

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 09/34369

(1)	REPORTABLE: YES / <del>NO</del>
(2)	OF INTEREST TO OTHER JUDGES: YES / <del>NO</del>
(3)	REVISED
8-10-2010	
DATE	SIGNATURE

In the matter between:

BIDDLECOMBE, JAMES DEVEREAUX

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

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J U D G M E N T

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MALULEKE, J:

INTRODUCTION

[1] This is a claim for damages for personal injuries sustained by plaintiff in a motor vehicle collision which occurred on Sunday 6 April 2008 at

approximately 10h00 at the intersection of Malibongwe Drive and River Road, Kya Sands, Randburg. At the time of the collision plaintiff was the driver of a Suzuki 750cc motorcycle with registration numbers VN 001 GP which collided with a MAN heavy load chassis truck registration numbers MZZ 783 GP which was then and there driven by one T P Motaung (the insured driver).

[2] The issue of quantum of damages has been settled and agreed to by the parties in the amount of R14 100 000,00 (fourteen million one hundred thousand rand) for all heads of damages excluding the claim for future medical costs for which a section 17 undertaking would be provided in terms of the Road Accident Fund Act. The agreed quantum including the undertaking are subject to the degree to which liability is established. Accordingly by agreement I have been asked to determine only the issue of liability.

### COMMON CAUSE FACTS

[3] The following matters are undisputed and are therefore common cause:

- 3.1 The collision occurred in the traffic lights controlled intersection of Malibongwe Drive and River Road in Kya Sands on Sunday 6 April 2008 at approximately 10h00. At the time the sun was shining, the tarmac road was dry and visibility was good.

- 3.2 Malibongwe Drive has an island in the centre and two lanes of travel on either side, the one for traffic travelling North to South and the other for traffic travelling from South to North. There is a short third lane for traffic turning right into River Road.
- 3.3 The traffic lights were functioning properly in proper sequence. There is a flashing arrow for vehicles turning right from Malibongwe Drive into River Road. When the arrow is flashing green for 14 seconds for traffic travelling South to North in Malibongwe Drive and turning right (eastwards) into River Road, the traffic lights are red for traffic travelling North to South on Malibongwe Drive. Thereafter the arrow turns to amber for 4 seconds and then goes off completely. At this point the main robot turns green for 24 seconds for traffic travelling North to South on Malibongwe Drive. The main traffic light for traffic travelling South to North on Malibongwe Drive remains green when the arrow is flashing and for the time that the North-South traffic lights are green. When the arrow is flashing green traffic turning right from Malibongwe Drive has right of way and when the arrow goes off traffic turning right must yield the right of way to traffic travelling North to South on Malibongwe Drive.
- 3.4 Plaintiff on the motorcycle was travelling North to South in Malibongwe Drive. The MAN truck (the insured vehicle) was travelling South to North on Malibongwe Drive and executed a

right-hand turn to proceed eastwards on River Road. The motorcycle collided into the first of the left double rear wheels of the MAN truck in a T-bone fashion. The skid brake mark caused by the rear wheel of the motorcycle before the collision measured 34.1 meters.

- 3.5 The insured driver had an unimpeded view of approximately 312 meters northwards on Malibongwe Drive and plaintiff also had an unimpeded view of the intersection and beyond on Malibongwe Drive southwards for a similar distance. The speed limit is 80 kilometers per hour in the area. The point of impact is on the fast lane for North to South traffic in Malibongwe Drive inside the intersection. (See photograph 17 in Bundle E.)

### THE DISPUTE

[4] Plaintiff contends that the collision was caused entirely by the negligent driving of the insured driver in that he executed a turn to the right across plaintiff's course of travel at a time when plaintiff had the right of way to travel straight through the intersection since the traffic lights were green for him. It is contended on behalf of the defendant that the collision was caused either entirely or partially by the negligent driving of the plaintiff who entered the intersection when the traffic light was red for him and when the insured vehicle was already in the intersection having moved from a stationary position and negotiated or executed a right-hand turn to the East into River

Road after the traffic lights had turned red for traffic in Malibongwe Drive. The crux of the dispute is therefore whether the traffic lights were green for the plaintiff's motorcycle or whether the traffic lights had already turned red for traffic travelling along Malibongwe Drive when the collision occurred.

