Case No 394/88
/wlb

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

CLYDE LESLIE HURN — Appellant
(Plaintiff *a quo*)

and

A A MUTUAL INSURANCE ASSOCIATION LIMITED (In Liquidation) — Respondent
(First Defendant *a quo*)

CORAM: BOTHA, SMALBERGER, MILNE, KUMLEBEN JJA *et* GOLDSTONE AJA

DATE OF HEARING: 5 March 1990

DATE OF DELIVERY: 22 March 1990

J U D G M E N T

MILNE JA/.....

MILNE JA:

On 10 November 1982 at about 9 a.m. a collision occurred between two vehicles at the intersection of Columbine Avenue and Royal Park Drive, Mondeor. One of the vehicles was an 8 ton truck ("the truck") driven by one Nthlabathe; the other was a Golf motor car ("the Golf") driven by one Lane. The appellant's son ("the minor") was being conveyed in the Golf at the time and allegedly suffered serious brain damage and a fracture of the femur in the collision. The truck was insured by the respondent in terms of the Compulsory Motor Vehicle Insurance Act, No-56 of 1972.

The appellant sued the respondent for damages alleged to have been suffered by the minor as a result of the negligent driving of the truck. The appellant also sued the insurer of the Golf in the alternative, but this action

was settled before the trial and nothing more need be said about it. The respondent gave a Third Party notice to Lane claiming a declaration that Lane was obliged to contribute to any award of damages made against the respondent in favour of the appellant.

At the commencement of the trial it was agreed that the trial court should first determine the issue of liability as a separate issue in terms of Rule 33(4) of the Rules of Court.

The learned trial judge (Flemming J) found himself unable to resolve the conflict in the evidence in the appellant's favour and granted absolution from the instance with costs. He also found that the respondent had failed to discharge the onus vis-à-vis Lane and ordered the respondent to pay Lane's costs. The trial court granted leave to the

appellant to appeal to the Full Court. No leave was sought by the respondent in respect of the order for costs awarded against it in favour of Lane. The Full Court dismissed the appeal, but in terms of s 20(4)(a) of the Supreme Court Act, No 59 of 1959, the appellant was granted special leave to appeal to this Court.

For reasons which will become apparent it is necessary to consider the evidence in some detail. The following matters were common cause: Shortly before the collision the truck was travelling in Columbine Avenue in an easterly direction and the Golf was travelling in the same road in a westerly direction. At the intersection of Columbine Avenue and Royal Park Drive, Lane intended to turn to his right into Royal Park Drive. The eastbound carriageway in Columbine Avenue was separated from the westbound carriageway by traffic islands. At the time of

the collision the islands to the west of the intersection did not continue right up to the intersection but ended some 19 m short of it. The islands to the east of the intersection did continue up to the intersection.

The version contended for by the appellant was that Lane commenced his right-hand turn and stopped the Golf in the centre of the intersection between the traffic islands, and that the truck hit the Golf on its left front when it was stationary in that position. The version contended for by the respondent was that the Golf suddenly swung across the path of travel of the truck at a stage when it was too late for Nthlabathe to take effective avoiding action. It is implicit in Nthlabathe's version that the Golf was not stationary when the truck collided with it and he, eventually, placed the point of impact approximately in the middle of the eastbound carriageway and said that the

truck struck the Golf in the middle of the left-hand side more or less in the vicinity of the passenger door.

I deal firstly with the evidence adduced for the appellant. The appellant's son (the minor) simply testified that he had no recollection whatsoever of the accident and this was not challenged. Lane described how he drove the Golf in a westerly direction along Columbine Avenue on the day in question. He said that at the intersection the robot was green for him "... so I proceeded through to wait for the oncoming traffic that had the right of way." He stopped on his side of the road between the two islands. He had no recollection whatsoever of what occurred thereafter until some three and a half weeks later when he recovered consciousness in hospital. When asked whether the front portion of the Golf protruded onto his incorrect side of the road he replied "Well, I can't really say that. I don't

think it was. It was between the two islands." He could not remember whether the oncoming traffic that caused him to stop was a car or a lorry. He did remember seeing a white truck but he could not remember whether it was parked or moving. The most important witness for the appellant was a Mrs Booysen ("Booysen"). She was the owner of a shop on the north-eastern corner of the intersection. She testified that she was standing at her front desk when her attention was caught by a sound which she described initially as "braking" but subsequently, and more graphically, as "tschoo". She looked up and saw the truck travelling in an easterly direction along Columbine Avenue (in the lane nearest the traffic island) passing a parked truck. She then heard a second sound similar to the first, and at that stage saw "... this little red car" (the Golf) stationary in between the islands in the intersection. The truck was going fast. It hit the left front side of the Golf "... and

then started munching it up the road" - with the Golf disappearing under the truck and being pushed right across the intersection and some distance up Columbine Avenue on the eastern side of the intersection and eventually ending up on the pavement.

