

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 43071/2010

DATE:01/03/2012

NOT REPORTABLE

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES:
YES/NO
(3) REVISED.

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In the matter between:

SEKWELE, REUBEN

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

J U D G M E N T

COPPIN, J:

[1] This is a claim of damages brought against the defendant for bodily injuries allegedly sustained by the plaintiff in a collision. The issues of negligence (the merits) and the quantum were separated by agreement between the parties. The matter proceeded before me only in respect of the merits.

[2] It is common cause that on the 16th of February 2008 and at about 15h00 a collision occurred between a white Mercedes Benz vehicle driven by the plaintiff ("the plaintiff's Mercedes") and a VW Golf V TDi ("the VW"), there and then driven by one Mr Aslam Mohamed ("*Aslam*"), on the R82 Vereeniging Road at or near that road's intersection with Main Road. It was also not disputed that the visibility was good; the sun was shining and the road was dry. It was further admitted that the R82 consists of a double dual carriageway and that the two carriageways are separated by a grassed island; further, that at the intersection in question and on the side of the road running from North to South there was one additional turn left only lane and an additional turn right only lane. The intersection in question was controlled by a stop sign and cars travelling on the carriageway had the right of way. It was also common cause that the VW was travelling from North to South in the right-hand lane (or "*fast lane*") and the plaintiff's Mercedes was from the side street and intended to cross over the carriageway (i.e. it was travelling from East to West) intending to travelling in a northerly direction on the northbound carriageway. It was further not disputed that the point of impact was in the right-hand lane in which the VW was travelling in. That after impact the VW came to a standstill in the right-hand lane and the Mercedes came to a

standstill on the centre island. It was further accepted that the speed limit on the R82 was 100 km per hour.

[3] In sum, the plaintiff alleged that Aslam drove at an excessive speed; failed to keep a proper lookout and failed to brake or take reasonable steps to avoid colliding with his vehicle and that Aslam was accordingly wholly and solely at fault with regard to the collision. Aslam, on the other hand, alleged that the plaintiff failed to stop at the stop street, failed to keep a proper lookout and failed to take appropriate steps to avoid a collision. It is trite that the plaintiff had an *onus* to prove that Aslam was negligent and that such negligence caused the collision. Similarly, the defendant had an *onus* to prove contributory negligence on the part of the plaintiff.

[4] The plaintiff gave evidence himself and called two other witnesses, namely, Mr Isaac Mnguni ("*Mnguni*"), an alleged eyewitness, and a collision reconstruction expert, Mr R A Opperman ("*Opperman*"). The defendant called Aslam, Mr Feroze Badat ("*Badat*"), an alleged eyewitness and the investigating officer attached with the investigation of possible negligent, or reckless driving, Const Mvelase ("*Mvelase*"). In addition to the oral testimony of these witnesses the parties relied on documents, in particular the contents of the police docket (including statements made by various witnesses) and photographs of the scene that were taken subsequent to the collision.

[5] I shall summarise the evidence of these witnesses as briefly as possible. Everything they said is on record and I had regard to all of it in

determining whether the parties had discharged the respective burdens of proof which I mentioned earlier.

[6] The plaintiff testified that he was presently 53 years old and a businessman with certain business interests. One the day of the incident he was returning from a property he owns in the area. He was accompanied by an employee and she was seated in the front passenger seat next to him (i.e. to his left). He intended to travel north along the R82. In order to do so he had to cross the southbound side of the R82 carriageway. He testified that he stopped at the intersection in compliance with a stop sign, intending to cross the south side of the carriageway and then join the northbound carriageway. He said that he looked to his right once and then to his left once and then again right once and at that point he saw a motor vehicle approaching from his right, but it was about 600 metres away from where he was. He described this distance as more than the length of a soccer field. He testified that he then proceeded to cross the intersection but before he could reach the middle point, where he was about to turn to travel along the northbound carriageway, he saw the grey VW, just before impact, in his right window. After the impact his Mercedes landed on the island. As he was not far from his property, one of his employees became aware of the collision and got others to come to the scene to assist in evacuating the plaintiff from his vehicle. The plaintiff says that he could not get the seatbelt off and that it had to be cut off before they could get him out. He further says that after the collision he was on the grass where he had been placed after being removed from his Mercedes and while there he became aware of another Mercedes Benz vehicle which was parked on the eastern side. He did not see this other Mercedes prior to the collision.

He testified that one of the persons who tried to help him out of his vehicle was Mnguni. He subsequently got information from a Road Accident Fund official, a Mr Mabunda, that there was an eyewitness to the incident, namely, Mr Mnguni. He was given Mnguni's contact details and he managed to trace Mnguni with the help of his employees. He says he spoke personally to Mnguni and took him to his attorneys to make a statement.

[7] The plaintiff testified further that when he first saw the vehicle from where he was standing at the intersection the vehicle was far, about 600 metres away and it appeared as if it was travelling at a reasonable speed. That allowed for him to enter the intersection to cross the southbound carriageway. Since the collision he is of the view that Aslam (in the VW) travelled at a speed greater than 200 km per hour because of the distance that the vehicle covered in a short period of time. (This is based on reconstruction.) He testified that he was taken to hospital because of his injuries which included an injury to his pelvis. Under cross-examination the plaintiff largely confirmed his evidence-in-chief. He testified that he only saw one vehicle when he took the final right look from where he was at the intersection. He could not say whether the car was travelling in the right or left lane of the southbound carriageway. He could also not see what make or colour the vehicle was. According to him this was because it was 600 metres away. He nevertheless used a soccer field as his reference for the distance, insisted that a soccer field was more than 500 metres in length and that the vehicle in question was more than 500 metres away from him when he saw it from where he was stopped at the intersection.

