

IN THE HIGH COURT, BLOEMFONTEIN
FREE STATE DIVISION, BLOEMFONTEIN

Appeal No.: A249/2013

In the appeal between:

DRAKENSBERG LOGISTICS (PTY) LTD

Appellant

and

PRESTPROPS 1251 CC

1st Respondent

ALL PAY FREE STATE (PTY) LTD

2nd Respondent

CORAM:

RAMPAI, AJP *et* NAIDOO, J *et* MOENG, AJ

JUDGEMENT:

RAMPAI, AJP

HEARD ON:

27 OCTOBER 2014

DELIVERED ON:

5 February 2015

[1] These were appeal proceedings. The appellant unsuccessfully sued the second respondent but was successfully sued by the first respondent. The appellant was aggrieved by those outcomes of a trial in which two actions had been consolidated. The appellant came before us with the leave to appeal granted by the Supreme Court of Appeal. The appeal was against the whole of the judgment by Kubushi AJ as she then was.

[2] A collision happened between two motor vehicles at Bethlehem in the Free State Province on 18 December 2008. The scene of the collision was at the intersection of Commissioner Street and Kerk Street. The one motor vehicle, a truck was owned by the appellant and the other again was owned by the second respondent. The truck and the van were driven by Mr Kubheka and Mr Lepele at the time of the collision. As a result of the physical impact the truck veered off the road, moved across the middle line over the pavement and ultimately crashed into a nearby building owned by the first respondent.

[3] For ease of reference the parties involved will be referred to as follows:

- 3.1 Drakensberg Logistics (Pty) Ltd (Drakensberg);
- 3.2 All Pay Free State (Pty) Ltd (All Pay);
- 3.3 Prestprops 1251 CC (Prestprops).

[4] The following were undisputed facts:

- 4.1 The citation of each of the parties was common cause;
- 4.2 Drakensberg was the owner of the Mercedes Benz truck with registration identity number NKR 33935 – the truck;
- 4.3 The driver of Drakensberg truck namely Mr Alfred Kubheka drove the Drakensberg truck within the course and scope of his employment with Drakensberg;

- 4.4 There was one cabin passenger in the truck, a gentleman by the name of Mr Patrick Mazibuko. He was called as a witness number two for Drakensberg;
 - 4.5 All Pay was the owner of the Ford Bantam van with registration identity number CWK 782 FS - the van;
 - 4.6 The driver of All Pay's van, Mr Pule Lepele drove the Bantam van within the course and scope of his employment with All Pay;
 - 4.7 There was one cabin passenger in the van, Ms Mantolo Mohale. During the vehicular collision she sustained severe bodily injuries.
- [5] The hearing in the court *a quo* commenced on 25 October 2011 before Kubushi AJ. Mr H J Benade appeared for Prestprops, Mr A P Den Hartog for Drakensberg and Mr F J Becker SC for All Pay. By agreement between the parties the court *a quo* granted an order whereby the issues were separated. The issues pertaining to the quantum were reserved. The issues pertaining to merits were adjudicated first.
- [6] What remains to be adjudicated by the court *a quo* in the consolidated proceedings were therefore the following:
- 6.1 Whether Prestprops was the owner of the business conducted at the building into which the truck collided.
 - 6.2 Whether Prestprops was the owner and/or bore the risk of loss in the equipment and stock that was allegedly damaged.

- 6.3 Whether there was any negligence on the part of the driver of Drakensberg or All Pay or both.
- 6.4 If the court should find that both drivers were negligent the degree of such individual negligence between the driver of Drakensberg vis-à-vis the driver of All Pay and what extent the negligence of each of the drivers, if any, contributed to the damages suffered by Prestprops.

[7] The collision subsequently gave rise to three delictual claims in two separate but consolidated action proceedings.

Firstly, Drakensberg sued All Pay in the South Gauteng High Court. Those action proceedings were initiated under case number 20500/2009. In its particulars of claim Drakensberg averred that the collision was brought about by the exclusive negligence of the driver of the van owned by All Pay.

Secondly, and in return All Pay filed a counter-claim in the same South Gauteng High Court against Drakensberg under same case number. In the particulars of its claim All Pay alleged that the cause of the collision was occasioned by the sole negligent driving of the driver of Drakensberg's truck.

Thirdly, Prestprops instituted a civil action against Drakensberg in the Free State High Court under case number 787/2010. In its particulars of claim Prestprops alleged that the cause of the damage to its property was the negligence of the driver of Drakensberg's truck.

[8] Pursuant to Prestprops' action against Drakensberg, Drakensberg by virtue of a third party notice issued out of the Free State High Court, joined All Pay as the second defendant. Obviously Drakensberg became the first defendant. After the joinder, All Pay did not file new pleas as the second defendant. In the Free State High Court Drakensberg joined All Pay as a third party claiming an indemnity alternatively a contribution in the event it is being finding liable in favour of Prestprops. By agreement between the parties All Pay's plea as against the claim by Prestprops was deemed to have been filed pursuant to Drakensberg's third party notice. The court *a quo* formally made an order to that effect.

[9] The version of the appellant, in other words Drakensberg was narrated by two witnesses, namely:

Mr Alfred Kubheka, the truck driver and Mr Patrick Mazibuko, the truck passenger.

The version of the second respondent, All Pay was narrated by two witnesses, namely:

Mr Pule Lepele, the van driver and Ms Mantolo Mohale, the van passenger.

The version of the first respondent, Prestprops was narrated by one witness, namely:

Mr Manuel Agostino Gonzales Baeta.

The hearing ended on 25 October 2011. Judgment was then reserved.

[10] The judgment by Kubushi AJ was handed down on 6 February 2012. The following order was made:

“[120] In the premises I make the following order:

120.1 Absolution from the instance against Drakensberg Logistics (Pty) Ltd in respect of the main claim against All Pay Free State (Pty) Ltd.

120.2 Absolution from the instance against All Pay Free State (Pty) Ltd in respect of the counterclaim against Drakensberg Logistics (Pty) Ltd.

120.3 Costs in respect of the claim and counterclaim to be costs in the cause.

120.4 Judgment is granted with costs in favour of Prestprops 1251 CC / Three Rivers Multimarket CC against Drakensberg Logistics (Pty) Ltd.”

[11] It was against that judgment and that order Drakensberg lodged its appeal. Its application for leave to appeal was filed. It was heard by Van Zyl J on 28 March 2013. Leave to appeal was denied.

[12] The appellant was again aggrieved by the order of Van Zyl J. It applied to the SCA on 30 April 2013. The application for leave to appeal was considered by Ponnann JA *et* Meyer AJA. The relevant portions of the Supreme Court order dated 18 October 2013 may be rephrased as follows:

- “14.1 The applicant, in other words Drakensberg, is granted leave to appeal to the full bench of the Free State High Court;
- 14.2 The costs order pertinent to Drakensberg’s unsuccessful application for leave to appeal in the court *a quo* is set aside;
- 14.3 The costs of Drakensberg’s application for leave to appeal both in the court *a quo* as well as in the SCA shall follow the ultimate outcome of the appeal to the Free State High Court.”

[13] The appellant, Drakensberg, filed its notice of appeal on 30 October 2013. The grounds of appeal were that the court *a quo* erred in no less than 13 respects. The grounds of appeal relied upon were set out as follows in the notice of appeal.

