

IN THE HIGH COURT OF SOUTH AFRICA

(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No. : 1175/05

In the matter between:-

DOUW GERBRANDT VAN WYK

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

HEARD ON: 30 AUGUST 2006

JUDGMENT BY: RAMPAL J

DELIVERED ON: 11 JANUARY 2007

[1] These are civil proceedings. The plaintiff instituted the action against the defendant in terms of section 17 of the Road Accident Fund Act No. 56/1996. He seeks to recover damages he allegedly suffered as a result of the bodily injuries he sustained in a road accident which occurred at Reitz on Monday 29 October 2001.

[2] The parties agreed at the pre-hearing conference and in accordance with that agreement I directed at the outset of the hearing that the adjudication of the quantum should be kept in abeyance and that the merits be adjudicated first. I did so in terms of Rule 33(4) of the Uniform Rules of Court.

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[3] The above ruling in essence entailed that I make a determination of the issues as contained in paragraph 4 of the plaintiff's summons and paragraph 3 of the defendant's plea. Therefore I proceeded to hear evidence in order to determine the relative negligence, if any, of the insured driver and that of the victim, if any, seeing that the defendant had pleaded contributory negligence on the part of the plaintiff.

[4] Two persons testified on behalf of the plaintiff, namely Douw Gerbrandt van Wyk, in other words, the plaintiff himself and James Roos Craven, the plaintiff's companion. In turn the defendant also adduced the evidence of two witnesses, namely Phinda Edward Nyembe, a police inspector and Gerald Lemmer, a retired university professor. After hearing the evidence and brief oral argument, I asked the parties to file written heads of argument. I then reserved judgment. Both parties have since complied with my request.

[5] First, in paragraph 3, the particulars of claim, the plaintiff alleged that a road accident occurred at Reitz on 29 October 2001 and that the scene of the accident was on the main road to Bethlehem. He also alleged that there were two motor vehicles involved in the accident. The one motor vehicle with registration number BZR 324 FS was a Toyota Camry sedan driven by the plaintiff, D.G. Van Wyk. The other motor vehicle was also a sedan, an Opel Monza with registration number BKK 876 GP which was driven by a certain E.J. Bothma, the insured driver. These averments were admitted by the defendant in its plea.

[6] Second, in paragraph 4 of the particulars of claim, the plaintiff alleged that the said road accident was caused by the exclusive negligence of the insured driver. No less than seven grounds of negligent driving were proffered. Perhaps the most important of those grounds was that set out in paragraph 4.5. It reads as follows:

“4.5 Hy het die middel van die pad oorskry tot in die baan van aankomende verkeer terwyl dit gevaarlik en roekeloos was om so te doen.”

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The defendant denied all these seven allegations.

- [7] Third, in paragraph 3 of the defendant's plea, the defendant alleged that the sole cause of the road accident was the negligent driving of the plaintiff. No less than nine grounds of negligence were proffered. Among others the defendant alleged in paragraph 3.2.6 of its plea that:

“3.2.6 he encroached onto Bothma's correct side of the road at a time when it was unsafe and inopportune to do so;”

The plaintiff denied all those nine allegations of negligence.

- [8] In the light of the above quotations from the pleadings and in view of the evidence presented at the trial, it became patently clear that the central issue and indeed the most important, single and factual dispute between the parties was where the area of impact probably was relative to the middle line. On the one hand the plaintiff's version was that it was on his correct side of the road. On the other hand the defendant's version was that it was on the correct side of its insured driver. This then completes the cursory resumé of the pleadings.

- [9] The evidence showed that the common cause consisted of the following facts. The Camry was travelling from Reitz to Bethlehem and the Monza in the opposite direction. The scene of the accident was approximately 15 kilometres from Reitz in the rural area. It occurred at night where there was no artificial source of lighting and during a heavy torrential downpour. The driver of

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the Monza and his passenger sustained fatal injuries in the accident. The driver of the Camry and his passenger survived. They were the only known eye-witnesses who testified about the tragic road accident.

[10] The particular stretch of the road was a tarred road with one traffic lane in each direction. The two were separated by a painted white line of demarcation. On the outside of each traffic lane was a painted yellow line. Beyond the external yellow boundary there was an emergency traffic lane on each side of the road. Such emergency traffic lane was wide enough for a motor vehicle to move. Between a motor vehicle on the emergency lane and the grass shoulders of the road, there was an extra space of approximately one metre. The portion of the road between the two final rest positions of the vehicles was straight with a downward slope from north to south.

[11] The plaintiff and Craven were rushed to the hospital at Bethlehem by an ambulance. Therefore on the night in question none of them pointed out any points on the scene to the police. They never did so at any other time afterwards. On account of the force of the impact the two vehicles veered completely off the road or tarmac and eventually came to rest in the veld on opposite sides of the road but in the same direction in which each was originally travelling immediately prior to the collision. It seems to me safe to say that the accident took place somewhere between 20h30 and 24h00.

[12] The police and the emergency service providers were on the scene. The scene was not cordoned off. The police made their own observations, marked certain points and photographed the scene. It was apparent that the Monza had rolled before it reached its final position of rest. The police revisited the scene the next morning during daytime and took a further photograph. These then were the undisputed facts.

[13] It is trite that the plaintiff bears the overall onus to prove, on a balance of probabilities, that the insured driver was driving negligently at the time of the collision. In **STACEY v KENT**

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1995 (3) SA 344 (ECD) at 352 i Kroon J writing for the majority of the full bench put it in this way:

“The enquiry at the conclusion of the case remains whether the plaintiff has, on a balance of probabilities, discharged the onus of establishing that the collision was caused by negligence attributable to the defendant. In that enquiry the explanation tendered by the defendant will be tested by considerations such as probability and credibility.”