### EVIDENCE

[5] Plaintiff and an "*independent witness*", Ms M van Eeden together with an accident reconstruction expert, Mr B Grobbelaar, testified for the plaintiff. Mr T P Motaung, the insured driver, and an accident reconstruction expert, Mr J P Verster, testified for the defendant. Van Eeden testifies that she was a rear seat passenger in a Renault Scenic motor vehicle which was travelling from North to South on Malibongwe Drive some 2 to 3 car lengths behind plaintiff who was also travelling in the same direction. They were travelling at approximately 60 km per hour (under cross-examination she testified that they were in fact travelling at approximately 30 to 40 km per hour) as the traffic lights at Malibongwe Drive and River Road were red for them. When they were approximately 200 meters from the intersection the traffic lights turned green for them and their motor vehicle as well as the other vehicles next to them accelerated and increased speed to approximately 60 to 70 km per hour. Plaintiff who was approximately 150 meters from the traffic lights when they turned green accelerated quicker than the motorcars but she is unable to say to what speed he accelerated: he was quicker than the cars behind him, but he was not "*too fast*". She did not see or observe any vehicles between the plaintiff and the intersection. Shortly after the light had turned green and

when the plaintiff was close to the intersection she then noticed the insured vehicle moving across their path of travel right in front of the plaintiff's motorcycle. The motorcycle crashed onto the left side of the truck and burst into flames. The traffic lights were green for the plaintiff when the collision occurred. Immediately before the collision she noticed that plaintiff applied sharp brakes to avoid the collision. Under cross-examination she was adamant that the traffic lights were not red for plaintiff when the collision occurred; she did not observe the truck stop in the centre of the intersection to allow traffic travelling North to South on Malibongwe Drive right of way before executing a right turn.

[6] Grobbelaar and Verster testified that when the flashing arrow is green for 14 seconds it then goes to amber for 4 seconds for traffic turning right from Malibongwe Drive into River Road and in which event this traffic has right of way. At that point the robots are green for traffic travelling South to North on Malibongwe Drive and red for traffic travelling North to South on Malibongwe Drive. The experts are agreed that having regard to the skid marks of 34,1 meters caused by the rear wheel of the motorcycle, the motorcycle was travelling faster than 58 km per hour prior to the beginning of the skid mark and that having regard to and on the basis of the length of the skid marks caused by the rear wheel of the motorcycle the plaintiff could not have avoided the collision if he noticed the insured vehicle turning right only when he was 50 meters away and further that the collision probably occurred as a result of the truck executing a right turn across the lane of travel of plaintiff when plaintiff was approximately 50 meters from the intersection. The two

experts are further agreed that they cannot determine the colour of the traffic lights at the time of the collision "*from an expert's point of view*"; they also cannot determine the exact speed at which the motor cycle was travelling when approaching the intersection and also when the motorcycle collided with the truck. Grobbelaar did not observe any damage to the fork of the motorcycle and on this basis it was his opinion that the motorcycle was probably travelling at 71 km per hour to 99 km per hour and more likely 80 kph before applying emergency brakes.

[7] Under cross-examination he conceded that if the fork was broken as observed by Verster, the motorcycle would have been travelling at a speed above 80 km per hour when plaintiff applied emergency brakes of the rear wheel. Grobbelaar conceded further in cross-examination that if plaintiff was travelling at 100 km per hour he would have been able to bring the motorcycle to a stop within 140 meters if he only applied rear wheel brakes and this allowing for reaction distance of 42 meters. Verster observed that the fork was broken at the bottom near the front wheel as a result of the impact and on this basis it was his opinion that the motorcycle was probably travelling a lot faster than 80 km per hour before plaintiff applied emergency brakes. On this basis he estimates that the motorcycle was probably travelling in excess of 99 km per hour. See photographs E21 and E22 on which both experts based their observations of the damage to the front of the motorcycle and the estimation of the speed at which the motorcycle was travelling prior to applying emergency rear wheel brakes.

