

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

CASE NO: 1817/2011

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: YES /NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED
DATE: <u>2 August 2013</u>	
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2/8/2013

In the matter between:

SBV SERVICES (PTY) LTD

Plaintiff

and

J MAHLANGU

Defendant

JUDGMENT

- [1] This matter relates to a motor vehicle collision which occurred between a Nissan UD 40 TFM Armoured cash transfer vehicle belonging to SBV Services (Pty) Ltd of Rutherford Estate, 1 Scott Street, Waverley and a white VW Polo, on the 24th of December 2009 at the corner of Aubrey Matlala Street and the R80 in Soshanguve.

- [2] The accident was serious in that the cash transfer vehicle not only collided with the VW Polo, but as a result of the collision, swerved into a taxi rank, on the left-hand side of the R80 close to the said corner, killing several people.

Separation of merits and quantum

- [3] The plaintiff claimed an amount of R170 206.04 in respect of the damage caused to its motor vehicle plus interest. The defendant counterclaimed for an amount of R27 400.00 plus interest.
- [4] This court was called upon to adjudicate only the merits regarding the issue of which driver's negligence has caused the said collision. A separation of the merits and quantum was called for at the commencement of the action, and, after hearing submissions, was granted by the court.

Plea of *lis pendens* and counterclaim

- [5] Initially a plea of *lis pendens* was raised in the pleadings because of certain court proceedings which were pending in a Randburg Magistrate's Court, but this plea was formerly abandoned at the commencement of the hearing.

[6] The defendant's counsel also formally withdrew the counterclaim.

[7] It also bears mention that although copious reference was made to an Aubrey Mailala Street, the accurate name of the road is Aubrey Matlala Street. (The street's name is, for example, correctly reflected in the pre-trial minutes.)

The circumstances which gave rise to the collision

[8] The driver of the plaintiff's cash transfer vehicle was a Mr Vuyani Nicholas Mntameka. Mr Mntameka was the first witness to be called on behalf of the plaintiff.

[9] Mr Mntameka was the driver of the plaintiff's cash transfer vehicle, and an assistant protection officer of the plaintiff's money in transit, at the time of the accident. Mr Mntameka testified that he was on duty on the 24th of December 2009, the day on which the collision occurred and commenced work at 05h00. He testified that on that day he, a Mr Doctor Masisi, who was seated in the passenger seat of the cash transfer vehicle and a Mr M.N. Teffu, who was seated in the back of the cash transfer vehicle, were dropping off money at various areas in and around Pretoria and also fixing faulty ATMs. He testified that the last ATM that they visited was the Nedbank ATM at Central City Shopping Centre's Nedbank, which is situated at Mabopane. He testified that they left the Central

City Shopping Centre at 19h20, which fact he remembered (as part of his duties consists of filling in a log sheet for each stop of the day) and that was the time that he had recorded when he had filled in the log sheet prior to leaving Central City Shopping Centre. He stated that they were on their way to the plaintiff's Arcadia Cash Centre to drop off monies and were travelling on the Highway Road (the R80) in the direction of Soshanguve towards Pretoria.

[10] The R80 is a major arterial road with a dual carriageway carrying east and westbound traffic in the directions of Pretoria and Mabopane, respectively (east to Pretoria and west to Mobopane). There are two demarcated lanes in each carriageway and the carriageways are separated by a central barrier.

[11] The collision occurred, so Mr Mntameka testified, at about, or just after 19h20. He stated that he had filled the details in on a printed accident report and drew the rough map (not to scale) to be found therein, which report and map he referred to in evidence. What the map does not make clear, but what is clear from photograph number 3 referred to in evidence by the witness (numbered photographs were discovered and referred to in evidence) is that at the intersection the two lanes of the R80 branch into a third lane (on the right hand side) intended solely for drivers who wish to turn right into Aubrey Matlala

Street. There are two traffic lights on the part of the carriageways of the R80, which lead to Pretoria - on the left-hand side and another in the middle of the R80 at the concrete barrier - separating the four lanes of the R80. On the left of the R80 carriageway leading to Pretoria, just before the intersection, there is a slipway on the left hand side for motor vehicles wishing to turn left into Aubrey Matlala Street. Such vehicles need not stop at the intersection but merely have to turn into the slipway if they wish to turn into Aubrey Matlala Street. Hence, when a motor vehicle travelling on the R80 in the direction of Pretoria reaches the traffic lights at the Aubrey Matlala Street crossing, the driver is confronted with two sets of traffic lights, indicating either red, orange or green. The same holds true for the motor vehicles driving on the R80 from Pretoria to Soshanguve/Mabopane. The two lanes of the carriageway similarly split into three, the third lane being dedicated to drivers who wish to turn right into Aubrey Matlala Street. Once again, such drivers are faced with two sets of traffic lights - the one on the left-hand side of the R80 and the other located on the concrete barrier separating the carriageways of the R80. These traffic lights do have a green arrow which starts flickering the moment the traffic lights turn green. The arrow then turns yellow. Thereafter the traffic lights remain green and anybody who wishes to turn right into Aubrey Matlala Street has to wait patiently for the traffic

moving into the direction of Pretoria for an opportune and safe moment to turn right.

[12] The top part of the map drawn by Mr Mntameka is in the direction of Pretoria, the bottom part in the direction of Soshanguve away from Pretoria. Further, after the Aubrey Matlala Street intersection and on the left-hand side of the map, there is a huge BP garage with a taxi rank.

