THE SUPREME COURT OF APPEAL

OF SOUTH AFRICA

Reportable
Case No: 21/2000

In the matter between:

SIBONGILE WENDY MAKHATHINI APPELLANT

and

ROAD ACCIDENT FUND RESPONDENT

Coram: ***Nienaber, Schutz and Navsa JJA***

Date of hearing: **6 September 2001**

Date of delivery: **14 November 2001**

Summary: **MVA – Whether a report by an unidentified policeman recording a statement by a driver, since deceased, about the speed at which he was driving when a collision occurred in which a child was injured, ought to be admitted in terms of section 3 (1)(c) of the Evidence Amendment Act 45 of 1988.**

JUDGMENT

NAVSA JA:

[1] At about midday on Saturday 26 October 1993 Mphathi Makhathini (Mphathi), then three years old and living in Ntuzuma township, KwaMashu in Kwa-Zulu Natal, accompanied two older children, Mthoko Ngege (Mthoko) and

someone identified only as Phindile, to fetch water from a communal tap. It proved to be a fateful trip. The communal tap is situated alongside Falezwe road, which is a narrow tarred road. Whilst separated from the other two children who were at the tap Mphathi was struck and injured by a motor vehicle. The appellant, in her representative capacity as Mphathi's mother and guardian, instituted an action for compensation against the respondent, an insurer in terms of the Road Accident Fund Act 56 of 1996 and the statutory successor to the Multilateral Motor Vehicle Accidents Fund.

[2] At the commencement of proceedings in the Durban and Coast Local Division of the High Court the parties agreed that the question of liability would be tried first. Mphathi was *culpa incapax* at the time of the collision and therefore, apart from certain other issues flowing from the pleadings which are no longer of any moment, proof of any degree of negligence on the part of the insured driver would render the respondent wholly liable to the appellant. Jappie J who heard the matter concluded that there was insufficient evidence to prove that the insured driver was negligent in any degree and granted an order for absolution from the instance with costs. It is against that order that the appellant appeals with the leave of the Court below.

[3] The appellant tendered in evidence a Road Traffic Collision Report ("the report") in terms of s 3 of the Evidence Amendment Act 45 of 1988 ("the Act"). In

his judgment on the merits Jappie J had this to say about it:

> "From the evidence before me, the identity of the author who wrote what appears in this particular block is unknown. Neither had it been established when this brief description of the collision had, in fact, been written out. Assuming, in favour of the plaintiff, that it was written by the policeman who received the report of the collision from Zondi, it is still doubtful whether he recorded accurately what Zondi, in fact, reported to him. It appears that what is recorded was the policeman's impression as to the circumstances as related to him by Zondi. Even assuming in favour of the plaintiff that the contents of Exhibit C [the report] under these circumstances are admissible in evidence, the value of what is contained therein is so doubtful that no reliable inference can be drawn from its contents. All that can be safely concluded from the existence of Exhibit C is that there was a report of a collision having occurred on 26 October 1993, and that this collision occurred between a minor child, Mphathi, and a motor vehicle driven by Justice Thembelihle Zondi."

[4] The issues in this appeal are, first, whether the report should have been admitted in evidence and, secondly, if so admitted, whether the evidence as a whole established the negligence of the insured driver.

[5] The driver of the insured vehicle, Mr J.T. Zondi ("Zondi") could not be called as a witness because he had died from a cause unrelated to the collision. Mthoko,

nine years old at the time of the collision and fifteen years old at the time of trial, testified in support of the appellant's case. He was the only witness called who was present at the scene where the collision occurred. I relate his version of events. Initially Mthoko, Phindile and Mphathi were all standing beside the communal tap whilst a bucket was being filled. Together the three of them crossed over to the other side of the road to dispose of some litter. Mthoko and Phindile then crossed back to fetch the bucket and left Mphathi behind at a point opposite the tap. The collision occurred while Mphathi was separated from the other two children. Mthoko did not see the collision. He was close to the tap and his attention was focused on the bucket. He last saw Mphathi, before the collision, standing on the opposite side on the gravel verge adjoining the road. Mthoko could not recall hearing the screeching of tyres or a hooter being sounded. After the collision Mthoko saw tyre marks on the road that were probably caused when Zondi applied the brakes. The vehicle was still on the road. Mphathi was lying on the road in front of and towards the right of Zondi’s motor vehicle, on the right-hand side of the road as Zondi was travelling. Mthoko recognized Zondi as someone he had seen driving around the neighbourhood.

