementioned letter of demand has reference.
2. Through thorough investigation please find our findings:
  - 2.1 Road condition:  
Our road condition were bad with potholes +/- 500 mm x 100mm deep  
Daily maintenance were carried out daily if potholes been noticed  
Warning signs were erected to warn road user about the condition of our road  
The accident could have been avoided if only the claimant had adhered to the road regulation signs
  - 2.2 The office is not in favor of 100% compensation to the claimant
3. See attached annexures
  - a. Warning signs were erected – find attached copies
  - b. Report from the Road superintendent
  - c. Attach find weekly sheets – maintenance evidence
  - d. Copy of accident report
4. I therefor refer this to the legal section to make final recommendation  
Kind regards

**Signed**

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**S.Z. GABA**  
**PRINCIPAL ROAD SUPERINTENDENT**  
**BETHLEHEM**

/fg  
Private Bag X11, BETHLEHEM, 9700,

Johan Blignaut Avenue, BETHLEHEM, 9700  
Tel: (058) 307 3809 Fax: (058) 303 4483 Fax to email: 086 759 9253  
e-mail: [groenewaldf@freetrans.gov.za](mailto:groenewaldf@freetrans.gov.za)

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- [24] The documents/letters are not in context. What was the query that caused the answer? One wonders if it goes to the factual issue, there is no application before the court for the annexures referred to, to be admitted. It is not certain whether all the annexures are available. The letters make mention of the "ROAD P16/2 (MEMEL-VREDE)". It does not state whether reference is made to the specific location of the incident (the accident report is referred to but it does not help the issue). The letters are general in nature. The letters are also not time specific. It was compiled in December 2014 and the incident occurred in July 2014. It did not state the condition of the road specific to the date of the accident on 14 July 2014 and the location. The *viva voce* evidence of the witnesses could have solved the questions.
- [25] The application only relies on the application for the admissibility of hearsay evidence and I will deal with it as such. The admissibility requirements for documents, opinion and hearsay evidence tend to overlap to a great extent. The factors being; relevance, authenticity, truth, veracity, purpose, value, context, prejudice, service to the administration of justice, constitutionality and fairness, etcetera are vital considerations in all these legal concepts.
- [26] Section 3(4) of the Law of Evidence Amendment Act 45 of 1988 defines hearsay evidence as: "evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence" (Accentuation added). Hearsay evidence is

only admissible in very limited circumstances and is presumed to be inadmissible unless proven otherwise.

[27] Section 3 of the Law of Evidence Amendment Act 45 of 1988 (the Law of Evidence Amendment Act) that substituted and codified the common law on hearsay evidence, reads as follows:

Section 3:

- (1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless—
  - (a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;
  - (b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or
  - (c) the court, having regard to—
    - (i) the nature of the proceedings;
    - (ii) the nature of the evidence;
    - (iii) the purpose for which the evidence is tendered;
    - (iv) the probative value of the evidence;
    - (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
    - (vi) any prejudice to a party which the admission of such evidence might entail; and
    - (vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice.
- (2) The provisions of subsection (1) shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence.
- (3) Hearsay evidence may be provisionally admitted in terms of subsection (1) (b) if the court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify in such proceedings: Provided that

if such person does not later testify in such proceedings, the hearsay evidence shall be left out of account unless the hearsay evidence is admitted in terms of paragraph (a) of subsection (1) or is admitted by the court in terms of paragraph (c) of that subsection.

(4) For the purposes of this section—

“Hearsay evidence” means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence;

“party” means the accused or party against whom hearsay evidence is to be adduced, including the prosecution.

[28] The factors in section 3(1)(c) are intrinsically interwoven. The one cannot exist without the other in coming to a final decision; it frequently overlaps.

[29] (i) The nature of the proceedings; (ii) the nature of the evidence; (iii) the purpose for which the evidence is tendered

There are two aspects to mind here; that the plaintiff wants to use the evidence to bolster the merits of his case in the trial and secondly, that the plaintiff wants to use the evidence to argue on during the inquiry into the burden of the costs of the trial.

### The inquiry into costs

As to the inquiry into costs the defendant was informed by its own employees, the Principal Road Superintendent and his Deputy in December 2014 already that:

2. Through thorough investigation please find our findings:

2.1 Road condition:

Our road condition were bad with potholes +/- 500 mm x 100mm deep

Daily maintenance were carried out daily if potholes been noticed

Warning signs were erected to warn road user about the condition of our road

The accident could have been avoided if only the claimant adhered to the road regulation signs.