It is also trite that no onus rest on the defendant to establish, on a balance of probabilities, the correctness of his explanation as to the circumstances which led to the occurrence of the event. **STACEY v KENT**, *supra* at 352 e and **GUARDIAN NATIONAL INSURANCE CO LTD v SAAL** 1993 (2) SA 161 (CPD).

- [14] On behalf of the plaintiff direct evidence was adduced by two witnesses. On behalf of the defendant as I have already stated indirect evidence was adduced by two witnesses one of whom was an accident and reconstruction expert. The approach which the court should follow in the circumstances where, as in the instant case, there is a conflict between a lay-witness' direct evidence and an expert witness' indirect evidence was spelt out in **MOTOR VEHICLE ACCIDENT ASSURANCE FUND v KENNY** 1984 (4) SA 432 (ECD) at 436 H – 437 B where Eksteen AJA, as he then was, said the following on behalf of the majority of the court:

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“An expert's view of what might probably have occurred in a collision must, in my view, give way to the assertions of the direct and credible evidence of an eyewitness. It is only where such direct evidence is so improbable that its very credibility is impugned, that an expert's opinion as to what may or may not have occurred can persuade the Court to his view.”

See also **ABDO NO v SENATOR INSURANCE CO LTD AND ANOTHER** 1983 (4) SA 721 (ECD) at 725 D – 726 E and **VAN ECK v SANTAM INSURANCE CO LTD** 1996 (4) SA 1226 (CPD) at 1229 H – 1230 B.

[15] It must be readily appreciated in this case that, as regards the merits, the versions put forward by the plaintiff and the defendant are virtually irreconcilable. In such circumstances the approach which the court should follow has recently been authoritatively stated as follows:

“The hard case occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised, probabilities prevail.”

STELLENBOSCH FARMERS' WINERY GROUP LTD AND ANOTHER v MARTELL ET CIE AND OTHERS 2003 (1) SA 11 (SCA) at par. 5 on p. 14 i – 15 e per Nienaber JA who spoke for the majority.

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[16] Where one motor vehicle suddenly deviated from its correct path of travel, moved across the middle line of the road and nosed or encroached onto the wrong side where it collided with another motor vehicle, the driver of the latter, the court has held, has proved facts from which an inference of negligence against the driver of the former motor vehicle may be inferentially deduced in the absence of an explanation. See **ARTHUR v BEZUIDENHOUT AND MIENY** 1962 (2) SA 566 (AD) at 573 C – H. In such a case the *maxim res ipsa loquitur* may correctly be applied. See also **SARDI AND OTHERS v STANDARD AND GENERAL INSURANCE CO LTD** 1977 (3) SA 776 (AD) at 780 C – D.

[17] I shall now examine the facts, evaluate the evidence and apply the aforesaid principles of law to the facts. Once again it must be mentioned that the crucial issue to be decided is whether the collision occurred on the plaintiff's correct side of the road or the defendant's.

[18] The plaintiff testified that he together with Craven attended a golf day at Reitz. In the evening they attended a function where trophies were presented to the top golfers. Dinner was served later on. They left Reitz at or about 20h30. It was raining quite heavily. They were on their way back to Bethlehem. The rain was such a serious thunderstorm that it made him to put the wipers of his car in the fast mode. Visibility was drastically reduced on account of the heavy rain that he could hardly see beyond three metres or so. The road was dark. He was travelling at a speed which fluctuated between 70 kilometres per hour and 80 kilometres per hour. He drove with the headlamps of the Camry on dim because switching them on bright worsened his already diminished field of vision.

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[19] He drove on the emergency traffic lane. He did so on Craven's advice. Because of the diminished visibility caused by the heavy rain he used the yellow line as a guideline. He could see the yellow emergency line better than the white middle line. Most of the time he drove completely on the emergency line. However, at times he would partially move over the yellow line in such a way that the yellow line was between the left and the right wheels of his car. He came across a few cargo carriers travelling in the opposite direction. Such heavy vehicles passed without any incident. He was adamant he never moved over the middle line onto the wrong side of the road.

[20] He testified that as he was driving on his correct side of the road he saw the lights of another vehicle, which turned out to be the Monza, all of a sudden looming up in front of the Camry. He heard Craven shouting: "lights!!!" The next moment the two vehicles crashed into each other there and then on his correct traffic lane. All this happened within a fraction of a second. He recalled that the lights he fleetingly noticed within a split second before the impact came from the opposite direction more or less in front of the Camry but diagonally to its right. At that crucial moment it was impossible for him to take any evasive action in order to avoid the accident. This concluded his direct evidence.

[21] During his indirect evidence the plaintiff conceded that on his own version he drove at an excessive speed given the prevailing circumstances. Although he could see no more than five metres ahead of him, he nonetheless drove at a speed of 80 kilometres per hour. Moreover he also conceded that had he driven at a much lower speed, he would probably have been able to avoid the collision.

[22] He conceded that he was able to see the lights of the other oncoming vehicles from a distance of approximately 30 metres to 40 metres or even 50 metres away from him despite the heavy rain. However he was unable to explain why he did not see the lights of the insured vehicle while it was still about 50 metres or 30 metres away from him. His direct evidence was that he suddenly saw the lights of the insured vehicle at the moment they loomed upon him, within a fraction of a second before the tragic accident.

