

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)**

Case Number: 2720/10

In the matter between:

DATE: 15/3/2013

SICELO TIKANA

PLAINTIFF

and

THE ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

MAKHUBELE AJ

INTRODUCTION

[1] Sicelo Tikana (the plaintiff) is an adult male attorney who resides at Room [...], O[...] Flat, [...] C[...] Street, Pretoria, Gauteng Province.

[2] The plaintiff issued summons against the Road Accident Fund (the defendant), 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 motor vehicle accident that occurred on 30 January 2009 at the intersection of Louis Botha and Fife Streets, Berea, Johannesburg.

[3] It is common cause that at the time of the collision, the plaintiff was a driver of his motor vehicle (vehicle) with registration letters and numbers V[...]. The plaintiff's vehicle collided with a vehicle bearing registration letters and numbers VZ[...] that was driven by Samuel Phutego Moloi (the insured driver).

3.1 The particulars of claim indicated that the plaintiff was the driver of the latter car, however, this was rectified in a supplementary affidavit¹ deposed to by him on 02 December 2012.

[4] At the commencement of the hearing, the parties advised me 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.

¹ Page 185 of the trial bundle.

4.1 Plaintiff handed in trial bundle (bundle) that contained amongst others, all pleadings, notices and expert reports. Both parties now and again referred to specific documents therein.

[5] In his particulars of claim, plaintiff alleged that the accident was caused by the sole negligence of the insured driver who was negligent in one or more or all of the following respects:

5.1 Drove without due consideration of other road users, particularly the plaintiff.

5.2 failed to keep a proper look-out.

5.3 drove at an excessive speed under the prevailing circumstances.

5.4 failed to apply brakes at all or timeously and adequately.

5.5 failed to take adequate steps to avoid the accident when he could have done so by exercise of reasonable care and diligence.

[6] The defendant raised three special pleas that I will not get into because they were not pursued during trial.

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

causation of the accident. Particulars of the plaintiff's alleged negligence or contribution to the causation of the accident are similar to those stated by the plaintiff in his particulars of claim, save for one addition, namely, that the plaintiff failed to take sufficient account of the presence of other road users, in particular the insured vehicle.

[8] The issues were narrowed down during the pretrial conference² and the remaining dispute I was required to adjudicate on was the negligence of the insured driver.

EVIDENCE

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

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

[10.1] He could remember the events of the morning of 30/01/2009 very well. He left his house in Pretoria for Johannesburg where he worked. He used the N1 then M1 highway. He off-ramped at Hillbrow, Joe Slovo Drive (formerly Houghton Drive).

[10.2] He arrived at the Y-shaped intersection of Joe Slovo and Louis Botha Avenue where there are several traffic lights (robots) regulating traffic. The robot was green and in favour of

² See pre-trial minute signed on 22 January 2013. P255-259 of the trial bundle.

him. He then entered the intersection, turning right into Louis Botha Avenue.

[10.3] He referred to the sketch plan³ and marked the direction he was travelling in and showed that for him to proceed, robots marked E and B would have to be red. These robots control traffic in Louis Botha Avenue.

[10.4] When he was in the middle of the intersection with an X1 marking, he heard a bang on the right hand side of his motor vehicle. He then collapsed (was rendered unconscious). He later learnt that he was transported by helicopter ambulance to the hospital.

10.5 I enquired from defendant's counsel if he has no objection to the sketch plan being used without calling the person who drafted it. There was no objection.

[11] This was the end of the plaintiff's evidence in chief.

[12] Under cross examination, plaintiff testified that he was 35 years old. He denied a suggestion that he had had five accidents in his lifetime. He admitted having told a certain Dr Kumburayi whose report appears

³ P208 of the trial bundle.

in the bundle that he had other accidents in the past. He denied that he was a driver in all of them and that this is not clarified in the report. He indicated that in some he was a passenger and could have been a pedestrian in others. The defendant's counsel did not pursue this point.

[13] Plaintiff was asked about his alleged memory loss or forgetfulness as indicated in the reports of several experts. This information was apparently provided by his wife who complained that he sometimes forget appointments or to prepare for court. Plaintiff put water on the extent of his alleged memory loss or forgetfulness as alleged by his wife. He dismissed it as her "*observations, maybe what she realized*".

[14] Counsel for the defendant enquired from plaintiff how he could recall the accident in view of allegations of memory loss, slow cognitive function and forgetfulness. It was put to him that his evidence is what he think happened. His answer was that:

[14.1] He was on his way to work and he uses the road regularly. The damage on his motor vehicle indicates more or less how the collision occurred.

[14.2] His mind was still in its "positivity" before the truck struck him and as such, he can still remember the vicinity where the accident occurred. He went on to state that he can still remember

things that happened before the accident, his family too, which he had before the accident.

[15] He was asked about the third motor vehicle, a Mazda that was involved in the accident that he was, up to that point not talking about. It was put to him that his motor vehicle collided with the Mazda after his first collision with the truck.

[15.1] Plaintiff maintained that he was not aware of a collision between his car and the Mazda. He only know being struck by the truck that was coming from the direction of Hillbrow.

[16] Counsel for the defendant put the following propositions to the plaintiff:

[16.1] Mr Mini was the driver of the Mazda and he was going to testify that his motor vehicle was stationary at the red robot waiting to proceed in the intersection of Louis Botha.