2.2 The office is not in favor of 100% compensation to the claimant

If the plaintiff manages to proof its case and is successful on the merits the evidence contained in the letters will be vital and admissible to the costs aspect of the litigation. The documents will not be admissible for the truth of the content but for the content. It will have to be explained why the witnesses were not even consulted on the issue to ensure that it does not clash or destroy the Miletus evidence. These two witnesses; focusing on the road in issue and working on the proverbial ground every day, loyal to their employer, could have provided valuable input on the veracity of the Miletus evidence; either by enhancing it or being in contradiction. It is the duty of an officer of the court to put the best evidence before court; not the evidence that suits his client more. Again Sutherland, DJP:

The duty of full disclosure and duty not to mislead a court on fact or law is pivotal to the relationship between the judge and the legal practitioner. The injunctions in the LPCC, overall, and in particular rule 57, demonstrate the dependence of a judge on the legal practitioner to lead the court through the matter and point out the real issues. The confidence that a judge must have in the integrity of the legal practitioner is unreserved. Competence, diligence, and honesty are to be taken for granted. The premise that any and every assurance given by a legal practitioner need not be second-guessed is the oil that enables the wheels of litigation to move at pace. When these attributes are absent, the system itself falters. These norms are endorsed in the caselaw to which reference is made hereafter.

Rule 57.1 requires that—



[a] legal practitioner shall take all reasonable steps to avoid, directly or indirectly, misleading a court ... on any matter of fact or question of law. In particular, a legal practitioner shall not mislead a court ... in respect of what is in the papers before the court ... including any transcript of evidence.<sup>12</sup>

He goes on to state at page 56 that:

The injunction to disclose 'every fact' is the crux. The presentation of facts on affidavit must result in a fair and not a distorted picture of the true position. I align myself with the conclusion he drew that the examples discussed in his article illustrating the application of the LPCC rules show that the judge is largely impotent to prevent an abuse by legal practitioners and is dependent upon their integrity. Only after the breach of an ethical duty is uncovered can remedial action be taken, if feasible, but seldom without inconvenience and costs. The sanction of punitive costs orders for such breaches is doubtless appropriate but is beside the point.

#### The trial on the merits and the evidence

This case is a civil trial and the fact remains that the plaintiff bears the onus to, on a balance of probabilities, proof that the condition of the road contributed to the accident of the plaintiff. The content of the letters is thus primary evidence and the ruling of the court will depend on it. If the veracity of the evidence cannot be tested or guaranteed then the court is not allowed to use the evidence to adjudicate the case. Purely based on the nature of the proceedings in this instance the evidence is inadmissible.

#### Conclusion

The letters may be used and is admissible in the inquiry into the burden of costs but not on the merits of the case in the trial itself.

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*Supra* at page 54.

- [30] (iv) The probative value of the evidence, (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends, (vi) any prejudice to a party which the admission of such evidence might entail.

I dealt with the fact that the evidence in the documents carries little probative value due to the fact that the veracity thereof cannot be tested as is a constitutional imperative in all trials that must be fair.

The mere refusal by the parties to consult with or call the witnesses because they might support the one or the others case or turn against the caller is based on speculation in the most extreme and a failure of justice. It is indeed a disappointment in the constitutional epoch. The caretakers of the road, that were and are the primary source on the condition of the road, were simply ignored. They were present on the road daily and are the “best evidence”.

The prejudice in this case is a failure of the administration of justice caused by the litigants. If the witnesses were consulted the application might not even have been necessary and the issues curtailed. This does however not make the evidence admissible on the merits of the case and on the Rule of Law; not for the plaintiff nor for the defendant.

- [31] (vii) Any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice.

There is not any other factor that allows the court to admit the evidence that is inadmissible on the basis and manner the plaintiff wants for it to be

allowed but for the inquiry into costs. The result may deflect against both the litigants in the end.

**[32] ORDER**

1. The application that the letters (“D208” & “D209”) from respectively; Mr. T.A. Moloi, Road Superintendent and Mr. S.Z. Gaba, Principal Road Superintendent, both to the Director: Legal Services of the Defendant’s Department, be regarded as admissible hearsay evidence under section 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988 *on the merits of the case, is denied.*
2. The letters “D208” and “D209”, *are regarded as admissible as real evidence for the purpose of the inquiry into costs.*
3. The costs of this application shall be costs in the cause of the action.

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**M OPPERMAN, J**

**APPEARANCES**

**FOR THE APPLICANT**

**ADVOCATE MULLINS SC**

**N VAN DER WALT INC**

90 Monument Road, Kempton Park

011 394 1888

Ref: SHE6/0001

c/o Symington & De Kok

169B Nelson Mandela Drive

Westdene

Bloemfontein

051 505 6600

051 430 4806

Ref: R BRINK/nvdm/MLD0706

**FOR THE RESPONDENT  
SNYMAN**

**ADVOCATE C**

**FREE STATE SOCIETY OF ADVOCATES**

051 430 3567

**PHATSHOANE HENNEY ATTORNEYS**

35 Markgraaf Street

BLOEMFONTEIN

051 400 4000

Ref: L Companie/JB/MEC2/0002