



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case Number: 22584/2017

In the matter between:

IAN MARK HALFON

Plaintiff

and

KEMPSTER SEDGWICK (PTY) LTD.

First Defendant

JUSTIN DAVIDSON

Second Defendant

JUDGMENT DELIVERED: THURSDAY, 24 OCTOBER 2024

NZIWENI, J

- [1] The collision that gave rise to this action, occurred on 16 November 2016, at about 9:15 a.m. on a clear sunny day. This is an action against the two defendants for damages arising from a two-car collision at a busy and extremely large intersection

of Hertzog Boulevard and Christiaan Barnard Boulevard in the Cape Town CBD ("the intersection"), during the peak traffic hour.

- [2] Traffic at this intersection is controlled by traffic lights. And the traffic lights are mechanically timed.
- [3] The Plaintiff is suing Volvo dealership ("the first defendant") [based on employer's vicarious liability] and the driver of the vehicle that collided with the Volvo ("the second defendant"). The two vehicles in question were driven by first defendant's employee [a Volvo] and the second defendant [a Mercedes Benz]. The action was brought on the basis that both drivers were at fault.
- [4] The Volvo was the first vehicle to enter the intersection on a green turn indicator signal. The traffic light turn arrow for the Volvo changed from green to yellow in the centre of the intersection, as it was well into the intersection. Subsequently, the traffic signals turned green for northbound vehicles that intended to continue through the intersection. In order to execute its right turn, the Volvo was required to navigate through four lanes, a mandatory right turn lane, and three northbound straight lanes.
- [5] When the driver of the Mercedes entered the intersection and at the time of the collision the traffic lights were green in his favour. The defendants concur that the traffic lights and the turning arrows do not always provide sufficient time for traffic to clear the intersection. As a result, motorists would be stuck in the intersection after the turning arrow had turned off.

- [6] In this matter it is not disputed that the driver of the Mercedes did not see the Volvo before the crash. He only saw the Volvo after the crash. Likewise, the Volvo driver saw the Mercedes a split second before the crash.
- [7] Prior to the accident, both drivers had travelled through the intersection numerous times and were aware that it was quite congested. The second defendant does not dispute that at the intersection, when the traffic lights turned green in his favour he had a duty to yield the right of way to vehicles that were still trapped in the intersection.
- [8] The primary question in this trial is whether there is sufficient evidence to hold the defendants liable. Six witnesses were called to testify in this trial. In the instant case, the plaintiff's testimony was only relevant to the issue of *locus standi*, as such his testimony did not advance the remaining issues between the parties. As regards the issue at hand, the plaintiff presented one eyewitness account to the accident, Mr Chambers.
- [9] The first defendant called an expert witness, Mr Craig Proctor -Parker, Mr Bergma ("the driver of the Volvo") as well as Mr Pretorius. I pause to note, with respect to the crash scene, even though I have already ruled on the issue of delivery / *locus standi* [during the application for absolution] that the plaintiff has *locus standi* as constructive delivery was effected; in somewhat different light, the first defendant, in its case called upon Mr Pretorius to testify upon the same question. Only one of the three witnesses called by the first defendant was an occurrence witness. On

the other hand, the second defendant ("the Mercedes Benz driver") was the only witness to testify in his own behalf.

Evidence pertaining to plaintiff's locus standi

- [10] On behalf of the first defendant, Mark Pretorius testified that at the time of the collision he was employed as a brand manager in Gauteng by Volvo Bedford. He recalls the sale of the Volvo vehicle to the plaintiff. The plaintiff requested for the Volvo to be delivered to Cape Town. Once the deal was concluded with the plaintiff, they discussed the logistics of transporting the vehicle to Cape Town and the handover or delivery.
- [11] They agreed with the plaintiff to transport the Volvo to Cape Town on a truck carrier and that the handover was to be performed by Volvo Cape Town, on their behalf. They contacted Volvo Cape Town and requested their assistance in facilitating the handover to the Plaintiff. The plaintiff did not play a role in the arrangements of the hand over, as they dealt directly with Volvo Cape Town. The costs for transporting the Volvo to Cape Town was born by Volvo Bedford who also paid Volvo Cape Town a fee in order to facilitate the handover.
- [12] At this juncture, Volvo Bedford had already registered the Volvo under plaintiff's name. Volvo Cape Town was supposed to only facilitate the regional licensing. He testified that when the plaintiff instructed Volvo Bedford to arrange for the vehicle to be delivered to Cape Town, Volvo Bedford acted as the agent of the plaintiff.