[6] It is common cause and appears clearly from the photographs that there is a bend in Falezwe road, which would have required Zondi to turn towards the right before he reached the collision point. Zondi would have been proceeding downhill

with the tap to his right. Whether he could have seen the tap before he rounded the bend depends upon the extent to which it and its surroundings were obscured from his view. However, the gravel verge where Mthoko last saw Mphathi standing was clearly visible on his left side at some distance. The two sets of photographs used at the trial reflect the state of the area at different times during 1996 (it will be recalled that the collision occurred in 1993). The photographs show vegetation on the side of the road where Mthoko last saw Mphathi. The vegetation consisting of reed-like plants and grass stood beyond the gravel verge. The appellant's photographs show less vegetation on both sides of the road than do the respondent's photographs. Mthoko could not recall the state of the vegetation at the time of the collision.

[7] The appellant's evidence did not take matters much further. She was in her house when she heard the screeching of tyres. She came out of the house and discovered that Mphathi had been struck by a motor vehicle. When she arrived at the scene she saw him lying on the gravel verge adjoining the road. She accepted that Mphathi had been moved immediately after the collision. The appellant saw Zondi at the scene and recognised him as someone from the neighbourhood. His motor vehicle was on the road. Mphathi was transported to a clinic in Zondi’s car. It was not disputed that when the appellant arrived at the scene, hawkers, who usually plied their trade beside the road, were present.

[8] The appellant’s evidence that the communal tap was the only source of water

in the area in which they lived was also not disputed. The appellant testified that there was no vegetation alongside the road at the time of the collision - a squad of workmen had "cleaned up the road". Her evidence on this aspect was not challenged in cross-examination.

[9] Mphathi's father, Mr Thembinkosi Jali ("Jali") testified. In my opinion, Jappie J was correct in largely ignoring his evidence. He repeatedly contradicted himself and clearly made things up as he went along. There is, however, no reason to doubt the following parts of Jali's evidence: that he followed Zondi to the clinic where they left Mphathi, that they thereafter went to the KwaMashu police station to report the collision and that he saw a policeman writing whilst Zondi was speaking to him. That evidence is important in relation to the report. It was not disputed that the policeman and Zondi were speaking to each other in Zulu. Jali, however, could not hear everything that was said.

[10] I turn to the report and the evidence connected to it. The relevant part of the report reads as follows:

> "Driver A was driving from northwards to southwards. He was driving m/v with registration number NJ 13355. At about 13:50 along unnamed road at "G" Section Intuzuma he approached the group of children who were fetching water at the tap. He lowered his speed and drove at 40 km/h. The group came aside and others left on the other side. While he was driving afore – one of the child from right ran to

> the road. He set on brakes but the child of ± 3yrs was knocked and the child fell down but sustained slight injury on his head. The vehicle stand still. The child was taken to Nozaza Clinic."

The report contains Zondi's full names, an address and the registration number of the motor vehicle. It also records that the driver in question had a code 8 driving licence. The police station recording the particulars contained in the report is stated to be the KwaMashu Police station. The report contains an official date stamp bearing the date 26 October 1993.

[11] Constable Dube ("Dube"), the investigating officer who handed in the original of the report, testified that he was stationed at the KwaMashu police station at the time of the collision. The report was in the docket. He did not recognise the handwriting of the person who completed the report and could not identify him. According to Dube the report would have been completed at the police station. Further attempts to obtain information from Zondi before his death proved fruitless.

[12] Captain Perumal Subramoney ("Subramoney") testified that he was the acting branch commander for detectives stationed at the KwaMashu police station. He confirmed that the official accident register at the KwaMashu police station recorded the collision in question. The date on which the collision was reported is recorded as 26 October 1993, which is the day on which, the collision occurred. Mphathi and Zondi's names appear in the collision register, as does an address

under Zondi's name. A registration number of a vehicle appears in the appropriate column alongside Zondi's name. The occurrence book at the police station also recorded the collision. The entry appears to have been made at 23h40 on 26 October 1993. It contains a cross-reference to the collision register. Subramoney did not identify the person who completed the report and took the statement from Zondi.

