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(2) Of interest to other Judges: NO
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Signature:

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 53091/17

In the matter between:

PHILIPPUS DANIEL RIEKERT OPPERMAN

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

MAKHUVELE J

Introduction

[1] Philippus Daniel Riekert Opperman, an adult male, who I shall henceforth refer to as 'the plaintiff' or 'Mr Opperman' issued summons against the Road Accident Fund, who I shall henceforth refer to as the defendant

which is a statutory body established in terms of the Road Accident Fund Act, 56 of 1996 for payment of compensation for damages suffered by him as a result of a collision that occurred on 12 August 2016 at the intersection of Viljoen and First Streets, Krugersdorp, Gauteng Province.

[2] It is common cause that at the time of the collision, the plaintiff was riding on his motor cycle with registration letters and numbers CK 32 CP GP and that he collided with a vehicle bearing registration letters and numbers JSC 810 GP that was driven by Ms Bontle Makhadzi Netshisaulu, who I shall henceforth refer to as the 'insured driver' or 'Ms Netshisaulu.

[3] The parties advised me at the commencement of the trial that they had agreed in terms of Rule 33(4) of the Uniform Rules of Court to separate the merits and the quantum. I accordingly granted an order in accordance with their agreement. The trial proceed on the merits only.

[4] The relevant bundles that both parties referred to now and again during the trial were the pleadings, the photo album as well as the Accident Report form (AR form).

The particulars of claim

[5] In paragraph 5 of his particulars of claim, the plaintiff alleged that:

"The sole cause of the accident was negligence of the insured driver, which was negligent in one of the following respects;

5.1 The insured driver:

5.1.1 failed to keep a proper and/or adequate look-out.

5.1.2 Failed to keep the motor vehicle he was driving under proper control;

5.1.3 Failed to ensure that the motor vehicle was road worthy;

5.1.4 failed to pay due regard to other road users and more specifically that of the plaintiff, by entering an intersection at a dangerous and inopportune moment when the Plaintiff had right of way and by colliding with the motor cycle of which the Plaintiff was the driver;

5.1.5 failed to pay due regard to the prevailing conditions on the road he was traveling on;

- 5.1.6 *failed to pay due regard to the rights, safety and wellbeing of other road users and more specifically that of the Plaintiff;*
- 5.1.7 *failed to prevent the accident when , by the exercise of due and reasonable care he could and should have done so.*
- 5.1.8 *failed to ensure that the motor vehicle is in good working order and that the motor vehicle's tyres and brakes are in good order;*
- 5.1.9 *failed to apply the brakes of the motor vehicle he was travelling in sufficiently alternatively timeously further alternatively at all.*
- 5.1.10 *failed to prevent the collision when he could have done so with exercising of reasonable care and skill;*
- 5.1.11 *drove too fast given the prevailing circumstances.*
- 5.1.12 *failed to observe and heed to the traffic signs regulating the flow of traffic in an intersection.*

[6] Although the insured driver is referred to as a 'he' in the particulars of claim, it is common cause that the plaintiff collided with a vehicle that was being driven by a woman, therefore a 'she'.

[7] In its plea, the defendant denied the collision and liability. In the alternative, it pleaded that the accident was caused by the sole negligence of the plaintiff, further alternatively that the plaintiff contributed to the causation of the accident.

[8] Particulars of the plaintiff's alleged negligence or contribution to the causation of the accident are that:

- 5.2.1 *he failed to keep a proper lookout;*
 - 5.2.2 *he travelled at a speed which was excessive under the circumstances;*
 - 5.2.3 *he failed to avoid the collision when, by taking reasonable and proper care, he both could and should have done so;*
 - 5.2.4 *he failed to apply brakes of the insured motor cycle at all, alternatively timeously and/or sufficiently "*
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Evidence

Plaintiff

[9] The plaintiff testified and did not call any witnesses.

]10] In his evidence in chief, plaintiff testified that:

[10.1] On the day in question at about 07:30 he was on his way to work and was riding his motor cycle. He was travelling from east to western direction of Viljoen Street in Krugersdorp. He emphasized the fact that he had a right of way over traffic travelling from First Street, which is an intersecting street from south to north and controlled by a stop sign.

[10.2] The weather was clear and he could see his way. He had been using the same road for about one to two years, and had been travelling by this particular motor cycle for about one and a half year. He knows all the traffic signs and marks along that road.

[10.3] The speed limit is 60 Km per hour and he was travelling exactly at that speed. He knows the speed he was travelling at because it was showing on the speedometer.

[10.4] The intersection of Viljoen and First Streets is in a residential area.

[10.5] On his side of travel the road was not busy, however, the oncoming traffic from the western to eastern direction where he was coming from was heavier because many people travel to Johannesburg for work at that time of the day.

[10.6] He was in possession of a Learner Driving Licence at the time, but he was entitled to drive alone.

[10.7] He was wearing a black pair of trousers, black shoes with steel points, a white helmet, black waistcoat which had the name of his Motor Cycle club called 'Xcalibur' emblazoned in big (size 72) white font.

[10.8] His motor cycle was visible because it had red and blue colours, big headlamp which was permanently on. He checks it every morning to ensure that it is still functional.

[10.9] He saw the insured motor vehicle when he was approaching the First Street intersection when he was about 10 metres away. It was on his left handside, south to eastern direction and it was moving slowly through the stop sign. The driver was driving over the stop street.

[10.10] When he was about 5 metres from her, he realized that she was not going to adhere to the stop sign because she had moved from it. He swerved to the right in front of her to avoid the collision. It was too late.

[10.11] The collision occurred on his lane of travel.

[10.12] On why he did not swerve to the left or take any other evasive actions, the plaintiff explained that there was loose sand on his left and his motor cycle was going to skid and he would have collided with the pallisade fence. Swerving to the right was the only evasive action he could take. He did not apply brakes because he thought that she would stop and that she saw him. Furthermore, applying sudden brakes or aggressive swerving would have caused the motor cycle to 'slipper' under him, causing him to fall.

[10.13] On his driving experience, he testified that he had been using the said motor cyce to work for about one and a half years. He also attended a driving course called 'Road Captains' just four months before the collision. This is a sort of a defensive driving course.

[10.4] Asked what he thought the insured driver's intention was when she crossed the stop sign, the plaintiff explained that she appeared like she was about to turn into Viljoen street, where he was coming from. The street has two lanes from west to eastern direction whereas where he was coming from (east to west) it has one lane.