The car was delivered to Cape Town for the sole benefit of the Plaintiff. The plaintiff said that arrangements were in place and that the vehicle would be delivered to Cape Town and that the individuals in Cape Town would contact him once the vehicle was ready.

[13] When the vehicle arrived in Cape Town, it was not held by Volvo Cape Town on behalf of the plaintiff.

[14] The evidence pertaining to liability can be summarised as follows.

The plaintiffs case

[15] Mr Chambers ("the motorcycle driver") testified that on the fateful day in question he was commuting to his office in central Cape Town, using his motorcycle. As he approached the intersection the traffic lights were red.

[16] The extreme left-hand lane at the intersection, is used to channel traffic that turns left to Christian Bannard Boulevard. As a motorist approaches the intersection [North bound] the far-left lane has direction arrows on the road surface that indicate it as a left turn lane and directs vehicles to the left turn towards Christian Barnard Boulevard. When the left turn has taken place, the final arrow in the place where the second defendant states he was stationary has an arrow pointing straight. Thus, as the motorist passes the feeder lane to the left, there is then a one direction arrow that directs vehicles to carry on straight to the intersection.

- [17] He testified that there are three additional lanes for traffic that proceeds straight through the intersection onto Hertzog Boulevard, while the extreme right lane is used by traffic turning right onto Christian Barnard Boulevard.
- [18] According to him, at 9:15 traffic would have been relatively busy at the intersection. When he approached the intersection the traffic lights were red for him. There would have been a queue of vehicles at the red light he was making his way to.
- [19] At the front of the intersection there were two vehicles and behind them there were more. He took a front position between the two vehicles ahead of him. He is unable to recall whether he positioned himself between the first or the second lane. Nevertheless, he had an unobstructed view of the intersection from his vantage point.
- [20] At the intersection, he saw a vehicle at the front of the queue waiting to make the right turn, move and complete the turn. The Volvo paused and did not move immediately after the first vehicle. He heard honking of a horn, and the Volvo then began to move. The Volvo turned to make a right-hand turn in front of him. The green arrow signal was still showing when the Volvo began to move.
- [21] As the Volvo was in the process of crossing the intersection making the right turn, the traffic lights went green in his [motorcyclist] favour. He did not see a second vehicle in the middle of the intersection. He was only aware of one vehicle that made the right-hand turn before the Volvo.

- [22] The Volvo was still in the intersection when the traffic signal turned green in his favour, and he and the other vehicles next to him waited for the Volvo to clear the intersection before he could move off. The result was that, despite having the right of way, he was compelled to remain in a stationary position for an extended period.
- [23] It is a common occurrence at that intersection, according to him. He accelerated after the Volvo passed in front of him. He was in the process of driving off when he heard a loud collision behind his left shoulder. He was in the centre of the intersection at that point. He halted and returned to the location of the collision.
- [24] He did not observe the Mercedes Benz in a particular lane prior to the collision, as he was unaware of its presence. He testified that the sound of the crash was sufficiently loud, and upon hearing it, he instinctively assumed that it was a high-speed collision. Particularly, when vehicles are just entering an intersection after being stationary.
- [25] He believed that the driver of the Mercedes Benz was in the wrong. He does not hold the same view as far as the driver of the Volvo is concerned. If anything, he has sympathy for the driver of the Volvo.

First Defendant's case

- [26] I have already indicated (in paragraph 9 above) that Mr. Craig Proctor - Parker, an accident reconstruction expert, testified for the first defendant. He testified that the accident involved a Volvo turning right and the Mercedes Benz travelling straight when the accident occurred. According to him, for the Volvo the traffic arrow will

turn green for eight seconds. Then it would have three seconds on yellow and then after the yellow there would be a two second delay and then the traffic in the opposite direction would get a green light.

[27] It is his testimony that the road in question was in good condition and it had a good grip and because the road is in an urban area its speed limit is restricted to 60 kilometers per hour. It was his testimony that the intersection is a pre-turn intersection, that means that the vehicles turning to the right drive through before the through traffic.

[28] It was the expert's conclusion that when the original paths of the vehicles are considered along with their final positions of rest, it is highly probable that the point of impact or immediate area of impact was at the point of turning path of the Volvo and the through path of the Mercedes Benz in the left lane. It was his testimony that the Volvo was struck and subsequently forced into the middleman.