[8] The plaintiff under cross-examination testified that he never kept the approaching vehicle under observation as he entered the intersection. He expressed the view that the VW must have been travelling at a high speed. He said that a Golf 5 has the capacity to travel at a speed of 300 km per hour and that the VW could have been travelling at more than 200 km per hour. He stated, *inter alia*, that his son had a Golf 5 and that it had the capacity to travel at a maximum speed of 320 km per hour. According to the plaintiff a car travelling at a normal speed would not have caused his Mercedes to look like “a Banana”, describing the kind of damage to the two right-side doors and centre pillar of the Mercedes. He says that the impact had caused him to fracture his pelvis and also caused him, in the process, to break the central consol inside his Mercedes. He said that there would have been less damage if the VW was travelling at 100 km per hour.

[9] The plaintiff also testified under cross-examination that he accompanied Opperman to the scene of the collision on or about the 6th of December 2011 and pointed out and told Opperman that the VW was travelling at 200 km per hour. Regarding the collision he also testified that before the impact he heard no screeching of brakes or hooting but only heard a bang on impact.

[10] The plaintiff also testified that he met Mr Mabunda about two years after the collision and it is Mr Mabunda that called him and wanted to arrange court appearances. The plaintiff was however not exactly certain of the

purpose of these court appearances. He did not know which case it related to and whether or not he was required as a witness in respect of the road accident claim lodged by Aslam. The plaintiff further testified that he prepared a sketch-plan on which he indicated the position of the vehicles and recorded the telephonic details of Mnguni. He conceded to visiting Prestine Motors in order to trade-in some of his taxi buses. He denied that the collision was mentioned in his interaction with Badat, or that he knew Mnguni from there. When it was put to him that Badat will deny that he raced against the VW, the plaintiff responded that he could not comment on that as he only saw Badat's Mercedes afterwards. He dismissed the version (i.e. of Badat) put to him as one that was "*cooked*" between Badat and the lawyers. He said that he learnt from Mnguni that Mnguni was no longer working for his boss but he never took down the name of Mnguni's boss. He did not consider approaching Badat as a possible witness and he ascribed this reluctance to his distrust, at the time, of Indian people. Regarding the version of Aslam, that was put to him, he testified that he had no knowledge of Aslam's version and could not comment, but nevertheless denied that Aslam's version was correct. In response to questions posed from the bench he testified that on the day of the collision it was sunny and the weather was clear. He testified that he was on his way back to work because he was still on duty.

[11] Mr Mnguni testified through an interpreter. I should mention that initially the plaintiff's representatives had no interpreter and were initially, seemingly, of the view that no interpreter was required and that Mr Mnguni's command of English was good enough, or adequate. Mr Mnguni himself was

confident that he could give evidence in English. The appointment of an interpreter was prompted by the bench as a precaution and the plaintiff's representative engaged an interpreter.

[12] Mnguni testified that on the day in question (it was common cause that it was a Saturday) he was travelling with his boss, Badat in his boss's Mercedes, a 280 C model, from Southgate. He was a front-seat passenger. They were travelling on the R82. His employer was travelling at a high speed. The VW was at a point driving parallel to Badat's Mercedes. Badat told him that the driver of the VW was driving badly and invited him to look on Badat's Mercedes' speedometer to see what speed the VW was travelling at. The VW was travelling at 200 km per hour. Badat was driving in the fast lane and the VW in the slow lane (i.e. the left-hand lane). After he had looked at the speedometer a noise emanated from Badat's Mercedes; it was a kind of rattling sound. This caused him and Badat to listen to the sound. Badat did not do anything about it save to decelerate. The witness described where the VW collided with the plaintiff's Mercedes. He also testified that prior to the impact he did not hear a screeching of brakes. He testified that just before the impact he lifted his knees towards the dashboard as he realised that they were too close. After the impact, Badat's Mercedes Benz went through the midst of the area where the VW and the plaintiff's Mercedes came into contact with each other. He testified that Badat never applied his brakes before the impact. After going through the gap in the impact area Badat stopped his vehicle and went to assist the people in the VW while the witness went to assist at the plaintiff's Mercedes. Mnguni testified that he had to kick the

seatbelts on both the plaintiff's side and his passenger's side in order to loosen them and that he also loosened the plaintiff's seatbelt and took the plaintiff from the vehicle. He testified that Badat did not assist at the plaintiff's vehicle. Mnguni also testified that he never spoke to the plaintiff at the scene and did not know the plaintiff prior to that. He further testified, in chief, that he left his employment with Badat about two years ago. He also said that he was asked to make a statement subsequent to the collision and that he was also approached by the plaintiff and taken to the plaintiff's attorneys to make a statement.

[13] Under cross-examination Mnguni testified that two people came to his place on two separate occasions to take a statement from him regarding the collision. He could not remember their names or where they were from. He could also not remember the dates when this occurred. However, he was adamant that he never went to the police station. Regarding the statement which was in the docket ("A16") he testified that it was possible that it was taken by police but he could not remember. He said that there were two people who came to take the statement and he signed it at his home. He further testified that the plaintiff spoke to him after he had made the statement (A16). Regarding that statement he says that he told those that took it exactly what he said here in court. They spoke to him in Zulu and wrote down the statement in English. According to him, communication was not a problem. Further, he testified that when he was contacted by the plaintiff he was no longer employed by Badat but was self-employed.

[14] It was put to Mnguni, *inter alia*, that it was strange that the speed of 200 km per hour was not mentioned in A16. In response he was adamant that he gave this information to those who took the statement from him. He also alleged that when the statement was taken he was busy working and that the statement taker(s) did not write down everything which he told them.