[10.5] After the collision he landed on the lane of travel of oncoming vehicles. He was severely injured, but fully conscious. The insured driver ran to him. She apologized and told him that she did not see him as she was busy talking on the phone. He did not see if she had any passenger.

[10.6] His motor cycle was damaged on the right handside. The right part of the blue panel was ripped off. The insured motor vehicle was damaged on its entire front part. The number plate also fell off.

[11] The plaintiff also identified the photos depicting certain areas in the scene of the collision such as the direction of the respective drivers, where his motor cycle landed, where the insured driver's vehicle ended as well as the damage to their respective motors.

I will deal with the photographic evidence and the accident report separately.

[12] Under **cross examination**,

[12.1] The plaintiff maintained that the learners licence authorised him to drive alone and it was valid for two years, which had not expired at the time. He did not give it to the police at the scene because he was still being attended by ambulance people and his licence was in the bag. He gave them his identity number. The learners licence got lost in hospital.

[12.2] His opinion about the insured driver's intention to turn right is informed by the fact that he saw her indicators flashing to turn to the right.

[12.3] He did not reduce speed after seeing her indicate and passing the stop sign because at that time she was not yet on his lane of travel to block his way but she was already over the stop sign.

[12.4] There is a distance of about one (1) metre between the stop sign and the corner of the intersection.

[12.5] He confirmed the damage on the insured driver's vehicle and denied that the extent of the damage was due to excessive speed on his part.

[12.6] There was a motor vehicle in front of him before he collideded with the insured driver. All he remembers is that it turned to the left, where the insured driver was coming from.

[13] This was the end of the cross-examination.

[14] **Under re-examination**, he confirmed photograph 17 that depicted the stop sign that the insured driver had to adhere to. He estimated the distance between the stop sign and where the motor cycle is standing as more than two (2) meters.

[15] By agreement between the parties, the Photo Bundle depicting photos marked 14 to 25 was handed in as Exhibit A. I will address the photographic evidence later on.

[17] The plaintiff closed his case.

Defendant

[18] The insured driver, Ms Bontle Makhadzi Netshisaulu ('Ms Netshisaulu) testified on behalf of the defendant.

[18.1] She was driving her younger sister to school in her father's motor vehicle, an Opel Astra model. She was travelling along First Street , from south to northern direction at a speed of 60 kilometers per hour.

[18.2] She uses that road on a daily basis and on this particular day the weather condition was clear and visibility was good.

[18.3] When she reached the intersection of First and Viljoen Streets, she stopped behind a vehicle that had also stopped.

[18.4] There were no vehicles coming from the western direction of Viljoen Street. There was a vehicle from the eastern direction that was indicating to turn left into First Street where she had stopped. After it turned, she moved in slowly as there were no other vehicles.

[18.4] She did not see the plaintiff's motor cycle and she believes that he was travelling above 60 km per hour because of the impact on her vehicle and the fact that he flew high and landed in a different direction to where the motor cycle rested after the collision.

[18.5] The plaintiff's motor cycle hit the right fender of her vehicle. Her vehicle stopped at the point of impact. It simply switched off.

[18.6] After the collision she went to the plaintiff and asked him if he was well but he did not respond though he was conscious. A group of people gathered at the scene. They kept on telling her to get away from him , and she did. She denied the plaintiff's version that she apologized to him and that she told him the reason she did not see him is because she was on the phone. She was taking her sister to school and she could not have been on the phone and drive at the same time.

[18.7] She denied the plaintiff's version that she did not stop at the stop sign.

[18.8] This concluded the defendant's evidence in chief.

[19] Under cross examination, she confirmed that,

[19.1] in the mornings there was a busy traffic flow at Viljoen Street compared to First Street, however, according to her by 7:30 it has reached its peak and no longer busy.

[19.2] there is a solid line in Viljoen Street separating the two lanes and that if one is traveling from west to east there are two lanes whereas there is only one lane for traffic traveling from east to west.

[19.3] the collision took place at a residential area.

[19.4] There were no vehicles coming from the western direction of Viljoen street and that there was one from the eastern direction.

[20] She did not report the accident but the police came to the scene within a very short space of time, about 10 to 20 minutes. She confirmed what was written in the Accident Report form, save for what she indicated as an omission relating to the presence of a motor vehicle that was turning left into First Street where she had stopped. The collision between her vehicle and the motor cycle happened not long after this vehicle had turned because the driver came to her and enquired if she was well.

[21] It was put to her that the version about the presence of a motor vehicle that was turning into her left side of lane of travel was not put to the plaintiff by her counsel during cross examination.

[22] She denied a suggestion that taking into account the fact that Viljoen street was busy and that it was a peak traffic hour, this made her to enter the intersection in a haste.

[23] She also denied a suggestion that because of the busy nature of the road (Viljoen street), it was more difficult for her to execute a right turn, which would have required her to look out for traffic from both directions, unlike if she were to turn to her left where she had to worry about traffic from the eastern direction only.

[23.1] She was emphatic that turning to the right was equally easy as turning to the left.

[24] She denied the plaintiff's version that traffic was heavier or busy from the western direction of Viljoen street.

[24.1] She referred to the photo that showed traffic from west to east that had been stopped after the collision to argue that it was not heavy at that time.

[24.2] She also testified that although traffic was busy in that area in the mornings, by that time it was no longer busy because there are two primary schools in the vicinity, 'Monans' and 'Sulas' which start at

07:30. Traffic is busier before schools start because parents drop off children. By the time the collision occurred it was no longer as busy as plaintiff had made it out to be.

[25] It was put to her that this version about schools and likely peak or busy hours of traffic was not put to the plaintiff during cross examination.

[26] She confirmed the plaintiff's attire but denied that he was wearing a white (or black) waistcoat with black or white signage. According to her, the plaintiff was wearing shorts and waistcoat but it had no white signage.

He was also wearing construction or safety boots but she did not see the steel points. She did not see the motor cycle's headlamp that the plaintiff testified about. Even if the motor cycle had such a head lamp, it is possible that he did not put it on.

[26] It was put to her that her version of what the plaintiff was wearing as well as the accessories of the motor cycle was not put to the plaintiff during cross examination.

[27] She denied the plaintiff's evidence that when he first saw her, 10 metres away from the intersection of First street, her vehicle was not completely stationary but was moving slowly into the intersection.

She was emphatic that she stopped, fully, at the stop sign.

[28] It was also put to her that the plaintiff first saw her when he was about five metres away. Her response was that he could have slowed down.

[29] She denied the plaintiff's version that there was loose sand on the left side of the road and this is the reason he did not swerve to the left or applied brakes.