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[23] When counsel for the defendant suggested to him that if he had kept a proper lookout, he would have been able to see the lights of the insured motor vehicle in good time as he did the others, he was constrained to agree with the suggestion. He also conceded that, on his own version, if he had kept a proper lookout and that if he had also seen the lights of the insured motor vehicle from the same distance as he saw the trucks, he had an extra space on the emergency lane from the left of his motor vehicle to the gravel shoulder of the road which space he could have used in order to avoid a collision.

[24] He further conceded that he had consumed three glasses of alcoholic beverages during the course of the long golf day. Notwithstanding the concessions he denied the suggestion that he moved over the middle line and thus encroached onto the insured driver's correct side of the road at the time when it was unsafe and inopportune to do so. He maintained that although at times he made certain lateral movements on the road, he did so on the emergency lane. This completes the cross-examination of the plaintiff.

[26] Craven testified for the plaintiff. He stated that he was a stock broker. He recited their visit to Reitz Golf Club on 29 October 2001. He confirmed that he was a front seat passenger in the sedan driven by the plaintiff. They left Reitz between 21h00 and 22h00. It was raining heavily.

[27] The Camry was travelling fast. It was moving over the yellow line, in other words the yellow line was between its left hand side wheels and its right hand side wheels. He paid attention to the yellow line. He was concerned about the conditions on the road. It was still heavily pouring down. The lights of the Camry enabled him to see the yellow line. He did not see the oncoming Monza at all. He only saw its lights. The Monza lights appeared from the front but slightly to the right hand side. He found it difficult to say how far the Monza was when he first saw its lights. He could not recall what evasive action the plaintiff took at the critical moment. Suddenly he saw the lights, the next moment the two sedans collided. All this happened very very fast.

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[28] He became unconscious as a result of the force of impact. He regained his state of consciousness on the scene. The first thing he noticed was that the plaintiff has shifted from the driver's seat to the front passenger's seat and that he was unconscious. His attempts to resuscitate him were to no avail. He realised that the Camry was in the veld on the side of the road. It was still raining when he regained his state of consciousness. The next moment he saw the police and the ambulance crew on the scene. From there he and the plaintiff were rushed to the hospital at Bethlehem.

[29] During cross-examination he answered that it was easier for him to see the solid yellow line. He did not thereby mean that he had a problem seeing the white middle line. He advised the plaintiff to drive as close as possible to the yellow line. The yellow line was on the left hand side of the Camry. However, now and then the plaintiff slightly swayed away from the yellow line towards the white middle line and back again. He denied the suggestion that the Camry swerved to the right, crossed the white middle line and encroached onto the correct lane of the Monza at the time when it was unsafe and inopportune to do so. Just before the collision, as they were driving, he did not first see faint lights from a distance ahead of the Camry which were quickly becoming brighter and brighter. When the lights suddenly loomed upon their sedan, he hardly had a chance to warn the plaintiff to swerve to the left to avoid the collision. He denied the suggestion that the plaintiff could have avoided the accident if he had seen the oncoming Monza while it was still 50 metres or 30 metres away.

[30] He admitted that in his police statement he stated that the accident took place at 23h45. He also admitted that he and the plaintiff consumed some intoxicating drinks together at the braai at the Reitz Golf Club. Once again he disputed the suggestion that the Camry drove over the white middle line. The plaintiff's case was then closed.

[31] The defendant opened its case by adducing the evidence of Phinda Edwin Nyembe. He stated that he was a detective inspector stationed at Reitz. He was on standby duty during the night of the accident. He was home when he received a telephone

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call pertaining to the accident. He drove to the scene. On his arrival he found Inspector Motaung already on the scene. Motaung showed him two motor vehicles as pictured in the photo-album exhibit "A". He took the court through the exhibit.

[32] He began inspecting the scene. The scene was dark. However there were three sources of artificial light which illuminated the vicinity, as would appear from photo 3 exhibit "A". He noticed broken pieces of glass on the road on the scene. There was a great concentration of glass debris on the traffic lane for the Reitz-bound stream of traffic than there was on the traffic lane for the Bethlehem-bound stream of traffic. The concentration of glass debris was on the correct lane of the Monza and was about 2 metres from the white middle line. He made a mental note of the concentration spot. The last six photos, in other words, photo 2 – 7 were taken after midnight.

[33] He returned to the scene in the morning on Tuesday 30 October 2001 with Inspector K.J. Mokhatla. He placed an orange cone on the spot where he saw the dense concentration of glass debris at night. He also indicated with the aid of cones the pre-accident direction of the Camry; the point where it left the road and its final position of rest. Similarly he also indicated the route of the Monza. Having done all these things he caused the scene to be photographed by Inspector Mokhatla. Photo 1 was then taken from north to south and not south to north. He confirmed the measurements were taken by Inspector Mokhatla. There was some glass debris in the vicinity where the Camry left the road. However, the spot marked C on photo 1 was the only area where there was a dense concentration of glass debris.

[34] During cross-examination he answered that he was the investigating officer and that he was aware that the national prosecuting authority declined to prosecute. He arrived on the scene at 00h20 – 00h30 on Tuesday 30 October 2001. The emergency services providers were already on the scene. The survivors had already been removed from the scene. The occupants of the Monza were already dead. The scene was not cordoned off. The road was still open for traffic. He confirmed that he noticed glass debris on both sides of the white middle line. He

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took no samples of the glass debris. It appeared to him the Monza had rolled. It was still raining heavily on his arrival on the scene.