W/O Rossouw was, at the date of the collision, the manager of a filling station on the south-eastern corner of the intersection. His evidence was to the effect that, at the time of the collision and for some time before, road-works were being constructed east of Mondeor. A number of heavily laden trucks carrying stone for the road-works would travel daily along Columbine Avenue and through this intersection past his filling station. There was a dip west of the intersection and a long hill for approximately 1 km east of the intersection. He said

"... dit was opmerklik gewees dat die voertuie, as hulle

afkom van wes na oos het hulle van die afdraande gebruik gemaak om spoed op te tel, sodat hulle teen hierdie hoogte uit kan ry.
En by die kruising self? --- U Edele, die kruising was male sonder telling deur my persoonlik gesien rooi, of geelkleurig, en daardie voertuie kon nie stop nie, hulle het regdeur gery."

As a result, he telephoned the traffic authorities and they established speed traps in the vicinity of the dip but the position never improved. I mention this evidence only because it has a bearing on the evidence of Nthlabathe at a certain stage during his cross-examination.

The main witness for the respondent was the driver of the truck, Nthlabathe. He testified that on the day in question he was driving the truck along Columbine Avenue in an easterly direction. The truck was loaded with stone. As he went through the dip west of the intersection he was travelling at about 50 km/h. As he approached the traffic lights in the intersection between Columbine Avenue and

Royal Park Drive they were in his favour and he changed from sixth gear to fifth gear and continued into the intersection. Immediately after he entered the intersection "... a red car came into the intersection and turned right in front of me." He estimated the distance between the truck and the car when it turned as about 2,5 m. He swerved and applied his brakes but it was too late to avoid a collision. The witness, Koen, who was also called by the respondent, does not really take the case any further.

The crucial question to be decided was whether the Golf was stationary between the traffic islands at the time of the collision or whether it swung across the path of travel of the truck and was struck by it in the middle of the eastbound carriageway. The evidence of Booysen and Nthlabathe is conflicting and mutually destructive. The learned trial judge came to the conclusion that both Booysen

and Nthlabathe were honest witnesses who tried to convey what they had seen. He said "I think that they both spoke the truth" by which he plainly meant that they both attempted to speak the truth as they saw it. He then went on to say, however, that "they both had their limitations, more so in the case of Nthlabathe who had more noticeable and glaring non-satisfactory aspects."

It is, of course, trite that the trial court is steeped in the atmosphere of the trial and has the advantage of seeing and hearing the witnesses. It is, accordingly, rare for an Appeal Court to disturb the trial court's findings of fact based on the credibility of witnesses. I am, however, driven to the conclusion that the evaluation by the learned trial judge of the witnesses is seriously flawed. He found that Booysen was

"in a good position to distinguish a moving vehicle from a

stationary one - that is, of course, if she looked for long enough and not really at the last moment."

The accident, as I have already mentioned, took place at nine o'clock in the morning and, as mentioned by the trial judge, it was not suggested that her vision was obstructed in any way. He said, however,

"With such a fleeting moment of observation I cannot exclude fully the possibility of mistake, that she missed some movement of the red car and that although she believed that the car was stationary that was not in fact the case. As far as the place where the car was, again, she looked at an awkward angle to assess position to the east and from some yards away and she did not even purport to be categorical about the exact position of the vehicle."

This reasoning is open to criticism in a number of respects. The test was not whether the court could "exclude fully the possibility of mistake". This is a misdirection. Throughout her evidence she was adamant that she saw the truck and the Golf before and at the moment of collision and that the Golf was stationary in between the islands at the moment of collision. The question which the court had to

determine was whether there was sufficient reason not to accept her emphatic and insistent assertion that she did not make a mistake despite the fact that she had only a very short time in which to observe the vehicles. This could only be determined by weighing up her evidence against Nthlabathe's and comparing their respective reliability with due regard to the probabilities.