[29.1] According to Ms Netshisaulu, the alleged sand, in photo 17 is behind the vehicle and if he had swerved to the left he would not even be near it.

[30] It was put to her that her version about the state of the road or obstructions that the plaintiff testified about was not put to the him during cross examination.

[31] She agreed with the plaintiff's version that the fallen blue panel depicted in photo 24 is part of the motor cycle.

[32] She denied the plaintiff's version that the impact was more on the left back of the motor cycle.

[32.1] According to her, the motor cycle hit her with its front part and went through the whole front of the vehicle. The blue panel probably came off as he drove through the whole front of the vehicle.

[33] It was put to her that her version of how the accident occurred and the likely cause of the damage was not properly ventilated with the plaintiff during cross examination.

[34] She confirmed that the ambulances had parked facing oncoming vehicles to prevent them from running over him where he had landed.

[35] She denied a suggestion that photo 20 is evidence or proof that traffic is busier from the western to eastern direction of Viljoen street.

[35.1] According to her, there are robots (traffic lights) in both west and eastern direction of Viljoen street. The robots from west could have opened, and this is the reason there appears to be more vehicles in photo 20.

[36] She disagreed with the plaintiff's evidence that she apologized to him and that she told him that she was busy on the phone and this is the reason she did not see him.

[37] It was put to her that her version that the group of people gathered at the scene had told her to go away was not ventilated with the plaintiff during his cross examination.

[36.1] Her response to this was that she did not want to use 'a race card', but the area in which the collision occurred is 'Afrikaner' and the lady that came first at the scene told her to go away.

[38] **In re-examination** she confirmed that she heard the impact on her vehicle but did not see the motorcycle as it approached.

[39] She said 'sorry' to the plaintiff because she was concerned that the accident happened, not that she caused it.

[40] On being asked by the court, she testified that;

[40.1] the distance between the stop sign and the intersection is about 2 metres.

[40.2] the distance between the stop sign and the motor cycle (photo 17) is less than 2 metres.

[40.3] She does not know who took the photos in the bundle before court.

[40.4] there is a traffic light (robot) about 500 metres away from the eastern direction of Viljoen street where the plaintiff was coming from.

[40.5] there is a traffic light (robot) about 800 metres away from the western direction of Viljoen street. There is also a 'crescent' between the robot and the intersection of First street.

[40.6] her vehicle did not move after it was hit. It switched off. She marked the point of impact in photo 17.

[40.7] the distance between the stop sign and the point of impact is 200 metres. The parties agreed that this estimate cannot be correct.

After she illustrated with the distances in court, it was agreed that the correct estimation is about 5 to 6 metres.

[41] There were no questions from the both counsel on issues arising from the court's questions.

[42] The defendant closed its case.

Submissions

Plaintiff

[43] The written heads of argument in the main dealt with the summary of the evidence tendered, the common cause and disputed issues, the proven negligence, whether there is contributory negligence as well as the failure by counsel for the defendant to put the insured driver's version to the witness (the plaintiff) during cross examination.

[44] On the law, the counsel for the plaintiff referred to and relied on the contentions made by the plaintiff's attorneys in a letter that was addressed to the defendant's attorneys in which they attached a copy of the Eastern Cape High Court judgment of Pickering J in the matter of Deyssel v Road Accident Fund, case number 213 /2007¹ (the Deyssel judgment).

[45] The gist of the plaintiff's case with regard to negligence is that the insured driver's version that she did not see him and that the plaintiff had a right of way is proof that the collision was caused solely by her negligence.

[46] On whether he contributed to the collision, the plaintiff's submission is that the court should accept his evidence that he was driving at a speed of 60 kilometres per hour and reject the insured version that he was most likely speeding because she is not an expert witness and cannot express an opinion. In fact, she is not entitled to say anything about his conduct because she did not see him. Furthermore, he took evasive action to avoid the collision and there is nothing else he could have done as the suggested actions would not have prevented the collision but caused him harm.

[47] On the law, I was told that the circumstances in the Deyssel judgment are actually similar to the matter before me. I was specifically referred to certain paragraphs. Unfortunately the paragraphs are not numbered and we

¹ Neutral citation : Deyssel v Road Accident Fund (213/2007) [2008] ZAECHC 19 (19 March

had to refer to pages of the judgment, namely, 10, 13, and 16. The essence of the issues arising from this judgment is that:

[47.1] The approach to be adopted to resolve irreconcilable and mutually destructive versions.

[47.2] The credibility findings, particularly the fact that the insured driver's evidence and that of his witness were found to be confusing and utterly improbable and furthermore the rejection of the police plan as it was unreliable and instead preferring the direct evidence of what happened. The case was decided on the version of the plaintiff.

[47.3] The rejection of mathematical calculations.

[48] On the learners licence controversy, Ms Scholz submitted that it is not a statutory requirement and that the defendant has not proved the causal link between driving with a learners licence and the accident.

I agree with this submission.

Defendant

[49] Replying to the plaintiff's submissions Mr Sioga argued that having a right of way does not mean that one has absolute right. A driver must still lookout for other traffic. He referred to cases cited in the matter of Mmeti v RAF² at paragraphs 41 and 42 for this submission.

[50] In his own heads of argument, Mr Sioga addressed evasive actions that the plaintiff should have taken, but failed to take to avoid the collision.

[51] He argued that the facts of the matter before me are distinguishable from the facts in the Deysel judgment that the plaintiff seeks to rely on because in the latter, the driver of the Mazda started to move when he was 6 metres away, but he applied brakes whereas in this matter, the plaintiff (Mr Opperman) saw that the insured driver would not stop at the stop sign when

² North West High Court, Mafikeng, Case No. 2038/2008, referring to Protea Assurance Co. Ltd v LTA Building (SWA) Ltd 1988 (1) SA 303 (A)

he was 10 metres away but continued to drive ahead. He anticipated that she would not stop.

[52] On the omission to put the insured driver's version to the plaintiff during cross examination, Mr Sioga referred to and handed up a judgment of De Villiers AJ in this division in the matter of GN Chipwatali v RAF (Case No. 6629/2015)³. This is a judgment on application for leave to appeal. He did not refer to the main judgment or at least state what has happened to the appeal because leave was granted on 8 June 2017, two years ago. De Villiers AJ granted leave to appeal her decision, on the basis that her approach to the issue of whether she erred by relying on the probabilities in the evidence after ruling out an objection to the evidence of the insured driver who was called to testify under circumstances where the version was not put to the plaintiff.