[16.2] The driver of the truck (insured driver) would also testify and say that his robot was green for his and the opposite traffic where the Mazda was and this is why he proceeded to pull away.

[17] Plaintiff denied that the robot was green for the insured driver. He reasoned that the version of the driver of the Mazda cannot be true because the insured driver collided with him on his right hand side, and

if the Mazda was on his left hand side, his motor vehicle would have been damaged on the left hand side too. He admitted though that the sketch plan shows three motor vehicles, namely; A, B and C.

Plaintiff also remarked that if the points indicated in the sketch plan are correct, vehicle A (Mazda) would have been struck by the insured motor vehicle before it landed on point C. This, according to plaintiff is indicative of the fact that the insured driver was driving at a high speed.

[18] Plaintiff admitted that the point of impact between his and the insured vehicle was in point X1. He stated further that the point of impact supports his version. His and the insured vehicle push each other after the collision .

18.1 Plaintiff marked certain important points in the sketch plan such as the direction he was coming from, the point of and the direction of the truck. His pointings were marked Exhibit 1.

[19] When asked whether he admits that X2 is the point of impact between him and the Mazda, plaintiff reiterated that he did not see the collision with the Mazda if it happened at all. If he hit the Mazda, it could have been that his vehicle was pushed after the insured vehicle struck him. He maintained that he did not collide with the Mazda because he was unconscious and he was no longer in control of his vehicle. Plaintiff

maintained that when he look at the sketch plan and the position of the vehicles after the collision, it is impossible that the insured vehicle did not struck the Mazda too. He also reiterated his reasoning that if he collided with the Mazda as alleged, his car would have been damaged on its left hand side.

[20] It was further put to him that the driver of the Mazda would testify that he pulled off and the plaintiff disregarded the robot and came at high speed and hit both the insured and his motor vehicle. He denied the suggestion and maintained that the Mazda driver was struck by the truck, if he was at all and not by him. Furthermore, his vehicle has no damage on the left hand side.

[21] It was also put to the plaintiff that the insured driver would testify that the robot went green in his favour as he was approaching and he proceeded. According to him, plaintiff came at high speed and disregarded the robot, and first struck the insured vehicle and then the Mazda. Plaintiff denied this suggestion again and maintained that the insured vehicle struck him. He does not know anything about the Mazda, except what he could discern from the sketch plan. His vehicle was only damaged on the right hand side, between the two doors. The rear and the left hand side were not damaged.

[22] Plaintiff was also asked about the robots in the vicinity and which traffic each one of them controlled.

I then suggested that all robots be marked from 1 to 5. The plaintiff then indicated how which robot regulates traffic.

[22.1] Robot 1 , opposite Houghton (Joe Slovo Drive.

[22.2] Robot 2, after F and in front of the island.

[22.3] Robot 3, in front of X1.

[22.4] Robot 4, in front of street names “Fife Ave and Louis Botha Ave.

[22.5] Robot 5, further down after robot 4 in Louis Botha Avenue.

[23] According to plaintiff, robot 1 regulates him whereas robot 2 regulates the insured motor vehicle. Robots 3, 4, and 5 control traffic from Fife Ave.

He denied a suggestion that as he came through, robots 3,4 and 5 were green and he mistook them for his own robot (1).

[24] When asked what motive the two drivers who are supported by sketch plan would have to lie against him, plaintiff replied that he would not know what is in their minds, but that as far as the Mazda driver is concerned, it means that he had stopped because the robot was red for him. The insured driver, so the reasoning of the plaintiff went, ignored

the red robot and collided with him. He went on to state that after the truck struck him, he no longer had control over his vehicle.

[25] Finally the plaintiff was challenged to point out a document in the bundle where he had stated that the insured driver skipped a robot. It turned out that this allegation is contained in a supplementary affidavit referred to above.

[26] Under re-examination, he testified that no one reminded him about the accident and that as far as he knows he collided with one vehicle. He heard about the third vehicle in court.

He confirmed the damage on his vehicle, which is on the right hand side doors and the roof that had a dent as well as a rear light that was disconnected.

He entered the intersection because the robot was green for him and red for the insured driver.

[27] The court asked him questions to clarify certain issues. The questioning yielded the following information:

[27.1] The accident occurred at about 7 in the morning.

[27.2] The weather condition was cloudy.

[27.3] He did not give a statement to the police because he was rendered unconscious. The only statement he gave is in page 185 of the bundle.

27.4] He does not know who pointed out the points in the sketch plan (p208). He saw it for the first time in court.

[27.5] He was unable to estimate the distance between his vehicle and vehicle A. It is a double carriageway though, with two lanes as it appears from the sketch plan. He saw some cars , but they were stationery.

[27.6] There were no vehicles in front of him and no other vehicle turning at that time.

[27.7] He does not know if there are pictures of his vehicle in a damaged state. The vehicle is at his house, but the damaged parts were cut and replaced.

[28] Counsel for the defendant pointed out to plaintiff that it is not correct that he only made one statement (p.185) because there is another one with his signature that accompanied the claim form. Plaintiff explained that he could not remember because the signature does look like his. He was also referred to the pictures of his vehicle in page 249 of the bundle.

[29] The case for the plaintiff was closed.

Defendant

[30] The first witness for the defendant was Samuel Phuthego Moloi (Moloi) who testified that he was the driver of the insured vehicle (truck) and that it was raining as he approached the robot. It became green for him when suddenly a Yaris approached at high speed. He hit the Yaris on the right hand side.