[15] Mnguni testified that he first became aware of the VW when it was behind Badat's Mercedes just when they left Southgate and were under a bridge. Badat was travelling in the right-hand (or fast lane). The VW then went into the left lane but there were many other vehicles in front of it. It then came back into the right-hand lane. At some point the VW and Badat's Mercedes were travelling alongside each other. Before they reached the intersection where the collision occurred there was Mazda in the left lane in front of the VW (i.e. in the slow lane). He testified that Badat had showed him what speed Badat's Mercedes was travelling at and it was at 200 km per hour. He did not look on his own at the speedometer initially, because he was in the passenger seat. Badat is the one that told him to look because he himself could not drive.

[16] Mnguni testified that as they were listening to the noise that emanated from Badat's Mercedes at a speed of 200 km per hour, their eyes were off the road. The VW had in the meantime managed to overtake them, in other words, had moved from the left lane to the right lane in front of Badat's Mercedes. When they lifted their eyes it was when the collision occurred. The witness testified that the Mazda went into the left-turn-only lane and

waited until the VW came to a standstill, after impact, and then drove off. He testified that Badat's vehicle is the only vehicle that stopped after the collision. He only saw the plaintiff's Mercedes when the collision occurred. He never saw it trying to cross their path of travel. He testified that he saw the plaintiff's vehicle when it was already in the fast lane. He said that he knows that it crossed in front of the Mazda because the Mazda came to a standstill. However, according to his testimony, the Mazda came to a standstill at the time of the impact.

[17] Mnguni testified that he does not know how they came to know that he was a witness. He could not say how far from the intersection they were when they heard the noise in Badat's Mercedes. He testified that just before the impact he lifted his knees onto the dashboard because he was afraid and just wanted the vehicles to be apart. According to him despite other vehicles being on the road Badat was able to travel at a speed of 200 km per hour. He said that the road was only busy on the opposite side. On their side of the road there was just one vehicle ahead, namely the Mazda. He was adamant that he had stated, in all the statements that he had made, that Badat's Mercedes and the VW were travelling at 200 km per hour. With regard to the inconsistencies between his statement, i.e. A16 and his testimony in court, he ascribed them to mistakes on the part of the taker of the statement. He said that the English on the A16 was not correct. Mnguni said that Badat stopped at the scene even though he had driven at an excessive speed before that, and risked being arrested. Mnguni denied being present when the plaintiff came to Badat's business premises (Prestine) for a possible trade-in. He said

that after the incident he did not go to the police even though his life had been endangered by Badat's driving. He testified that he just wanted to go home.

[18] Opperman is a qualified civil engineer with a university degree. He has been practising and giving evidence as an accident reconstruction expert for a long time. With regard to the present case, he readily conceded that he had been given very limited information. He was given a completed accident report form, statements by the plaintiff and his passenger ("*Tloti*") and a sketch-plan and key prepared by the Metro Police. He testified that he may have been given other documents such as medico-legal reports but these did not assist him in coming to his conclusions. He was not given any information that the VW was travelling at 200 km per hour and only became aware of this on Friday the 3rd of February 2012, when the trial commenced in this Court.

[19] Opperman testified that he only had at his disposal information by the plaintiff that the VW was travelling at an unreasonable speed. He did not have Aslam's statement or the plaintiff's sketch with a note suggesting that Aslam travelled at 200 km per hour. He attended the scene of the collision with the plaintiff and the plaintiff's legal representative on the 6th of December 2011. In his report, which was traversed with him during his evidence-in-chief, he records that certain details were pointed out to him and he took some photographs and measurements using a measuring wheel, level and a measuring tape.

[20] According to his report, Opperman established, *inter alia*, that the individual lanes of each carriageway was approximately 3,7 metres wide and that the carriageway was separated by a grassed island which was approximately 15 metres wide; that approaching the intersection from the North (i.e. travelling in the same direction as the VW did) the road is slightly downhill (with a gradient of 4%) and curves to the left; and that the uninterrupted sight distance for a driver that would be at the stop street, where the plaintiff would have emerged from, toward the North, was about 280 metres.

[21] Opperman came to certain conclusions based on his assessment of the probabilities, based on the documents he was given and what, according to him, was pointed out to him by the plaintiff at the scene. On the assumption that the measurements and details in the Metro Police sketch-plan and what was allegedly pointed out to him by the plaintiff regarding the point of impact was correct, Opperman concluded that the plaintiff's Mercedes would have taken 4,43 seconds to move from where it was at the stop street to the point of impact; that the distance from the stop line to the point of impact was 14 metres; that the distance the VW Golf could travel in 4,43 seconds, if it was travelling at a speed of 100 km per hour, was 123 metres and the distance necessary for the Golf to stop was 94 metres. Opperman also worked out on a scenario where the distance from the stop line to the point of impact was 8 metres. According to him it would have then taken the Mercedes 4,95 seconds to reach the point of impact and if the VW Golf was travelling at 100 km per hour it would have covered 138 metres in 4,95

seconds and that the Golf would have required 94 metres to stop. Opperman also calculated scenarios where the VW would have travelled at 200 km per hour but evidence of this was rightly objected to. Opperman's conclusions on the scenarios I mentioned, is that if the driver of the VW Golf had kept a proper lookout he could have avoided the collision.

[22] For the defendant Badat testified that he is a motor-dealer with a business situated along the R82 in De Deur and that he lives in Roshnee in Vereeniging, which is about 5 km away from his business. He is 47 years of age; he is very familiar with the road in question and he testified that it is known as a "death-trap" as fatal collisions are a common occurrence on this road. He has also lost relatives due to accidents on this road.