[53] De Villiers AJ referred to authorities that appear to support her decision in the main action but she felt that probably her approach was wrong, hence the granting of the leave to appeal. In her main judgment she accepted the insured driver's evidence because there was no prejudice against the plaintiff and also the fact that putting the version to the plaintiff would not have changed anything.

[54] During argument, Mr Sioga took the blame for failing to put the insured driver's version to the plaintiff. Apparently he did not consult with her properly because there was no firm confirmation that she was going to attend the trial. He took time to consult during breaks as the trial was proceeding.

[55] On contributory negligence, Mr Sioga submitted that the apportionment should be 50%.

Accident Report (AR form)

[56] This form, duly completed by a police officer who attended the scene of the accident was amongst the documents that were admitted into evidence by

³ Neutral citation: Chipwatali v Road Accident Fund (6629/2015) [2017] ZAGPPHC] 334 (8 June 2017)

agreement between the parties. However, no evidence was led on issues arising from it, except when counsel for the plaintiff asked the insured driver to confirm that she gave the police officer the information recorded under '*brief description of the accident*'.

[57] Drivers A and B refer to the insured driver and the plaintiff respectively. The statement reads as follows;

'As alleged by driver A she approach the stop sign then she turned right, she didn't see the motor cycle she saw the motorcycle late and she was already entered the road.

As alleged by driver B he was traveling straight from East to West. Suddenly the car bumped him'.

[58] I have already indicated that during cross examination Ms Netshisaulu (the insured driver) did admit that she told the police officer what is attributed to her in this form, but according to her this is not all. The police officer omitted information about the presence of a vehicle that was turning left into her direction of travel. She executed a right turn after this vehicle had turned.

[59] It can also be noted here that under Driving licence it was recorded that the plaintiff had 'none'.

[60] It was also recorded that both drivers were traveling on their correct road lane before the accident and that A was turning to right ,whereas B was traveling straight.

[61] The damage on A's vehicle was indicated as right front, left front, front centre and the bonnet. The damage in B's motorcycle is indicated as 'multiple'.

[62] The accident was described as a 'sideswipe opposite direction'

[63] The 'Accident Sketch ' shows the insured vehicle a bit further from the stop sign and standing in the middle of the solid line, in a turning position. It sort of straddled the solid line, partly on the inner lane of the western direction and the other part on the the lane of travel of the plaintiff (east to west).

[64] The plaintiff's motor cycle is shown to have landed on the northern side of First Street, on the edge of the road.

[65] As testified by the both drivers, Viljoen street is indicated as having two lanes from the western to eastern direction and one lane from east to west.

[66] There are no points indicated or measurements of basic distances such as (a) the point of impact, (b) the distance from the stop sign regulating traffic on the southern side of the Intersection where the insured driver was coming from to the point of impact, (c) the point of impact to where the vehicle and the motorcycle rested, (d) distance estimated by the plaintiff with regard to where he was when he first saw the insured driver.

[67] All these issues that I have noted from the Accident Report Form are material because as it is often stated, the accident scene speaks for itself and form a starting point for evaluation of the parties' respective versions.

[68] The assistance of police officers who attend scenes of road accident is very important and has been emphasized by our courts more often. In the matter of Daly v Road Accident Fund⁴, Rampai J was faced with a situation where the police officer and expert witness had failed to take photographs of what was alleged to have been a big oil spill. He referred to the matter of Guardian Royal Exchange Assurance Rhodesia v Jeti⁵ where Baron JA said:

"This Court has said repeatedly that it is of the utmost importance for investigating officers to examine the scene of an accident with meticulous care and to place before the Court the fullest possible factual information, including accurate measurements."

[69] In the matter before me, and as far as the both drivers' evidence corroborate the AR form, even without measurements, it does offer some assistance in that it confirms, where the parties were in relation to each other when the accident happened. It is unfortunate that parties often underestimate the value of accident reconstruction evidence.

⁴ (1857/2001) [2004] ZAFSHC 14 (4 March 2004)

⁵ 1981(2) SA 102 (ZA at 106B)

[69.1] I am alive to the fact that in the Deyssel judgment that the plaintiff relies on, the expert and police officers' evidence, including the sketch plan were declared as unreliable. The reasons were clearly stated, as such, one cannot regard those reasons as a crystalized principle that expert or police drawings of accident scene is irrelevant. It depends on the facts and how the evidence was gathered and presented. Of importance, the Deyssel matter was decided on the factual testimony of the witnesses, which the Judge found to be more compelling than that of the reconstruction expert and police drawings. The reason the expert evidence was discarded is that the initial calculations were based on a wrong assumption that the witness in the Mazda was a passenger in the motor cycle and furthermore, the calculations of distances and certain points in the sketch plan were found to be factually incorrect.

Photographic evidence

[70] At my request, photo 16 was marked to illustrate the direction in which the parties were traveling from. It accords with the Accident Sketch and the narrative I have given above with regard to the position of the insured vehicle and motor cycle after the collision. The nose (front part) of the insured vehicle is standing on the solid line separating the traffic from both directions. It protruded into the oncoming inner lane. Almost the whole body has actually covered the entire lane of travel from east to western direction and it is outside the stop sign 'box'.

[71] A clearer picture of where the insured driver came to a rest is in photos 17, 18, 21 and 25. The stop sign board and the ground written stop sign are far behind, and looking at the road markings, the vehicle is standing across the solid line.

[72] Photo 21 shows where the plaintiff's motor cycle came to a rest. This is on the edge of the northern part of First Street. The photo also shows a completely damaged front part of the insured vehicle which is standing in a turning position. The damage on the insured vehicle is also depicted in photos 15 and 25. Photo 24 shows the fallen number plate.

[73] There is no photo showing where the plaintiff landed but it is common cause that he landed on the oncoming lane.

[74] Photo 23 depicts the damage on the motorcycle. The right part of the panel has fallen (broken) off. Other than this, the other parts all still there and intact. The damage is difficult to tell by looking at the photos.

Issues for decision

[75] Both counsel believe that their witnesses' evidence met the required standard to discharge the respective burden of proof and onus. It is clear from the evidence led that there are material disputes with regard to how the collision occurred. In this regard, the question is which version is more probable.

[76] If I find that the plaintiff's version with regard to the negligence of the defendant is more probable, the next question is whether looking at all the circumstances, the defendant has proved that his conduct contributed to the causation of the accident.

[77] Lastly, whether the failure to put the insured driver's version to the plaintiff during cross examination is fatal to the defendant's case and to what extent in the context of the respective burden of proof and onus.