[31] When asked which part of his vehicle made contact with the Yaris, Moloi indicated that it was the right hand side corner.

[32] He indicated that he was able to recognize the area, although the sketch plan had no markings. He was from left to right (South to North).

[33] When asked how far away he was from the Yaris when he first saw it, he answered that *“not far way as he was in the intersection”*. He maintained that the Yaris was *“so close”* when it was put to him that he must have entered the intersection from left.

[33] Moloi went on to testify that he flicked his head lights, hooted, applied brakes and then hit the Yaris at point X1.

He indicated that there is nothing else he could have done even now when he reflect on the matter.

[34] When asked about a third motor vehicle, he replied that yes, there was a Mazda, but he did not see the collision between the Mazda and the Yaris because he was trying to control his car.

[35] He admitted that his vehicle ended up at point X3, which is the opposite lane to which he was travelling in. He explained this by stating that he lost control, and the vehicle jumped to the other lane.

[36] He did not see the collision between the Mazda and the Yaris.

[37] Cross examination yielded the following facts:

[37.1] He first saw the Yaris as it was *“entering the intersection”, “when it entered the intersection”*.

[37.2] He was about 3 metres away from his robot at the time.

[37.3] He flicked lights, hooted and applied dead brakes because he could see that *“the man cannot see the robots are red for him”*.

37.4 His vehicle was sliding and continued to move forward even after he had applied brakes. This was caused by the wet conditions as it was raining, not because he was speeding as counsel for the plaintiff had suggested.

[37.5] He obtained his driving licence in 1999 and it was not the first time for him to drive in such conditions.

[37.6] When asked if he has a problem with stopping a car, he replied that according to his knowledge, a truck does not stop immediately, more especially in wet conditions.

[37.7] He did not check the speedometer, but he knows he was travelling at 60 km/h because that is the speed limit indicated in the signs. He conceded though that he does not always drive at the prescribed speed limit.

[37.8] He started to apply brakes when he was on top of the line (robot) and by this time plaintiff was already in the intersection.

[37.9] Defendant's counsel objected to a question that he "*failed to take a proper lookout*" because plaintiff did not testify about it. I upheld the objection because the words are a conclusion and no foundation was laid during evidence in chief.

[37.10] There was a stationary Mazda on points B and A in the sketch plan. He saw it as it was stationary and after he crossed the robots. The Mazda was coming from robot 5. The robot was green

but the Mazda did not move. It was green for him too, and he moved forward.

[37.11] He swerved into the direction where the Yaris was coming from (left hand side) because the truck lost control and if he had swerved onto his right hand side, he could have collided with the stationary Mazda. He hit the Yaris on its right hand side. There were no other vehicles behind the Yaris.

[37.12] He saw the Yaris before it passed its own robots.

[37.13] There were other vehicles travelling towards same direction as his vehicle, but on the “slow” (left) lane. There was nothing to obstruct his view.

[37.14] He denied that the Mazda was stationary because the robot was red for it, and him too.

[37.15] The collision between the his vehicle and plaintiff's vehicle occurred in the middle of the road at X1.

[37.16] It was put to him that defendant's counsel submitted that the Yaris collided with him and the Mazda. He denied this and reiterated that he did not see the latter collision.

[37.17] After the collision, he came out of the vehicle, and sat down because he was confused. He saw an ambulance. He cannot remember much because the place was *"too busy"*.

[37.18] He was not injured, just confused by what happened. The truck was damaged on its right hand side corner.

[37.19] There were no other vehicles where the Mazda had stopped (at the robot).

[37.20] He was able to speak to the police.

[38] Moloi was asked to indicate important points in the sketch plan such as the direction he was coming from, the point of impact and where he first saw the Yaris. His pointings were marked Exhibit 2.

[38] The second witness for the defendant was **BENEDICT MINI**, who testified (contrary to what counsel had earlier put to the plaintiff), that he was the owner, not the driver of the Mazda, with registration

letters and numbers P[...]. On the day in question, he was a passenger in this vehicle , and his friend, Vusi was the driver because he does not have a driving licence.

[39] Just like the plaintiff and Moloi, Mini too made certain markings in the sketch plan. The points as indicated by him were marked exhibit 3. The vehicle in which he was travelling is indicated as A in the Accident Report Form and the sketch plan and was travelling in the opposite direction in relation to the truck. The both of them were regulated by the same set of robots.

[40] He testified that the robot was red for the Yaris and green for the insured vehicle and his.

[41] When asked when was the first time he saw the Yaris, he replied that “ *when the truck hit it and it spinned and came and hit my car*”.

[42] He also testified that the Mazda started to move when the robot turned green, but stopped due to the impact with the Yaris. He confirmed that X1 is the point of impact between the Yaris and the truck. The Yaris spinned and hit his car at the right rear door at point X2, with

two blocks A and B inside. His car after the impact was still facing where it was going and did not move.

[43] After the collision he went to assist the plaintiff. He realized that he had “collapsed” (rendered unconscious). He tried to open the driver’s door, but it was locked. He then opened the passenger door. He called the police. The ambulance came too. He did not see a helicopter. He went to open a case at Hillbrow but was referred to Loveday Police Station. He went to see the plaintiff at the hospital, but he was in a coma. When he went there again he was told that he had been transferred to another hospital. He spoke to plaintiff’s wife about the damage on his vehicle.