[29] As far as speed is concerned, he testified that one of the factors they try to determine in a crash is speed which is a key factor in a crash. According to him they knew almost knew all the parameters accurately and could therefore evaluate speed.

[30] He testified that they employ a calculative process to determine speed. Additionally, they also look at the damages and where the vehicles came to rest. He testified that there was sufficient evidence to support his conclusion that the Mercedes Benz was travelling at a far high speed than the Volvo. He calculated

that the speed of the Mercedes at impact was 78 kilometers per hour and that of the Volvo was 36 kilometers per hour. According to him, the Volvo was not travelling at an excessive speed while passing through the intersection.

[31] He also testified that the evidence is sufficient to support the conclusion that in light of the speed they calculated for the Mercedes Benz, it is absolutely impossible that the Mercedes Benz pulled off from a stationary position at the intersection. He testified that if the Mercedes had pulled off from a stationary position at the intersection, it would have reached a speed of around 23 to 25 kilometres per hour and the vehicles would not have been damaged to the extent that they were. He also testified that at 25 kilometres per hour, it is virtually impossible for the Volvo to have moved and ended where it did. The expert also testified that, if it were to be accepted that the Mercedes Benz was at a stationary position and pulled off and then impacted the Volvo, it would mean that it covered approximately 10.48 metres before the collision.

[32] He further testified that even without conducting a calculative process to determine speed, he could determine that the Mercedes Benz must have travelled at a high speed. He was able to determine this because the force of impact literally displaced the Volvo causing it to strike an island mounted traffic light signal pole and came to rest on an island. According to him, the Mercedes Benz came to a rest, facing somewhat forward and a slight leftward orientation. It was also his testimony that the Volvo struck the pole with such force that it was decimated and forced out of the ground.

- [33] It is his testimony that the crash was a typical right angle intersection crash. He further testified that the collision was a side impact collision as the front end of the Mercedes Benz crashed into the left side of the Volvo.
- [34] According to him, the fact that he did not cover the version of the second defendant in compiling his report does not affect his findings.
- [35] He testified that, in view of the evidence that vehicles were stationary at the traffic lights in the first and the second lanes, there was a degree of restricted sighting of opposite vehicles. It was also his testimony that if at the traffic lights there were two stationary vehicles [stopped to his left] in the opposite side of the intersection, [north bound traffic] that would have definitely obstructed to some extent the Volvo driver's view of vehicles that were behind [the stationary vehicles] or vehicles approaching from [south] the side of the Mercedes Benz [northbound traffic]. He is unable to precisely quantify the degree of impediment, but he is certain that there would be some degree of impairment.
- [36] It was also his testimony that if the Mercedes Benz was approaching in the left lane and there were stationary vehicles ahead, the Mercedes Benz driver too would have some level of obstruction to his view. According to him, the two vehicles would have certainly obscured the view of the Mercedes Benz driver.
- [37] It is his opinion that, if it is accepted that the Mercedes Benz did not stop before it entered the intersection and the second defendant [the Mercedes Benz driver] saw the other vehicles ahead of him on the right; had a green traffic light in his

favour; also saw that the other vehicles on the right had not moved; that should have been a red flag for him to slow down substantially or also come to a stop.

[38] During cross examination he testified that based on the evidence that he considered, both parties were negligent albeit Mr Bergma was negligent to a lesser degree than the second defendant.

[39] Mr Bergma [the driver of the Volvo] testified that on the day of the collision he was employed as a driver at Volvo Cape Town. His work duties there entailed amongst others, transporting of customers and fueling of new vehicles on their arrival.

[40] When the crash occurred, he was driving a Volvo XC90 ("the Volvo") on his way to put fuel in the Volvo, preparing for a delivery to a customer. By delivery of the vehicle, he understood that to mean that the vehicle was sold and there would be somebody to come and collect it.

[41] Before he entered the intersection, he approached it from a northerly direction toward a southerly direction. He intended to turn right into Christian Barnard Boulevard. As he approached the intersection from Hertzog Boulevard intending to turn into Christiaan Barnard, the traffic light was flashing green. The intersection was busy.