Legal principles

[78] The versions presented before me by both the plaintiff and insured driver as to how the accident occurred are totally irreconcilable and thus mutually destructive. The legal principles pertaining to resolution of irreconcilable and mutually destructive versions are trite and there is a wealth of authorities in this regard. Under the circumstances, two issues arise for consideration, namely, which of the two irreconcilable versions is most probable and the respective duties of a driver who enter a stop sign-

controlled intersection and one who is proceeding straight on a road with intersecting streets.

[78] With regard to the first issue, the approach is stated in the matter of **Stellenbosch Farmers Winery Group & Another v Martell & Others**⁶. The court summarized the technique generally employed to resolve factual disputes in order to come to a conclusion. The court is required to make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities.

[79] On the question of onus, the Supreme Court of Appeal, per Mhlanta JA had this to say in the matter of **the City of Johannesburg metropolitan Council v Patric Ngobeni**⁷ had this to say:

"[50] It is trite that a party who asserts has a duty to discharge the onus of proof. In African Eagle Life Assurance Co Ltd v Gainer,¹¹ Coetzee J applied the principle set out in National Employers' General Insurance Association v Gany 1931 AD 187 as follows:

'Where there are two stories mutually destructive, before the onus is discharged the Court must be satisfied that the story of the litigant upon whom the onus rests is true and the other false. It is not enough to say that the story told by Clarke is not satisfactory in every respect, it must be clear to the Court of first instance that the version of the litigant upon whom the onus rests is the true version'

[51] The approach to be adopted when dealing with the question of onus and the probabilities was outlined by Eksteen JP in National Employers' General v Jagers,¹² as follows:

'It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfied the Court on a preponderance of probabilities that his version is true and accurate

⁶ 2003(1) SCA 11 at 14I-15E

⁷ supra

and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.'

[52] In the present case the plaintiff, during the trial, abandoned his main ground and pursued his claim on the basis that Ledwaba negligently discharged the firearm. It follows that the plaintiff bore the onus of proof and had to prove that Ledwaba had been negligent. Accordingly, the defendant no longer had a duty to prove the defence of justification as it could not raise such a defence against a claim of negligence. In the result, the plaintiff had to prove the element of negligence on Ledwaba's part in order to succeed. Regarding the question of onus, Spilg J remarked:

'I am satisfied that after subjecting the evidence in this manner the truth is readily discernible. Moreover I am satisfied that irrespective of who was required to discharge the onus, the result will be the same.'

[53] I do not agree with the trial judge when regard is had to the facts. It is difficult to comprehend how the judge could make this statement unless he had pre-judged the issues. He adopted an approach that is flawed and which cannot be applied when faced with two mutually destructive versions. It was imperative for Spilg J to have been alive to the issue relating to the onus and to make a determination in that regard. Had the trial judge adopted a proper approach and applied the principles set out in the Jagers case, the result would have been different. I will hereafter show how the trial judge erred in his approach."

[80] It is common cause that the insured driver in the matter before me was in the process of entering a stop sign controlled intersection by executing a right turn. According to her, she stopped at the stop sign behind one car. There was a vehicle coming from the eastern side where she was to turn to.

She waited for it and it entered the street she was traveling in, on her left handside. Thereafter, she proceeded to execute the right hand turn. She was already in the intersection when she heard a bang on her right hand side.

[81] Her conduct (executing a right turn) should be judged against the following principles confirmed by Msimeki J on behalf of the appeal court in the matter of Jacobs v Road Accident Fund⁸

" [12] EXECUTING A TURN TO THE RIGHT

1. Our Provincial Divisions and the Supreme Court of Appeal have held that to turn across the path of oncoming or following traffic is an 'inherent dangerous manoeuvre' and that a driver who intends executing such a manoeuvre bears a stringent duty to do so after satisfying himself that it is, in deed, safe and then choosing the right moment (often called the opportune moment) to do so. (See in this regard AA Mutual Insurance Association Ltd v Noneka, 1976 (3) SA 45 (AD) at 52E; R v Cronhelm 1932 TPD 86; Sierborger v SAR & Harbours, 1961 (1) SA 498 (AD) and Johannesburg City Council v Public Utility Transport Corporation Ltd, 1963 (3) SA 157 (W)). It is therefore understandable why a driver turning right has a greater duty towards both the traffic following as well as traffic approaching from the opposite direction.

2. A driver turning to the right must signal his intention clearly and avoid turning until an opportune moment presents itself. (See in this regard Welf v Christner 1976 (2) SA 170 (N)).

3. He should only turn to the right once he has satisfied himself that there is room enough between his motor vehicle and the approaching vehicles to allow him to complete the manoeuvre safely. (See R v Court, 1945 TPD 133 at 134).

4. A driver is entitled to assume that those who are travelling in the opposite direction will continue in their course and that they will not suddenly and inopportune turn across the line of traffic. This assumption may continue until it is shown that there is a clear intention to the contrary. (See Van Staden v Stocks, 1936 AD 18 and Rustenburg v Otto, 1974 (2) SA 268 (C) and Old Mutual Fire and General Insurance Co of Rhodesia (PVT) LTD and Others v Britz and Another 1976 (2) SA 650 (RAD).

5. Drivers who see a driver signalling his intention to turn right are entitled to assume and accept that that driver will only execute his turn to the right at a safe and opportune moment. This is so because they are not obliged to guard against the unreasonable and negligent actions of a driver who signals his intention to turn to the

⁸ (A402/2008) [2011] ZAGPPHC 121 (13 June 2011)

right. In this regard *Var. Winsen AJA* (as he then was) in the matter of *Serborger v South African Railways & Harbours* (supra) at 504 - 505 said; "..... the answer seems to be 'none other than keep a look-out'. There was no obligation upon him to stop or even slow down because of having seen a signal in parenthesis. it need scarcely be remarked, that du Frøezes statement in evidence that had he seen appellant's signal he would have stopped, even supposing it to be true, cannot burden him with an obligation not imposed by law." (My emphasis)

In *Moore v Minister of Posts & Telegraphs 1949 (1) SA 815* at 826, *Schreiner JA* (as he then was) said:

"Speaking very generally one expects and is entitled to expect reasonableness rather than unreasonableness, legality rather than illegality, from other users of the highway."

6. It therefore follows that a driver is only called upon to take precautions against reasonable foreseeable contingencies and not the reckless driving of other motorists. See *Rondalia Versekerings Korporasie van SA Bepark v De Beer, 1976 (4) SA 707* at 711.