1. Her Ladyship erred in finding that Lepele was a credible witness and that his version could not be rejected.
2. Her Ladyship erred in not finding that Lepele’s version of the collision was an impossible one and should therefore be rejected.
3. Her Ladyship erred in not finding that the sole cause of the collision was the negligent driving of Lepele in not stopping at a red robot.

4. Her Ladyship erred in finding absolution in the instance against the Plaintiff vis-à-vis the Second Defendant.
5. Her Ladyship erred in finding that the Appellant's driver acted negligently in the situation of "sudden emergency".
6. Her Ladyship erred in finding that Kubheka's conduct in the circumstances was not that of a reasonable man.
7. Her Ladyship erred in not finding that there was no way that Kubheka could have avoided the collision and that the Appellant attracts no liability.
8. Her Ladyship erred in not finding that the cause of the "sudden emergency" was the negligent driving of Lepele and that, that was the direct cause of the damages suffered by Prestprops.
9. Her Ladyship erred in finding that Kubheka's loss of control of his senses and acted in a state of automatism constitutes negligent conduct.
10. Her Ladyship erred in not finding that the total loss of control of the truck in the circumstances was reasonable and due to circumstances beyond Kubheka's control.
11. Her Ladyship erred in finding that Kubheka would not have collided with the building/business had he applied the brakes. The logical conclusion is that a truck travelling at the speed as set out by Kubheka could not have stopped within 2 to 3 metres.
12. Her Ladyship erred in not taking into account the full effect of the right front tyre that burst in the collision.
13. Her Ladyship erred in making an inconclusive finding as to the location of the damages of the Bantam bakkie.

[14] On the one hand Mr Hartog, counsel for the appellant, contended that the court *a quo* misdirected itself as alleged. Counsel submitted that Drakensberg had made out a case against All Pay; that All Pay was erroneously absolved from the instance and that its sound defence of sudden emergency to Prestprops' claim was erroneously dismissed. Accordingly counsel urged us to interfere by upholding the appeal, setting aside the order by the court *a quo* and replacing such order with the following order:

“11.1 The claim of Prestprops 1251 CC against Drakensberg Logistics (Pty) Ltd is dismissed with costs;

11.2 The counterclaim of All Pay Free State (Pty) Ltd against Drakensberg Logistics (Pty) Ltd is dismissed with costs;

11.3 Judgment is granted with costs in favour of Drakensberg Logistics (Pty) Ltd as claimed in case number 787/2010.”

[15] On the other hand Mr Benade, counsel for the first respondent differed. He argued that on his own version, Mr Kubheka, the truck driver was clearly negligent; and that his negligence was the cause of Prestprops' damages. Counsel submitted that the court *a quo* had not erred in finding that the appellant was liable for the first respondent's loss. He submitted that the court *a quo* could not be faulted in any way. Accordingly counsel urged us to dismiss the appeal with costs.

[16] Like Mr Benade, Mr Becker, counsel for the second respondent, supported the judgment of the court *a quo*. He too opposed the appeal and urged us to dismiss it with costs. As regards the first action he contended that the court *a quo* correctly granted absolution from the instance in respect of both the competing claims of Drakensberg and All Pay, *vis-à-vis* each other. As regards the second action he contended firstly, that there was no conceivable basis upon which All Pay could be held liable for Prestprops' damages, and secondly that Drakensberg can only escape liability for Prestprops' damages if we, on appeal, can find in favour of Drakensberg on its defence of sudden emergency.

Counsel submitted that, in all the circumstances Drakensberg was correctly held liable for Prestprops' damages and that Prestprops' claim against All Pay should have been dismissed with costs. In the light of all these submissions, counsel urged us to dismiss Drakensberg's appeal with costs.

[17] It appeared practically convenient to consider the two actions separately. I propose to deal first with the merits of the first action, in other words, the case which originated from the South Gauteng High Court in 2009. That dispute concerned Drakensberg and All Pay only. I shall determine the issue of negligence there in the first place.

Once I have identified the driver whose negligence was the primary cause of the collision and in what manner or to what

extent his or their respective degree of negligence, if any, contributed to damages allegedly suffered by Prestprops. The second exercise would entail consideration of the merits of the second case, in other words the action proceedings which originated from the Free State High Court in 2010. It will be recalled that in those proceedings the first respondent, Prestprops was the plaintiff, the appellant Drakensberg the first defendant and the second respondent All Pay the second defendant.

[18] I deem it unnecessary to discuss the evidence of each of the five witnesses in detail. However, I shall thematically highlight important aspects of the evidence by each individual witness along the way. Before I do that, I consider it appropriate to restate some of the applicable legal principles.

[19] The principles relative to general approach on factual findings on appeal have been laid down in a number of decisions. It appeared to me advisable to refer to a few of the guiding principles.

It has been held that, notwithstanding the practical advantages from which an appellate court suffers as compared to a court of first instance, it is the duty of an appellate court to overrule a conclusion of a court of first instance on a question of fact when it is convinced that the conclusion to which the court of first instance has come is clearly wrong.

Mineworkers Union v Brodrick 1948 (4) SA 959 (A) on 970.

[20] It has repeatedly been laid down that, in general an appellate court is reluctant to disturb factual findings made by the court of first instance in view of the advantages enjoyed by the trial court in seeing and hearing the witnesses and in being steeped in the atmosphere of the trial.

[23] As regards appellate approach to factual findings by the court of first instance important principles applicable to questions of fact on appeal were laid down authoritatively in **R v Dhlumayo and Another** 1948 (2) SA 677 (A) on 705 to 706. That decision has repeatedly been relied upon by various courts and upheld with approval by the SCA itself. Among others, the following principles may be recited here.

1. An appellant is entitled as of right to a rehearing, but with the limitations imposed by these principles; this right is a matter of law and must not be made illusory.
2. The trial judge has advantages – which the appellate court cannot have – in seeing and hearing the witnesses and in being steeped in the atmosphere of the trial.
3. The appellate court is reluctant to upset the findings of the trial court as regards findings of fact.

6. Even in drawing inferences the trial court may be in a better position than the appellate court in the sense that that court may be more able to estimate what is probable or improbable in relation to the particular people or witnesses whom it has observed during the course of the trial.
7. That sometimes, however, the appellate court may be in as good a position as the trial court itself to draw inferences whether they are either drawn from admitted facts or from the facts as found by the trial court itself.
8. That where there has been a misdirection of fact by the trial court the presumption is that the conclusion of the trial court is correct. The appellate court will only reverse it where it is convinced that it is wrong.
10. That there may be a misdirection on fact by the trial court where the reasons are either on their face unsatisfactory or where the record shows them to be such; there may be such a misdirection also where, though the reasons as far as they go are satisfactory, the trial court is shown to have overlooked other facts or probabilities.
11. That in such circumstances the appellate court is then at large to disregard the findings of the trial court on fact, even though based on credibility, in whole or in part according to the nature of the misdirection and the

circumstances of the particular case, and so come to its own conclusion on the matter.

12. That an appellate court should not seek anxiously to discover reasons adverse to the conclusions of the trial court, because no judgment can ever be perfect and all-embracing, and it does not necessarily follow that, because something has not been mentioned, therefore it has not been considered.

13. That the appellate court is constrained to decide the case purely on the record, the question of onus becomes all-important, whether in a civil or criminal case.

14. That subject to the difference as to onus, the same general principles regarding an appellate court apply both in civil and criminal cases.