[13] I pause to point out that the other witnesses who testified were referred to this map and asked to indicate where north, south, west and east were. Because the witnesses clearly did not know from which angle to interpret the map and were clearly unable to understand the map. (A slipway, as can be seen from the map, was drawn in, on the map, on directly opposite sides thereof by the witnesses; vehicles and traffic were stated to be in the most unlikely places, for example, traffic lights in the middle of a lane, etc. As a result the court ultimately requested that the witnesses not be taken to the map and that they testify without any reference being made thereto.)

[14] A driver in the right-hand lane of the R80 carriageway, travelling to Pretoria would have, on his right, motor vehicles wishing to turn right into Aubrey Matlala Street and, as far as oncoming traffic travelling from Pretoria is concerned, vehicles in the third lane of the R80 carriageway waiting for an

opportune moment to turn right into Aubrey Matlala Street (should they have missed the period of time whilst the green arrow flickers, allowing them to turn right into Aubrey Matlala Street). These motor vehicles will, to some extent, obstruct a driver's view of the traffic in the other two lanes of the opposite carriageway leading to Soshanguve/Mabopane travelling straight on, not wishing to turn right (or for that matter left) into Aubrey Matlala Street.

- [15] Mr Mntameka testified that when he approached the intersection, the traffic lights were green. At that time he saw a Toyota Hi-Ace hesitating whether it should stop or turn into Aubrey Matlala Street and testified that it made a "yielding stop" but then accelerated. It turned safely, but Mr Mntameka hooted and flicked his lights at the driver of the Toyota Hi-Ace taxi, as Mr Mntameka believed that because he was so close, the manoeuvre was dangerous. The Toyota Hi-Ace was followed by the defendant's white VW Polo vehicle. Mr Mntameka testified that even though his foot was on the brake pedal and he reduced his speed, the impact with the white VW Polo vehicle was unavoidable. He also testified that his headlights were on. He testified that the driver of the VW Polo vehicle did not even look in his direction. He further testified that the time it takes to travel between the Central City Shopping Centre to Aubrey Matlala Street was short - only about 12 minutes.

- [16] Mr Mntameka could not say whether the green arrow was still flickering when the Toyota Hi-Ace and VW Polo turned into Aubrey Matlala Street. The reason therefore is obvious, as he could only see the rear of the traffic lights facing the traffic in the opposite carriageway of the R80.
- [17] Mr Mntameka further testified that when he saw the white VW Polo it was only about three paces away and he collided with the VW Polo hitting the left front side of the VW Polo between the wheel and the passenger door. One should remember that the human brain requires a certain reaction time, which luxury was not afforded Mntameka, on his version. The force of the impact was such that the cash transfer vehicle's steering locked and he could no longer control the vehicle. The cash transfer vehicle then continued to move forward and ended up on the left-hand side of the R80, colliding with a white Toyota Quantum taxi that was stationary and parked on the left hand side of the road (just after the BP garage - about 30 metres away from the point of impact). He further testified that he was driving at about 40km an hour before the collision took place.
- [18] Mr Mntameka stated that upon impact with the Toyota Quantum taxi the cash transfer vehicle's engine died. He also stated that at that stage he was not sure if the accident was

part of a robbery or if it was a genuine collision. He testified that he and his occupants observed what was going on through the windows. He stated that they endeavoured to contact their base without success as the vehicle's network was affected by the collision. His gunman, Mr Teffu, tried to fix the phone and pressed the panic button. Mr Mntameka stated that he tried to start the vehicle but due to the power failure the vehicle would not start nor would the doors open. He stated that he opened the escape hatch at the top of the vehicle and looked out of the vehicle to ascertain what was going on.

[19] Mr Mntameka stated that at that stage it was still their priority to protect the money and that he told his gunman, Mr Teffu, to cover him with his firearm whilst he climbed through the hatch of the vehicle in order to get out and check on the occupants of the VW Polo.

[20] Mr Mntameka testified that when he reached the VW Polo he saw the driver of the VW Polo sitting in the vehicle smoking a cigarette, with a passenger next to him. He asked the driver of the VW Polo why he had cut in front of them, whereupon the driver of the VW Polo answered that he had not seen the cash transfer vehicle approaching. Mr Mntameka testified that he enquired as to what injuries they had sustained, but that he

received no response. A police officer in uniform approached them at that stage.

[21] Mr Mntameka stated that when he walked back to the cash transfer vehicle he saw that there were two people lying in front of the Toyota Quantum. He did not whether they were alive or dead but he did not venture closer as the crowd that had gathered around the taxis were becoming hostile and threatening to burn the cash transfer vehicle.

[22] Mr Mntameka stated that he had no alcohol to drink and that blood tests were conducted on him.

[23] Mr Mntameka also stated that the R80 was not busy that evening and that there were no vehicles close to him on his side of the R80. He also stated that visibility was fine, as the sun had only started to set when the collision took place.

[24] Under cross-examination it was put to him that the green flicker lights were still on for the VW Polo and that the collision occurred after the VW Polo driver had completed his turn. Mr Mntameka stated that he did not know whether the green flickering light was on. (As stated, he could only see the rear of the traffic lights facing the VW Polo vehicle.) It was further put to him that the traffic light was red for him and that he swerved because of a stationary Toyota Corolla at the

intersection. It transpired later that the defendant alleged that the Toyota Corolla was stationary in the left lane of the R80 carriageway facing Pretoria and also deduced from this that the traffic light facing the cash transfer vehicle was red. Why this deduction is incorrect, is set out below.

[25] It is emphasised that the witnesses testified in their various home languages (save for Elsie Nkosi who testified in English) and that the evidence and cross-examination took place in English and Afrikaans. How much might have been lost in translation is unclear to the court.