There is, in my view, no reasonable possibility of Booysen being mistaken. Even if a car is moving very slowly and one sees it for a split second then, in the ordinary course of events, one is perfectly well able to judge on a clear day at nine o'clock in the morning whether it is moving or stationary. This is all the more so when it is common cause that she was in a good position to distinguish a moving vehicle from a stationary one and when her attention had been drawn to the truck by the noise which she

described and, on her version, she was looking at the truck and the Golf before the collision. There is simply no evidential basis for the suggestion that she "looked at an awkward angle". As already mentioned, there are passages in the judgment to the contrary. Two further but rather tentative points of criticism of Booysen's evidence were raised by the learned trial judge. The first is expressed as follows

"The first application of brakes is perhaps one of the unsatisfactory features of Mrs Booysen's evidence in the sense that it sounds improbable that there would have been a braking and she is unable to explain what she had really heard in such a way that the court can think that she really heard a braking."

There is no substance in this criticism. Booysen heard a sound which she thought came from the truck and which she first described as "braking". She then said that the sound was a sound which is reflected on the record as "tschoo". This may well have been the sharp expulsion of air from the

air-pressure tank which is commonly used in the braking systems of heavy vehicles such as buses and trucks. There is no evidence on the point except that she said that "I hear it (this sound) all the time now when the trucks come down the street." In any event, her version was that the truck was going fast and it had to take a turn to the left as it approached the intersection. There is, therefore, no inherent improbability in what she says. The second point of criticism is the following:

"If her observation of the Golf was of any duration of time one would have expected her to see this truck. For a reason which is not quite clearly known she cannot really say why she did not see it earlier."

I do not understand this criticism. She said that she saw the truck when her attention was drawn to it by the noise already mentioned and that thereafter when it again made a similar noise she saw the Golf. There does not appear to be any reason why she should have seen the truck earlier than

she did. It then seems to be suggested (by implication) that there is an inconsistency between her evidence that the Golf was on its correct side of the road and the fact that "she does not anywhere purport to say that the truck was on its wrong side of the road." On her evidence the collision occurred between the islands. If this constitutes a collision on the truck's wrong side of the road then she did say that the truck was on its wrong side of the road. If, however, a collision between the islands is not on the truck's wrong side of the road there is no inconsistency.

One final matter which the trial court apparently took into account in weighing up the respective versions, was the fact that Nthlabathe said that the Golf was struck on the passenger door and that this evidence was "not challenged". Here again the learned trial judge has misdirected himself. There was no need to challenge this

evidence of Nthlabathe since Booysen had said quite plainly in her evidence that the Golf was struck on its left front.

There are, however, some improbabilities in Booysen's version. This was the main basis upon which the Full Court dismissed the appeal. I shall deal with this aspect after consideration of Nthlabathe as a witness.

The record reveals that he flatly contradicted himself on a vital aspect of the case. It also reveals that he was an evasive and truculent witness. The contradiction relates to when he first saw the Golf. His evidence in chief suggested that he first saw it when it turned in front of him. This was confirmed in cross-examination when he said

"When I entered the intersection I did not know where this red car came from. I only saw it at the time when it turned right in front of me."

He had a clear view of the intersection and of Columbine Avenue as he approached and there was nothing travelling ahead of him, so he said. There is, therefore, no reason why he should not have seen the Golf as it approached the intersection. In fact, at a later stage in cross-examination, he said quite clearly that he had seen it before it turned.

"Right, you then approached the intersection? --- Yes.
And you never saw the approaching red car at that stage? --- The witness (the interpreter is here speaking and referring to Nthlabathe) can't say how this vehicle - that car came from the front, it just came and turned.
That you already indicated to his Lordship, but before it made its turn didn't you see it approach? --- Well, I did see it but I thought it was going to drive past."

In the next breath, however, he reverts to his original version.

"So did you see it before it made a turn? --- It just came into the intersection - at the time when I saw it, it came into the intersection and turned right in front of me, that is when I swerved to the left.
Where was that car when you first saw it? --- When I first

saw it was at the time when it turned right in front of me. It was at this distance turning in front of me.
When you first saw it was it travelling straight, that is east/west, or was it already negotiating a turn? --- It was negotiating a turn.
So it was already in the intersection? --- Yes. And at the time they collided.
You didn't see it at any time before it was in the process of making a turn? --- I did not."

The trial court deals with this contradiction as follows:

"I think that his one answer that he referred to seeing it, is to be understood that he had some awareness of the vehicle but did not make a pertinent observation."

I do not really understand what the learned judge was trying to convey in this passage. Making due allowance for the fact that Nthlabathe was giving evidence through an interpreter, this is a glaring and important contradiction. His excuses, furthermore, for not having seen the Golf before it was in the process of turning in front of him are lame in the extreme. One is left with the clear impression

that he did not see the Golf at all before the collision because he was not keeping a proper look-out.