[23] He testified that on the day in question he was travelling from Fordsburg towards Vereeniging on the R82. He was driving a vehicle belonging to his business, namely, a Mercedes Benz 180 C automatic. He was accompanied by Mnguni who was an employee of his business and who worked as a parts stripper. Mnguni sat in the front passenger seat, that is on his left. Badat testified that about 1½ km before the collision scene and on the R82, he was stopped at a robot controlled intersection in the right-hand lane. There were vehicles following him. As he pulled off from the robot-controlled intersection he moved into the left, or "slow" lane, to allow the vehicles following him to pass in the right lane. In the distance there was a bakkie in front of him which was also travelling in the left or "slow" lane in a southerly direction. He testified that at that stage he had noticed the VW. He

said that the bakkie passed the intersection where the collision occurred and by that time the VW had passed his vehicle and was travelling in the right-hand lane. The plaintiff's Mercedes crossed the intersection after the bakkie had passed the intersection but at that stage the VW was too close to the plaintiff's Mercedes and slammed into it. Badat testified that when the bakkie went through the said intersection it was about 100 metres ahead of his vehicle. He said that he saw the plaintiff's Mercedes when it was inside the intersection. Badat further testified that some of the debris from the impact between the VW and the plaintiff's Mercedes flew onto his car, but he was able to stop before the intersection on the left-hand side of the road. He testified that as he was approaching the intersection he was travelling between 80 to 90 kilometres per hour. He estimated that at the time when the VW passed him it must have been travelling faster than his vehicle, possibly at a speed in excess of 100 km per hour.

[24] Badat denied ever racing with the VW, or travelling at 200 km per hour as Mr Mnguni testified. He denied showing Mnguni the speed on the speedometer. He described Mnguni's version that they were racing, as "a lie" and said that he would never race, or drive at a high speed on that road, because of the known dangers on that road. He said that he does not even think that Mnguni was aware of what was happening. According to him Mnguni was busy with a listening device. Badat says that he even alerted Mnguni to the impending collision between the VW and the plaintiff's Mercedes.

[25] Badat testified that at the time of the collision Mnguni had been working for him for 5 to 6 years. Mnguni's father had also worked for Badat for a long time (about 20 years). After Mnguni's father's death there was an issue relating to the father's estate, or assets, that Badat was requested, by the family, to discuss with Mnguni. The family alleged that Mnguni had removed certain items from his father's property without permission. When Badat summoned Mnguni to the meeting with his other family members, Mnguni absconded and never returned to his employment.

[26] Badat testified that at some point subsequent to the collision the plaintiff came to his business in order to discuss a trade-in of vehicles. He said that he recognised the plaintiff and reminded him of the collision. He told him that he was on the scene. The conversation concerning the accident came about as they were discussing the vehicle that the plaintiff was driving at the time. The conversation concerning the collision was however brief and Badat could not remember the detail.

[27] Badat testified that when he had stopped his vehicle after the collision, he went to the vehicles that were involved in the collision in order to assist. At some stage there was someone, who he assumed to be a nurse, at the plaintiff's Mercedes who told them not to remove the plaintiff from the vehicle, but to wait for the paramedics to do so. He testified that he also assisted at the VW. He further said that he provided his details i.e. his name and telephone number, to the police who came to the scene. He could not remember if Mnguni did the same.

[28] Badat testified that he did not know Aslam prior to the incident and of the occupants in Aslam's vehicle (i.e. the VW), he may have come across Aslam's father somewhere before. He testified that he was on the scene when the plaintiff was removed from his vehicle by paramedics and that an older lady who had been in the VW, was placed next to his vehicle where it was standing.

[29] He testified that the C180 Mercedes that he was driving is not a high performance vehicle, but conceded that you can go fast in it if you wanted to. He further said that as a rule he does not drive fast. He said that when the VW passed him they were about 100 metres from the point of impact, but he also testified that the VW was about 150 metres ahead of his vehicle. He conceded that the VW must have increased its speed when it passed his vehicle. He could not say whether it travelled in excess of 120 km per hour, but said that it was possible.

[30] Badat was adamant that the plaintiff crossed the intersection when the VW was already too close to it. He testified that he was not sure for what purpose he was asked to give someone from Aslam's family a statement. He was otherwise never contacted by anyone for a statement until about last week (i.e. the first week of February) when someone telephoned him and asked him about the accident.

[31] Badat said that the plaintiff's Mercedes was damaged on the right side; both its right doors and the pillar separating it was "smashed" in. He conceded that this was "*big damage*". He could not say whether the VW was a write-off, but said its whole front was "smashed" in. He testified that he had enough distance to avoid the collision, because he was in the left-hand side lane, away from the collision. He saw no other vehicle ahead of him save for the bakkie which had already passed the intersection before the collision. He testified that he had no reason to race and he was surprised by Mnguni's blatant lies in that regard. In addition to the other reasons for not wanting to drive fast on that road, which I mentioned earlier, he said that it was impossible to travel at 200 km per hour on that road.

[32] Badat denied accusing the plaintiff of causing the accident when the plaintiff came to his business for a trade-in. He denied that he was following the VW in the fast lane as Mnguni testified and that his car passed in the gap left after the VW and plaintiff's Mercedes separated on impact. He described Mnguni's evidence as a concocted version of events. Badat said that after impact the VW came to a standstill in the very lane it was travelling in. It just "bounced back" after hitting the plaintiff's Mercedes. Badat denied that he was not admitting to speeding because he would be admitting to an offence. In re-examination Badat, *inter alia*, testified that the plaintiff's Mercedes, when it crossed in front of them was about 100 to 120 metres away from his vehicle.