[42] When he entered the intersection the traffic light still had a green turn arrow signal. Halfway into the intersection, the traffic light turn arrow changed from green to yellow. He was driving at a speed of between 30-40 kilometres per hour when he entered the intersection. There were vehicles on the intersection opposite him on

the south lane, [stationary on northbound lanes] waiting to proceed through the intersection of Hertzog Boulevard and Christiaan Barnard Boulevard.

[43] As soon as the traffic light turned yellow, as a precautionary measure, he slowed down. At that moment the vehicles in the south lane were on his left intending to travel from south to north [opposite direction]. The oncoming traffic in the south lane edged slightly forward. However, when the oncoming traffic in the south lane noticed him in the intersection, they stopped to allow him to complete the turn into Christiaan Barnard Boulevard.

[44] The moment the traffic in the south lane stopped for him, he proceeded with his turn and passed the traffic that allowed him to proceed. Subsequently, he then resumed at a speed of between 30-40 kilometres per hour. He kept a look out for the traffic. As he was completing his right turn proceeding towards Christian Barnard, he failed to observe the motorbike being operated by Mr Chambers.

[45] There are four lanes on the northbound road, which runs from south to north. The vehicles that halted to allow him to complete the turn were situated in the first three lanes on the right. The far-left channel was devoid of vehicles. He would have observed, if there were, any [vehicles]. He subsequently continued eastward until he reached the intersection.

[46] He saw the Mercedes Benz vehicle a split second before the crash. At the moment he saw the Mercedes there was nothing he could do. He then felt a hard violent knock. The crash occurred when he had basically almost completed his right turn.

- [47] Prior to the point of impact, he did not hear warning such as screeching noises or the sounding of a horn. Due to the suddenness, he was unable to avoid colliding with the Mercedes Benz. He could not swerve or honk the horn. No tyre marks were left by the Mercedes. The Volvo was struck on the left side by the driver's door and the pillar. The Volvo spun around and hit the island and took out a traffic light. The vehicle finally came to rest on the island.
- [48] It is his testimony that the intersection is a dangerous intersection because there are accidents constantly there. The intersection also gives little time for the turning vehicles to complete the turn. Briefly that was his testimony.

The second defendant's case

- [49] Mr Davidson [second defendant] testified that on the day in question he was on his way to work in Cape Town. According to him, his work would usually begin at 8:30 a.m. He testified that he was late for work, and he was on the backfoot as far as time management of that day. He was 45 minutes late for a meeting that was scheduled for 8:30 a.m.
- [50] He testified that as he was heading for work, he travelled down Nelson Mandela Boulevard approaching the intersection in the lane furthest to the left closest to the island. This is his normal route to work. The far-left lane is a turning lane to the left. According to him, the time of the crash happened at a busy intersection during peak hour.

- [51] He stated that when he arrived at the intersection the traffic light was red, he stopped, and he remained stationary in the lane furthest to the left. In that lane he was in front. He noticed a stationary motorcycle to his right, that arrived ahead of him at the intersection. Besides the motorcycle, there were other vehicles in the right lane, as such, there was a traffic back up in the intersection.
- [52] His goal was to pull away and get ahead of the traffic so he could continue straight. He intended to land in the lane which continues straight. He believed that there was no risk involved therein.
- [53] When the traffic lights turned green, there was a vehicle moving through the intersection towards Christian Barnard and there was a minibus that was travelling through the mid-point of the intersection. After the minibus had moved through the intersection, he looked forward across his peripheral view. He then looked at the motorcyclist [Chambers] and a thought went through his mind that he needed to get ahead of the cyclists to be on the lane that continues straight. When the traffic lights turned green, he waited for three seconds. When he took off from his stationary position, he noticed that the motorcyclist and other vehicles hesitating.
- [54] He accelerated and pressed the accelerator flat down into the intersection whilst indicating right and changing lanes. He admitted that in doing so he aggressively accelerated. He made a rapid lane changed to the right and as a result he was immediately ahead of the motorcycle.