[35] He again confirmed that photo 1 was taken in the direction of Bethlehem. He also confirmed on the scene the road slopes from west to east. He had no idea why Inspector Makhatla did not take photographs of the gouge marks which he observed on the edges of the road where the motor vehicles left the road. He had no idea as to who compiled the statutory accident report. He used a stone at night to mark the spot with a dense concentration of glass debris. This concludes Inspector Nyembe's testimony.

[36] Gerald Lemmer testified on behalf of the defendant. He stated that he was a retired professor in mathematics, applied mathematics and physics. He considered himself an expert in his professed field. He confirmed as true and correct the opinions which he expressed earlier in the written summary of his evidence save the factual recording in paragraph 3. He explained such opinions further.

[37] In paragraph 3 of his written summary he assumed, inadvertently I must point out, that the white patch on the road surface on the western emergency lane somewhere between the yellow cone and the orange cone was the concentration of the glass debris referred to by Nyembe. *Vide* the enlarged photo 1 exhibit "A". He explained after becoming aware of the incorrect assumption and the correct position of the concentration according to Nyembe that if the evidence of Nyembe was accepted that he saw the concentration of glass debris around the orange cone, the

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opinions he expressed and the conclusion he arrived at remained valid and unaffected. It did not make any difference whether the concentration was where he thought it was or where it really was according to Nyembe.

[38] He dismissed the plaintiff's claim that the collision occurred on the eastern emergency lane. He also dismissed the possibility that the collision could have happened on the plaintiff's correct traffic lane. He was of the opinion that none of the alleged two scenarios could, according to the laws of physics, be reconciled with the respective displacement routes of the vehicles after the physical impact and the respective positions of their final rest. Both scenarios, he testified, were also totally at variance with the position of the dense concentration of glass debris.

[39] It was his considered opinion that, unlike the plaintiff's testimony and his witness' testimony, the testimony of the defendant's witness, Nyembe, was practically consistent with the objective and uncontroverted facts. He therefore supported Nyembe's evidence as to the spot he saw and regarded as the possible area of collision. Nyembe's version was in accordance with the laws of physics. Although he recognised that glass debris was an unreliable indicator of the point of collision, he stated that he could find nothing in the law of physics which was at variance with Nyembe's testimony as to what he observed on the scene.

[40] During cross-examination he conceded as a fair proposition to say that one could not advance a dogmatic assertion where, as in the present case, there were some unknown factors. He also conceded that a scientific view was of much practical value where an expert who opined it had visited the scene and inspected it in order to qualify himself as an expert who can assist the court. He also confirmed as correct the comment that he was never on the scene. He answered that he depended on Nyembe's testimony.

[41] He said it was unlikely that the glass debris Nyembe observed at point C of photo 1 was deposited there by the Monza alone as it was rolling. In his opinion the Monza rolled off and not

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on the road. If it had rolled on the road it would have left visible gouge marks on the tarmac. His opinion was that such glass debris originated from the two sedans involved in this accident although no tests were done. Point C was the centre of the scattered glass debris. The pieces of glass debris which Nyembe saw on the correct lane of the Camry could have landed there as a result of the initial scattering of the glass debris. There could also have been a secondary displacement of glass debris caused by passing motor vehicles. The heavy thunderstorm water could have washed away the glass debris which could explain why glass debris was not visible on the photograph. This concludes Professor Lemmer's testimony. It brings us to the end of the defendant's case.

[42] Mr. Pohl, on behalf of the plaintiff, urged me to find in favour of the plaintiff. He argued that according to the version of the plaintiff, which version was substantially supported by Craven, the collision took place on his correct side of the road. Therefore, he submitted that the insured driver of the Monza was negligent.

[43] But Mr. Ferreira, on behalf of the defendant, disagreed. He argued that the version of the plaintiff itself showed that the plaintiff himself was negligent and that his exclusive negligence was the sole cause of the accident. He submitted therefore that the only inference to be drawn from all the evidence and the probabilities was that the collision occurred on the insured driver's correct side of the road.

[44] The plaintiff was unable to give the court any indication of the approximate area of the collision which he alleged was on his correct side of the road. Like the plaintiff, Craven was also unable to do so. In fact none of them could identify the scene of the collision let alone the precise point or even the approximate spot where the sedans collided.

[45] The testimony of the plaintiff was that he was driving on the correct side of the white middle line at all times. From the moment

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he set out until the critical moment of the impact, he never moved over the white middle line. According to his version, in fact, he was driving on the emergency lane on the outer side of the yellow line when the lights of another vehicle suddenly loomed up on him.

[46] Craven, however, testified that the plaintiff did not drive on the emergency lane. He was quite pertinent that the plaintiff was driving on his correct lane, that is to say on the inner side of the yellow line.

[47] Mr. Pohl submitted that this discrepancy was the kind of difference that one might come to expect from witnesses who testified almost four years after an event had occurred. Mr. Ferreira saw Craven's testimony as a complete *volte face*. He submitted that Craven's evidence was not only in conflict with the evidence of the plaintiff but was irreconcilable with the version put forward by the plaintiff.

[48] In my view the foregoing is a material contradiction. It cannot be underplayed as an insignificant discrepancy in the sense suggested by Mr. Pohl. According to Craven his advice to the plaintiff was that the plaintiff should drive the Monza on his correct lane but as close as possible to the yellow line. Apparently the plaintiff did just that for the greater duration of the trip. He denied that he advised the plaintiff to drive on the emergency lane as the latter claimed he did.