[26] However, as transpired from the evidence which was tendered later, the stationary Toyota Corolla was actually standing near the slipway on the left-hand side of the R80 in the direction of Pretoria. Because of the slipway, there is no necessity to stop at the intersection when a vehicle wishes to turn left into Aubrey Matlala Street. The motor vehicles simply turn left into the slipway. Apparently the motor vehicle had experienced engine trouble.

[27] In cross-examination Mr Mntameka said that he was unsure as to the precise time of the accident but that it could have occurred at approximately 19h45. He stated that he gave his work telephone number and address to the first police officer who arrived at the scene of the collision.

- [28] As to the period which elapsed from him leaving Central City Shopping Centre and the collision he said he was unsure, but conceded that it could have been half an hour.
- [29] When asked as to how far the VW Polo was from him before he collided with it he said five paces. It was put to him that in evidence-in-chief he had stated that it was three paces. He stated that he had merely given an estimate of how far behind the Toyota Hi-Ace the VW Polo had been and that he had not given an exact distance.
- [30] Mr Mntameka further testified that when a motor vehicle negotiates a turn it should do so gradually and not recklessly as the VW Polo driver had done. He said he never saw the VW Polo before it was too late. It was put to him that three to four people had died because of his negligence. Mr Mntameka denied that he had driven recklessly or negligently. He was questioned as to why he had never seen the VW Polo and why he had testified that onlookers threatened to burn the cash transfer vehicle. He reiterated that he saw the VW Polo too late and answered that the onlookers alleged that he had skipped a red traffic light. He continued to maintain that the light was green for him.

- [31] The next witness called on behalf of the plaintiff was Mr Mntameka's left front passenger, Mr Doctor Masisi. Mr Masisi stated that he was 34 years old and was also a protection officer in the employ of SBV Services (Pty) Ltd. He testified that their last stop had been Central City Shopping Centre's Nedbank at 19h20. He stated that when they reached the Aubrey Matlala Street and R80 intersection, a white taxi bus cut in front of them and that Mr Mntameka flashed his lights and hooted. He testified that the white VW Polo then appeared and that Mr Mntameka sought to avoid a collision by swerving and thus only hit its bonnet.
- [32] Mr Masisi further testified that had Mr Mntameka not swerved they would have collided with the passenger side of the VW Polo. He stated that the VW Polo had appeared out of the blue. He emphasised that the traffic lights were green and that he did not check the time when the collision took place. (Mr Mntameka did not testify that he had swerved but he could have done so, given the point of impact with the VW Polo.)
- [33] During cross-examination Mr Masisi stated that he had been working with Mr Mntameka for six years, that they were colleagues but that they did not socialise. He stated that he often worked with Mr Mntameka - depending on their allocations. He testified that he knew that they had left Central City Shopping Centre's Nedbank at 19h20 because Mr

Mntameka had recorded the time on his timesheet and that he seen him doing so. He testified that the filling in of the timesheet was Mr Mntameka's duty. He said that he did not check to see whether Mr Mntameka had perhaps filled in the wrong time on the timesheet. Upon a question as to how far from Central City the collision occurred, he replied 2km and he did not know how long it took them to get to Aubrey Matlala Street because of speed humps and traffic. Mr Masisi stated that the Mabopane highway was not busy that evening. He stated that there were no other vehicles on the road at the point where the collision occurred. He reiterated that the VW Polo motor vehicle was very close to the cash transfer vehicle, in fact, just in front of them and that Mr Mntameka tried to avoid it. He also referred to the Toyota Hi-Ace vehicle which cut in before them and that Mr Mntameka hooted and flicked his lights. He said that when he suddenly saw the VW Polo it was too close behind the Toyota Hi-Ace vehicle to avoid a collision. He said that the lighting was good as the street lights were already on and that they were travelling at a normal speed.

- [34] Mr Masisi's testimony was to the effect that he did not know what the speed limit was. He testified that Mr Mntameka did not brake for the Toyota Hi-Ace vehicle as there was sufficient time for it to negotiate the turn safely. (In this respect he contradicted Mr Mntameka.) When he was asked as to why

Mr Mntameka would hoot and flicker at the Toyota Hi-Ace motor vehicle, he testified that it was because it was close. He indicated on the rough sketch that the star on the rough map was the point of impact with the VW Polo motor vehicle and he also indicated that the point of impact of the cash transfer vehicle with the taxis was at the top left hand corner of the rough map drawn by Mr Mntameka. This distance, he stated, was about 30 metres, whereas the distance between the cash transfer vehicle to the VW Polo before the collision was about from where he sat in the witness box to where the court stenographer was seated.

[35] Mr Masisi testified that after they had collided with the taxi, people were injured and killed as these people had been standing around the taxis. But that, at the time, he did not know or ask whether people had been killed or injured and stayed inside the cash transfer vehicle.

[36] Mr Masisi stated that the crowd around the cash transfer vehicle was hostile and that certain of the people were crying and that they were stating that the cash transfer vehicle had skipped a red traffic light.

[37] Mr Masisi stated that he was unaware of what the condition of the occupants of the VW Polo was and that they pushed the panic button. He stated that it was his duty to protect the

money in the cash transfer vehicle. He reiterated that Mr Mntameka had not braked for the Toyota Hi-Ace motor vehicle nor the VW Polo because the collision was unavoidable. He testified that even had Mr Mntameka braked, the collision would have occurred and denied that the damage caused would have been less due to the weight of the cash transfer vehicle which added to its impetus.