[24] It seemed apparent to me that the court *a quo* predicated its factual and credibility findings in the South Gauteng High Court matter on the following:

24.1 The respective versions of Drakensberg and All Pay were mutually exclusive in that both drivers averred that they entered a robot controlled intersection having right of way. Each of the drivers was certain that he entered the intersection when the traffic lights were green in his favour;

24.2 None of the drivers was, according to their respective evidence, driving at an excessive speed;

24.3 None of the drivers could take any precautionary measures to avoid the collision;

24.4 No independent witnesses testified in respect of the alleged negligence of either of the drivers;

24.5 None of the versions of the drivers could be rejected as untruthful or false;

24.6 There was no objective evidence in favour of the version of the one driver at the expense of the other;

24.7 There were no probabilities to corroborate or to repudiate the version of any of the drivers;

24.8 Drakensberg bore the onus of proving its main claim and all pay its counterclaim.

[25] I now proceed to examine the versions of the truck driver. The evidence of Mr Kubheka was that he was travelling from the direction of Fouriesburg toward Bethlehem. He entered the town of Bethlehem via Commissioner Street. He approached Kerk Street, which he intended crossing. At the intersection formed by those two streets, traffic was regulated by means of traffic lights. It was the first such set of traffic lights he came across since he entered the town.

The traffic lights were initially red against him as he approached the intersection. His view from the intersection down Kerk Street to his right was obscured. The physical impediment was created by buildings. Situated right in the south-eastern corner of the intersection was KFC building. As a result of such obstruction, he could not ascertain the traffic situation of the motor vehicles travelling up in Kerk Street towards Commissioner Street.

- [26] Despite his impeded vision, he did not reduce speed. He was more or less in the middle of Trent Tyre business premises, adjacent to KFC, when the traffic lights turned green in favour of the truck. The truck entered the intersection at the estimated speed of 45 km per hour. The critical evidence of Mr Kubheka was that he never saw the van driven by Mr Lepele at all before the collision.

If his range of vision was so dangerously obscured by the building, so much the reason why he should have entered the intersection with caution. He could have done so in two ways at least. Firstly, by reducing speed as he was nearing the obviously hazardous intersection. Secondly, he should have paid particular attention to the situation of the traffic approaching the truck from the right in Kerk Street seeing that Kerk Street was a one way street. A cautious driver would have concentrated on the traffic approaching him from the right, since there would have been none approaching him from the left.

- [27] Even if Mr Kubheka's vision was as severely restricted as he claimed, on his own say-so, he clearly kept no proper look-out whatsoever at the crucial moment. He blindly entered the intersection. That was the only probable explanation for his failure to see the van of All Pay at all prior to the collision. The admission was telling. It strongly militated against his assertion that the driver of the van belonging to All Pay was the sole cause of the collision. Since he did not see the van at all, he took no evasive action whatsoever. By the exercise of reasonable care he could and should have avoided the collision.
- [28] The evidence of the driver of Drakensberg's truck, Mr Kubheka, was unsatisfactory in many material respects. His conduct immediately prior to the collision fell hopelessly short of that of a reasonably careful driver. He was driving a heavy truck at night. He was approaching the first and main intersection in Commissioner Street. The traffic lights were red against him seconds before the disaster. His vision was drastically curtailed. Notwithstanding all those unfavourable factors, there was virtually no positive signals on his part which demonstrated that he appreciated or sensed that crossing Kerk Street might be a hazardous attempt. His venturing into the intersection in that careless manner constituted negligence in my view.
- [29] According to all the witnesses, the intersection was well lit, with little or no traffic and there would have been no obvious reason for him not to have seen the bakkie from his elevated

position when he entered the intersection. When Mr Kubheka entered that intersection he would have had an unrestricted line of sight up and down (in other words, left or right), in Kerk Street. However, as I have already indicated, there was no need for him to even bother about the traffic situation to his left, because Kerk Street was a one-way traffic street. The material damage to the vehicle was captured photographically. See exhibits 'a' and 'b'. It is apparent from that photographic evidence that the primary impact was with the left front portion of the van. These two factors appeared to militate against Mr Kubheka's evidence. The location of the physical damage to the truck and the physical damage to the van, as can be seen from those exhibits tended to support the version of Mr Lepele to the effect that he entered the intersection before Mr Kubheka, because the traffic lights were green in his favour.

[30] There are two further aspects of Mr Kubheka's evidence which required to be explored.

Firstly, he attempted to ascribe blame for the collision to the alleged high speed at which Mr Lepele was driving the van. It must be bore in mind that he did not see the van approaching the truck. Therefore, he made that inference solely on the alleged loudness of the impact. Clearly his allegation was not based on personal observation of the speed of the van at the time it was approaching the truck prior to the collision. His evidence was, therefore, suspect because he did not actually see the van at all. When

confronted during cross-examination with the fact that he would not be able to distinguish the speed of a van travelling at a speed of 50, 60 or 70 km per hour in terms of the loudness of the collision, he offered no answer at all.

Secondly, Mr Kubheka maintained that the van of All Pay travelled in the middle lane in Kerk Street. The evidence of Mr Lepele, the driver of the bakkie, was that he had used the outer lane in Kerk Street. Again the question arose if Mr Kubheka did not see the van, driven by Mr Lepele or even the collision as he had testified, how could he have known that the van was travelling on the middle lane before the impact. This too makes his evidence highly suspect. It is significant to note that, according to the police sketch plan, the van driven by Mr Lepele was travelling on the outer lane. Mr Kubheka's version that the van was travelling in the middle lane was recorded nowhere in the police sketch plan.

- [31] Mr Kubheka admitted that he was present when the police drew up the sketch plan. It is extremely unlikely that his version, which materially differed from that of Mr Lepele, would not have been recorded by the police, had he informed them that Mr Lepele was travelling on the middle lane and not on the outer lane. By his silence, he implicitly corroborated the version of Mr Lepele. The police stood nothing to gain in not recording the version of Mr Kubheka. It is unlikely that Mr Kubheka had ever indicated, to the police on the scene, that Mr Lepele's van was travelling on the middle lane. Had he done so, the police would probably have

recorded his version on the police sketch plan as well, just as they had recorded Mr Lepele's version.

[32] It was Mr Kubheka's evidence that, shortly before the collision, the truck he was driving was travelling at a speed of between 40 and 45 km per hour. During intense cross-examination he conceded that if he had indeed travelled at to that speed, he would have been able to stop the truck between 2 to 3 metres if he had applied the brakes. On his own version, therefore, he would have slammed the brakes, he would have been able to stop the vehicle and he would have been able to avoid the collision irrespective of which of the two vehicles (the truck or the van) had the right of way had he kept a proper lookout. It is clear, therefore, that even if Mr Kubheka's evidence is accepted that he had the right of way at the intersection because the traffic lights were green in his favour, it is abundantly clear that he could have taken an invasive action to avoid the collision, created by Mr Lepele's negligence as he claimed, by disobeying the red traffic lights against him and entered the intersection at a time when it was dangerous to do so. In my view, all these unsatisfactory aspects of Mr Kubheka's evidence weakened the contention that he was careful and that Mr Lepele was careless. On his own evidence, it is not difficult to come to a contrary conclusion.

[33] Here I pause to make an observation. It is an important one. The aforesaid evidence of Mr Kubheka was representative of Drakensberg's modified version. The essential feature of his

version as amended was the assertion that the truck and the van were approaching each other at 90 degree angle. By so doing, the evidence of Mr Kubheka, in fact, amounted to a re-alignment of the version of Drakensberg. In essence, such evidence was an admission that the van driven by Mr Lepele was travelling in a different street (Kerk Street) and not the same street (Commissioner Street) as Drakensberg had earlier pleaded. It has to be mentioned and stressed that shortly before the amendment, which was made on the first day of the hearing, the original version of Drakensberg had been that prior to the collision the van was also travelling in Commissioner Street, the same street in which the truck was travelling prior to the collision.