- [55] Prior to entering the intersection, he took the following steps to make sure that it was safe to proceed into the intersection. He allowed time to pass for the vehicles to travel through the intersection and he kept glancing at the motorcyclists to gauge his position in the intersection. He cannot say at what speed his vehicle was when he collided with the Volvo. He cannot recall the point of impact and he cannot dispute the one that was indicated by Mr Bergma.
- [56] During cross examination he conceded that the position of the point of impact as indicated by the expert [which he does not dispute], does not reveal a movement to the right-hand as he [the second defendant] testified. Instead, it reflects a straight path of travel. He also acknowledged that the admitted point of impact is in conflict with his version. He also testified that he cannot dispute the expert's speed calculations at the time of impact.
- [57] Before he could move entirely into the right lane, it felt like a second. He travelled for approximately 10 metres and his entire vehicle rattled, airbags deployed, and he felt an impact of the crash. He did not see a glimpse of the oncoming vehicle [the Volvo]. He only noticed the Volvo after the impact wrapped around the traffic light pole. He was completely blind sighted by the Volvo. He does not know where the Volvo came from.
- [58] At the time of the crash, he deemed the driver of the Volvo to be the one who caused the accident as he was of the view that he turned on a different turning signal. When a statement was posed to him that the first defendant and the plaintiff are alleging that he is the cause of the collision, he responded by saying that with

the benefit of hindsight with his concentration not so focused on the cyclist, he should have taken more time to assess the intersection more carefully and more thoroughly.

- [59] According to him, the vehicles collided in the middle of the intersection. He also testified that as a frequent user of the intersection he is aware that there would be traffic coming through after the arrow had turned off. He admits that extra precautions should have been taken, for instance to keep a proper look out for vehicles that may still be stuck in the intersection.

Evaluation

The locus standi

- [60] It is trite that a trial court may entertain variation of a simple interlocutory order that it had made earlier, at any time before final judgment. Such correction or variation of an interlocutory order may be made *inter alia*, when the facts on which the order was originally based have changed.
- [61] The first defendant, in its endeavours to show that there is good cause for the variation of the *locus standi* order, tendered and relied upon the evidence of Pretorius. It is thus important to focus again on the issue of *locus standi*. There is nothing negative I can say regarding the credibility and reliability of Pretorius as a witness. As such, I accept his testimony as being truthful.

- [62] It seems to me perfectly clear that when Pretorius testified that the plaintiff instructed Volvo Bedford to arrange for the vehicle to be delivered to Cape Town and in this process, Volvo Bedford acted as the agent of the plaintiff. That the Volvo vehicle was delivered to Cape Town for the sole benefit of the Plaintiff; he confirmed this Court's interlocutory finding.
- [63] As it turned out, Pretorius's testimony reaffirms what I stated in paragraphs 29- 30 of the interlocutory judgment that there was a tripartite agreement between the seller, the plaintiff and the first defendant regarding delivery of the vehicle to the plaintiff. This further reaffirms that the vehicle would not have been in Cape Town, if, the plaintiff and the seller did not know, or consent to the first defendant to hold the vehicle on behalf of the plaintiff.
- [64] As I see Pretorius's testimony, it had not the slightest effect upon the interlocutory judgment. Hence, I am of the view that the evidence of Pretorius did not take the preliminary issue raised by the defendants any further. Additionally, I believe that the authority of *Raqa v Hofman* 2010 (1) SA 302 (WCC), relied on by the defendants is readily distinguishable. In the *Raqa* matter, the plaintiff assisted a friend to purchase a motor vehicle by entering into a sale agreement with a financial institution understanding that the friend would take delivery and possession of the vehicle and pay instalments.

The merits

[65] In this matter, *inter alia*, the plaintiff contends that both defendants were negligent in causing the collision. The starting point, of course, is that between the parties, there are common cause issues or issues that are not seriously disputed.

[66] The following issues are common cause or not seriously disputed.

1. The collision
2. The point of impact;
3. The expert's speed calculations at the point of impact;
4. Point of impact is in conflict with the version of the second defendant;
5. The direction of the Volvo before the collision;
6. That the second defendant [Mercedes Benz driver] did not see the Volvo before the accident;
7. The second defendant did not see the Volvo until it was too late to avoid the accident;
8. The second defendant only noticed the Volvo after the impact wrapped around the traffic light pole.
9. The Volvo driver was trapped in a huge intersection when the traffic lights turned green for the Mercedes
10. The second defendant did not take sufficient time to assess the intersection more carefully and more thoroughly.

[67] The second defendant in his plea alleges that the Volvo driver was the sole cause of the collision in the following respects:

1. He failed to keep a proper look out;
2. He failed to avoid a collision whilst with the exercise of reasonable care he could and should have done so;
3. He failed to apply his brakes timeously or at all;
4. He drove in excessive speed under the circumstances;
5. He entered an intersection at an inopportune moment and whilst it was not safe to do so.