- [38] The plaintiff then called an expert witness, Mr Mabadimo Lehlongonalo Molapu. No expert witness summary had been prepared for him. The explanation proffered by Mr Theron, on behalf of the plaintiff, was that the plaintiff only managed to get hold of him early the week before the trial. He testified that he had in his custody the information pertaining to the City of Tshwane's traffic signals, *qua* employee of the City of Tshwane in control of data pertaining to traffic signals. He testified that the arrow for motor vehicles travelling to Soshanguve from Pretoria does not flicker after 19h15 nor over weekends and that his brother had designed the program for the traffic lights. During cross-examination he conceded that he did not know whether the arrow flickered on the 24th December 2009 and that he did not know when the arrangement regarding the times when the arrow would flicker was implemented. Hence his testimony took the matter no further, and the defendant suffered no prejudice as a result of him being allowed to testify.

[39] The plaintiff then closed its case.

[40] For the defendant the driver of the VW Polo motor vehicle was called to testify. He testified that he remembered the collision well and that it took place after 18h00 on the evening of 24 December 2009 but before 19h00. He testified that visibility was good, and that although the collision took place after sunset, it was still light enough to see properly. He testified that he was the owner of the VW Polo motor vehicle. He stated that he had left from Secunda to be with his wife Elsie Nkosi's family for Christmas, and that his wife and her child were passengers in his motor vehicle. He testified that he had been a teetotaller from 2005 and that although blood alcohol tests were conducted on him he had never - even until the date of the trial - been notified of what the results were. He stated that nobody had instituted any action against him personally. He stated that when he arrived at the crossing of the R80 and Aubrey Matlala Street the traffic light was red. He stated that a Toyota Hi-Ace taxi stood before him waiting for the light to turn green. When the light turned green and the arrow flickered and the Toyota Hi-Ace turned right into Aubrey Matlala Street, he followed. He testified that there was a stationary Toyota Corolla motor vehicle on the R80 on which the cash transfer vehicle was travelling.

[41] Mr Mahlangu stated that the roads were busy. He further testified that he never saw the cash transfer vehicle before impact and that it apparently never stopped but just continued driving. He testified that all that he saw was the stationary Toyota Corolla, the Toyota Hi-Ace in front of him, and the flickering light. He confirmed that the cash transfer vehicle only came to a stop on the left side of the R80 at the top of the rough sketch drawn by Mr Mntameka. He testified that the distance from the point of impact to where the cash transfer vehicle came to a stop was plus-minus one and a half lengths of the courtroom. He testified that Mr Mntameka came to his motor vehicle. He stated that he struggled to open the door of his vehicle to remove his unconscious wife, who had cut wounds, and then proceeded to lay his wife down on the ground. He stated that the child exited on her own from the motor vehicle. He stated that he had no injuries and never spoke to Mr Mntameka whilst inside his motor vehicle - only when he had exited therefrom. He stated that Mr Mntameka asked him what he thought he was doing. He denied seeing the cash transfer vehicle flicking its lights, nor did he hear it hoot. He also testified that he only smoked when standing outside his motor vehicle.

[42] Mr Mahlangu further testified that the cash transfer vehicle must have been driving at a high speed because had he driven more slowly he would have seen it. He stated that he

could not dispute the plaintiff's expert witness' evidence but that he maintained that the arrow had flickered when he turned into Aubrey Matlala Street.

[43] Mr Mahlangu stated that the people at the taxi rank were extremely hostile and angry and that his wife was taken to the hospital by the second ambulance that arrived at the scene. He testified that the speed limit at that point was 60km per hour and that the cash transfer vehicle must have exceeded the speed limit and could not have been travelling at 40km per hour as contended by Mr Mntameka. He testified that had the cash transfer vehicle travelled slowly, both of them would have ended up where his VW Polo ended up, namely next to the pole on the pavement.

[44] During cross-examination Mr Mahlangu testified that they left Secunda at about 15h00 because he had still worked in the morning. They stopped only once on the way for about thirty minutes. He was asked how long it takes to drive from Secunda to Soshanguve and he stated approximately two hours, depending on the traffic. He stated that when they reached Pretoria the roads became busy, that the sun had set and that it was dusk. He reiterated that he was a teetotaler since 2005 because he was robbed of all his money and injured during 2004 whilst under the influence of alcohol.

Hence his decision never to drink any alcoholic beverages again.

[45] Mr Mahlangu testified once again that the purpose of the visit to Pretoria was to spend Christmas with his wife's family. He confirmed that the traffic light was red and conceded, during cross-examination, that he never came to a complete stop before the green arrow flickered. He testified that he only looked at the arrow and did not concentrate on the colour of the traffic light. It was put to him that the traffic light would be green when the arrow flickered green, and that he had a selective memory. He testified that he only looked at the arrow and did not focus on the colour of the traffic lights *per se*. He conceded that he would have been able to see the colour of the traffic lights *per se* had he concentrated.

[46] Mr Mahlangu was also asked why he saw the stationary Toyota Corolla but not the cash transfer vehicle. He answered that the cash transfer vehicle was clearly driving at a very high speed and that the speed limit was 60km an hour. It was put to him that he simply did not look out for motor vehicles on the R80 driving in the direction of Pretoria and he admitted simply following the Toyota Hi-Ace taxi. He further testified that there were many vehicles. (The version put to Mr Mntameka during cross-examination, namely that he swerved to avoid the stationary Toyota Corolla, could thus not be accurate as Mr

Mahlangu, on his testimony, never saw the cash transfer vehicle.)

[47] When Mr Mahlangu was asked whether he had a clear view, he conceded that there were no trees on the central barrier pavement which could have obstructed his view.