[33] Aslam testified that he was presently 30 years old. (At the time of the collision he was 26 years old). He resides with his family in Walkerville. He

completed his N3 certificate in engineering and was employed in an engineering concern. He testified that he purchased the VW about a year before the collision and at the time of purchase it had only done 60 000 kilometres. He testified that due to the collision it was written-off.

[34] Aslam said that on the day of the collision he was driving the VW and his father, aunt and brother were his passengers. They were travelling from Rosebank, where he went to look at rings in preparation for his marriage. They drove on the R82 on their way home (i.e. from North to South). His father was sitting in the front passenger seat next to him. His father is presently 52 years old (i.e. he was about 48 years old at the time of the collision).

[35] Aslam described the VW as a hatchback Turbo Diesel vehicle with fuel-injection (i.e. a “TDI”). He testified that he was driving at about 100 km per hour toward the scene. He noticed the plaintiff’s Mercedes when he came around the bend. This was around 120 metres from the intersection where the Mercedes was to enter into the carriageway. He testified that he saw the plaintiff’s Mercedes rolling slowly out of the service road towards the stop. At the time Aslam was travelling in the right-hand lane of the southbound carriageway.

[36] In chief, Aslam testified that he saw the plaintiff’s vehicle rolling slowly to the stop and suddenly shoot across. He said that he hardly had time to think and a collision occurred. The front of the VW collided into the side of the

plaintiff's Mercedes. He said that when he saw the plaintiff's vehicle "*slowly rolling*" to the stop he assumed that it was going to stop. He did not consider it a danger to him and proceeded. In front of his vehicle there was a Hyundai Getz in the left-hand lane. It was 50 to 80 metres ahead of his vehicle and it managed to clear the intersection before the collision.

[37] Aslam denied racing with Badat, or anyone else. He testified that he did not know Badat personally, but heard of him because of his car sales. He testified that he would not have raced with his father in his vehicle and would not have raced against Badat, who was probably his father's age. Aslam testified he did not know where Badat came to a standstill after the collision. He said that he sustained a fracture of his fourth lumbar vertebra. His father and aunt sustained relatively minor injuries, but his brother sustained more extensive injuries.

[38] Aslam testified that he had lodged a claim with the Road Accident Fund for his injuries. The matter was eventually settled in his favour after the present plaintiff (Sekwele) failed to come to the Magistrates' Court on three occasions. He settled on the basis of an apportionment of 80/20, in his favour, in order to finalise the matter and not because he admitted to any negligence, but for practical reasons. His business, according to him, was more important. He could not remember who the defendant's attorneys were in that case.

[39] Aslam recalled that after the impact his vehicle came to a stop in the very lane in which he was travelling and that he was told that the plaintiff's vehicle had landed on the island.

[40] Aslam also testified that he became aware of Badat's presence on the road because his father, who knew Badat, waved at him. He could not recall whether this occurred at the robots. He testified that he passed Badat's vehicle about 1½ kilometres from the bend in the road. He indicated with reference to a tree that stood to the left of the southbound carriageway that it was more or less at that point that he became aware of the plaintiff's Mercedes that was rolling slowly in the service road towards the stop street. It was put to him that Opperman said that the distance from that tree to the intersection where the plaintiff crossed was about 155 metres. Aslam said that he was not sure about that. He denied driving at the speed of 200 km per hour and said that he did not think that his vehicle had the capacity to reach such a speed.

[41] Aslam said that he was not aware of anyone acting on his behalf contacting Badat for a statement. Under cross-examination he denied that his vehicle travelled at a speed of 194 kilometres and said that his car could only attain a speed of about 169 kilometres per hour. He said that the plaintiff's Mercedes came rolling slowly to the stop and he had assumed that it would stop. It was put to him that in a written statement submitted to the police and the defendant, Aslam (and the other witnesses in his vehicle) had stated that the plaintiff had stopped before entering the carriageway. Aslam said that what he meant was that it seemed as if the plaintiff was going to stop. He

assumed that the plaintiff did so. He said that his recall of events has improved over time.

[42] Aslam further stated under cross-examination that he remained in the right-hand lane after he overtook Badat's vehicle. He saw the plaintiff's vehicle when it was 5 to 10 metres away from the stop street. Aslam further suggested that the plaintiff's vehicle "shot" into the intersection. He said that when he collided with it, it seemed as if it had been standing still in front of his vehicle. He does not know if the plaintiff braked, or not.

[43] Aslam denied lying in court. He could not remember whether he gave the police a statement on the scene of the accident. He testified that after he assumed that the plaintiff would stop there was no reason for him to keep his eyes on the plaintiff's vehicle. He said he was looking straight ahead. He testified that there were no other vehicles ahead of him, save for the vehicle in the left lane. He did not move into the left lane. Further, he testified that when he passed Badat's vehicle it was travelling at a speed of 80 to 90 kilometres per hour. He passed Badat gradually and he was only travelling at 100 km per hour. He denied exceeding the speed limit and said that Badat's estimation of his speed was wrong. He conceded not mentioning the speed at which he was travelling in his statement. He ascribed the omission to his inexperience of collisions at the time. The collision under consideration, according to him, was the first one that he was involved in.

[44] Aslam conceded that he only saw the plaintiff's Mercedes again when it was in front of him in the right-hand lane. He said that everything happened so fast. He was satisfied that the plaintiff had stopped at the intersection and conceded not keeping the plaintiff under constant observation. He denied that his version in court, to the effect that the plaintiff did not stop, was a fabrication. He said that he assumed that the plaintiff was going to stop. Aslam mentioned that the collision occurred about 4 years ago and that English was an "ambiguous" language.