[68] On the other hand, it was argued on first defendant's behalf that the second defendant was the sole cause of the collision.

[69] The issue in this case is the issue of causation. In the circumstances of this matter, it is appropriate to ask whether the negligence of the defendants was a concurring cause of the collision, or if the collision was proximately caused by the negligence of one driver.

[70] At the outset I wish to state that the expert's evidence was clear and satisfactory. He gave reasons for his findings. I got the distinct impression that his opinion was independent, objective and predicated on a sound factual foundation and principles. I am also satisfied that the expert used a reliable system of analysis to assess the facts of this case. In essence, the expert made a good impression to this Court.

[71] Much was made by the second defendant's counsel about the fact that the expert witness did not consult with the second defendant, in the preparation of his expert report. Even though the expert did not consult with the second defendant, I am satisfied that his evidence reveals that he had made a thorough and objective assessment. For that matter, it was his testimony that the fact that he did not consult with the second defendant did not have an impact on his report. I am satisfied that the expert's conclusions were appropriate given their application to this case. I am thus satisfied that the method that was used by the expert to reach his conclusions is reliable.

[72] In my view the highlights of the expert's testimony were that:

1. he testified that it was impossible that the second defendant pulled off from a stationary position;
2. the second defendant's speed at the time of impact was 78 kilometres per hour;
3. that if the second defendant was approaching in the left lane and there were stationary vehicles ahead, the second defendant would have had some level of obstruction to his view;
4. that the point of impact or immediate area of impact was at the point of turning path of the Volvo and the through path of the Mercedes in the left lane.

[73] In the present case, the expert's testimony is not in alignment with the testimony of the second defendant. For instance, the expert testified that his assessment of

the evidence from the crash indicates that the second defendant did not accelerate from a stationary position upon entering the intersection. It is evident that the expert relied on objective factors to come to such conclusions. For that matter, even the second defendant testified and conceded that albeit his testimony indicates that he had switched lanes to the right when he entered the intersection, he admitted during cross examination that the undisputed position of the point of impact as indicated by the expert, does not reveal a movement to the right-hand as he testified. Instead, it reflects a straight path of travel. He also conceded that the point of impact does not support his version.

[74] This evidence became more cogent as the evidence of both Mr Chambers and the driver of the Volvo did not see the Mercedes Benz at the intersection until just before and after the crash.

[75] The second defendant testified that the traffic lights were red for him when he arrived at the intersection as a result he had to wait. One point emerging clearly from the evidence is that some of the evidence presented by the second defendant is in total contrast to the testimony of the expert. The expert's testimony casts doubt on the reliability of the testimony presented by the second defendant.

[76] There is another oddity in the second defendant's testimony. The second defendant should have observed the Volvo negotiating the right turn in front of him if he arrived at the traffic signals while they were still red. At the core of the

second defendant's evidence is the fact that he saw a minibus that was travelling through the mid-point of the intersection. Strangely, the minibus was exclusively observed only by him. What boggles one's mind is the fact that he did not see the Volvo in the intersection. Yet, according to him, he was stationary in front, in the lane furthest to the left. The fact that he did not see the Volvo in the intersection is quite telling.

- [77] I am not convinced that the second defendant's account about what transpired at the intersection is truthful and credible. It was hazy as to particular facts.
- [78] For instance, the second defendant's account as to how he entered the intersection is also uncertain. He testified that he accelerated and pressed the accelerator flat down into the intersection whilst indicating right and changing lanes. He admitted that in doing so he aggressively accelerated. He made a rapid and abrupt lane changed to the right and as a result he was immediately ahead of the motorcycle. This evidence is not supported by the testimony of Mr Chambers, the cyclists, the point of impact and the expert's testimony.
- [79] Mr. Chambers' testimony unequivocally demonstrates that he was cognisant of his immediate surroundings at the intersection. Clearly, Chambers should have observed the second defendant's aggressive change of lane, which would have resulted in him surpassing him. The second defendant's account is refuted by

the fact that, according to Chambers, the collision occurred behind him, necessitating that he returns to the impact site.

[80] Chamber's testimony was also specific in that he only entered the intersection after the Volvo passed him. Then there begs the obvious questions, if the second defendant had surpassed him? What was the reason for Chambers' decision to return to the accident site after hearing it, rather than proceeding to it.