[48] Further from the cross-examination it transpired that the stationary Toyota Corolla was parked on the R80, in the left lane, where there is a slipway to turn into Aubrey Matlala Street without a driver of a vehicle having to stop. This of course could explain why the cash transfer vehicle would allegedly have swerved to avoid it. Mr Mahlangu testified that he saw the stationary Toyota Corolla after he had turned into Aubrey Matlala Street, but said nothing, as indicated above, about the cash transfer vehicle swerving.

[49] Mr Mahlangu also stated that he was not able to dispute the fact that Mr Mntameka had flicked his vehicle's lights and had hooted.

[50] It was also put to Mr Mahlangu that the longest days are during December and January, which Mr Mahlangu stated he could not dispute.

- [51] It was further put to Mr Mahlangu that to state that a collision occurred between 18h00 and 19h00 was a very vague statement but he was adamant that the collision had occurred then.
- [52] Mr Mahlangu once again reiterated that the reason why he did not see the cash transfer vehicle was because of the speed at which it was travelling. Mr Mahlangu further alleged that if the cash transfer vehicle was indeed travelling at 40km per hour, that Mr Mntameka would have seen his VW Polo and that he should have braked. (All of this evidence was, clearly, speculation.)
- [53] Mr Mahlangu was asked why he thought the Toyota Corolla was stationary at the point that he said it was. He answered that it was because the traffic lights were red. It was put to him that he was not giving evidence but drawing inferences. It was also put to him that because there was a slipway that one could use to turn left into Aubrey Matlala Road, there would be no necessity for a motor vehicle to stop at the intersection.
- [54] It was further put to Mr Mahlangu that the Toyota Corolla was not facing forward but stood angled to the left. Mr Mahlangu testified that did not concentrate on the stationary vehicle's precise position. It was put to him that the Toyota Corolla was stationary because it had broken down. Mr Mahlangu was in

no position to furnish an answer to this statement and nobody was called to testify as to the precise position of the Toyota Corolla and why it was allegedly stationary. This "evidence" should therefore be disregarded.

[55] The next witness called for the defendant was Elsie Nkosi.

[56] Ms Nkosi stated that she lived with Mr Mahlangu and was his wife and that they left Secunda at about 15h00. She stated that her youngest daughter aged 13 sat in the back of the VW polo and that she sat in the passenger seat. She testified that at the crossing of the R80 and Aubrey Matlala Street there are three lanes/carriageways and that they had turned into the third lane/carriageways intended for drivers who wish to turn right into Aubrey Matlala Street. She said that the roads were busy. She testified that they followed a Toyota Hi-Ace taxi which turned right and that they were right behind it. She said they moved slowly and when they reached the crossing the red light turned green as well as the arrow. She said she could not remember anything thereafter. She stated that she, also, did not see the cash transfer vehicle and neither did she see it flicking its lights or hear it hooting.

[57] Ms Nkosi stated that she could not estimate the time of the collision correctly. She pertinently testified that the traffic light was green when they turned right into Aubrey Matlala Street.

[58] During cross-examination Ms Nkosi confirmed that she and her husband had left Secunda at 15h00 because he had worked that day, and that they stopped only once for about 30 minutes. She testified that the highway was quite busy.

[59] Ms Nkosi said that they were nine paces away from the intersection (indicating the breadth of the court room) and that they stopped at the intersection and only turned right, following the taxi, after the traffic light turned green. She testified that she did not think that there were any other motor vehicles in the intersection. Hence, on her version, she did not see the Toyota Corolla motor vehicle. She also testified that she did not know what the colour of the traffic lights were for motor vehicles travelling in the opposite direction as she could not see the colour of the traffic lights (clearly because the rear ends faced her).

[60] It was put to her that they never stopped at the intersection according to her husband, Mr Mahlangu (the defendant). She answered that she was not really looking out because they were following the Toyota Hi-Ace taxi when turning right. She was adamant that she had never seen the cash transfer vehicle.

[61] The next witness called on behalf of the defendant was a Mr Moses Skosana. He is a 61 year old taxi driver who owns his own taxi. He stated that he was at the taxi rank close to the BP garage at 17h00 on 24 December 2009. He stated that the collision took place at about 18h00. He testified that he did not check the time but still maintained that the collision took place at 18h00. He was referred to a photograph and confirmed that it was the BP garage on the corner of the R80 and Aubrey Matlala Street. He stated that just before the garage (in other words next to the garage, closer to Pretoria) there was a bus stop and a taxi rank. He also testified that the taxi rank was indicated with a red "T". The taxis were loading passengers. He testified that he was talking to customers going to town and looking into the direction of the intersection because that was where potential customers were coming from. He stated that the cash transfer vehicle skipped a red robot and collided with a VW Polo. He said that the cash transfer vehicle just carried on moving and collided with six taxis. The taxis were loading passengers. He said his taxi was also damaged and that the sliding door of his taxi was dislodged. The cash transfer vehicle then came to a stop. Onlookers streamed to the scene and he said he panicked because two taxi drivers were lying dead on the ground. He felt weak with shock and sat down. He was adamant that the robot was red for the cash transfer vehicle.

[62] Mr Skosana reiterated that six taxis were damaged. Four were standing parallel, the fronts of the taxis facing the R80 and that the other two taxis were parked parallel, and that his taxi was parked behind the first taxi parked parallel to the street, and which was closest to the intersection. He disputed that the cash transfer vehicle was driving at 40km an hour. He testified that if this were accurate the cash transfer vehicle would have been able to stop after the collision with the VW Polo. He disputed that the onlookers who flocked to the scene threatened to burn the cash transfer vehicle.