[44] Under cross examination he testified that his car had slightly jumped after it collided with plaintiff. His driver told the police what happened, and pointed out how the accident occurred. He assisted too.

[45] He also mentioned that when they saw the truck, it had stopped because the robot was red for both of them. When it turned green, they moved. The Yaris came and in his opinion it was probably trying to beat the robot. The Yaris spun towards his vehicle. The truck passed them, but he did not see it. The Yaris ended behind his vehicle after the collision

[46] The accident had not yet happened when his driver started to move away after the robot turned green. He did not finish the move and he does not know the reason why, it could be that he was afraid of the accident.

[47] He did not know Moloi before the accident. They exchanged telephone numbers and he spoke to Moloi's manager, one Sabelo after the accident about the owner of the Yaris.

[48] They were travelling on the left lane. Their car was in front. There were no cars in the right hand side lane.

[49] He went on to state that the Yaris was speeding but he does not know if the truck was speeding too. He did not verify the damage on the truck because he was concerned about the damage on his own vehicle.

[50] Upon questioning by me, Mini indicated that he first saw the Yaris after it had been hit by the truck. When asked at what point he saw the Yaris speeding as he alleged, he replied by stating that after it was struck by the truck and that he did not see it (Yaris) before this.

He indicated further that the truck stopped at the robot, but he did not see it move forward.

He did not make a statement to the police. When asked who gave information to the police about the points in the sketch plan, Mini replied that he and his friend (the driver of the Mazda) did.

[51] The case for the defendant was closed.

[52] Before I analyze the evidence and make findings on the facts, I need to address a concern I have about the manner in which this trial was conducted, namely; the level of preparedness and whether I should have done something to fill in the gaps.

[52.1] Counsel for the defendant did not object to the sketch plan being used without calling the author to explain the points, however, the exercise was time-consuming and in the final analysis it was not very helpful because there are no markings. The distances that could have been helpful were not indicated. He/she only measured the distances from the point of impact to where the vehicles landed. The distances were measured by paces. I find it strange, to say the least, to estimate a distance in terms of paces in this millennium where there are measuring instruments. I do not accept that a pace of short person can ever be equal to a long-legged one.

Plaintiff struggled to understand the sketch plan, despite the fact that the sketch is dated 30/01/2009, and is in the bundle that was handed in by his counsel. He lamented that he saw it for the first time in court.

[52.2] The accident report forms part of the bundle, but was never referred to. I perused it and in any event I do not think it could have assisted because the versions of the drivers (at least those who were at the scene with the police) were not recorded. The involvement of a third vehicle caught plaintiff by surprise and apparently he heard this in court for the first time too. I wonder if he consulted with his counsel at all before taking the stand.

[52.3] The photos depicting the damage on plaintiff's vehicle are also in the bundle and they were never referred to in his evidence. In response to my question, plaintiff responded by stating that he was not aware if there are photos. Counsel for the defendant directed him to the relevant pages. Although the photos in the bundle are black and white, leading evidence about them could at least have supported the plaintiff's version about how the collision occurred. This is a non-issue because the defendant did not deny the damage. Again, the question remains whether

plaintiff and his counsel were familiar with their own documents in their own bundle.

[53.4] Plaintiff could have done better in his evidence in chief to substantiate the allegations in his particulars of claim. His evidence was simply that he entered the intersection because the robot was green for him and he was struck by a truck that jumped a robot. Should he fail to prove this, then it is the end of his case.

[53.5] The question is whether I, as a trial judge should have questioned the plaintiff to establish all the facts, called 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.

[53.5] The answer to the question I posed in 53.5 is in the negative.

In the matter of **City of Johannesburg Metropolitan Council v Patrick Ngobeni**⁴, 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

⁴ 9314/110 [2012] ZASCA 55 (30 March 2012)

and questioned witnesses, mero motu called witnesses, and on his own initiative decided that an inspection in loco beheld.

[53.6] This is not to say that the evidence not led or brought before me would have added some immeasurable value . A trial judge can do and order certain things in the course of a trial, but not as a substitution for counsel's ineptitude or lack of preparedness.

[53.7] I am raising these issues because it was glaring that plaintiff and his counsel were not adequately prepared for trial. At the end of his very brief evidence in chief, I had to ask him questions to establish such basic information like time of the accident , weather condition, damage on his vehicle, distances, etc.

[53.8] I do appreciate the fact that it is not the quantity but quality of evidence that matters. However, in this matter, plaintiff has boxed himself in a very small compartment. Having alleged several grounds of negligence in his particulars of claim, the evidence tendered only raise one question; whether the insured driver jumped a red robot or not.

THE LAW

[54] The collision took place at a traffic light (robot) -controlled intersection. The versions presented before me as to how the accident occurred are totally irreconcilable and thus mutually destructive. Under the circumstances, two issues arise for consideration:

[54.1] which of the two irreconcilable versions is most probable.

[54.2] the duties of a driver who enters a traffic light-controlled intersection.

[55] With regard to the first issue, the approach is stated in the matter of **Stellenbosch Farmers Winery Group & Another v Martell & Others**⁵. 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.

[56] 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**⁶ 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 Cainer,¹¹ Coetzee J applied the principle

⁵ 2003(1) SCA 11 at

⁶ *supra*

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 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."

[57] It is common cause that the plaintiff was in the process of entering an intersection by executing a right turn. According to him, the

robot was green and in his favour. He was already in the intersection when he heard a bang on his right hand side.