[13] Counsel representing the appellant submitted that since the requirements for admissibility in terms of s 3(1)(c) of the Act had been met, Jappie J erred in not admitting the report as evidence. The appellant's principal purpose in tendering the report was to rely on that part of it which records Zondi's extra-curial statement to a policeman that the speed at which he was traveling at the time of the collision was 40 kmph. It was submitted that in all the circumstances that speed was excessive.

[14] Counsel for the respondent opposed the admission of the report on several grounds. The first ground was that the report was patently inaccurate. So, for example, the report contained a statement that the child with whom Zondi collided came from the right-hand side of the road whereas the evidence established that he had come from the left. Furthermore, since the driver could obviously not have seen the tap before he rounded the bend in the road he could not have seen "[t]he group came aside and others left on the other side" as recorded in the report. Secondly, it was submitted that the recording of the statement was clearly

unreliable. The idiom and the grammar used in the report were such as to indicate that the policeman's command of English was poor and reflected negatively on the reliability of the report. Thirdly, and most importantly, he submitted that the report did not comply with the requirements of s 3 (1)(c) of the Act.

[15] Section 3(1) of the Act and part VI of the Civil Proceedings Evidence Act 25 of 1965 are statutory interventions permitting the reception of statutorily defined hearsay evidence, if the respective statutory preconditions are satisfied. Section 3(1) and s 3(2) of the Act provide:

> "**3. Hearsay evidence.** – (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."

Hearsay evidence and "party" are defined respectively in s 3(4) as follows:

"(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."

[16] In ***Mdani v Allianz Insurance Limited*** **1991(1) SA 184(A)** at **189 H-190 A** this Court, in dealing with the testimony of a policeman (A), that an insured driver (B) made admissions to him, held, with reference to s 3 of the Act, that such evidence is not hearsay if tendered for the purpose of determining whether such an admission was made. Whether B in fact made the *admission* (in the absence of testimony by B) depends on A's credibility and could be tested by cross-examination. The Court held further, that the *content* of the admission, if it is to be

used to establish the truth of what was said, constitutes hearsay within the definition of hearsay in s 3(4) of the Act as that question depended upon B's credibility. At **190 B** the following was said:

> "Accordingly, in the postulated example, A's evidence as to the content of B's admission falls within the definition of 'hearsay evidence' in s 3(4) of the Act and may therefore be admitted in terms of s (3)(1)(c) of the Act. It follows that the Court *a quo* was not precluded from admitting Basson's evidence if, having regard to the provisions of s 3(1)(c)(i)-(vii), it was of the opinion that it should be admitted in the interests of justice."

[17] The Court in ***Mdani's*** case held (at **190 C**) that the Court below had misread ***Union & South West Africa Insurance Co Ltd v Quntana N.O.*** **1977 (4) SA 410(A)** and had wrongly concluded that it was precluded from admitting the driver's admissions against the defendant third party insurer on the basis that they constituted inadmissible vicarious admissions. Van Heerden JA in the ***Mdani*** case said the following at **188 I-J**:

> "The Court *a quo* seems to have been under the impression that in *Quntana* the statement was held to be inadmissible because it was hearsay *and* because of the lack of the necessary privity or identity of interest or obligation between a stranger (the driver) and a party to the suit (the defendant). That, however, is not what this Court decided. It is quite clear from the judgment that the statement in question was held

> to be inadmissible on a single ground, viz that it was hearsay."

At **190 C-E** he said the following:

> "As a result of its wrong view of the law the trial Court did not apply its mind to the question whether Basson's [the policeman's] evidence should have been so admitted. …the matter should be remitted to the trial Court so that it can exercise its discretion whether or not to admit the hearsay evidence in terms of s 3(1)(c) of the Act."

[18] The ***Quntana*** case was decided before the advent of the Act. The conclusions reached in the ***Mdani*** case were critisised by Professor David Zeffertt in the **1991** ***Annual Survey*** at **537–539**. He submits that the Court *a quo* in the ***Mdani*** case was justified in its reading of the ***Quntana*** judgment. The learned author goes on to contend that the ***Mdani*** decision could have ramifications far beyond what the draughtsman of s 3 may have imagined and that "the law of evidence may never look the same again".

[19] In ***Botes v Van Deventer*** **1966 (3) SA 182(A)** Williamson JA dealt with vicarious admissions and said the following at **197 B**:

> "Extra-judicial declarations or admissions by a party to a civil action which are relevant to an issue raised in the action are generally receivable against him in evidence. Such declarations or admission by others are generally inadmissible on the ground that they are hearsay."

