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**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GQEBERHA)**

NOT REPORTABLE
CASE NO. 1476/2021

In the matter between:

GAWIE GERT GREEFF

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

NONCEMBU J

[1] This is a claim for damages arising from a motor vehicle collision which occurred on 4 July 2019 at the intersection of John and Caledon streets in Kariega, Uitenhage. The plaintiff's vehicle collided with an Atlas security vehicle which was driven by a one Farrel du Toit (the insured driver) who was employed as a reaction officer at Atlas security.

[2] It is alleged in the particulars of claim, that the insured driver was the sole cause of the collision, as he was negligent in one or more of the following ways:

(a) He failed to keep a proper lookout;

(b) He drove the insured vehicle at an excessive speed in the circumstances;

(c) He failed to apply breaks of the insured vehicle timeously or at all;

(d) He failed to avoid a collision by the exercise of reasonable care and skill he could and should have done so;

(e) He entered an intersection:

(i) In a dangerous manner;

(ii) At an inopportune time;

(iii) Against a red traffic light.

[3] It is further alleged that as a result of the aforesaid collision, the plaintiff sustained serious bodily injuries.

[4] In its amended plea the defendant alleges that it is the plaintiff who was the sole cause of the collision as he was negligent by *inter alia*, entering an intersection against a red traffic light.

[5] The matter proceeded on the issue of liability only as per court order dated 17 October 2022. Two witnesses tendered evidence in the plaintiff's case, and three witnesses testified for the defendant.

Summery of evidence

[6] The plaintiff testified in support of his claim, and led the evidence of a person who witnessed the collision. The defendant led the evidence of three witnesses: the insured driver, his colleague at the time of the accident and a police officer.

[7] Briefly, the evidence of the plaintiff can be summarised as follows. On the day of the incident, he was on his way to Engen garage to buy pies as he was hungry. It was during the night, but he could not recall the exact time. He was driving along John Street, approaching a robot-controlled intersection where he was to turn right onto Caledon Street. John street, where he was travelling has two lanes and he was travelling on the right lane which allows him to turn to the right. He was travelling at a speed of between 55 and 60 km per hour.

[8] As he was approaching the intersection the traffic light was red on his side, but when he was about 30m away from it, it changed to green, thus allowing him to proceed. He had his right indicator on. He proceeded to enter the intersection after making the necessary observations. He could not see properly on his right-hand side because there was a big building at the corner which was obscuring his view. He looked on his left, and when he looked on his right again the insured vehicle was already at the intersection, and he could not avoid the collision.

[9] His vehicle was bumped on the right-hand side, and it spun around. He sustained bodily injuries which included his ribs, lung, chest bones, and a permanent concussion which resulted in him getting spells of dizziness from time to time.

[10] He confirmed that the photos in exhibit "A" depict the damage to the right side of his vehicle which was sustained during the collision, as well as the intersection where the accident happened.

[11] He had consumed one beer around four o'clock on the afternoon in question but he was sober at the time of the accident. He could not recall whether or not he was

working night shift on the day of the accident as he has been suffering from short term memory loss since the accident.

[12] Peter Isaac Sutch was the second witness for the plaintiff. He testified that he was working for Certus Security as a security guard, posted at Algoa Toyota, which is situated at the corner of Bishop and Caledon streets, at the time of the accident. He explained that on the other side of the intersection John Street becomes Bishop Street.

[13] On the night in question he was standing by the robot smoking, when he noticed two Atlas vehicles on Caledon Street, speeding towards the robot-controlled intersection. The traffic lights were red on their side. He also saw a white Nissan that was driving towards the intersection on John Street. The traffic lights were green on its side, and therefore it had a right of way. The Nissan entered the intersection, passed the first traffic light and the first lane of Caledon Street. When it was on the second lane, one of the Atlas vehicles jumped a red traffic light, rammed onto the body of the Nissan on the right hand side it in the middle, whilst the second vehicle passed it from behind. The doors on the right side was damaged.