[49] It is indeed so that Craven was after all only a passenger and the plaintiff the driver. In general and for obvious reasons a passenger does not intently concentrate on where the vehicle is travelling as the driver does. But that was not the impression I got

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here. I am inclined to think the opposite was the case. I am not persuaded that the discrepancy underlines their rather truthfulness and lack of collusion on the part of the two witnesses. It seems to me that the plaintiff was somehow trying to make his case appear stronger than it really was. Therefore I would go along with Craven on this aspect. The gentleman, Craven, was more impressive as a witness than the plaintiff. He conceded that on one occasion or so the Camry would slightly move farther away from the yellow line closer towards the white middle line.

[50] The plaintiff's contrary evidence that he maintained a safe distance on the yellow line far away from the white middle line failed to impress me. I cannot, therefore, accept his evidence that the Monza strayed so deep onto the correct side of the Camry. If that was the case, the Camry would immediately have been knocked off the road. It would not have been displaced as it was according to Lemmer. His evidence that he used the yellow side line as a visual aid to guide the Camry was not only neutralised by that of his witness but was further weakened by a number of telling concessions he made during the course of his indirect examination.

[51] Among others, he admitted that visibility was drastically diminished. He could hardly see well beyond six metres ahead. The extremely poor visibility forced him to set the headlamps of his car on a dim mode because putting them on a bright mode had the effect of aggravating the already poor visibility. The accident happened at night. But it was not an ordinary kind of night for him as a driver. It was raining so heavily that he could only manage to slightly notice an oncoming heavy vehicle when it was at most 50 metres from him. Although he saw and came across a few trucks he did not at all see the insured vehicle approaching. When he first saw it, its lights were dangerously looming upon the Camry.

[52] He could give no sound explanation as to why he belatedly noticed the insured vehicle. There are two possibilities. He might have been busy with something which distracted his attention from the road or he simply might have had a momentary lapse of concentration bearing in mind that he had had a long day at Reitz Golf Club which was rounded off with a braai in the evening during

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which he consumed some intoxicating beverages.

[53] Craven was quite concerned about the hazardous conditions which were prevailing at the time. Among the things which made him anxious was, naturally, the speed at which the plaintiff was driving in these circumstances. It will be recalled that the plaintiff himself admitted during intense cross-examination that he was not keeping a proper lookout and that he was driving at an excessive speed in the circumstances. The fact that the worried Craven had to advise the plaintiff to drive on his correct lane as close as possible to the yellow side line and not on the emergency lane itself is not without significance. Craven might probably have been prompted to say so by his realisation that the sideways movements of the speeding Camry either towards the middle or the edge of the road were potentially hazardous and discomforting.

[54] Despite the aforesaid unfavourable aspects in the evidence of the plaintiff as well as the material contradiction between his evidence and that of his witness, I am not persuaded that the defects individually or cumulatively considered warrant the impugning of the plaintiff's credibility. His evidence that he did not encroach onto the wrong side of the road was bolstered by that of his witness. It is fitting to describe the latter as an objective, trustworthy and a credible witness. He was as adamant as the plaintiff himself that the Camry did not move over the white middle line. In my view this was a material corroboration. The only significant critique which can be levelled against Craven, was the big discrepancy between his court testimony and his police statement as to the time of the accident and his failure to say why he did not see the Monza earlier.

[55] Nyembe testified that he saw glass debris on the road. He saw it at night and in the morning. However, not a single photo was taken of the alleged glass debris. Six photos were taken on the scene at night. However, no debris can be seen on any of them. No sample of glass debris was taken and gathered as an exhibit. Mr. Ferreira argued that the concentration of the glass debris, which was on the traffic lane of the Monza, indicated a probable point of collision. However, Mr. Pohl argued that it did not. Firstly, he doubted whether there was any concentration of

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glass debris on the lane of the insured driver at all. Secondly, he argued that even if there was, it was simply unknown from which vehicle such concentration of glass debris came.

[56] We do know, however, that the Monza rolled after the collision and that its windows were shattered. It may therefore be argued that such glass debris could possibly have come from it in the process of rolling as opposed to it just falling from the vehicle at the moment of the collision. However, according to the evidence of Lemmer, there was no objective evidence to show that the Monza rolled on the road. If it did, there would have been gouge marks on the tarmac. It can therefore be argued that the absence of such gouge marks suggests that the concentration of glass debris resulted from the collision of the two sedans as opposed to the subsequent rolling of the Monza. The difficulty is that although Nyembe saw the gouge marks where the two motor vehicles left the road and took photos of such positions, no gouge marks can be seen on the photos. In my view it has to be accepted that Nyembe did see glass debris on the scene and that he did see some gouge marks, although these cannot be seen on the photos. It is also more probable than not that such debris came from the two motor vehicles involved in this accident. Although it is also conceivable that the heavy rain would have diminished the likelihood of the vehicle leaving superficial marks on the road, it is improbable that it could completely have prevented every possible trace of the gouge marks.

[57] Nyembe's evidence was that he arrived on the scene almost half an hour after midnight. He had no idea as to precisely what time the accident occurred. Neither the evidence of the plaintiff nor that of the plaintiff's witness was helpful in this regard. On this aspect there are three marked differences in their testimonies. Nyembe found glass debris scattered on the scene on both traffic lanes. The concentration of the glass debris was at point C on photo 1. If it is accepted that the accident took place at the latest at 23h45 as stated in Craven's police statement then Nyembe arrived on the scene approximately 45 minutes afterwards. During that time vehicular traffic drove past the scene and would have scattered and displaced the glass debris from its original position. In view of the extremely heavy rain that continued throughout the

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evening and even after midnight, it is most likely that the rainwater would have done the same. Worse still even after the police and the emergency service providers had arrived on the scene, the vehicular traffic was allowed to traverse both lanes where the glass debris was. These physical disturbances of the scene which was not cordoned off, certainly allowed for further displacements of such glass debris from its original position immediately following the impact.