[82] The plaintiff, on the other hand was proceeding on a straight on the road (path) that he was travelling in.

[83] It is so, as counsel for the defendant has correctly submitted, that having a right of way does not mean that one has no duty of care towards fellow road users. There is an equal number of authorities in addition to those that the counsel for the defendant has referred to on this issue. Every driver has a duty to keep a proper lookout, and the duty on a driver proceeding in a street with intersections is greater than one driving in a street without intersections. A motorist on a through street must be aware of what is happening in the cross roads, even in stop streets. (*Marine & Trade Insurance Co LTD V Biyasi 1981 (1) SA 918 (A)*)

[84] A driver, particularly one who knows the area has a greater duty to approach intersecting streets with caution. He must have regard to traffic coming from an intersecting street and must exercise reasonable care to avoid a collision. The cases cited in the letter that the plaintiff's attorneys wrote to the defendant's attorneys actually make this point, but for some reason,

probably to gain strategic advantage, only the parts that support their contentions were summarized.

The failure to put the insured driver's version

[85] The legal principles in this regard are trite. The purpose of putting a version, as counsel for the plaintiff has submitted, is to avoid trial by ambush. However, this is not a mechanical principle cast in stone. One must look at each case on its own merits because the evidence that should have been put must be material and have an effect on the strength of the opponent's case.

[86] The principles were restated in the following paragraphs of the recent SCA decision in the matter of Mkhize v S (390/18) [2019] ZASCA 56 (1 April 2019).

[15] The evidence of Captain Hadebe was clear and straightforward, but the appellants submitted that he initially made a general statement, but immediately afterwards clarified it by saying that the first appellant made the report as to what happened and that the other appellants were in the passage when he made the report. I disagree with this submission because the nub of his evidence is that when the first appellant reported to them what had happened, all the appellants were present in the room'. This important piece of evidence squarely placed the appellants at the scene. During cross-examination it was not put to the Captain Hadebe that anyone of the appellants were not present during the interrogation. It was also not put during the trial that the appellants were not present in the room. Cross-examination of Captain Hadebe was focused on the injuries sustained by the deceased and the cause of death. At no stage was it ever put to Captain Hadebe that the other appellants would disprove his evidence about what Mkhize told him in their presence. It is the duty of the cross-examiner to put all contested points to the witnesses in cross-examination. A cross-examiner who fails to do so runs the risk of having his witness criticized of recent fabrication when that witness later testifies. Leaving contradictions, improbabilities or lies undisputed is dangerous. Failure to do so would in appropriate cases lead to an adverse inference being drawn from the failure to cross-examine on the contested issues. (highlighted for emphasis)

[16] In *President of the Republic of South Africa v South African Rugby Football Union 2000 (1) SA 1 (CC)* para 61 it was stated:

'The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness-box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct. This rule was enunciated by the House of Lords in

Browne v Dunn and has been adopted and consistently followed by our courts.'

[17] It was further held para 63:

'The precise nature of the imputation should be made clear to the witness so that it can be met and destroyed, particularly where the imputation relies upon inferences to be drawn from other evidence in the proceedings. It should be made clear not only that the evidence is to be challenged but also how it is to be challenged. This is so because the witness must be given an opportunity to deny the challenge, to call corroborative evidence, to qualify the evidence given by the witness or others and to explain contradictions on which reliance is to be placed. (At para 63) and to explain contradictions on which reliance is to be placed.' (Emphasis added.)

In the present matter the appellants did not do so. Instead they sought refuge in their silence and declined to join issue with the state witnesses. The argument of the appellants loses sight of the fact that cross-examination cannot be used to prove anything, it can only establish inconsistencies or weaknesses in the case, but it cannot establish evidence. Assertions or questions put by counsel during cross-examination remains so and is not evidence.

[87] The failure to put the insured driver's version in the matter before me has a lot to do with inexperience or competency of the counsel, to which he readily owned up during oral argument.

[88] The general cross examination in my view failed to elicit the relevant facts. Similarly, the presentation of the plaintiff's case was very basic. In all fairness, most of the material issues, such as distances, marking of point of impact and the scene of the accident in general came from my own questioning. At some point I felt like I was on the verge of descending on the arena.

[89] I could have urged the counsel for the defendant to put some sort of version to the witness but that would have been obvious because he ended the cross examination without saying anything about what the plaintiff's version on her alleged negligence was going to be.

[90] The question is whether I, as a trial judge should have questioned the plaintiff and the insured driver or even urged the both counsel to call the author of the accident report or sketch plan, ordered an inspection in loco or trawled through the bundle to find relevant evidence to present to myself. The answer to this question is in the negative.

[91] In the matter of *City of Johannesburg Metropolitan Council v Patrick Ngobeni*⁹, the appeal court was requested amongst other things to consider whether the conduct of the trial judge was irregular under circumstances where he descended to the arena and questioned witnesses, *mero motu* called witnesses, and on his own initiative decided that an inspection in loco be held.

[92] The level of preparation from both sides was not sufficient. I have already analysed the shortcomings in the Accident Report. None of the parties thought of calling witnesses, at least the police officer or even the person that took the photos.

[93] Judge Pickering in the Deyssel judgment had the luxury of considering all sorts of evidence, hence he was in a position to discard the police evidence, the mathematical calculations of the reconstruction expert and other evidence and made findings of facts which resulted in discrediting the evidence that was clearly improbable.

[94] In the matter of *S v Mafua and Others* 2008 (2) SACR 653 (W), the appeal court, per C.J Claassen J discussed these issues under two headings; 'The competency of the appellant's legal representatives' and 'Descending into the arena'. With regard to the former, at the end, it is the litigant's rights to effective legal representation that are at stake as it appears from an extract from the following passages in this judgment.

[23] In para [14] of his judgement in *S v Halgryn* 2002 2 SACR 211 (SCA), Harms JA illuminated the constitutional right to legal representation as follows:

"The constitutional right to counsel must be real and not illusory and an accused has, in principle, the right to a proper effective or competent defence.... Whether a defence was so incompetent that it made the trial unfair is once again a factual question that does not depend on the degree of ex post facto dissatisfaction of the litigant. Convicted persons are seldom satisfied with the performance of their defence counsel. The assessment must be objective, usually, if not invariably, without the benefit of hind sight..... The Court must place himself in the shoes of defence counsel, bearing in mind that the prime responsibility in conducting the case is that of counsel who has to make decisions, often with little time to reflect.... The failure to take certain basic steps such as failing to consult, stands on a different footing from the failure to cross-examine effectively or the decision to call or not to call a particular witness. It is relatively easy to determine

⁹ *supra*

whether the right to counsel was rendered nugatory in the former type of case but in the latter instance, where counsel's discretion is involved, the scope for complaint is limited."