[14] He explained further that Caledon Street has two lanes which split into three towards the intersection. According to him the Nissan was driving at a normal speed. Some time after the incident, he was approached by some Atlas employees who promised to pay him cash if he did not give a statement about what he saw regarding the accident.

[15] During cross-examination, he was questioned extensively about his initial evidence that he was standing by a tree on Bishop Street when he witnessed the accident. On this point, the argument was that Caledon Street is not visible from the aforementioned position. In clarifying this, he stated that he was standing next to the robot (at the corner of the intersection), and hence he was able to see both sides of the intersection when the accident happened. He denied that there was a police vehicle travelling together with the Atlas vehicles at the time of the accident. Two days later he

made a statement to the police regarding the accident. This was after he was asked by the plaintiff's wife to give a statement and after he had seen the plaintiff and the terrible condition he was in, as his initial stance was not to get involved in the matter.

[16] Photos depicting the scene of the accident as well as damages to the respective vehicles, were admitted as exhibits "A", "B" and "C" respectively.

[17] The first witness for the defendant was Farell Christian du Toit, the insured driver. His evidence was that at the time of the incident he was employed as an Armed Response Reaction Officer by Atlas Security. He was responding to a report of a breaking in that was in progress at business premises in Kruisrivier at the time of the accident. He was driving an Atlas vehicle which had a light beam that was flashing on top, and his emergency lights were also on.

[18] He was driving along Church Street, and he joined Caledon Street at a T-junction intersection. His colleagues, Gradwell Booysen and Gaylar Tosan were driving in another Atlas vehicle, also with emergency lights on and the light beam on top flashing.

[19] At the intersection of Church and Caledon Streets, they were joined by an unmarked police vehicle, which was also responding to the aforementioned break-in. The three vehicles proceeded along Caledon Street, with his colleagues' vehicle driving behind him and the police vehicle traveling alongside him on the left lane. He was driving at a speed of around 80km per hour, having informed his control room that he was going to exceed the speed limit, which, for that area was 60 km per hour. The police vehicle was therefore left behind, and it drove behind his colleagues' vehicle, who were about 10 meters behind him.

[20] When he was about 20 meters from the Caledon and John Streets intersection, he noticed that the traffic light was green on his side. He had not seen the traffic light before the said distance, but he could not give an explanation as to why. He reduced his speed when he was about 10 meters from the intersection, looked to his left and when

he looked to his right the Nissan vehicle (plaintiff's vehicle) was already there. Everything happened very fast, he did not see the Nissan coming and as such he was not able to avoid the collision. He collided onto its right side.

[21] He maintained that the traffic light was green on his side when the collision happened, and that it was red on the plaintiff's side. On his estimation, the plaintiff's vehicle was travelling at a speed of between 40km and 60 km per hour.

[22] The second witness for the defendant was Gradwell Booysen who was the driver of the second Atlas vehicle. His evidence was that he was employed by Atlas as a trainee on the day in question, and he was travelling with a partner who was permanently employed.

[23] They were responding to a call of a break-in, which was in progress at Kuilsrivier. There was a second Atlas vehicle travelling with them also responding to the said call. The two vehicles proceeded down Church Street and turned right at a robot-controlled intersection in Keller Road. They met a marked police vehicle that was going in the opposite direction at the corner of Burt Street, which made a U-turn and followed them. The three vehicles followed each other and turned right onto Caledon Street at the Church Street intersection. The police vehicle was driving behind him and he was driving behind the insured driver.

[24] According to this witness, he could see the traffic light at the John Street intersection when he joined Caledon Street from Church Street as the road was clear. He could not recall what speed he was travelling at, nor the speed limit on the said road, but reckoned that the insured driver was travelling faster than him.

[25] The traffic light at the intersection of Caledon and John Street was green on their side. When the insured driver was approaching the intersection, a vehicle came from John Street and jumped a red traffic light. The insured driver applied brakes, but it was

too late. His vehicle collided with the said vehicle. The police came and said they saw everything, and that this vehicle had jumped a red traffic light.