[45] Aslam testified that he looked at his speedometer at about the time when he passed Badat's vehicle. That is how he knows he travelled at 100 km per hour. He denied that he could have braked or swerved to the left in order to avoid the collision and stated that instead it would have been easier for the plaintiff to stop at the intersection (or stop street). He denied the correctness of Badat's evidence that he was about 150 kilometres ahead of Badat when the collision occurred. In re-examination Aslam *inter alia* testified that his lawyers prepared a written statement that he had signed.

[46] Constable Mvelase identified the docket which was Exhibit B. She was the second investigator involved in the investigation of possible charges of reckless driving arising out of this collision. She, *inter alia*, identified the statement of Mnguni (A16) as a statement that she took down and commissioned. She could not remember when and in what circumstances; whether she went to Mnguni's place or whether he came to the police station. She testified that she spoke to Mnguni in Zulu and wrote the statement down

in English. She only wrote down what Mnguni told her. She did not write down what he did not tell her. She could not recollect whether she gave him the statement to read, but he did sign it. The usual procedure is to give the interviewee the statement to read and to sign it if he is satisfied that it is correct. Dealing with specific things appearing, or not appearing, in Mnguni's statement she testified, *inter alia*, that if Mnguni told her that the vehicle in question was travelling at 200 km per hour she would have written it down and she would have asked both drivers about it. She could not say why Badat was not approached and why a statement was not obtained from him. She could not recall if she asked Mnguni what his employer's name was. She could not remember whether she recorded what Mnguni told her in summary form, or whether it was *verbatim*. She confirmed that is recorded in the investigation diary that the prosecutor declined to prosecute anyone because even though he or she believed that Aslam drove at a high speed – it could not be proved and, furthermore, according to the prosecutor, the plaintiff had entered the intersection when the road was not clear.

SHORT SUMMARY OF THE MAIN ARGUMENT

[47] The main issue was whether the plaintiff had discharged his *onus* of proving that Aslam was negligent and that his negligence was the factual and legal cause of the collision. Further, if so, whether causal negligence on the part of the plaintiff had been proved by the defendant and, if so, how the fault was to be apportioned.

[48] On behalf of the plaintiff it was submitted, in essence, that even on Aslam's version of events, the plaintiff has discharged his *onus*. It was submitted that Aslam was wholly negligent, or at worse for the plaintiff, the plaintiff was 25% to blame while Aslam was 75% to be blamed for the collision. Counsel for the plaintiff referred, in particular, to two decisions of the Appellate Division in support of his submission namely *Griffiths v Netherlands Insurance Co Ltd of SA Ltd*¹ and *Caldwell v Commercial Union Assurance Co of SA Ltd*². Both of these cases dealt with collisions between a motorist entering a main thoroughfare from a stop street with the intention of turning and a motor vehicle driving along the thoroughfare at an excessive speed. I will deal with the detail of the submissions made on behalf of the plaintiff in the course of my analysis of the evidence.

[49] It was submitted on behalf of the defendant, in essence, that the plaintiff's version (and that of Mnguni) should be rejected. Further, that the matter should be decided on the version of Aslam and Badat; that one had to bear in mind that the circumstances and speeds given were estimates arrived at by reconstruction and that the collision occurred a long time ago. Further, that Opperman's calculations were based on unreliable information, approximations and assumptions. It was furthermore submitted on behalf of the defendant, that even if it could be found that Aslam on his version (and the calculations of Opperman in that regard) was negligent, which was denied, it had not been proven on a balance of probabilities that such negligence caused the collision. It was submitted that the plaintiff entered the intersection

¹ 1976 (4) SA 691 (AD).

² 1977 (1) SA 748 (AD).

precipitately and when it was not safe to do so and that he was the author of his own misfortune.

[50] Counsel for the defendant also submitted that the cases of *Caldwell* and *Griffiths* were distinguishable from the present case on their facts. Several cases dealing with the duties of drivers in the through road and those entering the through road from a stop street were referred to.³ It was also submitted (in the alternative) by counsel for the defendant that if causal negligence had to be found on the side of Aslam then it was slight and at worse there should be an apportionment of fault in the order of 80/20 against the plaintiff.

ANALYSIS OF THE EVIDENCE

[51] Mr Sekwele did not impress me. His estimate of distances on one aspect in particular, was not only unreliable, but outrageous. He was adamant that when he saw the vehicle approach from his right on the through road it was at a distance of about 600 metres away when he entered the intersection, but at the same time stated that the distance he was referring to was more than the length of a soccer field. A soccer field according to him was about 500 metres long. This was clearly wrong. A soccer field is not 500 metres let alone 600 metres in length.

³ Regarding the duties of the driver on the through road: *Protea Assurance Co Ltd v LTA Building (SWA) Ltd* 1980 (1) SA 303 (A); *National Employers' General Insurance Co Ltd v Sullivan* 1988 (1) SA 27 (A); *Marine and Trade Insurance Co Ltd v Biyasi* 1981 (1) SA 918 (A); *Bothma v Zentkowsky* 1951 (1) SA 63 (T). Regarding the duties of a motorist who approaches a through road from an intersection: *S v Truter* 1987 (1) SA 339 (C).