[58] According to Professor Lemmer, the defendant's expert witness, it is well established that glass cannot be used to determine a point of collision accurately. It is indicative of a region of collision. Naturally the above physical interfering factors pertaining to the physical displacements of the glass debris, weaken the reliability of glass as an indicator of the possible point of collision even further, in this particular case. It must also be borne in mind that Lemmer testified that one of the assumptions that he made in his report was incorrect because it was based on the wrong information supplied to him by the attorneys of one of the victims. The highlighted patch on the emergency lane in the vicinity of point D of photo 1 was in fact not the glass debris which Nyembe referred to in his testimony. Given the correct information and taking that error into account, did not radically change the real picture and his conclusion, the expert explained.

[59] Lemmer's expertise in the reconstruction of motor vehicle collisions was accepted on behalf of the plaintiff. This expert witness conceded that if Nyembe's evidence about the glass debris was rejected or ignored, then the collision could have occurred anywhere on the road between the final rest positions of the two vehicles. This means that the opinions he expressed and the conclusion he arrived at will necessarily hold no water if, in the opinion of the court, the concentration of the glass debris seen by Nyembe did not represent the original point of impact.

[60] According to Nyembe point C on photo 1 represented the point of collision. This is how it was stated in the key to the plan and repeated in his testimony. Nyembe is not an expert in the reconstruction of motor vehicle collisions. In saying that point C was the point of collision, he did not thereby project himself as an

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expert in that field. He did not claim to be qualified to render any expert opinion as to where a point of collision was. The essence of his evidence was that point C was the spot where he observed concentration of glass debris. He saw that as an assistive tool which indicated more or less the probable area where the two sedans could have collided. He did so because no eye witness was on the scene. Indeed he expressed the opinion of a layman which has no probative value. He did not profess to express an expert opinion. It was a layman's objective observation on the scene. It is up to the experts to say what can be deduced from that observation and for the court to decide how much evidential weight can be attached to that observation. It can never amount to an misdirection by a court of law to rely on a layman's direct observation and to draw some inference from such direct and objective observation which inference a lay witness is not competent to draw. Nyembe's testimony that he found glass debris on the scene was interpreted by an expert debated by the lawyers and only the court, in the final analysis, has to decide whether the inference which the defendant seeks to be drawn from it, is the only reasonable and legitimate inference that can be drawn on the facts.

[61] Lemmer quite fairly conceded that his evidence as an expert should be approached by the court, in essence, in the manner as highlighted by Eksteen AJP, as he then was, in the case of **MOTOR VEHICLE ACCIDENT ASSURANCE FUND v KENNY** 1984 (4) SA 432 (ECD) at 436 – 437. Direct evidence adduced by an eye witness which is both credible and probable is preferred to that of an expert witness.

[62] I have previously referred to certain unsatisfactory and unfavourable aspects pertaining to the testimony of Nyembe. He was the investigating officer. However, his gathering of the evidence, his processing of the information so gathered and his

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investigation of the collision as a whole can only be described as regrettably poor. For instance he failed to ensure that the photographer, Mokhatla, took a photo of the glass debris at night before it was disturbed and washed away. He returned to the scene the next morning because, among other reasons, he went out there at night ill-equipped. He had no reflective cones to use. He was forced to rely on a mental note and a stone. It still baffles me as to how one makes a visible mark on a wet tarmac with a stone. He failed to cordon off the scene in order to preserve and to secure vital evidence, such as the gouge marks among others. He failed to take samples of the glass debris from the road and the vehicles involved in order to establish the origin of the glass debris he saw on the road by forensic means. Notwithstanding all these unfavourable aspects I am not prepared to say that he was such a poor witness on whose evidence little or no reliance should be placed.

[63] It was his evidence that he deemed the presence and the locality of the glass debris important. The fact that he did not have such concentration of glass debris immediately photographed by his colleague, Mokhatla, does not without more justify a finding that he was an untruthful witness. As I understood him he wrongly thought Mokhatla had taken a photo of the concentration of glass debris. He was careless in making that wrong assumption without first verifying it with Mokhatla before he left the scene at night. His direct evidence was that he made a mental note of where the concentration of glass debris was before he left the scene at night. The next morning he returned to the scene with Mokhatla and took a photograph of the spot where the concentration of glass debris was. During cross-examination he went a step further and stated that he made a mark on the road to indicate not only where the glass debris was, but also where, for instance, the vehicles left the road. I do not see that as a material contradiction to warrant the rejection of his evidence or to doubt his credibility. It is not correct in my opinion to argue, as Mr. Pohl did, that if his evidence was true that he made a mark on the road surface, then it was even more strange that no photo was taken of this mark. Of course the photos of all the marks he made were taken. In having the photos taken the focal point of the exercise was not the marks themselves that he made the previously night, but the points where those

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marks were made and what their relevant significance was to the collision we are here concerned with.

[64] I have already said enough about Nyembe's late arrival on the scene. The scene was not cordoned off; traffic was allowed to move in both directions; the rain was pouring down; the police vehicles, the traffic vehicles and the emergency vehicles were also on the scene. It is only logical that these vehicles and their personnel to a greater or a lesser degree would also have disturbed and scattered the glass debris. No doubt the physical displacement of the glass debris continued throughout the night until Nyembe and the photographer returned to the scene the next morning. By then the corrosive effect of the aforesaid variety of both human and natural elements had remarkably disturbed the scene even further.