[26] The third and last witness for the defendant was Elroy George Bullegalo who holds the rank of a Sergeant in the South African Police Services (Sgt Bullegalo). His evidence was that he was coming from the police station with his colleague when they received information of a break-in that was in progress in Kuilsrivier. They proceeded to the said premisses. As they were driving down Caledon Street there was an Atlas vehicle which was driving next to them. The Atlas vehicle had its roof lights on; hence they knew that they were also responding to the same call. As this was not a serious call, they did not put the siren or blue lights on in their vehicle.

[27] On approaching the John Street intersection, the traffic light was red on their side, and it turned green when they were about 17- 20 meters away. The Atlas vehicle accelerated and passed them, immediately thereafter a collision happened. He could not say how the accident happened, nor state where the point of impact was on the road, except to say that it was on the second lane of Caledon Street. He was also not sure what the speed limit on that road was; whether it was 60 or 80 km per hour.

[28] That concluded the evidence at the trial.

The issue

[29] The triable issues for determination before this Court are: whether the insured driver was negligent and therefore the sole cause of the accident; and whether the plaintiff's negligence contributed to the cause of the collision.

The legal principles applicable

[30] The legal framework upon which the claim is predicated is set in the provisions of the Road Accident Fund Act (RAF Act).¹

[31] Section 17(1) of the RAF Act stipulates that the defendant is obliged to compensate a person (third party) for loss or damage suffered because of a bodily injury caused by or arising from the driving of a motor vehicle. The defendant's liability is conditional upon the injury having resulted from the negligence or wrongful act of the driver.² An evidentiary onus rests on the plaintiff to prove such negligence on a balance of probabilities.

[32] Contributory negligence on the part of the plaintiff can reduce such loss or damage in accordance with the provisions of section 1 of the Apportionment of Damages Act³, which states –

‘(1)(a) Where any person suffers damage which is caused partly by his own fault and partly by the fault of any other person, a claim in respect of that damage shall not be defeated by reason of the fault of the claimant but the damages recoverable in respect thereof shall be reduced by the court to such extent as the court may deem just and equitable having regard to the degree in which the claimant was at fault in relation to the damage.

(b) Damage shall for the purpose of paragraph (a) be regarded as having been caused by a person's fault notwithstanding the fact that another person had an opportunity of avoiding the consequences thereof and negligently failed to do so.’

[33] It is a trite principle of evidence that in civil matters the plaintiff bears the onus of proving his or her case on a balance of probabilities. In the book titled *Principles of Evidence*,⁴ this principle is formulated as follows:

¹ Act 56 of 1996.

² MP Olivier, ‘*Social Security: Core Elements*’: *LAWSA (LexisNexis, Vol 13(3), 2ed, July 2013)*, para 163.

³ Act 34 of 1956.

⁴ PJ Schwikkard (et al), *Principles of Evidence* (Jutastat e-publications, 5th Ed, 2023), at ch32-p 666.

'In civil cases the burden of proof is discharged as a matter of probability. The standard is often expressed as requiring proof on a "balance of probabilities" but that should not be understood as requiring that the probabilities should do no more than favour one party in preference to the other. What is required is that the probabilities in the case be such that, on a preponderance, it is probable that the particular state of affairs existed.'

[34] In *Miller v Minister of Pension (Miller)*⁵ Lord Denning expressed the civil standard of proof as follows:

'It must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say "we think it more probable than not", the burden is discharged, but if the probabilities are equal it is not.'

[35] The Court in the present matter is faced with two mutually destructive versions. Essentially, the case turns on whether the insured driver entered an intersection against a red traffic light; or as it is alleged by the defendant, the plaintiff is the one who entered an intersection against a red traffic light and therefore was the cause of the collision.

[36] Under these circumstances, the plaintiff can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the defendant's version is false or mistaken and falls to be rejected.⁶

⁵ [1947] 2 All E.R. 372 (25 July 1947) at 374. (*Miller* was referred to with approval by the Supreme Court of Appeal in *Ocean Accident and Guarantee Corporation Ltd v Koch* 1963 (4) SA 147 (A) p 157).