There are three exceptions to this rule. In Schmidt and Rademeyer's **Bewysreg**, (4th ed) at **509** the learned authors set them out:

> "…naamlik, waar die party die derde magtig om namens hom te praat, waar hy die derde se verklaring as sy eie oorneem of dit ratifiseer en waar, weens die identiteit van hulle belange, die derde se verklaring as die ekwivalent van sy eie beskou word."

In the ***Botes*** judgment, *supra*, Williamson JA at **206 F-G** referred to a number of decisions in which it was held that there was no privity of interest between a driver of a vehicle and a third party insurer but, because he was dealing with a master and servant relationship he did not find it necessary to comment on the correctness of those decisions.

[20] It is true that in the ***Quntana*** case, after referring to the judgment of Williamson JA in the ***Botes*** case and after examining the then prevailing statutory framework providing statutory insurance to motorists, Corbett JA said the following at **426 E-F**:

> "For these reasons, therefore, I am of the view that, in general, and certainly in this particular case, the admission of the driver of the insured vehicle is not admissible against the registered insurer, in an action under Act 29 of 1942, on the ground of privity or identity of interest or obligation; and that, in the absence of some other ground of admissibility, such as the admission forming part of the *res gestae* or having been authorized by pre-appointment or reference or by subsequent adoption, the admission is not receivable in evidence at all. Earlier cases in the Provincial or Local Divisions in which a contrary decision was reached must be regarded as having been incorrectly decided."

It does not follow that such a statement by a driver of an insured motor vehicle which does not fall within the exceptions referred to in paragraph [19] cannot now be admitted if the requirements in terms of s 3(1)(c) of the Act have been satisfied. The ***Mdani*** case settled that question. Schmidt and Rademeyer in ***Bewysreg***, *supra*, in dealing with that case state the following at **509-510**:

> "Die hof gaan voort en bevind dat 'n middellike erkenning nie voortaan meer uitgesluit sal word bloot omdat dit nie gemaklik inpas in een van die drie gemeenregtelike uitsonderingsgronde nie. Slegs hoorsê is ter sprake, en enige middellike erkenning, of dit nou behoort aan 'n gemeenregtelike uitsonderingsgrond of nie, se toelaatbaarheid sal bepaal word aan die hand van artikel 3(1) van Wet 45 van 1988. Dit beteken natuurlik nie dat die gemeenregtelike posisie geheel irrelevant raak nie. Die gemeenregtelike reëling bly steeds hoogs relevant, want

> ons howe sal dit uit die aard van die saak in ag neem wanneer hulle hul diskresie ingevolge artikel 3 (1)(c) uitoefen."

Du Toit *et al* in their ***Commentary on the Criminal Procedure Act*** make the following comment (at **24-70 A)**:

> "It may be simpler, however, to put aside labels which have outlived their usefulness and to view the admissibility of such admissions purely in the light of the general principles relating to relevance and hearsay."

[21] I consider that this latter comment correctly reflects an important aspect of the decision in ***Mdani's*** case (even though the judgment does not spell it out in detail). Section 3 of the Act defines hearsay evidence and whilst retaining the common law's caution about the reception of such evidence, it altered the rules governing when it is to be received and when not. The particular old rule under discussion – extra-curial "admissions" by a "stranger", the admissibility of which was determined by the absence or presence of "privity of interest" (an essentially foreign concept derived from substantive law) - has now been supplemented by notions of relevance, weight and the interests of justice. A reading of the analysis that had to be undertaken by Corbett JA in ***Quntana's*** case under the old hearsay rules demonstrates one of the respects in which those rules were deficient, at least if the privity there envisaged finally determined admissibility or inadmissibility. The

statutory preconditions for the reception of hearsay evidence are now designed to ensure that it is received only if the interests of justice dictate its reception. In their application the common law justification for the reception of admissions will not be forgotten. It was, in the words of Parke B in ***Slatterie v Pooley*** **(1840) 6 M & W 664, 151 ER 579**, that "what a party himself admits to be true may reasonably be presumed to be so". That will remain so and will be placed in the scale when the factors (i) to (vii) are weighed. That will also remain so if the declarant is not the party himself, but his agent or privy in the common law sense, so that one may still speak of an admission by the party. But when one has a case such as the one before us in which a "stranger" (Zondi) makes a statement, the effect of which is adverse to a party, there can be no more talk of an admission. But the fact that it is not an admission does not mean for that reason it must always be excluded. And that is what the effect of ***Mdani*** was. This Court did not decide that the statement there in question should be admitted. What it did do was to consider whether the content of the statement made to the policeman constituted hearsay evidence as defined. After deciding that question in the affirmative, it left it to the trial court to decide whether the statements should be admitted after having regard to the factors listed in s 3(1)(c)(i)-(vii).