[65] I do not, for a moment, doubt that Nyembe's evidence that there was glass debris on the scene has to be accepted as true. His evidence that the next morning there was far less glass debris due to the aforesaid corroding factors is also understandable. Accordingly it follows that it must necessarily be accepted as an accomplished fact that there was scattering and physical displacement of such glass debris. The original scattering of glass on impact was followed by the subsequent displacements by the corroding agencies I have already mentioned above. The moment that is accepted it follows that the spot where Nyembe saw the concentration of glass debris can never serve as conclusive proof of the original point where the two sedans collided. How far away from the original position the glass debris could have gravitated, is difficult to say. The gradient of the tarmac on the scene from east to west probably could also have accelerated the process of physical displacement of the glass debris.

[66] One of the most important pieces of evidence adduced on behalf of the defendant was Lemmer's concession that if you think away or ignore the physical spot of the concentration of the glass debris Nyembe testified about, then the collision could have taken place anywhere on the road tarmac on any of the two lanes somewhere between the final rest positions of the two vehicles. It follows naturally, therefore, that if it is accepted that the two

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vehicles could have collided anywhere on that stretch of the road then the collision could implicitly have occurred on the correct lane where the Camry was travelling as Craven testified.

[67] Although Craven was the better of the two witnesses, the plaintiff did not fair badly. He narrated his story in a logical, chronological and simple manner. He readily made reasonable concessions. He was polite and courteous. He projected the demeanour of a credible and truthful witness. Craven, as I have said, was even better in all those departments. I can make no seriously adverse or unfavourable findings concerning his trustworthiness.

[68] Neither the plaintiff nor his witness gave a flawless account of course. Their evidence can be criticised in certain respects. I have already mentioned some of those. On the whole, however, their evidence can in brief be described as direct, probable, credible and reliable as to what probably happened during the collision. I could find nothing so inherently improbable to justify the wholesale rejection of their version.

[69] As regards Nyembe he was, of course a latecomer on the scene. Despite the unfavourable aspects of his evidence which in my opinion were due to lack of experience more than anything else, his evidence was credible and reliable to an extent. So was the defendant's expert witness, Lemmer.

[70] It is important to bear in mind the following: Observation by Eksteen AJP in **MOTOR VEHICLE ACCIDENT ASSURANCE FUND v KENNY** 1984 (4) SA 432 (ECD) at 436 H to 437 B:

“Direct or credible evidence of what happened in a collision, must, to my mind, generally carry greater weight than the opinion of an expert, however experienced he may be, seeking to reconstruct the events from his experience and scientific training. Strange things often happen in a collision and, where

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two vehicles approaching each other from opposite directions collide, it is practically impossible for anyone involved in the collision to give a minute and detailed description of the combined speed of the vehicles at the moment of impact, the angle of contact or of the subsequent lateral or forward movements of the vehicles. Tompkins' concession, therefore, that there are too many unknown factors in any collision to warrant a dogmatic assertion by an expert as to what must have happened seems to me to have been a very proper one. An expert's view of what might probably have occurred in a collision must, in my view, give way to the assertions of the direct and credible evidence of an eyewitness. It is only where such direct evidence is so improbable that its very credibility is impugned, that an expert's opinion as to what may or may not have occurred can persuade the Court to his view."

[71] Although Lemmer was certainly a good and credible witness his expert evidence can never be preferred over the good, direct, credible and reliable evidence of the only eye witnesses. The scientific foundation of his evidence was shaken by the aforesaid unsatisfactory features of Nyembe's evidence. I have already dealt with those. If this is ultimately accepted, as I think it should, then it follows that the matter has to be decided on the version proffered by and on behalf of the plaintiff.

[72] It was put to the plaintiff during his indirect examination that he failed to keep a proper lookout and that had he been keeping a proper lookout he would have been able to avoid the collision. The plaintiff conceded this proposition.

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[73] As regards a driver's failure to keep a proper lookout it is necessary to have proper regard to the decision of **GUARDIAN NATIONAL INSURANCE CO LTD v SAAL** 1993 (2) SA 161 (C). The principle was succinctly summarised in the headnote as follows:

“Held, that in order to recover damages against the appellant the onus had been on the respondent to prove on a balance of probabilities that M had driven negligently and that his negligent driving had caused or contributed to the collision.

Held, further, that the finding by the trial Court that M had not been keeping a proper lookout at the time of the collision was not sufficient to render the appellant liable, since respondent had to prove that M's failure to keep a proper lookout was causally connected with the collision, the critical question being whether M ought reasonably to have become aware thereafter, at a stage when effective avoiding action could still be taken, that the pick-up truck was not going to stop.

Held, further, that the respondent had to prove that, had M reacted when the reasonable man would have reacted, the collision would probably not have occurred.”

[74] It has to be borne in mind that the evidence of the eye witnesses was that when the lights of the Monza loomed up in front of them, the collision occurred in the blink of an eye thereafter. The gist of this was therefore that there was absolutely no time within which the plaintiff could have taken any evasive action to avoid the tragic accident. He virtually had no adequate time for reactive action. The driver's ability to avoid an accident depends among other factors, on the

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speed of the vehicles approaching each other. In this case we know that the Camry, driven by the plaintiff, was travelling at the high speed of 80 kilometres per hour and that the Monza driven by the insured driver was travelling at an even higher speed. Before the Monza there was no evidence that any other sedan approached the Camry from the front and safely passed it. The evidence showed that the plaintiff and his witness were able to see the trucks. It may well be that this was so because of their size and the many lights which trucks sometimes have as compared to the small sedans. There is, therefore, no concrete proof that the plaintiff should have seen the Monza earlier and that if he had seen it he would have been able to take appropriate action to avoid the collision.