⁶ *National Employer's General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (E).

[37] The *locus classicus* authority in dealing with irreconcilable versions when evaluating factual disputes is *Stellenbosch Farmer's Winery Group Ltd v Martell et Cie and others*,⁷ where Nienaber JA stated the following:

'To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c), the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, 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.'

Evaluation

⁷ 2003 (1) SA 11 [SCA] at 14J – 15E.

[38] The crux of the matter is whether the plaintiff has established on a preponderance of probabilities, that his version is true and accurate, and therefore acceptable, and that the defendant's version is false or mistaken and falls to be rejected.

[39] In establishing this onus, the plaintiff relied on his own testimony; that of an eyewitness (who, for reasons that follow, I consider to be an independent witness for purposes of this matter); as well as documentary evidence in the form of photos depicting the accident scene and damages to the vehicles involved in the collision.

[40] I cannot level any criticism on the calibre and cogency of the plaintiff's performance as a witness in the matter. His evidence was corroborated in material aspects, by that of Mr Sutch, and supported by the documentary evidence presented to Court. He had mentioned that he suffers from short term memory loss which is sequelae to the accident, and that certain minor details which he could not recall were due to this predicament. This evidence was not disputed.

[41] He conceded that he had consumed some alcohol earlier on the day in question, but that this was a small amount (only a glass) and much earlier in the day (the common cause evidence was that the accident happened around 10 in the evening). Overall, his evidence was clear, straightforward and remained consistent and steadfast even under strenuous cross-examination. I found him to be a credible witness. I therefore have no reason not to accept his evidence.

[42] Ms Naidoo, for the defendant argued that Mr Sutch was not a reliable witness and therefore his evidence ought to be rejected. This was based on the fact that his initial evidence was that he was standing next to a tree (which on the undisputed evidence is much further and out of the view of Caledon Street) when he witnessed the accident, and later stated that he was standing next to the robot at the corner.

[43] This aspect, in my view, was resolved already under his examination in chief. Granted, Mr Sutch's powers of narration are a tad short of one who can be characterised as a good storyteller. At best, it was difficult to follow his testimony at times. This however, by no means qualify him as an unreliable witness.

[44] When the issue of where he was standing when he witnessed the accident came up, he was referred to photo 2 in exhibit "A", where he had to point out where he was standing. The dialogue in this regard went as follows:

Mr Schubart: At the time the collision occurred where were you situated if one has a look at this photograph? Can you tell us?

Mr Sutch: I was standing *here by the tree* and the *robot pole is there*. I was standing *there*. (emphasis intended) I was on my way to the workshop.

Mr Schubart: what were you doing?

Mr Sutch: I must go to clock.

Mr Schubart: And were you standing or walking?

Mr Sutch: no, I was standing there because I was smoking.

Mr Schubart: If we can also just get photograph 2, the route that we see in the foreground, is that John Steet?

Mr Sutch: that is positive, ja. Here where that white bakkie stand, John's Steet, yes.

Mr Schubart: and then the intersection itself is that the intersection of it is John Street on this side, I think the other side of the intersection it has another name. Is that right?

Mr Sutch: Bishop Street. Positive, ja.

Mr Schubart: And then the road that would go to the left and to the right from this intersection, which one is that?

Mr Sutch: It is Caledon Street.

Mr Schubart: Now this collision do you know what time this collision occurred?

Mr Sutch: I will be honest, I cannot remember.

Mr Schubart: It was night time, it was dark.

Mr Sutch: Yes, it was.

Mr Schubart: Now can you tell us what did you see that particular night with regard to the collision?

Mr Sutch: At that night *I was standing at the robot.* (emphasis intended) Before I see the white Nissan car coming up John straat, I was see two Atlas vehicles. They was racing from my left towards the location or something.'