[63] Mr Skosana was asked, in cross-examination, how it came about that he was a witness. He stated that he did not have an attorney but did know that Mr Mahlangu was coming to court and thus became a witness for the defendant. He stated that it took a long time to fill the taxi as it only became busy at 19h00. He stated that the road was not very busy before then.

[64] Mr Skosana denied, as Mr Mahlangu had testified, that the accident could have taken place at 18h00 because the sun had not yet set. He had no idea as to the time when the collision took place. He testified that the sun was only beginning to set. (How one should reconcile this evidence with his evidence-in-chief, is unclear.)

- [65] Mr Skosana stated that he was looking in the direction of Soshanguve as that is where potential passengers would come from. He reiterated that the traffic lights were red for the cash transfer vehicle.
- [66] It was put to Mr Skosana that he was blatantly lying as the rear of the traffic lights was facing him - which fact he conceded. He was forced to agree that he could not see the colour of the traffic lights facing the cash transfer vehicle. Mr Skosana said, however, that the lights were synchronised. If they were red for the VW Polo vehicle, they would, similarly, be red for the cash transfer vehicle.
- [67] Mr Skosana also conceded that he could be mistaken as to the time when the collision took place because he does not have a watch.
- [68] Mr Skosana stated that the VW Polo and the taxi that it was following stopped first for a short while and then the arrow turned green and they entered the intersection. It was put to Mr Skosana that a witness who was a few paces away had testified that the VW Polo had never stopped.
- [69] Mr Skosana answered that when the light turned green a taxi turned right and the VW Polo vehicle followed.

[70] It was also put to Mr Skosana that the cash transfer vehicle is a very heavy vehicle and it would not be able to stop immediately.

Analysis of evidence

[71] It was argued that the version of the plaintiff's driver, Mr Mntameka, was more probable than that of the defendant, given the two opposing versions. It was argued by Mr Theron that Mr Mntameka did not contradict himself and that his estimation of when the collision took place was accurate. It was pointed out that his version was supported by Mr Doctor Masisi's evidence. (This was not an accurate submission in all respects as Mr Masisi's had stated that Mr Mntameka has not braked but had swerved.) It was further emphasised that he was an honest witness who did not seek to elaborate on facts which he did not know. It was also emphasised that if a Toyota Corolla was parked where the VW Polo vehicle's driver (the defendant) stated it was, it would be precisely at the traffic light on the left hand side of the R80 but that that could not be accurate as it would have turned left using the slipway. Furthermore, the VW Polo driver could only see the green arrow and not the green traffic light and therefore demonstrated a selective memory. It was emphasised that the VW Polo vehicle's driver also conceded that he did not fully stop and simply followed the Toyota Hi-Ace taxi when it

turned right. He also contradicted himself regarding the colour of the traffic light. On one version it was red, because he stopped. On another version, he never looked at the traffic light, only at the colour of the arrow.

[72] It was further emphasised that the defendant admitted that he focused on the arrow only and did not look at the traffic lights *per se*. Elsie Nkosi stated that she did not see any other motor vehicles in the intersection (yet the Toyota Corolla should have been visible to her if it were standing where Mr Mahlangu stated it did). Ms Nkosi said that both traffic lights were visible to her (and yet she did not see the Toyota Corolla.)

[73] Furthermore, the defendant's witness Mr Skosana was clearly also mistaken in believing that the defendant stopped at traffic lights for a short while and then turned right, following the taxi. He was also far away from the scene of the collision, talking to customers, on his own version. He also conceded that he could not see the colour of the traffic lights facing the cash transfer vehicle and could be mistaken regarding the time of the accident. In general, his evidence was unsatisfactory and clearly based on perceptions rather than on what he had actually witnessed. It was further submitted that Mr Skosana had probably discussed the matter with the defendant. Their time estimate of the collision was also erroneous. It was

argued that there were simply too many contradictions in the defendant's version.

[74] Advocate Niemann, counsel for the defendant, emphasised that the driver of the plaintiff's motor vehicle had no independent witnesses to collaborate his version. He emphasised that the speed at which the cash transfer vehicle must have been travelling must have been high because it only came to a rest 20 to 30 metres beyond the point of collision with the VW Polo vehicle. He stated that this could not be attributed to the weight of the vehicle only, but had to relate to the speed at which the vehicle was travelling. He further argued that it was difficult to state, with any certainty, how far away the VW Polo was from the plaintiff's motor vehicle when it executed the turn. He emphasised, that neither the driver of the cash transfer vehicle nor his passenger, who testified, saw the VW Polo until the moment of impact.

[75] The court agrees with the plaintiff's counsel that the cash transfer vehicle's driver and his passenger were credible witnesses who openly admitted that they did not see the VW Polo. Clearly, their attention was focused on the Hi-Ace taxi which can be understood, given the circumstances. Their version of the time when the collision took place was also much more credible than those of the defendant and his

witnesses. The court disregards the evidence of the expert witness due to the fact that he could not testify regarding the flickering arrow's time sequences on 24 December 2009. The evidence of the witnesses for the plaintiff to the effect that the traffic light was green for them is plausible. The preponderance of probabilities also favours the plaintiff's version, because the defendant admitted not looking at the colour of the traffic light but simply following the Toyota Hi-Ace taxi. His version regarding a stationary Toyota Corolla, was not borne out by his passenger, his wife. Furthermore it was common cause that a Toyota Hi-Ace taxi preceded the VW Polo and, on the probabilities, the VW Polo closely followed the Toyota Hi-Ace taxi. Mr Skosana's evidence was clearly based on perceptions, and should be disregarded.