[22] To sum up: Hearsay evidence is not as a general rule admissible. A long recognised exception to the rule occurs where the contested hearsay statement

amounts to an admission made by a party to the litigation and, by extension, by someone who has an identity of interest with such a party. The driver of an insured vehicle who had made an admission which, if admitted in evidence, would be held against an insured who is a party to the litigation does *not* have such an identity of interest with the insured. Section 3 of the Act introduced a general statutory exception to the general rule. It follows that an admission by an insured driver, otherwise hearsay, would only be admissible in evidence if it complies with the preconditions prescribed by s 3 of the Act. Before the advent of the Act statements made by strangers to a suit, which were construed as admissions, were not admissible unless they fell within the exceptions, referred to in paragraph [19]. Now such statements are examined to see whether they fall within the statutory definition of hearsay evidence. If they do they are then measured against the requirements set out in s (3)(1)(c)(i)-(vii) and are admitted if they pass muster - that is the true effect of ***Mdani's*** case.

[23] Once one approaches the matter in this way there is no reason in principle for excluding the driver's extra-curial statement, and particularly not because it is not an admission. In principle his extra-curial statement as to his speed is no different to that of his passenger who had his eye on the speedometer just before the collision. Once one is beyond the barrier of principle it may be that in a particular case the driver's statement, contrary also to his own interest, may carry more weight

than the passenger's, but one cannot generalize. Whether statements of this kind should be admitted at all, and if so, what weight should be given them must depend upon the outcome of the application of the statutory tests to the facts.

[24] The fears expressed by Professor Zeffertt about the possible consequences of the approach adopted in the ***Mdani*** case, as described in paragraph [18], do not seem to have been realised in the ten years that have passed since then. The cases referred to later in this judgment illustrate that courts have been heedful to admit hearsay evidence only if the statutory preconditions have been met. There has been a consistent concern about a too ready reception of untestable hearsay evidence. Equally, there has been a concern to admit hearsay evidence where the interests of justice demands its reception

[25] In the present case Dube (A), testified that the report was in a police docket and must have been completed by a policeman (B), at the KwaMashu police station. The statement in question is a statement by Zondi (C), to the unidentified policeman, about the speed at which he was driving. Zondi was not a party to the litigation and could not testify. The policeman did not testify. It is clear that in respect of the statement recorded by the policeman, unlike the position in the ***Mdani*** case, *supra*, (where the policeman testified about an admission made to him by the driver of the insured motor vehicle), the evidence by Dube is hearsay evidence as defined in s 3(4) of the Act. Dube could have been cross-examined

about the provenance and authenticity of the report. As it happens the respondent's legal representative did not do so. In so far as the truth of the content of the statement is concerned, that depends on the credibility of Zondi and it is upon the truth of the content that the appellant relies. If the statement is admitted then the appellant has to surmount a second hearsay hurdle, namely, the acceptance that the recordal by the unidentified policeman reflects what Zondi said. This is what is called double hearsay. Obviously, the more hearsay is piled on hearsay the more unreliable it becomes. But double hearsay is not precluded by s 3 provided its requirements are met. In ***Magwanyana and Others v Standard General Insurance Company Ltd*** **1996(1) SA 254 (D)** at **257 H**, the Court, in dealing with the admissibility of a statement tendered in terms of s 34(1) of the Civil Evidence Proceedings Act and in terms of section 3(1)(c) of the Act, admitted double hearsay but considered its evidential value, in the totality of the circumstances of that case, to be minimal, particularly when seen against the direct evidence of three witnesses. In due course I will deal with the evidential value of the statement before us. As will become apparent, the nature of the double hearsay statement in this case differs substantially from that examined in the ***Magwanyana*** case, *supra*, and described in the judgment at **256 E-G** and at **257B-G**.