[45] Clearly from the above, Mr Sutch was very precise when he stated that he was standing at the robot when he witnessed the accident (first stating that 'the robot is *there*, I was standing *there*', after pointing out the tree as '*here*'). The confusion regarding the tree can only be attributed to the fact that on the picture itself, which he was pointing to at the time, it appears to be right next to the robot. On further examination however, as demonstrated above, this issue was clarified. The argument that his evidence is unreliable therefore, is unsustainable.

[46] The same, however, cannot be said of the defence witnesses. The material contradictions in their evidence make one wonder if they were at all at the same accident scene. Firstly, there are conflicting versions on where the Atlas vehicles met up with the police vehicle before the accident. According to the insured driver, he met up with the police from the intersection of Church and Caledon streets, and from there the police drove on the left lane next to him, as he was driving on the right lane, and they only lagged behind as he was approaching the John Street intersection. Contrary to this evidence, on Mr Booyesen's version the police vehicle was driving behind his as he was following the insured driver.

[47] According to Mr Booyesen (the second Atlas driver), the police vehicle was driving in the opposite direction when they first met it, and it made a U-turn and followed them. This, however, was explicitly denied by Sgt Bullegalo (the police officer who was the driver of this vehicle).

[48] Secondly, Sgt Bullegalo, throughout his testimony, only referred to one Atlas vehicle, notwithstanding that according to all the other witnesses there were two Atlas vehicles involved in the matter.

[49] I also find it quite telling that Sgt Bullegalo's memory regarding the entire incident was very vague, except for the aspect that the robot was green for the Atlas vehicle. In this regard, his evidence was that the robot turned green when they were about 17-20 meters away from it, and that the Atlas vehicle just passed him immediately before the collision happened. This is in clear contradiction to the evidence of both the Atlas drivers. He could not recall whether he was driving a marked vehicle or not, at what speed he was driving at or the speed limit on that road, despite the fact that he had been working as a policeman in that area for a very long time.

[50] Thirdly, and perhaps most significantly in this regard, is the defendant's version with regards to the traffic light at the John Street intersection. The insured driver's evidence was that he only saw that the traffic light was green when he was 20 meters away from it and could give no explanation of why he did not see it earlier. He applied breaks to see if it would not change and to ensure that it was clear for him to go through.

[51] On the other hand, Mr Booyesen who was driving behind him told the court that the road was clear and that he could see the traffic light from the time he joined Caledon Street from Church Street. Further, according to him the insured driver only applied his brakes when he was trying to avoid colliding with the plaintiff's vehicle, and not before. This begs the question of why the insured driver, who was driving in front with no obstruction before him, did not see the traffic light sooner; and why the two have conflicting versions on when he applied his brakes. The inescapable conclusion that one can come to is that the insured driver was not maintaining a proper look-out.

[52] To further compound this situation, according to Sgt Bullegalo, the traffic light on their side was red the whole time, and only turned green in favour of the insured driver when he was about 20 meters away from it.

[53] Considered cumulatively, these challenges, if anything, render the plaintiff's version more probable than not. Overall, the defendant's version is so fraught with contradictions and inconsistencies that it makes one wonder if these witnesses were all at the same scene, thus solidifying Mr Such's testimony that the police were not at the scene in question. I am fortified in my view that the defence witnesses did not present an accurate account of the events of the day in question, and that their evidence was deliberately crafted to mislead the Court. In the circumstances, I find that the defendant's version is false and falls to be rejected.

[54] The plaintiff gave a clear account of how the collision occurred, which was supported by the evidence of an independent witness. The common cause evidence was that the collision occurred on the second lane of Caledon Street, indicating that the plaintiff had already passed the first lane, and as such should have been clearly visible to any vehicle approaching from Caledon Street. The damage to the two vehicles also indicates that the Atlas vehicle rammed into the plaintiff's vehicle, which was already in the middle of the intersection. Damages to the plaintiff's vehicle are on the right in the middle, while those of the Atlas vehicle are in front.