[24] *The idea of being represented by a legal adviser cannot simply mean to have somebody stand next to one to speak on one's behalf. Effective legal representation entails that the legal adviser acts in the client's best interests, saying everything that is needed to be said in the client's favour and calling such evidence as was justified by the circumstances in order to put the best case possible before the court in the client's defence.⁶ Implicit in the rights entrenched in section 35(3)(f) of the Constitution is the concept that legal assistance to the accused person must be real, proper and designed to protect the interests of the accused. The legal representative has an obligation to conduct the case in the best interest of the client while still ensuring that the inherent duty towards justice is maintained. In order to be able to conduct a trial in such manner the legal representative has to acquaint him- or herself with the charges, the facts with which the accused is confronted and more importantly, the version of the accused.⁷ The principles just set out accord with the concept of the right to effective legal representation in an open and democratic society. In similar vein are the remarks of Justice Blackmun in **Burger v Kemp** 483 US 776 (1987) at 800:*

"The duty of loyalty to a client is 'perhaps the most basic' responsibility of counsel and 'it is difficult to measure the precise effect on the defence of representation corrupted by conflicting interests'".

[95] Now, let us examine the nature of evidence that was not put to the plaintiff during cross examination.

[97.1] The alleged apology to the plaintiff and an admission that she caused the accident as she was on the phone. The insured driver admitted the apology but denied the admission of guilt. In my view, the latter issue, even if it was put to the plaintiff would best be decided on the probabilities based on the overall impression that I will have about the credibility of the both parties. In terms of Section 61 of the National Traffic Act, Act No.93 of 1996, a driver of motor vehicle in a public road that is involved in or contributed to an accident in which a person has been killed or injured or there has been damage or loss of property is obliged to do certain things at that scene of accident, amongst which is a duty to stop and remain at the scene, ascertain if any person has

been injured and the extent thereof and to offer any assistance that he/she is capable of rendering.

Therefore, there was nothing wrong with the insured driver's gesture of approaching the plaintiff and enquiring if he was well.

[97.2] That she did stop at the stop sign and the presence of a turning motor vehicle. The evidence of the plaintiff on whether she stopped or not was not as clear as it is made out to be. Initially he said when he first saw her, he was about 10 kilometres away from the intersection and she was moving slowly into the intersection. It is only when he was pressed for a firm answer that he committed to a version that she did not stop. They both testified about a vehicle that turned left at this intersection. The insured driver says it is the vehicle that he was waiting for to pass, and then it turned left into the street she was travelling in. Then she moved into the intersection, and then heard a bang on her vehicle. The plaintiff testified that he was driving behind a vehicle that turned into First Street. After this vehicle had turned, that is when he saw the insured driver entering the intersection.

They both testified about the same vehicle.

[97.3] The presence of two primary schools in the vicinity of the scene of accident.

I have already alluded to the duty of both parties to bring relevant evidence before court to enable a fair assessment of the issues. The plaintiff did not refer to anything in his assertion about congested traffic. Pictures of the accident scene were handed up but there was no discussion of the happenings there except the collision of the two motors. The insured driver's response came about in response to a question regarding reasons for congested traffic in the morning. The response was justified by reference to photographic evidence, being a picture depicting stationary vehicles which I believe may be taken into account even if the insured driver's version is left out.

[97.4] The general condition of the road. This is about the presence of the sand on the road. The insured driver referred to one of the photos to support her version that the sand was not on the lane of travel of the plaintiff but in a corner next to her stop street. It is common cause that looking at the photos submitted there is no sand or stones on the road.

The photographic evidence is sufficient even if the insured driver's version may be discarded.

[97.5] The point of contact between the motor cycle and the insured vehicle. The photos tell the story.

[97.6] The colours of the plaintiff's clothes and the head lamp

The insured driver did not give a reason why she did not see the plaintiff other than that she entered the intersection after the vehicle she was waiting on had turned. Similarly, the plaintiff mentioned the colours of his clothes but no specific issues arose from that evidence. It would have been of assistance if the police officers had done their work properly because the issues relating to a lit headlamp are relevant to questions such as the visibility of the plaintiff to other road users.

[97.7] The group of people that gathered at the scene and that one of them told the insured driver to go away. The photos tell a story but whether or not such utterances were made is not one of the issues for decision in this matter. The insured driver had a statutory duty not to leave the scene of accident and to assist the injured. There are no allegations that she did not.

Was the insured driver negligent

[98] Even without measurements, it is clear from looking at the photos that the stop sign and actual stop area (what I called stop box) is far from the intersection. This would explain the plaintiff's description of the insured driver's actions as 'slowly moving away from the stop sign into the intersection'. The driver of the Mazda in the Deyssel judgment had an

advantage of an island that was meant to act as a yield sign for turning vehicles, which is not present here.

[99] From looking at the photos, the southern intersection of Viljoen and First streets on the left handside where the insured driver was coming from curving inwards to the left , leaving a wider area around the intersection. The stop sign and the actual intersection are a bit further apart. A driver intending to execute a right turn would have to move further away from the stop sign towards the intersection.

There is no evidence before me as to whether from east to western direction there are any obstructions that would have prevented the plaintiff from seeing the insured driver from a further distance than what he testified about.

[100] My overall impression of the insured driver is that she was an honest and forthright witness. She was failed by counsel for the defendant who failed to put her evidence to the plaintiff. She was criticised for putting up an argument when required to answer a question regarding the easiness of turning to the left compared to the right. Her attempt to argue in my view is because the question was not clear and it appeared as if she was being criticised. She did not try to make up a story that she saw the plaintiff and he was far when she entered the intersection.

According to her, she waited for the turning vehicle and as soon as it had turned she entered the intersection. From her description of what happened, the plaintiff's motor cycle must have been very close to this turning vehicle.

[101] It also does not appear from the insured driver's evidence that she satisfied herself that there was no vehicle behind the turning one and why she did not hear the usual noise of a motor cycle such as the one described by the schoolboy witness in the Desel judgment which drew his attention from a distance.

[102] The insured driver was entitled to move closer to the intersection due to its position to the stop sign. She had almost turned when the motor cycle hit her.