[8] Plaintiff's testimony is in agreement with that of Van Eeden in most respects except in the following three important and material respects:

- 8.1 Van Eeden saw the traffic lights facing them change from red to green when plaintiff was approximately 200 meters from the intersection. Plaintiff only saw the traffic light being green and did not see it change from red to green and he estimates that he could have been 150 meters from the intersection when he saw the green robots.
- 8.2 Van Eeden saw plaintiff accelerate quicker than the cars behind him when the traffic lights turned green whereas plaintiff maintains that he was travelling at a constant speed of 60 to 70 km per hour until he applied sharp emergency brakes of the rear wheel at the beginning of the skid marks when he noticed the insured vehicle moving across his lane of travel when he was about 50 meters from the intersection. The speed of the bike varies a bit to about 5kph up or down as the bike moves.
- 8.3 Van Eeden for the first time saw the truck enter the intersection across plaintiff's lane of travel when plaintiff was approximately 150 to 200 meters from the intersection. Plaintiff says at 150 meters from the intersection he observed the green robots and the insured truck come to a standstill in the middle of the intersection. This is consistent with the insured drivers version



that he stopped in the middle of the intersection to give right of way to three motor vehicles which were travelling from North to South on Malibongwe Drive and after the cars had passed he set the truck in motion and at that stage plaintiff was approximately the length of a sports field (100 meters) from the intersection. It is a critical contradiction that Van Eeden saw the truck enter the intersection across plaintiff's lane of travel without stopping when plaintiff was approximately 150 to 200 meters away from the intersection whereas plaintiff's testimony is that when he was 150 meters from intersection he observed the robots being green and saw the insured truck stop at the intersection and when he was about 50 meters from the intersection he suddenly saw the truck move and turn across his path of travel and actually that when he was 150 meters the trucked stopped as if to allow him right of way and as he got closer the truck suddenly drove across his lane.

[9] The insured driver testified that he entered the intersection when the traffic lights were green for him and the flashing arrow was off. As he intended to turn right into River Road he stopped in the middle of the intersection to allow three motor vehicles which were travelling North to South on Malibongwe Drive right of way. When the last of the three vehicles entered the intersection the traffic lights facing him were turning to red for traffic travelling on Malibongwe Drive. He noticed plaintiff was approximately the length of a soccer field (100 meters) from the intersection and appeared to be

reducing speed. As the traffic lights were turning to red and the motorcycle was the length of a soccer field away from the intersection and in fact appeared to be reducing speed, he set the insured truck in motion and negotiated the right-hand turn towards River Road across the path of travel of traffic travelling North to South on Malibongwe Drive. He kept the motorcycle under observation and when the front of insured vehicle was just about to reach the beginning of River Road the rear part of the truck was across the plaintiff's lane of travel. The truck is a 12 ton and is 10 meters long and was carrying a heavy load of tiles. The truck moved very slowly from the stationary position and he had accordingly moved only a few meters across when the motorcycle crashed into the two left rear wheels of the truck and burst into flames. He estimates that the rear wheels of the truck are approximately 3,5 meters from the chevron at the back of the truck. He did not notice or observe any motor vehicles following the motorcycle. He did not see or hear the motorcycle make skid marks when plaintiff applied emergency brakes. Under cross-examination he remained consistent and adamant that the motorcycle was about 100 meters away from the intersection and appeared to be reducing speed and the robot had turned red for traffic travelling along Malibongwe Drive when he set the truck in motion. In his evidence-in-chief insured driver had testified that the flashing arrow changes from green to red before going off. Under cross-examination he corrected himself and stated that the arrow in fact changes from green to amber before it goes off. He consistently maintained that when he set the truck in motion, plaintiff was about 100 meters from the intersection and appeared to be reducing speed and the robots had turned red for traffic in Malibongwe Drive. He did not

observe cars travelling behind the motorcycle but he saw vehicles stop at the scene soon after the collision. These vehicles were travelling in the same direction as the motor cycle.