[34] Prior to the amendment, the case of Drakensburg was completely different. It was premised on the averment that the van approached the truck from the opposite direction in Commissioner Street. The premise of Drakensburg's case drastically changed on the first day of the trial. At the trial it was commonly accepted that the van travelled in Kerk Street, and never in Commissioner Street, at all material times prior to the collision.

[35] The obvious question is how such statement and sketch plan could exist at all if the information was not forthcoming from Khubeka, as well as the inferences which are to be drawn from the existence of such an initial statement and sketch plan. There is only one of two possibilities, namely that:-

35.1 Khubeka initially lied in making such a statement and providing the information for such a sketch plan to be drawn; or

35.2 Khubeka paid no attention to the presence of other road users or vehicles when entering the intersection, to such an extent that he initially thought that the All Pay bakkie had approached the intersection from the opposite direction while travelling in Commissioner Street.

[36] It was important to bear in mind that the case of Drakensberg as pleaded in the SGH case was completely different from its case as amended and pleaded in the Free State High Court. As the very first allegation of negligence Drakensberg asserted that the van of All Pay, while it was approaching the truck of Drakensberg at an angle of 180°, turned right across the path of travel of the truck of Drakensberg at a time when it was dangerous and inopportune to execute such a manoeuvre. It has to be noted that such an original version of Drakensberg precisely corresponded with the initial statement and rough sketch plan of the collision submitted in support of Drakensberg's insurance claim against its comprehensive insurer.

[37] Furthermore, in the Drakensberg plea to the claim by Prestprops in the Free State High Court case, this is also **the first reason** why it contended that the driver of the All Pay bakkie was negligent. It should therefore be apparent that until its formal amendment at the commencement of the trial

(its notice of amendment having been filed a few days prior to the trial and its amended pages having been filed a few days prior to the trial and its amended pages having been delivered and handed up at the commencement of the trial), **Drakensberg's case had always been that the All Pay bakkie executed a right turn directly in front and across the path of travel of its vehicle** (in other words out of Commissioner Street right into Kerk Street). This version then changed before the trial. One can only assume that it was realised that this false version would have been exposed at the trial.

[38] Khubeka was furthermore confronted with the fact that the statement contained such detailed information regarding his names, identity number, age, business address, telephone numbers and particulars of his driver's licence **that no one else, except Khubeka, could have provided this information.** He could not provide any explanation for this. More importantly, he could not give an explanation as to why the statement (and sketch plan) would contain this (according to him) wrong version.

[39] Although the statement (exhibit a) and the rough sketch of the collision (exhibit b) were unsigned, it was improbable that anyone other than Mr Kubheka could have provided the detailed information concerning Mr Kubheka's very personal and private particulars contained in the initial statement. I pause to point out that Mr Kubheka's one and only passenger, Mr Mazibuko, denied being answerable for the

existence of those two exhibits. In any event, it was doubtful that Mr Mazibuko would have had knowledge of such detailed information relative to Mr Kubheka's peculiar personal particulars. Mr Mazibuko's disassociation strengthened the contention that it was objectively more probable than not that Mr Kubheka was the source of such information.

[40] The statement was ostensibly made to Drakensberg's insurer. The statement and the sketch plan contained at the top of both the reference of Drakensberg's insurance broker or underwriter namely "*Wheels Underwriting Manager*". This in turn corresponded with the motor accident claim form administered by "*Wheels*".

[41] Mr Kubheka furthermore testified that he specifically went to the police to make a statement. However, whether or not Mr Kubheka made this statement to Drakensberg's insurer (i.e. Wheels as their broker or underwriter) or to the police for purposes of a police statement, he was, on a balance of probabilities, clearly the person responsible for providing the information which was recorded on both the statement and the sketch plan. He testified that he spoke to the policeman in Zulu; that the policeman recorded the statement in English and that the statement was read back to him in English and translated in Zulu. It matters not that he did not read the statement or he did not even sign it. No other statement to the police or to the insurer or to the investigator other than this statement was discovered. The only known statement

which was substantively and peculiarly associated with Mr Kubheka was this disputed statement.

[42] The fact of the matter is that he conveyed the information which was read back to him and translated to him in his mother tongue. As I have already pointed out, the police would hardly have had anything to gain in recording such a wrong or false version. Therefore, any insinuation that the relevant policeman (or anyone else, for that matter) was responsible for this false version should be rejected as utter speculation and conjecture.

[43] Similarly, it is improbable that the representative of Drakensberg's insurer (i.e. an employee or representative of Wheels) would have incorrectly recorded the very crux of how the accident occurred, so soon after it had occurred. Again one would have to ask what the motive would have been for anyone else to falsely record such a version if it did not emanate from Mr Kubheka himself. I pause to observe that it did appear that the testimony of Drakensberg, which was ultimately presented at the trial was not backed up by any prior statement obtained from Mr Kubheka. That too is telling against Mr Kubheka's veracity. For these reasons Mr Kubheka's entire version should be regarded with such circumspection that it could not be seriously relied upon. As I have indicated his new version, in a rather strange kind of way, corroborated the steadfast version of Mr Lepele that the two motor vehicles were travelling in two different streets shortly before the collision occurred. That had been Mr

Lepele's evidence or stance as evidenced by the pleadings of All Pay and his own oral testimony at the time. That version was never readjusted, as was the version of Drakensberg.

[44] If we accept, and I think we have to, that Mr Kubheka made two materially inconsistent statements as to how the collision occurred, then his veracity as a witness was greatly diminished. When a witness gives two irreconcilable explanations in respect of one and the same question, then he is not allowed to summersault. Instead the witnesses is held to the answers he first gave. When that principle is applied to the facts of the instant matter, the credibility and reliability of Mr Kubheka appears to be badly tarnished.

[45] However, if I am wrong in finding that Mr Kubheka's evidence was adversely and materially blemished by unfavourable features of untruthfulness that justified its rejection, then it should be plain, at the very least, that Mr Kubheka had simply paid no proper attention to the ever present possibility of the presence of other road users such as motorists at the time of his entering the intersection.

If his initial belief was genuine, that the van of All Pay approached the intersection from the opposite direction of the truck of Drakensberg in Commissioner Street, then the facts speak for themselves. He evidently failed to keep a proper lookout. He hardly knew where the van came from. It had to be borne in mind that he conceded during cross-

examination that had he seen the van he could have stopped the truck within a reasonably safe distance of 3 metres or so, at least to allow the van to pass. The negligence of Mr Kubheka was, with respect to anyone who believed otherwise, self-evident. The failure of Drakensberg to have the initial statement explained had consequences.

[46] A striking omission in the trial by Drakensberg was its failure to call a witness from its comprehensive insurer or Wheels Underwriting Managers to explain the conflict between Mr Kubheka's initial statement and the common cause facts at the trial regarding the direction in which the van of All Pay travelled. If one accepts Mr Kubheka's evidence, (which we were urged not to) he could not provide any explanation for the very existence of the statement and sketch plan. It was clearly incumbent upon Drakensberg then to either call a witness to explain this crucial issue or even proffer some explanation why such witness could not be found or would have no knowledge of these facts. Drakensberg did neither.