It is clear, furthermore, that he was deliberately obstructive when he was questioned about the way in which trucks were habitually driven in the vicinity of the intersection (against the background of Rossouw's evidence that trucks used to gather speed going down the dip and build up momentum in order to travel at a good speed up the long hill and that they frequently went through a red light or yellow light at the intersection because they could not stop). When cross-examined about how these trucks used to go through the dip and through the intersection he quite plainly evaded answering the question because he thought that he might get himself into difficulties and he attempted to avoid giving any kind of answer to the questions. He said that he had been driving up and down Columbine Avenue

for three years before this accident, but it was only in answer to repeated questions by the trial judge that he was even prepared to admit that he had seen other trucks driving on that road. When he was cross-examined about the speed that he was travelling at, it is quite apparent that he was not prepared to make any concessions, even if they were the truth, which he thought could conceivably reflect upon his own evidence or that might weigh unfavourably against him or the respondent's case. Having said in his evidence in chief that he was travelling at about 50 km/h in the dip he said when asked about the maximum speed of the truck -

"On the meter is written 100 but it did not reach that speed. On a level road it would go up to about 25".

He was not even prepared to say that the truck could reach 60 km/h going downhill and heavily loaded and when challenged on that said that would be exceeding the speed limit. When it was put to him that travelling at 60 km/h

would not be exceeding the speed limit he reverted to saying that the truck could not reach that speed. He eventually was driven to saying

"... and that law says we are not supposed to drive above 50 - between 50 and 60."

The trial court described this evidence of Nthlabathe as

"... avoidance rather than evasion."

He said

"It is reluctance to go into the topic rather than being untruthful on those topics on which he did give answers."

The point is he was reluctant to give a <u>truthful</u> answer to the questions because he thought it might land him in difficulty. Not only is this an indication that the witness was not frank and open, the fact of the matter is that in giving the answers that he did he was being deliberately untruthful.

It is a further criticism of Nthlabathe that his

version as to the particular part of the Golf that was struck by the truck was not put to any of the appellant's witnesses, nor was his version as to where in the road the collision occurred. To sum up thus far, Booysen was a wholly satisfactory witness and Nthlabathe was an untruthful witness.

I deal now with the probabilities. The main criticism of Booysen's version is that in order to strike the Golf the truck would have had to deviate to its right. If of course the Golf was protruding slightly between the two traffic islands into the truck's right-hand lane the truck would not have had to deviate at all to strike it. Taking into account, however, that this is not the version contended for by the appellant, one has Booysen's unequivocal evidence that the truck was going fast. When one adds to that, that the truck was either taking or was

just coming out of a left-hand bend so that centrifugal force would tend to push it out towards its right, the improbability is diminished. This is all the more so if Nthlabathe was not keeping a proper look-out. When one examines Nthlabathe's version, however, it is clear that his account of the collision cannot possibly be right. He says that when the Golf was some 2,5 m in front of him it turned across his path. He then swung to his left and struck the Golf in the vicinity of the left-hand front door and approximately in the middle of the esstbound carriageway. He was, so he says, travelling in his right-hand lane, that is to say, closest to the traffic islands and if the Golf swung across his path when he was only 2,5 or even 5 m away it is simply not possible for his truck to have swerved so as to strike the Golf in the middle of the eastbound carriageway.

I have already referred to several material misdirections by the trial court. This leaves this Court free to reassess the evidence on the record. Having done so, I am satisfied that the appellant discharged the <u>onus</u> and the trial court should accordingly have found that the respondent was liable to the appellant for damages caused in the collision. There is not even a theoretical possibility of the appellant not proving any damages since it was agreed at the pre-trial conference that the appellant's past medical expenses in respect of the minor were R334.32.

The order of the court is as follows:

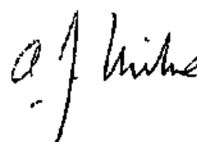
(a) The appeal succeeds with costs.

(b) The order of the Full Court is set aside and the following order is substituted therefor:

"(i) The appeal succeeds with costs.

(ii) Save in respect of the order for costs

made against the defendant in favour of the Third Party, the order of the trial court is set aside and there is substituted an order that the defendant is liable to the plaintiff in damages and that the defendant is to pay the plaintiff's costs of the hearing."



A J MILNE
Judge of Appeal

BOTHA JA]
SMALBERGER JA]
KUMLEBEN JA] **CONCUR**
GOLDSTONE AJA]