[10] It is trite that the plaintiff bears the onus to establish on a balance of probabilities that the collision was caused solely by the negligent driving of the insured driver. The version of the plaintiff and his eye witness is that the collision was caused solely by the insured driver executing a right turn across plaintiff's lane of travel at a time when the robot was green for plaintiff to have a right of way. The version of the insured driver is that the collision was caused by the negligent driving of the plaintiff who drove into the intersection against a red traffic light. These are accordingly two mutually destructive versions on the basis of the direct eye witness evidence. In such a case it is convenient first to provisionally determine whether based on the eye witness evidence plaintiff does discharge the onus upon him on a balance of probabilities in accordance with the approach and principle as stated in *Abdo No v Senator Ins Co Ltd* 1983 (4) SA 721 (ECD) at 725 D-F. The expert evidence will thereafter be considered and taken into account.

[11] The plaintiff's version is somewhat unconvincing due to the material contradictions and inconsistencies with Van Eeden's evidence on the following crucial issues. Plaintiff did not observe as Van Eeden did that the traffic lights changed from red to green and the truck turn across his lane of travel when he was approximately 150 to 200 meters away from the intersection and the plaintiff's denial that he increased speed to above 70 km

per hour when the traffic light changed to green or when he was about 150 meters from the intersection. It is also Van Eeden's evidence that she did not see the truck stop in the centre of the intersection before it drove across plaintiff's path or lane of travel. Further the version of the plaintiff that the truck stopped for the plaintiff when he was 150-200 meters away and when plaintiff was 50 meters from the intersection the insured driver suddenly drove into the intersection across plaintiff's lane seems improbable. On this version the insured driver stopped and waited for plaintiff to get nearer and then deliberately moved to block his way when the light was still green. On the other hand the only criticism raised by Mr Wessels against the insured driver's evidence is that he contradicted himself on whether the green arrow flashes and changes to red before it goes off which he corrected in cross-examination. Even Verster initially said the arrow changes from green flash to red before it goes off. Verster accepted under cross examination in fact that the arrow changes from green to amber. It is evident that plaintiff erroneously like Verster, mistook amber for red in his evidence in chief. Further in my view the flashing green or amber arrow played no role in the collision. Plaintiff is also criticised that he did not observe Van Eeden's car following the motorcycle and that he only saw Van Eeden and the other vehicles arrive at the scene of the collision after the collision had occurred. I similarly do not consider this to be a material weakness or contradiction in the evidence of the insured driver. It is common cause that Van Eeden's vehicle played no role or part in the collision and the failure of the plaintiff to observe the vehicles behind the plaintiff should not be regarded as a lack of veracity or a failure to keep a proper lookout on his part.

[12] I do not agree with the contention by Mr Wessels, for plaintiff, that plaintiff and Van Eeden did not materially contradict each other and that the insured driver's evidence has material contradictions. Whilst it is evident that Van Eeden is an "*independent witness*", the fact that she did not see or observe the truck stop in the middle of the intersection when the motorcycle was approximately 150 meters from the intersection is a crucial weakness in her evidence particularly since plaintiff agrees with the insured driver that the insured truck in fact did stop in the middle of the intersection when plaintiff was approximately 150 meters away from the intersection. I find merit in the argument by Mr Patel, for defendant that the testimony of Van Eeden should either be disbelieved or at the least be treated with caution for the following reasons:

- a) Her evidence that she saw the plaintiff accelerate quicker than the car she was in is contradicted by plaintiff who testifies that he travelled at a constant speed of 60-70 kph until he was about 50 meters from the intersection.
- b) She was reticent to estimate the speed plaintiff had accelerated to when she saw the insured truck turn across plaintiff's path of travel and
- c) She did not observe the insured truck stop in the middle of the intersection whereas both plaintiff and the insured driver are adamant that the insured truck did in fact stop at the intersection.

The reasonable inferences to be drawn from these facts are either she had less than optimum conditions and opportunity for reliable observation or she is a “sympathetic witness” who designs her evidence to favour the plaintiff.