His 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 Fund**⁷

“[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 inopportunely turn across the line of traffic. This assumption may continue until it

⁷ (A402/2008) [2011] ZAGPPHC 121 (13 June 2011)

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 right. In this regard *Van 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 Freezes 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 Beperk v De Beer*, **1976 (4) SA 707** at 711.

[58] The insured driver, on the other hand was supposed to proceed straight on the road (path) that he was travelling in. It is common cause that when the traffic light is green for the plaintiff, it is red for the insured driver, and vice versa.

[58.1] The duties of a motorist (such as the insured driver) approaching a traffic light are summed up in judgment of Viljoen JA in the matter of **Santam Insurance Co Ltd v Gouws**⁸

“Dealing with the issue as to whether Jackson was negligent, the learned Judge had regard to what was said in Netherlands Insurance Co of SA Ltd v Brummer 1978 (4) SA 824 (A) and A A Onderlinge Versekeringsmaatskappy v Mantje 1980 (1) SA 655 (A) and concluded that, in his view, the reasonably prudent driver in Jackson’s position should have kept a lookout for traffic in the intersection that may have entered the intersection before the lights changed, and had not yet cleared the intersection. This is so, said the learned Judge, particularly in view of the considerable length of the intersection. He was satisfied that the reason why Jackson did not see the respondent at an earlier stage than he did was because he only transferred his attention to his right when he commenced to turn to the right. The learned Judge considered the aspect of the lighting and was satisfied that Main Road was sufficiently lit for the respondent to have been clearly visible despite his dark clothes. He concluded as follows:

“Considering all the circumstances, such as the absence of other traffic, which left sufficient room for Jackson in which to take avoiding action; the slow speed at which plaintiff was travelling and Jackson’s own relatively slow speed, it seems

⁸ 1895 (2) SA 629 (A)

clear that had Jackson seen plaintiff when he should have, he could have avoided the collision.”

I have no hesitation in agreeing with the learned trial Judge that the respondent was clearly negligent. His negligence borders, in my view, on recklessness. Almost as soon as he entered the intersection the traffic lights facing him changed to amber at which colour they remained for a period of three seconds before turning to red. He could therefore not have proceeded far into the intersection before the traffic lights showed red for him. In spite thereof he proceeded forward in the middle of the road without looking at the traffic lights facing him and without taking any precaution whatsoever to avoid a collision with traffic that might, with the green light in its favour, emerge from Cecil Road into the intersection. If regard is had to the all red period of two seconds the respondent must have proceeded into the intersection for a period of five seconds from the time the light turned to amber for him until it turned green for Jackson. At that stage Jackson was still some 40 metres in distance from the intersection and some 5 seconds in time. Were one to add to that another two seconds (including reaction time) before the collision occurred it would follow that the respondent must have travelled in the intersection for a period of roughly 12 seconds with first the amber and then the red light facing him without keeping a lookout at all.

What remains is to consider whether the learned trial Judge was right in finding that Jackson was also causally negligent. The duty of a motorist who approaches an intersection and enters it with the green light in his favour is to have regard to the reasonable possibility that traffic which entered the intersection lawfully, may still be in the intersection.

He should therefore regulate his speed and his entry into the intersection in such a manner as not to endanger the safety of such other traffic. The closer the

motorist is to the intersection when the traffic light turns green in his favour the more likely it is that the intersection may not be completely clear of traffic. See Doorga and Others v Parity Insurance Company Ltd 1963 (3) SA 365(D) at 367F 368; South British Insurance Company v Barrable 1952 (3) SA 239 (N) at 242 F G; Cockram v Durban City Council 1965(1) SA 795 (N) at 802 A B.”

SUBMISSIONS BY THE PARTIES, FINDINGS AND ANALYSIS OF EVIDENCE

[59] At the end of the trial, counsel for both parties submitted written heads of argument at the close witnesses testimony. I am grateful for their submissions and authorities I have been referred to.

[60] Counsel for the plaintiff submitted that there is no evidence to suggest that he (plaintiff) may have forgotten the details of the accident. I agree with this submission because the suggestion was merely put to the plaintiff on the basis of certain extracts from the expert reports. The full report, which could probably have placed the matter in a proper perspective was not placed before the court. I am satisfied with plaintiff's responses that he can still recall things that happened before the accident. His evidence was consistent. He appeared to me to be a

reliable witness and his evidence except for whether the robot was red or green was corroborated by the defendant's insured driver. The accident took place in an intersection where plaintiff had to execute a right hand turn. If he had problems with memory, he would have muddled the explanation. He may be forgetful , but there is no evidence to suggest that he forgot things that happened before the accident, after the accident or both. The only reason I allowed questions around this issue is because I thought the defendant would actually prove that he cannot possibly recall on the basis of scientific proof. This point was abandoned by counsel for defendant when plaintiff explained what he can still remember.

[61] The fact that plaintiff cannot remember that there was a third vehicle that was allegedly involved in the accident does not mean that he cannot recall details of the accident. His explanation is that after he was struck by the truck, he lost consciousness and obviously was no longer in control of the vehicle. This is corroborated by the second witness for the defendant (Mini) who testified that the Yaris spinned after it was struck by the truck and when he went to it he found the driver (plaintiff) unconscious. According to Mini, the impact on his car was as a result of the Yaris spinning towards his direction after being struck by the truck. The fact of the matter is that plaintiff recalls how his and the insured vehicles collided. It is a fact that he was rendered unconscious

thereafter, and as such he cannot be expected to recall his vehicle spinning and hitting the Mazda, if it did.