[26] It is clear that at best for the appellant only s 3(1) (c) of the Act applies to the facts of the present case. The nature of a decision on the admissibility of evidence

in terms of s 3 of the Act and the power of a court of appeal to set aside a decision wrongly arrived at is dealt with in ***McDonald's Corporation v Joburgers Drive-Inn Restaurant (Pty) Ltd and Another and two related cases*** **1997 (1) SA 1(A)** where this Court said the following at **27 D-E**:

> "It was contended that the Court *a quo* exercised a discretion in refusing to allow the evidence under section 3 of the Act, and that its decision in this regard may be set aside only if the Court of appeal considers that the discretion was not judicially exercised. I do not agree. A decision on the admissibility of evidence is, in general, one of law, not discretion, and this Court is fully entitled to overrule such a decision by a lower court if this Court considers it wrong. There is in my view nothing in s 3 of the Act which changes this situation."

[27] The purpose of the Act is to allow the admission of hearsay evidence in circumstances where justice dictates its reception. In ***Metedad v National Employers General Insurance Co Ltd*** **1992 (1) SA 494 (W)** it was stated as follows at

498 I-499 G:

> "It seems to me that the purpose of the amendment was to permit hearsay evidence in certain circumstances where the application of rigid and somewhat archaic principles might frustrate the interests of justice. The exclusion of the hearsay statement of an otherwise reliable person whose testimony cannot be obtained might be a far greater

> injustice than any uncertainty which may result from its admission. Moreover, the fact that the statement is untested by cross-examination is a factor to be taken into account in assessing its probative value. … There is no principle to be extracted from the Act that it is to be applied only sparingly. On the contrary, the court is bound to apply it when so required by the interests of justice."

In each case the factors set out in s 3(1)(c) are to be considered in the light of the facts of the case. The weight to be accorded to such evidence, once it is admitted, in the assessment of the totality of the evidence adduced, is a distinct question.

[28] The factors set out in s 3(1)(c)(i)-(vii) should not be considered in isolation. One should approach the application of s 3(1)(c) on the basis that these factors are interrelated and that they overlap. See ***Hewan v Kourie NO and Another*** **1993(3) SA 233 (T)** at **239 B - C** and Schmidt and Rademeyer's ***Bewysreg***, *supra*, at **481** where the learned authors state:

> “Soos reeds uit die voorafgaande bespreking van die afsonderlike faktore sou blyk, behoort 'n hof nie die faktore onafhanklik, en sonder inagneming van die ander, in ag te neem nie. Die afsonderlike faktore hou tot 'n hoë mate op verskillende vlakke met mekaar verband, en elkeen kan gevolglik net effektief in aanmerking geneem word indien die hof, in die oorwegingsproses, die impak en invloed van die ander ook in die weegskaal plaas.”

[29] I turn to consider the application of s 3(1)(c) to the facts of the present case. Section 3(1)(c)(i) requires a consideration of the nature of the proceedings. Section 3(1) of the Act makes it clear that it applies to both criminal and civil proceedings. Section 3(1)(c)(i) requires a consideration in the widest sense, of the nature of the proceedings, for instance whether they be civil or criminal or trial or motion proceedings. One may then consider the other factors in s 3(1)(c) in relation to the nature of the proceedings. For example, if the proceedings are motion proceedings, whether the party against whom the evidence is sought to be adduced will be prejudiced, or whether allowing further sets of affidavits or resorting to any other procedural or evidentiary means may balance matters. If the matter is a civil trial a court may consider the absence of the testing power of cross-examination which will always be attendant when hearsay evidence is admitted, but may nevertheless admit hearsay evidence if the party against whom it is sought to be admitted can counter the effect of such evidence by other means. If one is dealing with a criminal trial, with its attendant consequences, the effect of the introduction of hearsay evidence may be such that an accused person may suffer prejudice of a kind such that it would not be in the interests of justice to admit the evidence. In the present case we are dealing with a civil trial.

[30] Section 3(1)(c)(ii) requires that the nature of the evidence be considered. Schmidt and Rademeyer in ***Bewysreg***, *supra*, at **477-478** suggest that this

requirement relates mainly to the reliability of the evidence sought to be introduced. Reliability is perhaps more pertinent to the enquiry in terms of s 3(1)(c)(iv), but as stated earlier in this judgment, the various factors are interrelated. In my view what is required by s 3(1)(c)(ii) is a characterisation of the evidence sought to be introduced. In the present case the strong probability is that a policeman at the KwaMashu police station who was performing official duties obtained the information in the report from Zondi. It ties in with the evidence by Mphathi's father that he accompanied Zondi to the police station to report the collision. The dates in the occurrence book and in the collision register which were not contested, tie in with the date stamp on the report, which reflects, at least on the face of it, that it was completed on the day of the collision. It is consistent with the evidence of Dube and Subramoney. In a nutshell, the evidence sought to be introduced can be characterised as a recording by a policeman of a report of a collision given to him by a driver of a motor vehicle on the day on which the collision occurred.