[13] From Van Eeden’s testimony that the motorcycle was about 150 to 200 meters from the intersection when she observed the truck enter the motorcycle’s lane of travel without stopping considered together with the insured driver’s evidence that the motorcycle was about the length of a soccer field North of the intersection when he set the truck in motion and the agreed stopping distances testified to by the two reconstruction experts, it is evident that if plaintiff had kept a proper lookout he would have started applying emergency rear wheel brakes from at least 100 to 150 meters from the intersection, and he could accordingly have brought the motorcycle to a complete standstill before the impact even if he was travelling at above 80 km per hour and even allowing for a reaction distance. Further, plaintiff’s evidence that he maintained a constant speed of about 70 km per hour until he applied rear wheel emergency brakes when he was 50 to 34.1 meters from the intersection is by itself negligence. Therefore if plaintiff had kept a proper lookout he would have seen the insured truck move across his lane of travel when he was at least 100 to 150 meters away from the intersection even if the traffic lights were green for him.

[14] The rules on the duties of a motorist who approaches and enters an intersection with the green light in his favour are eloquently stated in *Santam Insurance Co Ltd v Gouws* 1985 (2) SA 629 (AD) at 634. On the basis of the

principles and rules as stated in this case, the insured driver, on his own version, considerably contributed to the cause of the collision. The provisional determination is therefore that the plaintiff fails to discharge the onus upon him on the balance of probabilities.

[15] It is now necessary to consider the evidence of the expert witnesses. Both the experts, Grobbelaar and Verster, it seems base their agreed conclusions and opinions mainly on the police statements of Van Eeden (Exhibit E27) and also on the documentation and photographs of the police together with the statement/affidavit of the plaintiff (Bundle E). The experts are agreed that on their common and agreed estimation of the motor cycle's speed and the stopping distances which are based on the aforesaid evidence, it is unlikely that the plaintiff would have been able to avoid the collision if he was travelling at a speed of 80 km per hour and observed the insured truck enter his lane of travel only when he was 50 meters from the intersection. But this notion is negated by the testimony of both Van Eeden and plaintiff on the basis of which even if the robots were green for plaintiff he could and ought to have observed the moving truck enter his lane of travel when he was 100 to 150 meters from the intersection. The reconstruction experts are agreed that travelling at 80 km per hour plaintiff should have been able to bring the motorcycle easily to a stop before the impact if he had observed the moving truck enter his path of travel when he was 100 to 150 meters away and applied the rear wheel emergency brakes immediately. The only reasonable inference to be drawn from the fact that plaintiff failed to observe the insured truck move into his lane of travel when he was 100 to 150 meters away and

that he as a result failed to regulate his speed as it was his duty to do, is that he did not keep a proper look out and this conduct contributed considerably to the cause of the collision. Under cross examination Verster conceded that if the robots changed to green when the motor cycle was 200 meters away it would take about 10 seconds for the motor cycle travelling at 70 kph to reach the intersection and that this would refute the version of the insured driver that the robot was red when the collision occurred as the robot remains green for 24 seconds. It is however important to note that both experts are agreed that the changes of the colours of the robots is a matter for eye witness evidence. In the circumstances it seems that there is sufficient acceptable eye witness evidence to determine how this collision occurred without the need to resort to the evidence of reconstruction experts. (*Abdo NO v Senator Supra*)

[16] For the aforesaid reasons I do not consider that the probabilities favour the version of the plaintiff and this view remains unchanged even after a consideration and taking into account the evidence and opinions of the experts. Accordingly the version of the plaintiff that he only observed the insured truck move across his lane of travel when he was 50 meters away can only lead to one compelling inference which is that he failed to keep a proper lookout. For these reasons plaintiff therefore fails to satisfy the test to establish on a balance of probabilities that the insured driver is entirely to blame for the collision. (See *NEG Insurance Co Ltd v Jagers* 1984 (4) SA 437 (ECD) at 440E-G). However "*in the final result a decision must be reached on the evidence as a whole*" (*Abdo NO v Senator (supra)* at 726). I consider that the version of the insured is credible and is not at variance with the expert



evidence. As already indicated on his own evidence the insured driver has also contributed to the cause of the collision.