Legal principles

- [76] How to deal with two mutually destructible versions is discussed in the case of *National Employers' General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (E) at 444E-G, where Eksteen J held that: –

“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 satisfies 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.

*This view seems to me to be in general accordance with the views expressed by COETZEE J in *Koster Ko-operatiewe Landboumaatskappy Bpk v Suid-Afrikaanse Spoorweë en Hawens* 1974 (4) SA 420 (W) and *African**

Eagle Assurance Co Ltd v Cainer 1980 (2) SA 234 (W). I would merely stress however that when in such circumstances one talks about a plaintiff having discharged the onus which rested upon him on a balance of probabilities one really means that the Court is satisfied on a balance of probabilities that he was telling the truth and that his version was therefore acceptable. It does not seem to me to be desirable for a Court first to consider the question of the credibility of the witnesses as the trial Judge did in the present case, and then, having concluded that enquiry, to consider the probabilities of the case, as though the two aspects constitute separate fields of enquiry. In fact, as I have pointed out, it is only where a consideration of the probabilities fails to indicate where the truth probably lies, that recourse is had to an estimate of relative credibility apart from the probabilities."

[77] In the matter of *Ruthenberg v Otto* 1974 (2) SA 268 (C) it was held that in the absence of some reasonable explanation as to how a collision occurred, the driver who takes a right-angle right-hand turn and places his vehicle in the path of an oncoming vehicle which he does not succeed in avoiding is *prima facie* in the wrong (at page 268C).

[78] In *Sierborger v South African Railways and Harbours* 1960 (1) SA 498 (A) it was held at 505B-505D that a driver has a

general duty whilst driving along a road to keep a look-out ahead to observe traffic in the road he drives but also, as he approaches a cross-section, traffic which might emerge from the cross-section: —

“A driver of a vehicle proceeding in this latter direction does not, with reference to a vehicle whose driver has signalled an intention to turn across his path and who is directing his vehicle towards the middle of the road preparatory to doing so, incur an obligation to stop or slow down. Certainly he must keep such vehicle under observation and as soon as it is clear that, despite the inopportuneness of the moment, it intends to cross in front of him, he must take all reasonable steps that may be necessary to avoid colliding with it.”

[79] A dictum, along the same lines, is to be found in *Old Mutual Fire & General Insurance Co of Rhodesia (Pvt) Ltd and Others v Britz and Another* 1976 (2) SA 650 (RA) at 652C-F: —

“What has got to be shown here, therefore, is not whether Britz, by driving at the speed he did, was negligent in the abstract, but that his negligence consisted of a breach of duty of care, which he owed to O'Connor, McKerron, 7th ed., p. 36, is to the same effect. In order for Britz to be found guilty of breaching this duty of care, it seems to me

it must be shown that in the circumstances he might reasonably have foreseen the possibility that O'Connor, without signalling, would suddenly turn across his path, because if O'Connor had not done that there would have been no accident. In these circumstances, it seems to me it is expecting too high a standard of care to expect a motorist to anticipate that another motorist, approaching him in the opposite direction, will suddenly, without any warning, turn right across his path. On the first approach, therefore, Britz was not negligent, when negligence is considered in the light of his duty to O'Connor, and for the same reasons, he did not fail to take reasonable steps for his own safety." [emphasis added]

[80] In the matter of *Biddlecombe v Road Accident Fund* (797/10) [2011] ZASCA 225 (November 2011) the following was stated: –

"Drivers of southbound vehicles could not proceed on the blithe assumption that such an event would not happen, as it is one of the ordinary risks of everyday driving. In a perfect world it would not happen, but experience teaches us that it does. If the traffic lights had changed to red, as Mr Motaung said they had, the position is reversed. It was perfectly proper for him to expect to be able to proceed to complete his turn before traffic in River Drive could

proceed, but he could not simply assume that traffic in Malibongwe Drive would stop to enable him to do so. The phenomenon of vehicles speeding up to try and go through traffic lights as they change from green to amber and amber to red is sufficiently commonplace for any driver in Mr Motaung's position to recognise it as a risk and guard against it."

[81] In *Smith v SA Eagle Insurance Co Ltd* 1986 (2) SA 314 (SE)

the following is further stated: —

"To return therefore to the enquiry as to whether, if Du Preez had seen the signal, any action was at that stage required of him to answer seems to be 'none other than to continue to keep a look-out'. There was no obligation upon him to stop or even slow down because of having seen the signal. In parentheses, it need scarcely be remarked, that Du Preez's 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. The heavy flow of urban traffic would be seriously interfered with if, on each occasion when a signal is exhibited by a motorist intending to turn across the line of traffic, such traffic were required to come to a stop or slow down. Such signal is of course a notification to following and oncoming traffic that

the driver intends to turn across the line of traffic, but equally implicit in it is that he intends to do so at an opportune moment and in a reasonable manner. It is also, more particularly, a signal to following traffic that the driver in question intends to move over towards the middle of the road preparatory to choosing the opportune moment to cross over on to that half of the road being used by traffic coming in the opposite direction. A driver of a vehicle proceeding in this latter direction does not, with reference to a vehicle whose driver has signalled an intention to turn across his path and who is directing his vehicle towards the middle of the road preparatory to doing so, incur an obligation to stop or slow down. Certainly he must keep such vehicle under observation and as soon as it is clear that, despite the inopportuneness of the moment, it intends to cross in front of him he must take all reasonable steps that may be necessary to avoid colliding with it."