[31] Section 3(1)(c)(iii) requires scrutiny of the purpose for which the evidence is tendered. The appellant's main purpose is to prove the speed at which Zondi was travelling, from which his negligence may then be inferred. As such it is a central issue. Schmidt and Rademeyer in ***Bewysreg***, *supra*, at **478** refer to ***S v Dyimbane* 1990 (2) SACR 502 (SE)**, ***Hlongwane and Others v Rector, St Francis College, and Others* 1989(3) SA 318(D)** and ***Hewan v Kourie***, *supra*, where it was

suggested that where the evidence sought to be admitted bears on the central issue in the case a court should be slow to admit it. The learned authors also refers to a different view as stated in ***S v Mpofu*** **1993 (2) SACR 109(N)** at **116 i**:

> "So far as the purpose for which the evidence is tendered I cannot, with respect, agree that the importance of the evidence is an aspect militating against its admission. Evidence that is otherwise relevant should not depend for its reception on its importance in the case. If the evidence sought to be led carries the hallmark of truthfulness and reliability then its reception is doubtless justified."

In ***S v Ramavhale*** **1996(1) SACR 639(A)**, a criminal case, the following appears at **649 c – d**:

> "I do not wish to enter into the debate whether s 3(1)(c) should or should not 'be lightly applied' (see eg *Metedad's* case above at 499E-F), but I would agree with the remarks in this and other cases, the effect of which is that a Judge should hesitate long in admitting or relying on hearsay evidence which plays a decisive or even significant part in convicting an accused, unless there are compelling justifications for doing so."

[32] Section 3(1)(c)(iv) requires that the probative value of the evidence be considered. Evidence sought to be introduced in terms of s 3(1)(c) may be such that its probative value, even at first blush is minimal and in those circumstances the enquiry will end there. Questions of relevance and reliability arise in the

application of this subsection: see ***S v Ramavhale***, *supra*, at **649 e – 650 a**. The policeman who received the report was an impartial outsider. The statement about speed would have been deliberately made and deliberately received. One can readily accept that a driver reporting a collision would not be prone to overstate his speed. The overwhelming probability is that the statement was made on the day of the collision a short while after Mphathi was left at the clinic to receive medical treatment. Regard being had to these factors one is led to the conclusion that the report sought to be admitted has relevance and probative value.

[33] Section 3(1)(c)(v) of the Act requires that a court enquire into the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends. Neither Dube nor Subramoney could identify the policeman who completed the report. Counsel for respondent criticized the appellant for failing to place evidence before the trial court about the steps taken to trace the whereabouts of the policeman who completed the report. In my view it is a legitimate point of criticism against the appellant that the enquiry as to the identity of the policeman who took the statement was not pursued with greater urgency by her legal team, but is not, in itself, decisive.

[34] Section 3(1)(c)(vi) requires a consideration of prejudice to the party against whom the evidence is sought to be adduced. The inability on the part of the respondent to test by cross-examination the accuracy of the statement recorded by

the policeman is obviously prejudicial but prejudice of that nature is implicit when hearsay evidence is admitted. That, as was stated in ***S v Ramavhale***, *supra,* at **649 j** is one of "the perils of hearsay evidence" which must be faced whenever it is sought to introduce evidence in terms of s 3(1)(c) of the Act. It is the degree of the prejudice that must in each case be taken into account to determine whether an injustice will be done to the party against whom it is sought to be adduced and that, as has been stated earlier, is a matter of fact to be determined in the circumstances of each case. In my view this is a borderline case. One must not forget that the onus throughout is on the appellant. On the other hand, there is a warrant of reliability to be found in the probabilities, particularly those discussed in paragraphs [30] and [32].

[35] Finally, in terms of s 3(1)(c)(vii) of the Act the court is required to take into account any other factor, which must refer to any relevant factor not yet covered by any of the preceding categories. I can think of no others.