[47] Drakensberg's gallant attempt in the court *a quo* to explain the previously false statement and worse, blaming Prestprops or All Pay for not leading evidence about such statement, held no water. Ever since the decision in **Sampson v Pim** 1918 AD 657 at 662, it is trite law that if a witness who could confirm another witness' allegations was available but did not testify, the inference is irresistible that his or her evidence would have been prejudicial. In these circumstances a court is entitled to make a negative

inference of the failure to call such a witness. This leads to one of the following three possibilities in the instant matter:-

47.1 The witness was located but not called for obvious reasons (that his/her evidence would not support Mr Kubheka's evidence);

47.2 Drakensberg did not even attempt to locate such a witness, which begs the question why this was not done;

47.3 Such a witness could not be located, without this fact being placed on record.

[48] *In casu*, such a negative inference is called for. It is, after all, its own driver's statement and sketch plan which are under scrutiny and its alleged inexplicable incorrectness calls for an explanation. Furthermore, it is unclear when Prestprops or All Pay could have found the time to investigate the matter and locate or subpoena a witness, bearing in mind that the amendment was effected at the last minute and immediately before the commencement of the trial. Therefore, it will be unfair to have expected the respondents to have done anything constructive in an attempt to trace the investigator concerned. To put it mildly, the respondents were ambushed by the belated amendment. For all these the appellant was to blame.

- [49] I find it necessary to refer to certain contradictions by Mr Mazibuko. Mr Kubheka testified that the traffic lights at the intersection of the two street turned green in his favour when the truck was opposite the Tren Tyre building which is the building before the Kentucky Fried Chicken. The building of Kentucky Fried Chicken was right at the corner of Commissioner and Kerk Streets.
- [50] Mr Mazibuko on the other hand testified that the Drakensberg truck was approximately in the middle of the Kentuck Fried Chicken building, in other words closer to the intersection, when the traffic light has turned green for the truck. Later on when he was confronted with the testimony of Mr Kubheka, only then did he adjust his evidence when he learned what Mr Kubheka had said.
- [51] There was a big bang at the moment of impact between the truck and the van. The evidence of Mr Kubheka was that he ducked under the dashboard when he heard that loud bang which he mistakenly thought was a gun shot. It has to be pointed out that Mr Kubheka's explanation as to why he ducked was never mentioned during his direct evidence. The trial court heard about the gun for the very first time during the course of his cross-examination. Now one would have expected the gun to have featured early during the direct evidence of the witness in view of its perceived catastrophic impact on the witness' actions. However, it strangely appeared that the gunshot was not right on the forefront of the witness' mind but right at the back thereof.

- [52] Curiously, Mr Mazibuko could also not wait to testify that the traffic light was in favour of the truck when it entered the intersection. He could not wait to mention that particular aspect. The haste in which he said it was rather surprising. He did so in a curious fashion. He created the impression that he was called as a witness simply to confirm that fact.

Unlike Mr Kubheka, he proffered no evidence as to the alleged high speed of the van shortly before the collision.

Like Mr Kubheka, Mr Mazibuko also testified that he also made a statement to the police and yet he could provide no explanation for the statement and the sketch plan.

- [53] Otherwise, the significant point was that Mr Mazibuko's evidence contributed little to the Drakensberg version of the events. Although the version of Drakensberg was narrated by two witnesses and that of All Pay by one witness the version of Drakensberg was nonetheless singularly unconvincing in my opinion. Accordingly, the attempted head count by Drakensberg's counsel did not persuade me otherwise. The point is this: A bad story does not become a good story because it is repeatedly told by many.

- [54] Now I turn to the version of All Pay. The passenger of the van, Ms Mantolo Mohale could not contribute anything meaningful as to how the collision occurred. This was so, because, as a result of the accident, she suffered memory

loss pursuant to the severe injuries she sustained during the collision.

[55] The driver of the van, Mr Lepele testified that he returned from a work function that night. He had consumed three beers (in other words, “*dumpies*” or small bottles of beer) over a period of four hours. It was his responsibility to see to it that all the eight vehicles of his employer were taken back, parked and locked up at his workplace that evening after the function. From the venue of the function he used the national road N5 for about 1km and then turned left into Kerk Street. I pause to point out that Kerk Street itself forms an exhaustion or continuation of the national road. Approximately 200 metre before Commissioner Street, he stopped at an intersection. From there he noticed that the next traffic lights at Commissioner Street were red against him.

[56] He was 100 meters closer to Commissioner Street when the traffic light there turned green in his favour. The buildings partially obscured his vision in such a way that he could not see road users travelling in Commissioner Street and approaching Kerk Street from his left hand side. Shortly before the collision, he estimated that he was travelling at the speed of no less than 40 kilometres per hour and no more than 60 kilometres per hour. He testified that he was already “inside the intersection” when he first saw the truck. At that stage, the truck was approximately 10 metres away from the van. He said that he immediately took his foot off

the accelerator. However, before he could slam the brakes, the truck crashed into the van. He supposed that he would have taken an evasive action by swerving to the right second before the collision.

[57] He denied the truck driver's evidence that, at most, the truck was travelling at the speed of 45 kilometres per hour. He estimated that the truck was travelling at the speed of 50km per hour. His impression was based on the fact that, after the initial impact, the truck veered off the road and uprooted a tree. He confirmed that exhibit "a" on page 48 of the record depicted the positions of the van and the truck at impact. He also confirmed that exhibit "a" page 64-5 of the record depicted the physical damage to the van. Photographic evidence tended to indicate that there was corresponding connection between the apparent physical damage to the van and the position of the vehicles at primary impact.

[58] On behalf of Drakensberg it was submitted that Lepele had placed an impossible version before the trial court. In support of that submission we were invited to consider a mathematical calculation. Because the distances were estimated, because the accuracy of each speedometers was unknown, because the mass of each vehicle was unknown, because the mass of the cargo on the truck was unknown - the mathematical calculation was obviously unreliable. There were simply too many unknown factors in the equation. It was very difficult if not impossible to establish, on the strength of counsel's mathematical calculation, whether the

truck would have missed the van altogether or whether the truck would have clipped the tail of the van or whether the truck might have caught the van, as it did, on the left and moved towards the front.

[59] In my view the foundation was not laid to sustain the submission that the evidence of the van driver boiled down to an impossible version. The entire foundation of the calculation was mathematically flawed. Such calculation is best left for an accident reconstruction specialist provided (s)he is furnished with accurate and reliable information about all the critical factors. It was not done in *casu*.

[60] Both counsels for the respondents submitted that, at best for Drakensberg, the court a quo correctly granted absolution from the instance in respect of the competing claims in the South Gauteng High Court.

[61] The driver of the truck alleged that he had the right of way at the intersection because, as he asserted, the traffic lights were green in his favour. The corollary of the assertion was that the traffic lights were red against the driver of the van. However, according to the driver of the van the factual matrix was different. The converse also applied. Where, as in this case, there are two mutually destructive versions by litigants, the principle was enunciated as follows in **National Employees Mutual Insurance Associated v Gany** 1931 AD 187 on 199 per Wessels JA:

“Where there are two stories mutually destructive, before the onus is discharged, the Court must be satisfied upon adequate grounds 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 Clark 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, and that in this case absolute reliance can be placed upon the story as told by A. Gany ...”