- [82] On the preponderance of probabilities, the plaintiff's driver had every right to proceed along the R80 highway at the speed of 60km an hour. The evidence of the driver was that he was driving at 40km per hour. Mathematically, this means that he was driving at approximately 11.1 metres per second. Within two and a half seconds he thus drove 27.7 metres. If he were driving at 60km an hour, he would advance approximately

16.6 metres per second. Within two seconds he would thus drive approximately 33 metres. Taking into account that the driver of the cash transfer vehicle required reaction time, it would appear that the Hi-Ace taxi and the VW Polo simply drove into the pathway of the cash transfer vehicle at an inopportune time.

[83] What puzzles the court, though, is that if the arrow was flickering for the Hi-Ace Taxi and the VW Polo, the traffic lights would only just have turned green and the question arises as to why the cash transfer vehicle had not slowed down to stop at the traffic lights which must have been red, at first, when it approached the intersection and turned green moments before the collision occurred.

[84] Questions along these lines were not posed to Mr Mntakwena or Mr Masisi. It is probable that the arrow was not flickering and that the taxi and the VW Polo turned right after the arrow had stopped flickering and that the traffic light was hence green at an inopportune moment for them, as traffic was still approaching in the direction of the Pretoria on the carriageway to Pretoria. However, the defendant and his wife were adamant that the arrow was flickering green. Yet, once the defendant conceded that he did not keep a look-out for oncoming traffic and “blindly” followed the taxi when turning, he admitted to being negligent.

[85] The evidence of the cash transfer vehicle's driver was that he had his foot on the brake pedal when the taxi turned into his lane at the intersection where Aubrey Matlala Street crosses the R80. This should have alerted him to the fact that he should be on the look-out. In any event, if the defendant is to be believed, the arrow had just turned green and this, depending on how long the arrow flickers for traffic driving from Pretoria to Soshanguve on the R80, the traffic light must have been red for the plaintiff's driver or barely have turned green. However both he and his fellow passenger were adamant that the light was green.

[86] The case law is to the effect that a driver has a certain duty of care when approaching an intersection, in the knowledge that there may be traffic wishing to turn into his pathway. On his own version, the plaintiff's driver did slow down when the Hi-Ace taxi turned right into his pathway and he hooted and flicked his lights. The Toyota Hi-Ace taxi still had sufficient time to complete the manoeuvre. This should have alerted the driver to the very real possibility of further motor vehicles doing the same but both on his own version and that of his passenger, Mr Masisi, the collision with the VW Polo was inevitable as it was right behind the Toyota Hi-Ace taxi.

Conclusion

- [87] On the evidence, it is clear that an apportionment in respect of negligence is called for. The court was urged by the defendant's counsel to hold that the probabilities were evenly balanced, and that the plaintiff's action should be dismissed, or that absolution of the instance should be granted.
- [88] However, the two witnesses for the plaintiff (who were in the cash transfer vehicle) were honest and their version credible and probable, even though there were small discrepancies between their versions, whereas the defendant's version had more discrepancies, a cardinal one being that he had stopped at the red traffic light, whereas he was forced to concede during cross-examination that he did not even see the colour of the traffic light, nor the vehicles coming from the opposite direction, nor did he stop fully at the red traffic light as he had stated in his evidence in chief. This, of course, by necessity, means that he did not look at the colour of the traffic light nor did he keep a look-out for oncoming traffic - a fact which he conceded.
- [89] It is thus held, that on a preponderance of probabilities, that the Toyota Hi-Ace taxi "took a chance" by turning into the pathway of the plaintiff's cash transfer vehicle at an inopportune moment and that the defendant, the driver of the VW Polo, blindly followed suit. On a preponderance of

possibilities, Mr Mntameka could not avoid a collision with the VW Polo as it was simply too close and had not even stopped properly before turning.

[90] However, the defendant's negligence was not the sole cause of the collision - the plaintiff's negligence contributed to the collision occurring in not radically reducing his speed as he approached the intersection. It is one of the risks of ordinary driving that the drivers of motor vehicles speed-up to turn at inopportune moments, which is precisely what the Hi-Ace taxi did with the VW Polo following suit. Mr Mntameka testified that he saw the Toyota Hi-Ace taxi hesitating whether it should stop or turn. That should have alerted him to the immediate need to slow down drastically. On his own testimony there was enough time for him to see the taxi before it turned, whilst it turned, and when it had completed its turn. It is difficult to understand why the plaintiff's driver did not see the VW Polo.

[91] The court therefore believes it appropriate to apportion the blame between the two parties as follows: 25% negligence of the part of the plaintiff's driver and 75% negligence on the part of the defendant.

Costs

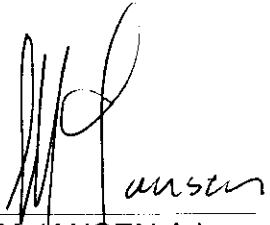
[92] It remains unexplained why the plaintiff instituted proceedings in this court. This action falls within the jurisdiction of the civil magistrate's regional court as the underlying amount is less than R300 000.00 rand. The lack of jurisdiction on this ground can be remedied by an appropriate costs order.

[93] The plaintiff was substantially successful and hence, in the exercise of its discretion, the court is of the opinion that the defendant should pay the costs of the hearing on the merits of the action.

Order

In the event, the following order is made: –

1. Blame, in the form of negligence is to be apportioned between the parties, the plaintiff being held 25% negligent and the defendant 75% in causing the collision in issue in these proceedings.
2. The defendant to pay the costs of the hearing in respect of the merits on a party and party basis on the scale of a magistrate's court.
3. No costs regarding the Plaintiff's expert witness are allowed.



MM JANSEN AJ
ACTING JUDGE OF THE HIGH COURT

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