[17] I agree, respectfully, with the principle as stated in the *dicta* from *Michael and Another v Linksfeld Park Clinic and Another* 2001 (3) SA 1188 (SCA) at 1201A-B where the Supreme Court of Appeal opined as follows in a medical negligence case:

*“A defendant can properly be held liable, despite the support of a body of professional opinion sanctioning the conduct in issue, if that body of opinion is not capable of withstanding logical analysis and is therefore not reasonable.”*

*In casu* the opinion of both experts is not at variance with or contradictory to the version of the insured and I do not consider that the opinions of the experts are illogical or unreasonable. It is not helpful though that the experts could not on the facts placed before them determine or estimate the precise speed plaintiff was travelling at and whether the traffic lights were indeed still green or had turned red for the plaintiff when the collision occurred. The critical determinacy of negligence is more the extent to which each driver observed the duties of a driver who approaches the intersection. The colour of the robot is but a factor.

[18] The following *dicta* by Viljoen JA in *Santam Insurance Co Ltd v Gouws* (*supra*) at 634I-J are particularly pertinent and apposite to the determination that both plaintiff and the insured driver contributed to the cause of this collision:

*“The duty of a motorist who approaches an intersection and enters it with the green light in his favour is to have regard to the reasonable possibility that traffic which entered the intersection lawfully, may still be in the intersection. He should therefore regulate his speed and his entry into the intersection in such a manner as not to endanger the safety of such other traffic. The closer the motorist is to the intersection when the traffic light turns green in his favour the more likely it is that the intersection may not be completely clear of traffic.”*

In *Smith v SA Eagle Insurance Co Ltd* 1986 (2) SA 3 (D) it was opined that a right-hand turn by a heavily loaded truck turning from a main road into a farm road is by itself a dangerous manoeuvre which requires to be negotiated with great caution. Even if the light turned red, the insured driver should have satisfied himself that the plaintiff was in fact going to stop before he (the insured driver) moved into the intersection across plaintiff's lane of travel and on the other hand the plaintiff should have observed the insured truck execute the turn from 100-150 meters away and should then have regulated his speed accordingly.

[19] As already indicated, the only criticisms of the testimony of the insured driver was that he first testified that the flashing arrow changes from green to red and that he did not see the Scenic vehicle of Van Eeden was following the plaintiff's motorcycle but he only noticed the Scenic vehicle arrive and stop at the scene after the collision. These are not indications of lack of candour. I find the insured driver to have been a particularly candid, credible and truthful witness. The determination of contributory negligence is arrived at on the basis of his testimony. He moved rather precipitately across the plaintiff's lane of travel.

## CONTRIBUTORY NEGLIGENCE

[20] Defendant has pleaded contributory negligence as an alternative to the denial of negligence. The determination of the apportionment of blame involves a comparison between the degrees of negligence on the part of the plaintiff and the insured driver respectively (see *Amler's Precedents of Pleadings* 7<sup>th</sup> Ed page 124). On a consideration of all the evidence in my view the plaintiff and the insured driver have contributed equally to the cause of the collision. Consequently the defendant should be held liable for 50% of the agreed quantum of damages suffered by plaintiff on the basis that plaintiff's negligence was 50% to blame for the collision in accordance with the provisions of section 1 of the Apportionment of Damages Act 34 of 1956 (see *South British Insurance Co Ltd v Smit* 1962 (3) SA 826 (AD) at 837F-H). I further determine that the defendant should bear the plaintiff's party and party costs of suit and such costs to include the qualifying fees of the reconstruction expert as well as all the medico-legal experts who prepared medico-legal reports and testified for the plaintiff prior to the issue of quantum of damages being settled by the parties.

In the result I order judgment for plaintiff against the defendant as follows:

- (a) Payment of 50% of plaintiff's proven and agreed damages of R14 100 000, 00 and the undertaking in terms of section 17 of the Road Accident Fund Act.

- (b) Interest on the said sum at the rate of 15.5% per annum, calculated from 15 days from date hereof to date of payment.
- (c) Defendant to furnish to plaintiff a section 17 undertaking in terms of the Road Accident Fund Act. The undertaking should be duly apportioned at 50%.
- (d) Costs of suit such costs to include the qualifying costs of the following experts:
- (i) Mr B Grobbelaar.
  - (ii) Prof Chait.
  - (iii) Dr D Shevel.
  - (iv) Mrs S Gröpp.
  - (v) Mrs B Donaldson.



**G S S MALULEKE**  
**JUDGE OF THE SOUTH GAUTENG**  
**HIGH COURT, JOHANNESBURG**

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