[52] His estimate was such that even Opperman did not treat it seriously. It is apparent from Opperman's report and an addendum to that report that was handed up at the hearing as Exhibit "D", that not one of the scenarios, Opperman did calculations on, is based on such a distance. Opperman readily conceded that a soccer field was not 500 metres in length and more in the order of 90 to 100 metres. Sekwele never mentioned to Opperman that the vehicle he saw was just over the length of a soccer field from where he was but had said in his statement, which was given to Opperman, that the vehicle was "*still far probably 600 m away*" from where he was at the stop street. Opperman's evidence was in any event that from the stop street, i.e. where the plaintiff emerged from, to the right, one would only have an unobstructed view for about 280 metres. In argument plaintiff's counsel did not even attempt to argue that the distance aspect should be accepted. Instead, it was submitted that the "*plaintiff's estimation of the distance of the approaching vehicle at 600 metres was inaccurate*". In my view the estimation of the plaintiff was not only inaccurate but grossly inaccurate.

[53] The plaintiff is not an illiterate person. He is a businessman with several business interests. He testified that he matriculated and the impression I got of him was that he was a reasonably sophisticated person. He must have been very familiar with soccer fields and may have known their lengths or could easily have ascertained the lengths. His insistence in court that a soccer field was 500 metres in length could not have been a case of mere error. An honest witness would have conceded that he made a mistake

in his estimation. It appears that he was not prepared to make such a concession because he probably thought that it would count against his case. After all in his written statement that was submitted to the police he had said that this vehicle was 600 metres away.

[54] His testimony that he looked right once and then left and then right again and then saw the vehicle which was 600 metres away is almost a textbook version of what a driver should do at a stop street. How he managed to remember the sequence is not clear. In any event in order for the plaintiff to explain how the vehicle that was 600 metres away reached his vehicle in order to collide with it, he had to “*assume*” that it was being driven at a high unreasonable speed. Otherwise his version that it was still about 600 metres away when he decided to cross, would make no sense at all.

[55] Even in a scenario, where the oncoming vehicle could be assumed to have been travelling at 200 km per hour, it could never cover the distance of 600 metres in about 4,43 seconds which, according to Opperman, was the time it would have taken the plaintiff to drive from the stop street to the alleged point of impact. I have a difficulty with the veracity of the version that the VW was travelling at 200 km per hour but I will deal with that aspect in discussing the version of Mnguni. On the plaintiff's own version, after leaving the stop street where he had stood he did not keep the vehicle, that was approaching from his right, under observation. He testified that it is only at about the time of impact that he saw the VW on his right side. I found his version that he would not have kept the oncoming vehicle on his right under observation to be

contrived. One does not just cross a carriageway, like the one in question, without looking. In any event a driver in his position had to keep a lookout in case there were material changes in the circumstances that he had observed when he first decided to cross.

[56] The plaintiff did not mention any other vehicle that was approaching from his right save for one (but his witness, Mnguni and Badat and Aslam who were called by the defendant, maintained that there were at least three vehicles close to the intersection just prior to the collision, i.e. the VW, Badat's Mercedes and another vehicle.⁴)

[57] Mnguni similarly made a poor impression. His version bears the hallmarks of untruth. Having seen both Badat, who is a middle-aged businessman and who, at the time of the collision was about 43 years of age, and Aslam, then a 26 year old, and also bearing in mind that Aslam had as passengers his father who was then about 47 years old, his aunt, and his brother, as well as the nature of the carriageway, it is in my view unlikely that Badat and Aslam were racing, or that they could have reached a speed of 200 km per hour on that road. It is accepted that prior to this incident Badat and Aslam did not know each other and at best that Badat may have seen Aslam's father somewhere previously but did not actually know him. According to Mnguni, Badat spontaneously decided to race against the VW driven by Aslam on this rather dangerous stretch of road and Aslam, notwithstanding

⁴ Each of these witnesses recollected that it was a vehicle of a different make from what the other recalled. Mnguni testified it was a Mazda, Badat testified it was a bakkie and Aslam testified that it was a Getz.

the presence of his passengers and the other conditions that prevailed, joined in this extremely hazardous pursuit.

[58] Mnguni's evidence that the VW and Badat's Mercedes were travelling at a speed of 200 km per hour is made up. It is unlikely that Mvelase would not have written down in her statement that Badat (and Aslam) were travelling at that speed. If Badat had made Mnguni to look on the speedometer of his vehicle it is more likely that it would have a prominent feature of Mnguni's version and would have been one of the things he would have told Mvelase. In my view, it is more likely that he did not mention it to Mvelase at all and that it was not part of his version at the time. The speed of 200 km per hour is also recorded in a corner of a sketch plan made by the plaintiff. It is apparent that the note, which I shall shortly discuss, was added to the sketch. The note does not say that a witness (Mnguni) has told the police that Aslam travelled at 200 km per hour but states *"Driver D who was following driver (A) gave statement to Metro Police, at what speed was drive (A) travelling at which suggest he was travelling at more than 200 km per hour"*. In his evidence the plaintiff testified that by driver "D" he was referring to driver "C" as per his sketch. Driver "C" as per his sketch would have been Badat which was following driver "A" (i.e. Aslam in the VW). In his sketch/statement, the plaintiff makes no mention of Mnguni saying to him, or to the South African Police, or to the Metro Police, that either Badat, or Aslam was travelling at 200 km per hour. It alleges that Badat made such a statement to the Metro Police. No such statement was produced. The Metro Police were never called to give

evidence and Badat denied ever making such a statement, or that either he or Aslam were travelling at such a speed.

[59] The fact that Opperman was not earlier informed that Aslam (or Badat) were travelling at such a speed is a good indicator that the evidence of Mnguni (and of the plaintiff) “*to that effect*”, is a fabrication. It was invented to try and explain how the VW could have covered 600 metres in a short space of time.