[62] Having disposed of the issue of memory and how it may impact on the value to be attached to plaintiff's evidence, the only remaining issue is whether the traffic light was green for the plaintiff and red for the truck.

[63] I do not agree with the assertion by counsel for the defendant that Mini and Moloi corroborated each other with regard to the issue of the traffic light. I have already summarized in great detail, the evidence of all witnesses.

If anything, Mini contradicted himself on the issue of whether the traffic light was red for the truck or not.

[63.1] In response to a question by plaintiff's counsel about the first time he saw the truck , he answered that it had stopped and their vehicle (Mazda) had stopped too because the light was red. He also confirmed this when I asked him the same question. This is a contradiction to the evidence of the insured driver, who testified that he did not stop because it turned green in his favour as he was approaching the intersection.

[63.2] The evidence of Mini suggest that he did not see plaintiff jumping the traffic light despite assertions to this effect at some point. Under cross examination, he indicated that he first saw plaintiff's vehicle after it was struck by the truck and spun and hit his vehicle. He confirmed this when I asked him. I asked him at what point he saw the Yaris speeding and his response was that *"after it was hit by truck.. I did not see Yaris before it was hit"*

[63.4] On his own (contradictory) versions, it is highly improbable that Mini saw the Yaris before the collision. The fact that the vehicle he was travelling in had stopped because the traffic light was red (red for the truck too) can only mean that the Yaris had a right of way.

[64.4.1] Although there are no measurements between the plaintiff's traffic light (marked 1 by agreement), and the point of impact (X1) with the truck, it is clear that plaintiff was almost at the end of clearing and finishing his turn. He was closer to the Mazda than traffic light 1. If he jumped the light, the truck would have hit him closer to where he entered the intersection.

[63.5] The insured driver's version about the traffic light is also improbable. According to him, he slowed down because the light was red as he was approaching. Three metres before he reached the light he saw the Yaris crossing and he started hooting, flicking and applying brakes. There is no explanation as to why he decided to slow down and wait for the light to be green instead of proceeding and wait at the stop (light). He indicated that he was driving at 60km p/h simply because that is the speed limit, not because he checked the speedometer.

[63.6] On the insured driver's version, it was raining, he knows that the truck does not stop immediately in wet conditions.

[63.7] Under cross examination, the insured driver indicated that he first saw the Mazda *"when it was standing and before I crossed the robots"*.

The insured driver and the truck were regulated by the same set of traffic lights. The Mazda had stopped and on the version of Mini the collision occurred as they were about to move. The collision occurred in the middle of the intersection and this indicates that the Yaris had already entered and was about to complete his turn. If the truck had stopped, it would have still been standstill when the Yaris cleared the intersection.

Had the insured driver stopped at the robot or had reduced speed as he alleged, the truck (heavy to an extent that it does not stop immediately) would not have picked speed accelerated to such an extent that it stopped 35 paces⁹ away after the collision.

[63.8] The insured vehicle's right hand side made contact with the Yaris's right hand side. The truck was damaged on its right hand side. This, in my view corroborates the plaintiff's evidence that he was in the middle of the intersection. If he was entering or just entered, the insured driver would have hit his car on the front through its left side. The explanation of the insured driver as to how the accident occurred is not compatible with the damage on both vehicles.

[63.9] I accept that the traffic light could have turned green just before the truck reached the stop (where robot is and where he is supposed to wait), but under the circumstances (having seen the Yaris enter the intersection, rain, and his knowledge that the truck does not stop immediately in wet conditions), the insured driver should have exercised more caution. He should have proceeded to stop at the robot and not play a waiting game on the road by slowing down until it turned green and then accelerating.

⁹ measurements per sketch plan.

[63.10] Counsel for the defendant submitted that if I make a finding that the truck ignored the traffic light, I should also make the same finding with regard to the Mazda because they were regulated by the same set lights. I am not prepared to make a finding that the Mazda ignored the traffic light because I never heard evidence of the driver of the Mazda.

In fact counsel for the defendant misled the court and the witnesses by telling the plaintiff when he was under cross-examination that the driver of the Mazda was going to testify and make certain assertions. He never did. Instead, Mini, who was a passenger testified. The observations of a passenger and a driver can never be the same. The passenger (Mini) may testify that they were about to move away from the robot, but it is the driver who would have been able to tell the court what this phrase “about to move” mean with reference to driving actions. There is no evidence to suggest that the driver was discussing each and every driving action he took or intended taking with the passenger (Mini).

[63.10] The evidence of Mini with regard to their traffic light is that it was red, which is why they had stopped. It went green and as they were about to move, their vehicle was hit by the Yaris that came spinning towards them after being hit by the truck. This

indicates that the Yaris entered the intersection long before. There are no measurements but it is clear from the sketch plan that the road is wide, two lanes on each direction and at least five traffic lights that were marked in court by agreement between the parties.

[64] According to the sketch plan and the evidence of Mini, the Mazda remained in its position , facing the same direction it was going despite the fact that it was hit by an alleged speeding vehicle whilst it was in a stationary position. Plaintiff suggested that the Mazda could have been hit by the truck. Neither witnesses for the defendant disputed the assertion by plaintiff that his vehicle was only damaged on the right hand side doors and the roof was dented. I do not have to make a finding in this regard because as I have stated above, plaintiff was rendered unconscious (this was confirmed by the passenger in the Mazda, Mr Mini) when the vehicle allegedly spun and struck the Mazda.