[81] I have no reason why I should reject Chambers testimony, as his version was credible in all material aspects. The evidence of Chambers reveals that the second defendant's testimony that he drove past Chambers [the cyclist] is incorrect and false. The evidence further indicates that the picture that the second defendant is trying to paint was based on untruths and fabrication.

[82] In this case, it is extremely illuminating that the point of impact, the speed at which the expert says that the second defendant was driving, the version that the second defendant states that he was late for work, and the expert's testimony that the second defendant would have had some level of obstruction to his view if he was approaching the intersection in the left lane.

- [83] It is telling that the point of impact was at the turning path of the Volvo and the through path of the Mercedes Benz in the left lane. In the instant case, the evidence establishes that the second defendant at no time saw the Volvo prior to the crash. For that matter, even the second defendant's own version attests to this.
- [84] It is pertinent to note that the evidence in this case shows that the second defendant entered a busy intersection on the blind side of other vehicle that were stationary at the intersection, at a high speed [that was above the legal speed limit] ignoring the "red flags" [hesitant vehicles]. The second defendant paid no heed to the other vehicles that stopped at the intersection awaiting the Volvo's passage. Moreover, in view of the amount of traffic at the intersection and the fact that the intersection is known for accidents. In fact, it is common ground that this intersection is hazardous.
- [85] It is further worth noting that due to the nature of the intersection, the second defendant was obligated to exercise greater caution than he would have been at a typical intersection. It was thus incumbent upon the second defendant to exercise due and reasonable care and drive cautiously.
- [86] There is substantial evidence that clearly demonstrates the second defendant's egregious negligence, as evidenced by the litany of evidence presented before

this Court, particularly the evidence of the expert and Mr. Chambers. I am convinced that the second defendant was negligent more than slight when he sped through this intersection on that morning. What is more, any reasonable and prudent driver would have at least hesitated at the crossing to determine why the other vehicles that had stopped at the intersection had not immediately proceeded on the green light. Similarly, I find that the second defendant failed to keep a proper lookout as he entered the intersection. For that matter, Mr Smit, on behalf of the second defendant had, in part, conceded as much; when he stated that if this Court finds that the Volvo driver entered the intersection lawfully, then it is conceded that the second defendant would have had a duty to keep a proper look out, which duty he failed.

[87] I am willing to concede that the circumstances of this case inevitably lead to the conclusion that the second defendant perceived the green lights in his favour and made the decision to proceed through the intersection. In doing so, he neglected to defer to a vehicle that was ensnared in the intersection. Similarly, he neglected to demonstrate the utmost vigilance and caution in light of the current situation.

[88] At intersections where traffic is regulated by traffic lights, drivers of vehicles entering the intersection on a favourable traffic light signal, may not rely entirely thereon. But shall anticipate, yield, and allow the right of way to vehicles trapped

in the intersection to clear the intersection. See the case of *South British Insurance Co. Ltd v Barrable* 1952 (3) SA 239 N at 243B.

[89] The evidence in this matter leads to the inference that the second defendant concentrated on his observation of the traffic light and totally disregarded other rules of the road. In so doing, the second defendant ignored the fact that the colour of the green traffic light does not grant a motorist *carte blanche* to drive as he or she wishes through an intersection, and to ignore other rules of the road.

[90] This brings me to the liability of the first defendant [Volvo driver].

Is there contributory negligence on the part of the first defendant?

[91] As will already be apparent, I readily accept that for a party to be held liable based on negligence, negligence should be predicated on evidence and or objective facts. Hence, it is said that negligence does not occur in a vacuum. Clearly, there should be a causal link between the negligence and the damage.

[92] The version proffered by the Volvo driver is not in dispute. According to all the witnesses' testimony, the Volvo driver entered the intersection lawfully. The Volvo driver testified that he only saw the Mercedes Benz that was driven by the second defendant a split second before the crash.

[93] Under the circumstances of this case, any evidence or argument that suggests that the Volvo driver was negligent because he only noticed the Mercedes Benz late, rests upon an incorrect premise that he did not keep a proper look out. This conclusion is amply supported by the evidence of the Volvo driver.

[94] The evidence of the Volvo driver plainly reveals that he took all the necessary, reasonable practical precautions and preemptive actions, to ensure that he completes his right turn out of the intersection safely. Indeed, the evidence reveals that when the traffic light turned yellow for him, he slowed down and moved only when the oncoming traffic from the south direction yielded the right of way to him. When he proceeded to drive, he drove at a speed of 30-40 kilometres per hour and kept a look out for traffic. He also noticed that there were no vehicles in the far-left lane.