- [75] Notwithstanding the plaintiff's concession to the contrary I have serious reservation as to whether given the distance remarkably short distance between the two vehicles when he first became aware of the Monza and the limited time within which he had to react he could have taken any reasonable and practical steps to avoid the accident. See **DIALE v COMMERCIAL UNION ASSURANCE CO OF SA LTD** 1975 (4) SA 572 (A) where at 578 E – F the court said the following:

“Nevertheless, assuming in plaintiff's favour that there was a culpable delay on Harmsen's part, I am of the view that plaintiff

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failed to establish that this was causally connected with the collision, in the sense that, had Harmsen reacted when the reasonable man would have reacted, the collision would probably not have occurred. If hitherto one has been beset by imponderables and uncertainty, now one enters the field of pure speculation. It was submitted by plaintiff's counsel that, had Harmsen commenced braking appreciably earlier, the station wagon would have been retarded sufficiently to enable the cyclist to pass safely in front of the station wagon; and that, accordingly, no collision would have occurred."

[76] In McMURRAY v H L & H (PTY) LTD 2000 (4) SA 887 (N) the court in pretty much a similar way had this to say about the reasonable man:

"One knows that the reasonable man generally expects and is entitled to expect reasonableness rather than unreasonableness, legality rather than illegality, from others. (*Solomon and Another v Musset and Bright Ltd* 1926 AD 427 at 433; *Moore v Minister of Posts and Telegraphs* 1949 (1) SA 815 (A) at 826.) The reasonable man certainly does not in general regard himself as obliged to take steps to guard against recklessness or the gross negligence of others. (*South African Railways and Harbours v Reed* 1965 (3) SA 439 (A).) Obviously this also applies to the criminal conduct of others. It goes without saying that this notional reasonable man generally complies with the law and always acts reasonably. We know that the reasonable man is not a timorous faintheart, always in trepidation lest he or others suffer some injury; on the contrary, he ventures out into the world, engages in affairs and takes

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reasonable chances. He takes reasonable precautions to protect his person and property and expects others to do likewise (per Van den Heever JA in *Herschel v Mrupe* 1954 (3) SA 464 (A) at 490F).”

- [77] If it is accepted that the collision took place on the plaintiff’s correct side of the road, and I do not say that it did, then the *maxim res ipsa loquitor* applies. In this regard it is then necessary to have regard to the decision of **ARTHUR v BEZUIDENHOUT AND MIENY** 1962 (2) SA 566 (A) at 573 C – H:

“I am of opinion that on the facts of the present case the maxim may rightly be applied. For, when plaintiffs proved that defendant's truck for no apparent reason suddenly swerved on to its incorrect side there to collide with their truck, plaintiffs proved facts from which an inference of negligence against defendant may, in the absence of any explanation, be drawn - *res ipsa loquitor*.”

- [78] In the case of **SARDI AND OTHERS v STANDARD AND GENERAL INSURANCE CO LTD** 1977 (3) SA 776 (A) the court had this to say about the *maxim res ipsa loquitor*:

“In this Court, in seeking to establish negligence of the driver of the insured vehicle, counsel for the appellant referred to the fact that he swerved across the road. Wherefore counsel relied on the *maxim res ipsa loquitor* (the thing speaks for itself). He submitted that it was for the respondent to adduce sufficient

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evidence to overcome the prima facie effect of the evidence that Coxon drove on to the incorrect side of the road. The maxim has no bearing on the incidence of the onus of proof on the pleadings. It is invoked where the only known facts, relating to negligence, consist of the occurrence itself;"

[79] In the instant case I am unable to find that the collision was occasioned by the exclusive negligent driving of Bothma, the insured driver. On the version presented on behalf of the plaintiff the direct evidence of the plaintiff's credible and reliable witness, was that at once stage or another the Camry driven by the plaintiff made certain lateral movements away from the yellow line closer to the white middle line. He conceded that at one stage the Camry, in fact, moved over the white middle line. It is therefore conceivable that the collision could as well have taken place at that critical moment when the Camry was on the wrong side of the road. Therefore it is just as possible that the collision could have taken place either on the correct lane of the plaintiff or on the correct lane of the insured driver.

[80] In the absence of any credible and reliable evidence that only the Monza and not the Camry deviated from its correct lane and crossed the middle line, the *maxim res ipsa loquitor* cannot assist the court to determine whose driving negligence caused the accident. I am unable to infer, on the facts, that the only reasonable and legitimate inference that can be drawn is that the collision occurred on the correct

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lane of the Monza as Mr. Ferreira contended that I should. Seeing that I am unable to find whether or not the collision occurred on the plaintiff's correct side of the road or on the insured driver's correct side of the road, I have come to the conclusion that the collision probably took place in the middle of the road on the white centre line.

[81] In that situation both counsels before me were *ad idem* that an apportionment of 50/50% would be fair and appropriate in the circumstances. See **VAN ECK v SANTAM INSURANCE CO LTD** 1996 (4) SA 1226 (C). In my view the collision was not occasioned by the exclusive negligent driving of either the insured driver or the plaintiff. To find otherwise would amount to doing injustice to the facts and the evidence. It seems to me to be fair to find that both drivers were equally negligent and that their joint negligence equally contributed to the occurrence of the collision.

[82] Accordingly I make the following order:

82.1 The defendant is liable for 50% of the plaintiff's proven or agreed damages.

82.2 The defendant is also liable for the plaintiff's costs to date.

M.H. RAMPAL, J

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