[36] When all of the factors enjoined to be weighed are taken together I think that it is in the interests of justice to admit the version of the person most immediately concerned, when we may assume with some confidence that he was not overstating his speed. The deficiencies in the report must obviously be taken into account when the ultimate question to be determined is what reliance, if any, can be placed on the contents thereof. Bearing all these factors in mind, I have come to the conclusion

that the report should have been admitted by the Court *a quo*. And if that had been done, there was sufficient support in the probabilities for it to have relied on the admission about the speed at which the insured driver had travelled at the time of the collision in determining whether he was negligent or not.

[37] Even if one accepts that there may have been some misunderstanding between the policeman recording the report and Zondi, one can with a reasonable measure of safety accept that the statement about Zondi's speed was accurately recorded. There is every indication in the remainder of the report that the policeman who completed the report was numerate. On the probabilities I accept that the policeman correctly recorded what Zondi told him about his speed.

[38] Having regard to Zondi's knowledge of the area and the condition of the road, a speed of 40 kmph was excessive in the circumstances. The children would have been visible to him if he had been keeping a proper lookout. There are only two possibilities. The first is that when Zondi came round the bend he was not keeping a proper lookout and did not see the children in the vicinity of the road until it was too late to stop. The second is that he did see the children when he was rounding the bend but that his speed was excessive, so that he could not stop in time.

[39] In ***Levy N.O. v Rondalia Insurance Corporation of SA Ltd*** **1971(2) SA 598 (A)** at **599 H – 600 C** the following is stated:

> "As a general proposition it is well settled, and it accords with

> humanity and common sense, that a motorist approaching young children near the edge of the road ought to drive with a degree of special care and vigilance because of their tendency sometimes to dash heedlessly across the road. To hold otherwise would be to put an old head on young shoulders, and to assume that they will look before they leap. But the rule must not be applied as a fixed principle without reference to the facts. The foreseeability of reasonably possible collision, and the degree of special care required, will vary according to the particular circumstances of each case, for example, the visibility of the children; their apparent age; their proximity to the edge of the road and to the path of the vehicle; their immobility or liveliness; the indications, if any, of an intention to cross the road; the extent of their supervision by a responsible person; the apparent awareness of the latter, and of the children, of the approach of the motorist; the available width of road; and the stopping power of the vehicle in relation to speed, brakes and road surface. Such factors (and the list is not exhaustive) are interrelated and not individually decisive. Their cumulative effect must be considered. Similarly, the particular circumstances will dictate the reasonable steps in relation to matters such as hooting, berth, swerving, slowing down or pulling up, with a view to guarding against the occurrence of collision, the reasonable possibility of which was foreseeable."

[40] In either of the possible scenarios previously sketched by me Zondi was negligent. He ought to have foreseen that there might have been pedestrians, including children, in the vicinity of the tap. He must have known that there were

potholes in the road and that the road was therefore not smoothly trafficable. In these circumstances he ought to have regulated his speed to enable him to stop to avoid such pedestrians that might have been crossing the road. If he had seen the children, who were all very young and unsupervised, earlier rather than later, he ought to have reduced his speed and ought to have applied his brakes sooner than the brake marks indicate he did. There was every possibility that the unsupervised children, including Mphathi, would dash heedlessly across the road. The brake marks on the road suggest a sudden braking and that Zondi saw the children too late. Because of the speed at which he was traveling he could not stop in time or take other evasive action. The evidence suggests that he did not sound his hooter. If he had done so at least one of the witnesses in the vicinity would in all likelihood have heard it. Zondi failed to take such care as could have been expected of a reasonable motorist in his position.

[41] In the light of the totality of the admissible evidence the Court below ought to have concluded that Zondi was negligent and ought to have held the respondent liable for such damages as may have been sustained by the appellant in her representative capacity.

[42] In the result I make the following order:

1. The appeal is upheld with costs.

2. The order of the Court below is set aside and there is substituted

for it the following:

(a) It is declared that the Defendant is liable to compensate the Plaintiff in her capacity as the mother and guardian of the minor child, Mphathi Advice Makhathini, for damages suffered as a result of injuries sustained by the said minor in the collision which occurred on 26 October 1993;

(b) the further hearing of the trial is postponed to a date to be arranged with the Registrar for the hearing of evidence as to the *quantum* of damages;

(c) the costs of trial thus far incurred are reserved.

MS NAVSA

JUDGE OF APPEAL

CONCUR

NIENABER JA
SCHUTZ JA