[64.1] The fact that the insured driver's vehicle ended up the furthest from all the other vehicles is in my view an indication that he was travelling at an excessive speed under the circumstances. Had he reduced speed as he approached the traffic light as he alleged, he would not have ended up 35 paces away from the point of impact.

Whether failure to plead that the insured driver ignored a traffic light is fatal to plaintiff's case.

[65] I do not agree with the submission by counsel for the defendant that plaintiff's claim should be dismissed because he did not allege in his particulars of claim that the insured driver ignored the red traffic light. In my view, jumping or ignoring a traffic light is just but one example of reckless driving that has the potential to cause harm to property or persons.

[66] Sections 63 and 64 of the National Road Traffic Act, 93 of 1996 provide as follows:

Reckless or negligent driving

“ 63. (1) No person shall drive a vehicle on a public road recklessly or negligently.

(2) Without restricting the ordinary meaning of the word "recklessly" any person who drives a vehicle in willful or wanton disregard for the safety of persons or property shall be deemed to drive that vehicle recklessly.

(3) In considering whether subsection (1) has been contravened, the court shall have regard to all the circumstances of the case, including, but without derogating from the generality of subsection (1) or (2), the nature, condition and use of the public road upon which the contravention is alleged to have been committed, the amount of traffic which at the relevant time was or which could reasonably have

been expected to be upon that road, and the speed at and manner in which the vehicle was driven.

Inconsiderate driving

64. No person shall drive a vehicle on a public road without reasonable consideration for any other person using the road.”

[67] I have already dealt with the circumstances (according to the insured driver) under which the accident occurred. At the risk of repetition and overburdening this judgment, he testified that (a) it was raining, (b) the truck does not stop immediately under wet conditions. Despite this knowledge and circumstances under which he was driving, he nevertheless , on his own version approached the traffic light, which was still red at 60 km/h. He slowed down, but could not say to what speed. I do not accept that this is the speed he was driving because the truck stopped 35 paces after it hit the plaintiff's vehicle. 35 paces is a long distance, even for a short-legged (paced) person. I invited the parties to estimate the distances in metres and no one took up the challenge.

[68] The conduct of the insured driver can at best be described as reckless disregard for the safety of other road users.

[68.1] The intersection is amongst others fed by traffic that comes from the highway. Plaintiff testified that he was coming from

N1 (M1) and other local roads¹⁰.

[68.2] It is a dual carriageway with two lanes each.

[68.3] The driver of the Mazda testified that there were other vehicles.

[68.4] There were no obstructions that could have prevented him from seeing the plaintiff's vehicle. In fact he testified that he saw it as it was entering the intersection. At some point he said he saw it when it was in the intersection.

[69] Recklessness in the context of motor accidents has been a subject of many cases and the leading authority is in the judgment of **Steyn CJ, in the matter of S v Van Zyl**¹¹ where he said the following:

“In die woordeboeke word aan die woord „roekeloos” betekenisse toegeskryf wat verskillende grade van onvoorsigtigheid uitdruk, soos sonder sorg, sonder sorg met betrekking tot gevolge of gevaar, onverskillig, onverskillig vir gevaar, nie op gevaar lettende, onbesonne, baie onbesonne, onberade. Vir die ooreenstemmende woord in die Engelse teks, „recklessly”, word naas „in a reckless manner”, die betekenis aangegee van „without regard to consequences, rashly”, terwyl „reckless” sou beteken „careless, heedless, lacking in prudence or caution, characterised or distinguished by heedless rashness”, en ook „destitute of heed or concern for consequences, foolishly heedless of danger,

¹⁰ See sketch plan

¹¹ 1969 (1) SA 553 (A)

headlong, rash, not caring or noting, neglectful, indifferent". Dit sou gesê kan word dat met betrekking tot gedrag of 'n handeling, soos die bestuur van 'n motorvoertuig, die aangewese betekenis gevind moet word in begrippe soos sonder sorg met betrekking tot gevolge of gevaar, onverskilligheid vir gevaar, nie op gevaar lettende nie, sonder ag te slaan op gevolge; maar ook hierdie begrippe behels nie noodwendig 'n bewustheid van gevolg of gevaar nie. Dit wil dus blyk dat die gewone betekenis van „roekeloos” („recklessly”), gevalle van onverskilligheid, onbesonnenheid of onoplettendheid insluit waarvan gevolgsbewustheid geen deel uitmaak nie. So 'n betekenis word in verskillende gewysdes aanvaar. In *R. v. Mahametsa*, 1941 A.D. 83 op bl. 86, is daar, in verband met die straf wat opgelê was vir manslag voortspruitende uit 'n padongeluk, die volgende bekende passasie:

„We do not disagree with the view that imprisonment is an appropriate punishment in case of recklessness, if by recklessness is meant gross negligence or a willful disregard of the rights of other road users, as for example in the case of numbers of accidents which are caused by the dangerous practice of 'cutting in', or driving round a blind corner on the wrong side of the road, or passing another car on the crest of a hill.”