- [62] The aforesaid principle was analysed by Coetzee in **Koster Koöperatiewe Landboumaatskappy v Spoorweë en Hawens** 1974 (4) SA 420 (W). The learned Judge reasoned that the principle only applied to cases where there were no inherent probabilities that could be deduced from other acceptable evidence. Where mutually destructive stories appear to be evenly balanced probabilities or inferences are resorted to and applied to resolve the impasse one way or the other.
- [63] In **African Eagle Life Assurance Co Ltd v Cainer** 1980 (2) SA 234 (W) at 237E – 238A Coetzee J revisited the principle owing to the negative critique levelled against Gany decision. The judge was at pains to elucidate his decision in Koster’s case. He stressed that the Gany approach to problems of proof in this type of cases only applies to cases where there are no probabilities one way or the other. The judge dismissed as fallacious the frequent criticism that Gany principle does not apply to civil cases.

“In quite a few cases which I have heard since the Koster Koöperatieve Landboumaatskappy case this portion of my judgment has been quoted to me out of context. At 426 I had hoped to make it clear what I thought what WESSELS JA meant, and something which does not seem to have been sufficiently clearly stated (judging by the frequency with which this further portion of the judgment is not quoted) is that this approach to problems of proof in this type of case only applies in cases where there are no probabilities one way or the other. Where there are probabilities, inherent or otherwise, there is no room for this approach. On the other hand, where there are no probabilities - where, for instance, the factum probandum was whether a particular thing was white or black, with not the slightest evidence as to the preponderance of white or black things in that particular community, there are clearly no probabilities of any sort. And, when the testimony of witnesses is in conflict, the one merely saying the thing was white and the other black, it does not matter logically what the measure of proof is, whether it is on a balance of probabilities or beyond a reasonable doubt. The position is simply that there is no proof, by any criterion, unless one is satisfied that one witness evidence is true and that of the other is false. It is frequently said that the dictum in the Gany case does not apply to civil cases because of the omission of the learned Judge to have regard to the measure of proof in civil cases being on a balance of probabilities. But this criticism is invalid because, unless suitably qualified, it confuses proof with the measure of proof. Where there is no probability there is simply no proof of anything (regardless of the measure by which you measure it) unless you believe one person and disbelieve the other. Until then the chances of it being black or white remain exactly evenly balanced. This is simple logic.”

[64] The principles as distilled from the aforesaid authorities may be summarised.

Firstly, in the case of two mutually destructive versions, where the one litigant alleges this and the other alleges that, then the litigant upon whom the onus of proof rests, must discharge such onus before judgement can be granted in his favour.

Secondly, In a case where the court cannot make a decision based on its acceptance of veracity of the evidence of the party upon whom the onus rest or decision based on its rejection of the other party's evidence as false, then the court should have regard to the probabilities or otherwise of the matter; and

Thirdly, unless there are probabilities or otherwise inherent in the matter on the strength of which a finding, on a balance of such probabilities, can be made in favour of one or other litigant, then the party who bears the onus of proof should fail.

- [65] I was persuaded that there were no probabilities that tipped the scale of equilibrium in favour of Drakensberg in support of its contention that the traffic lights were green in its favour at the time its driver entered the intersection. For the reasons already given, if anything, the probabilities favoured All Pay. Since Drakensberg bore the onus of proof its claim should have failed. On the substantive merits, therefore, the version of All Pay had a comparatively favourable or meritorious edge. Notwithstanding this finding, no appellate interference is called for. This is so because Mr Becker pertinently urged us not to disturb the finding of the court a quo that the two versions were evenly poised – hence absolution from the

instance was ordered. This then concludes the appeal in connection with the South Gauteng Case.

[66] Now I turn to deal with the second component of the appeal. The Free State High Court case needs to be considered. The common cause facts showed that the truck of Drakensberg crashed into the building of Prestprops causing damage to the building. The delictual act suggested, *prima facie*, that the Drakensberg truck negligently crashed into the building of Prestprops. Because the truck was mobile, and obviously the building not, it was for Drakensberg to prove justification for such *prima facie* negligent conduct. In an endeavour to do so, Drakensberg confessed that its truck drove into the building of Prestprops but averred that it did so on account of sudden emergency created by a third party, All Pay.

[67] It becomes necessary, in view of Drakensberg aforesaid confession and avoidance, to take a closer look at the actions of Mr Kubheka after the impact between the truck and the van. In order to ascertain the merits of the defence of sudden emergency, such an investigative excursion appears to be necessary. It was common cause in the matter that, immediately after the collision, Mr Kubheka ducked to his left horizontally with the dashboard and remained in that position until the truck had also collided with the building. In addition to that his right foot was sort of entangled. It pressed upon the accelerator causing the truck to travel faster than it otherwise would have. He testified that

he hung onto the steering wheel all the time which logically caused the truck to veer off to the left and ultimately to collide with the building. During cross-examination Mr Kubheka conceded that he would not have collided with the building of Prestprops had he applied the brakes or had he remained upright instead of ducking and had he not remained in the horizontal position while the truck was gaining speed. That concession was telling.

[68] At the commencement of the proceedings in the court *a quo* a further last minute amendment by Drakensberg was introduced. Through such an amendment, Drakensberg relied on the defence of sudden emergency. Some confusion existed as to whether Drakensberg had given proper notice of its proposed amendment in this regard. However, whether or not such notice was furnished in good time, the fact remained that the amendment containing its allegation of sudden emergency was nonetheless allowed at the commencement of the hearing by consent between the parties. Such a belated amendment related to Drakensberg's plea and its third party notice in the Free State High Court case.

[69] Perusal of the appeal record showed that no objective evidence or statement by Mr Kubheka existed or was given in which this issue was ever raised. Counsel for All Pay contended that the so-called sudden emergency defence relative to Prestprops' claim appeared to be a contrived after-thought.

[70] Fundamental requirements and qualifications or limitations of the doctrine of sudden emergency are firstly, that the doctrine applies only when a party's conduct has been prima facie negligent (see Van Staden v Stocks 1936 AD 18); Secondly, that the party relying on sudden emergency in effect concedes negligence, but pleads that the option exercised by the apparent negligent driver was an error of judgment; thirdly that such error was occasioned by the agony of the moment, or that his conduct was reasonable in those prevailing circumstances and fourthly, that his apparently negligent behaviour should be excused as not being wrongful.

[71] The scope of the defence of sudden emergency was appositely elucidated in Goode v SA Mutual Fire and General Insurance Co Ltd 1979 (4) SA 301 (W) at 306H – 307B per King J:

“The other qualification is that the conduct of the person setting it up must, of course, be reasonable, for the principle that a person in the agony of the moment is not expected to act with the same judgment and skill as in normal circumstances must not be extended to excuse conduct which, even in a critical situation, is not reasonable (vide Van Staden v May 1940 WLD 198). It is not, therefore, every error of judgment which is excusable as not amounting to negligence, but only one which a reasonably careful and skilled driver of a vehicle might commit. There can only be a moment of agony if the person whose conduct is in question

had neither the time nor the opportunity to weigh the pros and cons of the situation in which he found himself.”

[72] In **Ntsala & Others v Mutual & Federal Ins Co Ltd** 1996 (2) SA 184 (T) the court held that in reacting and possibly taking a wrong option in a sudden emergency, the driver was required to act like a reasonable man should have in the abnormal circumstances.

[73] In **S v Lombard** 1964 (4) SA 346 (T) at 3474 – 348A the court found that if a horsefly or any other insect which could perhaps cause trouble, flies in through a car window, a reasonable driver, will immediately apply his brakes and bring his vehicle to a stop. In the course of the judgment, reference was made to various other disturbingly unnerving situations that may unsettle a driver. The court concluded with the warning that many unforeseen things can happen on a road such as: lights of an oncoming vehicle going out; a driver being blinded by the lights of an oncoming vehicle; a stone from another vehicle hitting the windscreen making it impossible to see or a frightening tyre burst of one's own motor vehicle. The court found that in all such instances it was still expected of a driver to apply his brakes immediately and bring the vehicle to a stand-still.