[103] I am satisfied that the insured driver was negligent by failing to ensure that there was no traffic coming immediately after the turning vehicle that they both described.

Any contributory negligence on the part of the plaintiff

[104] The plaintiff's case was built around the fact that he had a right of way and as such he could not be expected to have ensured that there is no vehicle coming out of the intersecting street.

There was no attempt to mark the point of impact or to call the person who took the photos who clearly must have been one of the people standing around as the lady in the leader jacket can clearly be seen in photo 16 for example making some pointing gestures.

[105] His evidence on when exactly did he see the insured driver and what was happening was not very clear, but having observed (from the photos) the visual distance between the stop box and the point of impact, it is clear that she must have moved out already when he was further than the 10 or 6 metres that he testified about. I cannot make a firm finding on this issue .

[106] What bothers me is the fact that according to him, he was behind a vehicle that was indicating to turn and could see the plaintiff's indicators flickering to turn right into Viljoen street. Instead of reducing speed (which was in any event at the prescribed maximum), he remained constant, thinking that she would stop. It is only when he was closer that he realized that she was not stopping.

[107] The evidence of heavy traffic from west to east is not supported by the facts because even though the emergency services arrived 10-20 minutes as testified by the insured driver, he was not run over or almost hit. Three emergency vehicles that appear like two ambulances and a police vehicle were able to occupy a big space between him and the traffic. Furthermore, the suggestion that it was more difficult to cross over to the east of viljoen that it would have been to turn to the western direction is also not borne out by

evidence because the insured driver was hit by the plaintiff , not vehicles from the west.

[108] I cannot guess or estimate his speed but there is no explanation why the insured driver's vehicle would be so extensively damaged.

[109] The plaintiff was aware that the insured driver was indicationg and as he approached behind the vehicle that turned, he should have driven with caution. In my view, the plaintiff had a greater duty to be cautious here because he had already seen that the plaintiff was turning, or moving slowly into the intersection according to him. Furthermore, this was a one lane road, and unlike the opposite direction, he knew that if there was an emergency he would have nowhere to run to.

[110] The plaintiff testified that he knows the road very well, its markings and signs, but failed to adduce any evidence with regard to presence of any obstructions that would have prevented him from seeing the insured driver when he was a bit further than what he testified about.

[111] He created a state of sudden emergency where he could no longer take meaningful evasive actions to avoid the collission, and ended up driving through the front part of the insured vehicle.

[112] The fact that he knew the surroundings, including the presence of sand on the left side of the westbound lane at the intersection of First street is more evidence that he knew that in a situation of emergency he was not going to safely turn to the left.

[113] I am satified that the plaintiff was negligent under the circumstances and that his negligence was the proximate causation of the accident because knowing the area very well and the dangers, he failed to ensure that he reduces speed as he approached the intersection with a vehicle that was already moving into the intersection as he testified.

[114] My assessment of the both drivers' negligence is that the insured driver is more blameworthy for all the reasons I have mentioned above. Her negligence in my view amounts to 70% whereas the plaintiff's is 30%.

[115] There is no reason why the defendant should not bear the costs of this action.

[116] Accordingly, I make an order in terms of the draft attached to this judgment and marked 'XY' which is incorporated in this judgment and as amended in paragraph 2 to reflect that the defendant's liability is 70%.

TAN MAKHOFELE U .

Judge of the High Court

APPEARANCES:

PLAINTIFF:

ADVOCATE L.D SCHOLTZ

Instructed by:

Podbielski Mhlambi Inc

C/O Kritzingers Attorneys

Hatfield

PRETORIA

DEFENDANT:

ADVOCATE KC SIOGA

Instructed by

Brian Ramaboa INC Attorneys

Hatfield

PRETORIA.

Heard on:

13 May 2019.

Judgment delivered on:

04 July 2019.

341A

Kritzinger Att
(012) 379 1810

"Xy"  04/07/19

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

IN COURT 8G

Before Her Ladyship, the Honourable Ms Justice MAKHUBELE (J)

On 13 and 14 May 2019

CASE NUMBER: 53091/2017

In the action between:

PHILLIPPUS DANIEL RIEKERT OPPERMAN

PLAINTIFF

and

THE ROAD ACCIDENT FUND

DEFENDANT

 **DRAFT ORDER: MERITS**

After hearing evidence and argument from the parties, the following order is made an order of Court:

IT IS ORDERED THAT:

1. The issues relating to merits are separated from all the issues relating to *quantum*;
2. The Defendant is ordered to pay ^{70%}100 % of the Plaintiff's agreed or proven damages;

3. The Defendant pays the Plaintiff's taxed or agreed party and party costs on the High Court scale for this portion of the claim up to and including 19 March 2019 and 13 and 14 May 2019, which costs will include, but not be limited to:

3.1 all costs of senior-junior counsel up to and including the trial date of 19 March 2019 and 13 and 14 May 2019, with further specific inclusion of all pre-trial proceedings, preparation, judicial case management meetings, conferences, agendas, practice notes, consultations and attendances;

3.2 reasonable costs of the correspondent on a high court scale where, in the opinion of the taxing master, more than one attorney has necessarily been engaged in the performance in any of the services covered by the tariff, in which event each attorney shall be reimbursed on the basis as set out in the tariff for the work necessarily done by him/her.

3.3 The plaintiff is a necessary witness and his attendance at court with An interpreter to medico-legal appointments necessary;

3.4 Costs previously reserved, herewith becomes unreserved.

3A. In the event that costs are not agreed the Plaintiff agrees as follows:

3A.1 The Plaintiff shall serve the notice of taxation on the Defendant's

attorneys of record; and

3A.2 The Plaintiff shall allow the Defendant 14 (fourteen) court days to make payment of the taxed costs.

3A.3 The Defendant will be liable for interest on 10.25% per annum from due date of the costs up to and including date of payment.

4. The remainder of the claim is postponed *sine die*.

BY ORDER

THE REGISTRAR OF THE HIGH COURT
OF PRETORIA

APPEARANCE AT ROLL CALL:

ON BEHALF OF PLAINTIFF: ADV. L D SCHOLTZ on instruction by KRITZINGER ATT
012 942 2218 / 012 430 4646/7
INSTRUCTING ATTORNEYS: PODBIELSKI MHLAMBI INC
018 786 2919 / 082 338 0256

ON BEHALF OF DEFENDANT: BRIAN RAMABOA INC ATTORNEYS
REF: MS V TSHIKOMBA/RAF31013
012 342 0900 / 082 762 4007
ADV K.C SIOGA
TEL: 079 251 5380