Hier word heel duidelik aanvaar dat roekeloosheid, afgesien van opsetlike verontagsaming van die regte van ander persone op die pad, ook uit growwe nalatigheid kan bestaan. Ten minste die eerste voorbeeld wat genoem word, veronderstel nie noodwendig 'n opsetlike verontagsaming van die regte van ander nie. In *R. v. Roopsingh*, 1956 (4) S.A. 509 (A.A.) op bl. 519, word met verwysing na hierdie passasie gesê:

„Although the appellant did none of these things it seems to me that a further instance of gross negligence might well be added to those described by the learned Judge and that is: driving, while under the influence of liquor at a speed of 40 miles an hour within some two feet of a stationary car, behind the right mudguard of which a man was standing.”

Hierdie bygevoegde geval is blykbaar gesien as een waarin die bestuurder roekeloos sou optree in die sin van grof nalatig, en ook hierdie geval veronderstel nie noodwendig 'n besef van die gevaar wat geskep word nie. (Vgl. R. v. Swanepoel, 1945 A.D. 444 op bl. 448; R. v. Bredell, 1960 (3) S.A. 558 (A.A.) op bl. 560).

In S. v. Grobler, 1964 (2) S.A. 776 (T) op bl. 780, kom die Hof tot die gevolgtrekking dat daar regverdiging bestaan vir die sienswyse dat die begrip roekeloos wyd genoeg is om growwe nalatigheid in te sluit, en in S. v. Barnard, 1965 (3) S.A. 644 (T), word bevind dat die gedrag van 'n bestuurder op grond van growwe nalatigheid as roekeloos beskryf kan word, sonder dat dit nodig is om in te gaan op die vraag of hy bewus was van die gevaar en onverskillig omtrent die moontlike gevolg van sy gedrag. Uit Engelse gewysdes omtrent die betekenis van die woord „reckless”, blyk dieselfde strekking. In R. v. Bates, (1952) 2 All E.R. 842, het dit gegaan oor die verbod in art. 121 (1) van die „Prevention of Fraud (Investments) Act”, 1939, op die roekelose maak van 'n verklaring, belofte of voorspelling wat misleidend, vals of bedrieglik is. Op bl. 845 word opgemerk:

„The ordinary meaning of 'reckless' in the English language is 'careless', 'heedless', 'inattentive to duty'. Literally, of course, it means 'without reck'. 'Reck' is simply an old English word, now, perhaps, obsolete, meaning 'heed', 'concern' or 'care'.”

Die Hof besluit dat die bepaling die geval dek „where there is a high degree of negligence without dishonesty”. In *Shawinigan v. Vokins & Co. Ltd.*, (1961) 3 All E.R. 396 op bl. 403, heet dit:

„In my view 'recklessly' means grossly careless. Recklessness is gross carelessness—the doing of something which in fact involves a risk, whether the doer realises it or not: and the risk being such, having regard to all the circumstances, that the taking of that risk would be described as 'reckless'.”

(Vgl. R. v. Chitanda, 1968 (1) S.A. 427 (R), en die vorige Rhodesiese sake waarna daarin verwys word).

Uit die voorgaande blyk dit, meen ek, dat die gewone betekenis van „roekeloos” („recklessly”) ook slaan op growwe nalatigheid met of sonder risikobewustheid.

Ek kan geen ander gewone betekenis vind wat die wetgewer in art. 138 (2) wou behou nie. Dit kan nie die meer beperkte juridiese betekeniswees nie van die soort risikobewustheid wat gepaard gaan met onverskilligheid ten aansien van die intrede van die gevolg, d.w.s. van opset met moontlikheidsbewussyn, want daardie betekenis word inbegrepe by die toegedigte betekenis en dit sou geen sin hê om te bepaal dat dit nie deur die toegedigte betekenis beperk word nie. Die enigste gewone betekenis wat deur die uitdruklike vermelding van opsetlike of moedswillige verontagsaming van

veiligheid beperk sou kon word, is die van roekeloosheid in die wyere sin wat ook growwe nalatigheid dek, waarvan risikobewustheid sonder bedoelde onverskilligheid ’n bestanddeel kan wees maar nie noodwendig hoef te wees nie. Dit, meen ek, is die gewone betekenis wat die wetgewer moes bedoel het, en daaraan moet gevolg gegee word, al is die grens tussen gewone en growwe nalatigheid moeiliker van geval tot geval te trek as die_

CONTRIBUTORY NEGLIGENCE

[66] The defendant pleaded contributory negligence on the part of the plaintiff, however, this was not pursued in cross examination or written heads of argument. In fact counsel for the defendant submitted that this is not a case where I should consider contributory negligence because plaintiff was solely to blame for the collision.

I agree that I do not have to consider contributory negligence, but for a different reason. There are two irreconcilable versions before me and the collision could have only occurred on either of the versions tendered. I have accepted that the plaintiff was already in the intersection when the collision occurred and that the insured driver did not stop at the traffic light.

[67] Therefore, under the circumstances, I make the following order:

[67.1] the insured driver was the sole cause of the collision

[67.2] the defendant is ordered to pay the plaintiff 100% of his proven damages.

[68] The issue of costs was not canvassed before me. In my discretion, I hereby order the defendant to pay the costs of this action.

MAKHUBELE AJ

Acting Judge of the High Court

Date heard: 29 January 2013.

Date of judgment: 15 March 2013.

Appearances:

Plaintiff: **Advocate Rasekgale**

Instructed by: Makwarela Attorneys
PRETORIA.

Defendant: **Advocate SJ Myburgh**

Instructed by: Moothle Jooma Sabdia Inc
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