[74] In **S v Erwin** 1974 (3) SA 438 (C) a bee stung a motorist on the left cheek while he was in the process of overtaking another motor vehicle. The driver instinctively pulled his head away to the right and bumped his spectacles against

the window of the right door with the result that the right lens of the spectacles broke. He, thereupon, released the steering wheel and grabbed his spectacles to protect his eyes against glass splinters, causing his motor vehicle to go out of control and to veer off to the left, where it collided with another vehicle. The court specifically dealt with the question whether the driver of the vehicle who was stung by the bee had acted as could be expected of a reasonable motorist in those circumstances. The court confirmed the principle that an error of judgment should be that which a reasonable driver would make before his conduct would be excused. The bottom line of the decision was, in my view, that not every error of judgment was excusable.

[75] In to **R v Du Toit** 1947 (3) SA 141 (A) at 145, it was confirmed that the driving of a motor vehicle requires skill, care and courage and that drivers cannot be excused if their judgment or courage should, without justification, fail them at the very moment when such attributes of skill, care and courage were most required in order to avert accidents or disaster. The fact that that principle was enunciated in a criminal matter makes no difference with the requirements expected of a driver faced with a sudden emergency or unexpected occurrence. The principle applies equally well to civil matters (**Erwin** *supra* at 439H).

[76] In **Butt and Another v Van den Camp** 1982 (3) SA 819 (A) the Court dealt with a similar situation to the one *in casu*, namely whether the driver in the alleged sudden emergency

acted reasonably after hearing something hit or strike the side of his car. The following *dictum* is especially apposite in the present matter:

“We are dealing with a driver who sees nothing but hears something strike or hit the side of his car. It may be a dog, it may be a stick or a stone, it may be a wild creature. Whatever it is, he is not entitled to overreact and swerve so as to endanger other traffic on the road. The reasonable driver is expected to be alert and to have a certain nerve. He knows that in modern traffic conditions the unexpected may happen at any time and that it may not, if I may mix my metaphors, always be plain sailing. Difficult situations arise suddenly; the reasonable driver must be able to cope with such situations. As was pointed out by Holmes JA in Sadie and others v Standard and General Insurance Co Ltd 1977 (3) SA 776 (A) at 782:

‘The licenced driver of a motor vehicle is expected to have a reasonable measure of expertise and the ability to manage his vehicle’.” I am in respectful agreement.

[77] In **Butt** *supra* at 826H the Court concluded the issue as to what is expected of a driver faced with sudden emergency by the following *dictum*:-

“The competent driver who hears something strike the side of the vehicle is not, as a rule, faced with an emergency. He is dealing with a sort of eventuality which an experienced driver must expect or at least bear in mind and with which he must be able to cope. He may stop his car and investigate the problem, but he will not suddenly swerve across the road. In this case it was unnecessary for the defendant to swerve. Indeed she was not able to explain in

the witness box why she did so, save to agree with counsel's suggestion that she may have had a fright."

Indeed fright was the reason why the truck driver behaved as he did in the instant matter. He was not entitled to hide. He lacked the required courage to deal with his fright. He should have been able to cope with the eventuality occasioned by the first impact.

[78] In a case where a driver lost control of a motor vehicle when the bonnet suddenly opened, partially obscuring her view which caused her to swerve onto the incorrect side of the road where the collision occurred, the court held that although the experience must have been unpleasant, there was no sudden emergency and the driver was liable for the damages caused to another motorist. See **De Ridder v Rondalia Versekeringskorporasie van SA Bpk** 1967 (2) PH (O) 50 (T).

[79] In applying the aforesaid principles when adjudicating Kubheka's actions after the collision, it is respectfully clear that Kubheka was not faced with a "*sudden emergency*", but that the alleged sudden emergency was one of his own making. Even if Mr Kubheka mistook the impact of the collision for a gunshot, his subsequent conduct was not that which was expected of a reasonable driver faced with unexpected circumstances. He heard only one "*gunshot*" and yet he remained in the horizontal position and

inexplicably pressed upon the accelerator instead of applying the brakes.

[80] Since he took the wrong option, which no reasonably skilful, careful and courageous driver would have taken in those prevailing circumstances – **Du Toit** *supra* he committed an inexcusable error of judgment – **Erwin** *supra*. He heard something but saw nothing to justify his over-reaction – **Butt** *supra*.

[81] I deemed it necessary to comment on the duty of the driver approaching an intersection. There are certain rules of the road as regards the duties of a driver approaching an intersection. On the authorities stated below there is no residual or additional duty on a driver approaching an intersection unless of course, the vehicle with which his vehicle collides was already in the intersection. In this instance, Kubheka conceded that if he had not reacted the way he did, he would have brought the truck to a stand-still and that, in that way, he would have avoided the second impact with the building. The fact of the matter was that he saw no gunman. Therefore, there was no gunshot to justify the way he reacted. In my view, Mr Kubheka was not justified to over-react, to duck and to let the truck go astray and move on without his guidance.

[83] A driver, who hears something strike his vehicle, is not, without more, faced with a state of sudden emergency – **Butt** *supra* skill. Mr Kubheka failed to display skill, care and

courage at the very crucial moment when he was expected to display those attributes as a reasonable, careful and alert driver would have done in such abnormal circumstances **R v Du Toit** *supra*. The principle is that a person in agony of the moment is not expected to act with the same judgment and skill as in normal circumstances but such protection must not be extended to excuse conduct which, even in a critical situation, is not reasonable and justifiable (**Van Staden v Mey** 1940 WLD 98). It is not, therefore, every error of judgment which is excusable as not amounting to negligence, but only one which a reasonable careful and skilful driver of a vehicle might commit. There can only be a moment of agony if the person whose conduct is in question had neither the time nor the opportunity to weigh the pros and cons of the situation in which he found himself (**Goode** matter *supra* at 306H – 307B). See also **Ntsala and others v Mutual and Federal Insurance Co Ltd** 1996 (2) SA 184 (T) where the court found that in reacting and possibly taking a wrong option in case of a sudden emergency, the driver is still to act like a reasonable man and should have in the circumstances. That the truck driver failed to do.

- [83] The version of Drakensberg that the van of All Pay was initially travelling in Commissioner Street and approaching Kerk Street from the opposite direction as compared to the truck was drastically amended shortly before the commencement of the trial. That version which was advanced in the South Gauteng High Court as well as in the Free State High Court then changed a few days before the

trial started. Mr Becker remarked that one could only assume that it was realised that that version was false and that it would have been exposed as such at the trial. I am inclined to agree. The particulars of the defence of sudden emergency were belatedly pleaded.

- [84] It was indeed so that Kubushi AJ disallowed the statement. She did so because the statement was unsigned. Mr Kubheka denied it and the investigator was not called to testify. In my view, that simplistic and cosmetic approach to the statement was incorrect. The probabilities were overwhelming that the statement was crafted on the information elicited from Mr Kubheka, the driver of the truck. I find myself unable to repudiate the statement as the trial judge did. The factual finding was flawed and clearly wrong in my respectful view. It is the duty of an appellate court to overrule a conclusion of a court of first instance when it is convinced that the conclusion to which the court of first instance has come was clearly wrong - Botdrick's case *supra*. Sitting as we are in an appellate mode we are at large to disregard that factual finding and to come to a finding of our own on the matter. The finding by the court *a quo* boiled down to repudiating substance in favour of form. It is my considered opinion that, on that score, the court *a quo* misdirected itself. The argument and submissions made by counsel for the second respondent were persuasive. I have no hesitation to find that it was highly probable that Kubheka was the provider of the information contained in that statement.