[55] Further, common cause evidence is that the plaintiff's vehicle was travelling at a normal speed, thus indicating that it did not suddenly jump into the intersection. Therefore, a reasonable driver maintaining a proper look-out should have been able to take evasive measures to avoid colliding into it. This, the insured driver failed to do.

[56] Therefore, I am satisfied that the plaintiff has established, on a preponderance of probabilities that his version is true and accurate. I have no reason not to accept it as such.

Whether contributory negligence is applicable

[57] The only question that remains, is whether the plaintiff 's negligence contributed to the cause of the accident, thus warranting a reduction on the damages he suffered as a result thereof, and if so, the extent of such reduction.

[58] It is the duty of every driver to keep a proper lookout at all material times, *i.e.* a continuous scanning of the road ahead, from side to side for obstruction or potential obstruction.⁸ A driver of an emergency vehicle, in this case the insured driver, is not entitled to proceed against a red traffic light unless and until he/she has satisfied him/herself that it is safe.⁹ This, the insured driver failed to do.

[59] Furthermore, the undisputed evidence of the plaintiff was that his view on the right was partially obstructed by the big building at the corner, making it difficult for him to see vehicles coming from Caledon Street at a distance.

[60] The evidence of the Atlas drivers was that they did not have any sirens on, other than the beam on top and the emergency lights. There was therefore nothing to alert the plaintiff that there were emergency vehicles approaching the intersection which would warrant that he gives them a right of way. Even the police officer who allege to have been at the scene stated that they did not have their sirens on in their vehicle as this was not a serious call, whatever that means.

[61] The evidence before me is that the plaintiff was driving at a normal speed as he was about to turn at the intersection. Whether or not his indicators were on does not take the matter any further in my view, because on the objective evidence, he had already entered the intersection, having already passed the first lane, when the collision occurred. Whether he was turning right or not, does not take away the duty of the insured driver of ensuring that it was safe for him to enter the intersection.

⁸ See *Jenneker v Marine and Trade* 1978 (2) SA 145 (SE) at 149H.

⁹ *R v Marais* 1946 CPD 261.

[62] The issue of intoxication does not arise before me. The only evidence before me pertaining to alcohol consumption is that of the plaintiff, which evidence remains undisputed. I therefore cannot find that the glass of alcohol he took hours before the accident may have affected his mental faculties and thus impacted his driving capabilities. There is, in any even no evidence to support such a proposition before me.

[63] I therefore cannot find that the plaintiff contributed to the cause of the collision. In my view the insured driver was the negligent party, having entered an intersection against a red traffic light without first ensuring that it was safe to do so. He was therefore the sole cause of the accident.

Order

[64] In the result, the following order is made:

- (a) The defendant is liable for 100% of such damages as plaintiff is able to prove, arising out of injuries he sustained in the collision he was involved in on 4 July 2019.**
- (b) The defendant shall pay plaintiff's costs of suit as taxed, to date in respect of the merits portion of the action. Such costs shall include:**
 - (i) Costs of photographs.**
 - (ii) Plaintiff's costs for attendance of a pre-trial inspection in loco; and**
 - (iii) Costs of Plaintiff's counsel including trial fees.**
- (c) Interest on the costs shall accrue at the legal rate of 7.75% per annum payable as from 14 days from the dated of taxation, until date of payment.**

(d) Payment of any amounts in terms of paragraphs (a), (b) and (c) shall be paid into the bank account of the plaintiff's attorneys, the details of which are as follows:

Johan Cronje Attorneys

Nedbank Uitenhage

Bank Code: 198765

Trust Cheque Account No.: 1[...]

V P NONCEMBU

JUDGE OF THE HIGH COURT

Appearances:

Counsel For the plaintiff:

Schubart SC

Instructed by:

Johan Cronje Attorneys

C/O Heine Ungerer Attorneys

Gqeberha

For the defendant:

Ms Naidoo

Instructed by:

Office of the State Attorney

Gqeberha

Dates of hearing:

22 February 2024; 20 and 22 March 2024

Date of judgment:

31 October 2024