[60] Mnguni’s evidence that Badat showed him the speedometer while they were travelling at a speed of 200 km per hour does not have the ring of truth. This combined with the fact that both he and Badat would have taken their eyes off the road to listen to the noise emanating from Badat’s vehicle at that high speed, is also not believable. His description of what then occurs when they lift their eyes, just before impact, is fictional. That they would have avoided being part of the collision, on his version, is nothing short of miraculous. The fact that Badat stopped and was composed and sensible enough to go and assist the people in the vehicles undermines the veracity of Mnguni’s version of them just having had a narrow escape.

[61] Mnguni did not say why he left Badat’s employment and Badat’s version as to why he probably left was not contested. The fact that no motive was proved why Mnguni would make up a version does not mean that he did not indeed make up a version. I found Badat to be a better and more believable witness than Mnguni. But for his estimates of the distance

between himself and the VW just before the collision, Badat was a reliable witness. He did not give me the impression that he was biased or in favour of Aslam. He readily made concessions concerning Aslam that were detrimental to Aslam's version. Insofar as Mnguni's evidence conflicted with that of Badat, I prefer to accept the latter's evidence.

[62] Furthermore, it is unlikely that Badat would have stopped on the side in order to go and render assistance at the scene and thus expose himself to the police and provide his detail, thereby risking arrest if he had indeed been racing with Aslam, or at the speeds testified by Mnguni. In my view, it is more likely in those circumstances that he would have tried to avoid the scene altogether.

[63] Opperman had no firsthand knowledge of any of the facts that he relied on. The facts he relied on were hearsay. His contribution was essentially to make calculations in respect of different scenarios that may, or may not have existed. He had no photographs depicting the damage to the vehicles. He never spoke to the Metro Police that were at the scene. The Metro Police were not called to confirm the correctness of the measurements as depicted on their sketch, nor did they give evidence at all. The plaintiff's version that the vehicle was at a distance of 600 metres when he first saw it, was clearly unreliable. Other than the plaintiff's version of distance that was given, there was no other version of the plaintiff available to Opperman as to where the vehicle was when the plaintiff first saw it approaching on the through road and when he decided to cross. The plaintiff clearly never mentioned a soccer field

to Opperman. There is nothing in the plaintiff's statement to the effect, nor does Opperman mention it in his report. Regarding Opperman's visit to the scene of the plaintiff on the 6th of December, Opperman testified that the plaintiff pointed out certain things to him. I wonder how effective this could have been since it was the plaintiff's evidence that he did not have his crutches with him and that he was sitting in his vehicle. Regarding distances, it is apparent that all the witnesses were reconstructing and estimating distances.

[64] Aslam's evidence in terms of which he estimates that he was approximately at a distance of a tree depicted in the photographs, when he first noticed the plaintiff's Mercedes, can also not been taken as a fact. It was clearly an estimation based on reconstruction.

[65] I found Mvelase to be an honest witness. She was fluent in English and answered questions frankly and without hesitation. Her memory of certain events was understandably vague and poor given the time lapse and lots of other matters that she may have dealt with in the intervening period. It is apparent from the statement that she took from Mnguni (i.e. A16) that at the time of the statement Mnguni had already indicated that he was self-employed. It is unlikely that she was told about Badat and Aslam travelling at 200 km per hour and that she would not have noted it that down and investigated the matter further. I believe her when she says that she only wrote down what she was told. Insofar as her evidence conflicts with that of Mnguni I accept her evidence.

[66] As I have stated before as far as Aslam's evidence is concerned, his evidence is corroborated in material respects by Mnguni's evidence and Badat's evidence. All three of these witnesses, although they spoke of a different third vehicle, testify of the presence of a third vehicle that was very close to the intersection. According to Badat and Aslam that vehicle would have cleared the intersection before the plaintiff entered the South bound carriageway. Aslam's evidence that he passed Badat was also corroborated. Regarding the speeds at which they were travelling, I cannot make a finding that he exceeded the speed limit given the evidence. Even though Badat conceded that he might have, Badat's evidence in that regard has to be considered in the light of the other evidence of Badat and Aslam. According to Badat he was travelling at 80 to 90 km per hour when he was passed by Aslam. If Aslam was travelling at 100 km per hour and Badat was only travelling at 80, then, as a matter of logic Aslam could have passed Badat without having exceeded the speed limit. Aslam's evidence that he did not keep the plaintiff's vehicle under constant observation after he had seen it slowly rolling up to the stop street cannot be criticised. He was entitled to assume that the vehicle would come to a stop.

[67] On the evidence of Badat and Aslam the plaintiff would have entered the through lane when they were too close to the intersection and Aslam was unable to avoid colliding with the plaintiff. If we accept the plaintiff's version that when he saw the oncoming vehicle it was just more than a soccer field away from where he was (in reality 90 to 100 metres away) then he had

entered the intersection precipitately, because if the oncoming vehicle was travelling at a speed of 100 km per hour it needed, according to Opperman's calculations, at least 94 metres of distance in order to stop. Taking all contingencies into account this might have been too late for the plaintiff. The plaintiff entered the intersection precipitately. On his own version he failed to keep approaching traffic under observation.

[68] On my evaluation of the evidence the plaintiff failed in proving, on a balance of probabilities, that Aslam was negligent and that his negligence caused the collision.

[69] Regarding the cases that were referred to by the plaintiff's counsel I am of the view that those cases can be distinguished on the facts. In any event in the present case no causal negligence has been proved on the part of Aslam. In those circumstances the plaintiff must fail. The costs must follow that result.

[70] I accordingly make the following order:

The plaintiff's claim is dismissed with costs.

P COPPIN
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

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