[85] I am persuaded that Mr Kubheka had ample opportunity to see the building, to slam the brakes and to avoid the secondary collision with the building. If he did not react as he did, he would have had ample time to execute an invasive action in order to avoid the second collision with the building. After the first collision he had time to execute the corrective action. The bang did not justify his decision to remain in a horizontal position. Even the very act of “ducking” appeared curious in the circumstances. Firstly, Mr Mazibuko who was faced with exactly the same circumstances did not react in that fashion. See **Butt** *supra*. Secondly, there was no suggestion that there had been subsequent bangs (or gunshots) to justify his decision to remain in a horizontal position in a moving vehicle. He made no effort to establish whether there was indeed a gunman firing at the truck. Nothing justified his remaining in that dangerous position until the truck collided with the building. In my view, he reacted in a disturbingly unreasonable manner.

[86] After the first collision the truck of Drakensberg veered off the road. Mr Kubheka did nothing to steer it back onto the road. On its path of devastation the truck uprooted a tree on the side of the road. Again Mr Kubheka did nothing to regain control of the truck. The evidence clearly showed that Mr Kubheka simply abdicated his responsibility to control the truck. It is improbable that a reasonable man would have acted the way he did, after the first impact. In those circumstances a reasonable driver would have immediately

applied the brakes in order to bring the truck to a halt after the first collision – **Lombard** *supra*.

[87] The law imposes certain duties on a driver approaching an intersection. As suggested above both drivers testified that they entered the intersection without taking any additional precautions on the basis that both of them presumed that they had a right of way by virtue of the fact that the traffic lights were green in their favour. It is improbable that the lights would have been green in favour of both drivers travelling in two different streets that were crossing each other. Neither of them slowed down nor took any other precaution. Mr Kubheka never became aware of the van driven by Mr Lepele. Mr Lepele became aware of the truck at the time when it was dangerously close. At least, he saw something. Mr Kubheka saw nothing at all.

[88] During cross-examination Mr Benade, counsel for Prestprops, put it to Mr Lepele that if he had slowed down prior to entering the intersection he could have prevented the collision from occurring. It must be borne in mind that it was common cause that both drivers had restricted view of the traffic situation on the streets they were about to cross. The suggestion, in other words, what was put to Mr Lepele on behalf of Prestprops, seemed to require an additional measure by Mr Lepele before he entered the intersection in order to avoid a possible collision. In the **Netherlands Insurance Co of SA Ltd v Brummer** 1978 (4) SA 824 (A) Muller JA remarked as follows at 833E-F about the driver

approaching an intersection where the green lights were in his favour:

“Sien ook Cockrant v Durban City Council 1965 (1) SA 795 (N) op 801 - 2; Rondalia Assurance Corporation of SA Ltd v Collins NO 1969 (4) SA 345 (T) E op 347; Walton v Rondalia Assurance Corporation of SA Ltd 1972 (2) SA 777 (D) op 779 - 780. Soos in bogenoemde gewysdes verduidelik moet 'n bestuurder wat 'n kruising binnegaan terwyl die verkeerslig vir hom groen is, uitkyk vir verkeer wat reeds in die kruising is, bv verkeer wat die kruising binnegegaan het voor die verkeersligte verander het. Hy mag natuurlik ook nie 'n voertuig ignoreer waarvan hy bewus is en wat duidelik op 'n nalatige wyse bestuur word. Maar dit word nie van hom verwag om uit te kyk vir verkeer wat moontlik onwettiglik die kruising teen 'n rooi verkeerslig van links of regs kan binnegaan nie.”

[89] Accordingly, a driver is entitled to assume that those who are precluded or prohibited from crossing the street by the red traffic lights would not unlawfully try to cross the street by disobeying or skipping such traffic lights and try to pass from left or from right the path of a driver who has a right of way by virtue of the green traffic lights.

[90] In **AA Onderlinge Versekeringsmaatskappy v Mantje** 1980 (1) SA 655 (A) reference was made to the **Netherlands Insurance** case *supra* by the defendant's counsel and dealt with by the court *a quo*. However, and importantly, the appellate division appears to agree with the principles enunciated therein and applied them in coming to its conclusion on the facts of that case. Both decisions in the

Netherlands case *supra* and Mantie's case *supra* were referred to in the matter of Santam Insurance Co Ltd v Gouws 1985 (2) SA 629 (A). Again the trial judge referred to those cases. In my view, she did so correctly. The court *a quo* clearly agreed with the principles supplied in those cases and certainly did not indicate that they were wrong or no longer part of our law. However, in the Gouws case *supra*, the court, went a step further and discussed the situation that the closer the motor vehicle is to the intersection before the traffic lights turn green in his favour, the more likely it is that the intersection may not be completely clear of traffic.

[91] Therefore, it was quite evident that, on the authorities cited above, Mr Lepele could not be fairly criticised for entering the intersection without taking any additional precautions since his evidence that the traffic lights were green in his favour could not be rejected as false or improbable. In my view his evidence was more credible and reliable than that of Mr Kubheka.

[92] The court *a quo* granted absolution from the instance as regards the South Gauteng Case. The claim of Drakensberg against All Pay was not proven on a balance of probabilities. Similarly the court also found that the counter-claim of All Pay against Drakensberg was not established on a balance of probabilities. Both Mr Benade, and Mr Becker, urged us not to disturb the findings of the court *a quo* as regards the order of absolution from the instance. I am inclined to

accede to that request. On the strength of that order and the available evidence, there was no conceivable basis on which All Pay could have been held liable for Prestprops' damages.

[93] It will be remembered that there was no physical contact between the van of All Pay and the building of Prestprops. A secondary collision gave rise to the proceedings relative to the Free State High Court case, in other words, the claim of Prestprops against Drakensberg. The building of Prestprops was damaged as a result of the secondary collision in which the truck of Drakensberg alone was involved. As regards the secondary collision Drakensberg would only escape liability for Prestprops damages if we were to find in its favour on the question of the defence of sudden emergency. In my view, Drakensberg failed to establish such a defence. If that is the case, then All Pay has to be eliminated from the equation.

[94] On behalf of the appellant the argument that Prestprops was not the lawful owner of the building damaged was not seriously pursued, if at all it was, on appeal. In my view, there was no substance in the argument. Therefore, I am also inclined to dismiss that special defence raised by the appellant. In all the circumstances Drakensberg was correctly held liable for the damages to Prestprops' property and Prestprops' claim against All Pay should have been dismissed with costs.

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

94.1 The appeal is dismissed with costs, which shall include the costs relative to the appellants' applications to the court *a quo* and to the Supreme Court of Appeal for leave to appeal.

94.2 The judgment of the court *a quo* in respect of both matters is upheld.

M. H. RAMPAL, AJP

I concur.

S. NAIDOO J

I concur.

L.B.J. MOENG AJ

On behalf of appellant:

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Instructed by:
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BLOEMFONTEIN

On behalf of first respondent:

Mr H J Benade
Instructed by:
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On behalf of second respondent: Advocate F J Becker SC
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