[95] As previously mentioned, the Volvo driver was trapped in an intersection. His decision to continue through the intersection does not amount to negligence. He could not stop in the middle of the intersection, otherwise, he would have blocked the traffic flow.

[96] I venture to repeat that, it was his [Volvo driver] testimony that when he decided to continue with his right turn there was no danger as the vehicles that were in front of him waited for him to clear the intersection.

[97] Additionally, in the context of this case, he had no obligation to anticipate that an approaching vehicle would not yield the right of way to him so that he could clear the intersection. More so, in light of the fact that the second defendant collided with him as he was to complete his turn. Surely, a motorist caught in mid-intersection due to changing traffic light signals, may assume that other motorist will yield to him to clear the intersection.

[98] However, the evidence in this matter further demonstrates that the Volvo driver did not proceed to complete his turn on the assumption that all the vehicles coming from south direction, would yield the right of way to him. He, however, proceeded on the knowledge that the vehicles from the south direction yielded their directional right of way to him and there were no vehicles in the far-left lane. Under such circumstances, he had a right of way *inter alia*, because the other vehicles permitted him to pass. In these circumstances, any reasonable person would have concluded the same.

[99] In my view, the evidence in this matter further establishes that the Volvo driver found himself in a situation of sudden emergency. This is so because the second defendant suddenly changed the conditions of the road, for the Volvo driver. The evidence also reveals that the Volvo driver acted as a reasonable person would have in light of the circumstances in which he found himself.

[100] I therefore reject the expert's testimony that the Volvo driver was also negligent. It is my firm view that the Volvo driver found himself in a perilous situation that was created by the second defendant and by the time he realised the dangerous situation he was in, he could not avoid the crash. In the circumstances of this case, it cannot be said that the Volvo driver failed to keep a proper look out. I thus cannot apportion negligence or fault on the part of the first defendant.

[101] A corollary to this finding is that the second defendant was solely responsible for the collision.

[102] This brings me to the issue of costs.

Costs

[103] This is a typical case that calls for an order of costs against unsuccessful defendant, to carry the costs of all the other parties that were involved in the litigation. From the onset, the plaintiff has sued the defendants in the alternative. Evidently, the plaintiff failed to prove liability against the first defendant. Be that as it may, the plaintiff in this action has lodged three alternative claims. The first one is against the first defendant, the second one is against the second defendant, and the third one is against both defendants jointly and severally.

[104] Further and significantly, in the circumstances of this case, I do not consider the plaintiff's decision to pursue litigation against both defendants as unreasonable or ill-thought in the context of this case.

[105] Moreover, the second defendant is the sole cause why the parties are before this Court. It was entirely unreasonable for the second defendant to file a notice of intention to defend his liability. Of course, I am acutely aware that this factor is not necessarily determinative, however, it is a pertinent and relevant consideration.

[106] It then simply does not make sense to mulct the plaintiff with the first defendant's legal costs. Particularly, if regard is also had to the plea of the second defendant, who was entirely blaming the Volvo driver for the collision. In the circumstances, the plaintiff cannot be faulted for joining the first defendant as a defendant.

[107] On the facts of the instant case, it would not make sense to allow the second defendant to escape the liability for the first defendant's costs on technical grounds. Upon these facts, and in the exercise of my discretion, I think, it would be reasonable, just and equitable to order that the second defendant should pay the costs of the first defendant as well as those of the plaintiff and the expert witness, Mr Proctor-Parker.

[108] In the result, I make the following order:

ORDER

1. The second defendant is 100 % liable for the plaintiff's proven or agreed damages.
2. The claim against the first defendant is dismissed.
3. The second defendant is to pay the costs of the plaintiff and the first defendant costs on scale C, such costs to include the costs of the expert witness Mr Proctor-Parker.


CN NZIWENI
JUDGE OF THE HIGH COURT

Appearances

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Instructed by: Visagie Vos Inc.

Ref: Mr Jaco Van Der Westerhuizen

Counsel for First Defendant: Adv. J Smit

Instructed by Pearce, Du Toit & Moodie Attorneys

Ref: Mr Kelvin Moodie

Counsel for Second Defendant: Adv. A Smit

Instructed by Bothas Attorneys

Ref: Mr A Botha