IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 37685/2014

1. Reportable: No
2. Of interest to other judges: No
3. Revised: Yes, on date reflected below

6 December 2019

(Signature)

In the matter between:

MKHABO, MANDLA LUCAS **First Plaintiff**

SHABALALA, DANIEL **Second Plaintiff**

and

ROAD ACCIDENT FUND **Defendant**

Heard on: 21, 22 and 25 November 2019

Delivered on: 6 December 2019

Collision – Robot-controlled intersection – light turned amber and red – duty on motorist with obscured view entering intersection against a green light – value of collision re-construction evidence based on unproven factual assumptions.

JUDGMENT

DE VILLIERS, AJ

[1] This matter concerns two actions against the Road Accident Fund ("**the RAF**") that were combined. The parties asked for "*merits*" to be separated

[2] In terms of section 17(1) of the **Road Accident Fund Act**, 56 of 1996 the defendant is (underlining added and quotation shortened to be in line with the facts of this matter):

> "*...obliged to compensate any person (the third party) for <u>any loss or damage which the third party has suffered</u> as a <u>result of any bodily injury</u> to himself or herself ..., <u>caused by or arising from the driving of a motor vehicle</u> by any person at any place within the Republic, <u>if the injury</u> or death <u>is due to the negligence</u> or <u>other wrongful act of the driver</u> ...*"

[3] The facts of this matter bring into play questions about the liability of both drivers, even based on their versions, as reflected below:

[3.1] The first plaintiff had stopped at a robot-controlled intersection when the light was red. The light turned green and gave him right of way. He entered the intersection with his view of any traffic remaining in the intersection (or enter it unlawfully) obscured by a larger vehicle, a taxi. The taxi entered the intersection first, he followed, but the taxi then stopped. Immediately thereafter a collision occurred between the first plaintiff and an unsighted vehicle crossing the intersection, a bus;

[3.2] The bus driver entered a robot-controlled intersection when the light was amber. Important also would be any liability of the first plaintiff

for injuries sustained by the second plaintiff when the bus collided with a building, and not in the initial collision between the two vehicles.

[4] The versions of the two plaintiffs were not common cause.

[5] Contributory negligence was pleaded. In terms of section 1 of the **Apportionment of Damages Act**, 34 of 1956 (underlining added):

> "*(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.*"

[6] I address the legal principles in some detail as the RAF relied on a judgment, **Lekgothoane v Road Accident Fund** (37965/2016) [2017] ZAGPPHC 657 (29 September 2017) where Seima AJ applied a 50/50 liability to a collision. A motorcyclist entered the intersection against the amber light (on his version). The other driver entered the intersection after the light turned green, and a collision occurred. However, the driver earlier had seen the motorcyclist, but had believed that it would have crossed the intersection in time. The facts of the two matters are different due to the earlier observation of the motor cyclist by the driver, but the RAF relied on Para 18 of **Lekgothoane** (underlining added):

> "*[18] It is trite law that every road-user owes a duty of care and consideration for any other road-user. This duty includes a duty to keep a proper lookout. The duty of care requires of every driver to drive like a reasonable man who would be able to reasonably foresee the possibility of unforeseen consequences and act in accordance with such appreciation.*

Failure to act in accordance to the above is tantamount, in law to negligence.

*See: **Minister of Safety and Security v Van Duivenboden** [2002] 3 All SA 741 (SCA).*"

[7] With respect, the learned judge has put the test for negligence of the driver entering the intersection against a green light too high.

[8] The general test is set out in **Sea Harvest Corporation (Pty) Ltd and Another v Duncan Dock Cold Storage (Pty) Ltd and Another** 2000 (1) SA 827 (SCA) Scott JA (Smalberger JA, Howie JA and Marais JA concurring) Para 21-22. It is not harm in general that should be foreseeable, or unforeseen circumstances or consequences, but harm generally of the kind that occurred. See too **Stedall and Another v Aspeling and Another** 2018 (2) SA 75 (SCA) a judgment by Leach JA (Cachalia, Petse and Mocumie JJA and Ploos van Amstel AJA concurring) at Para 35 (underlining added):

"*[35] ... The child was the primary responsibility of the second respondent, and it would have been reasonable to assume that she would have continue to keep the child under observation and not to allow her to roam free. There is no absolute duty upon a landowner to ensure that any person upon his property will not be injured in some way. The sources of potential danger to a toddler in a normal domestic household and garden are numerous, and no homeowner can be expected to guard against all the harm that might befall a young child. On the other hand, a homeowner can reasonably expect that a child will be supervised and guarded from harm by its supervising parent, and would not foresee that the parent would be distracted whilst caring for its child. Moreover, it must also be remembered that a reasonable person is neither a timorous faint-heart always in trepidation of harm occurring but, rather, ventures out into the world, takes reasonable chances, takes reasonable precautions to protect his or her property and person and expects others will do the same – see **Herschel v Mrupe** 1954 (3) SA 464 (A) at 490E-F.*"

[9] Although there may be fewer possibilities of harm in an intersection than at a house, a person entering a robot-controlled intersection against a green light

is not unduly burdened with potential liability. There are many cases in our law to the effect that a driver who is in the position of the first plaintiff in this case, is entitled to assume, in the absence of indications to the contrary, that traffic facing the red signal will not enter the intersection against the signal. There is a possibility that some traffic, lawfully in the intersection, may not have cleared the intersection as the light turns green to give him or her right of way. As a result, although he or she has right of way and may enter an intersection, he or she is still required to keep a proper lookout. Once he or she has become aware (or should have become aware) of dangerous conduct by another motorist, the situation changes and normal delictual principles apply.

[10] Ultimately the test for negligence stands on two legs, foreseeability and preventability. I deal with some of the cases below. As some of the leading cases are in Afrikaans, I reflect additional judgments to convey the principles.

[11] In this division Potterill J (Tlhapi J and Phatudi J concurring) summarised the position in **Bosman obo Bosman and Another v Road Accident Fund** (A746/2010) [2012] ZAGPPHC 190 (24 August 2012) as follows in Para 10 (underlining added):

> "*10. The case-law pertaining to entering a robot-controlled intersection on green can be summarized as:*
>
> - *A motorist entering on green has the duty to lookout for vehicles still in the intersection, but there is no duty on such motorist to look out for motorists entering the intersection illegally;* - ***Netherlands Insurance Co of SA Ltd v Brummer*** *1978[4] SA 824 on 833E-F.*
>
> - *"A motorist may assume that even though an approaching vehicle is travelling fast that its driver will observe and obey the red light although this may involve a sudden and violent application of the brakes."* - ***Van der Walt v Gershater*** *1944 TPD 240 on p243.*
>
> - *Only in exceptional circumstances where it would be obvious to any reasonable person that the conduct of the oncoming vehicle is dangerous and with ordinary care he could have avoided an accident*

*would he then be considered negligent. [**Van der Walt v Gershater** 1944 TPD 240 on p244].*"

[12] A short summary of the principles appears in **Guardian National Insurance Co Ltd v Saal** 1993 (2) SA 161 (C) at 163C-E, a judgment by Cooper J (Williamson J and Selikowitz J concurring) (underlining added):

> "*The trial Court found*
>
> > *'that there was no impediment to a proper lookout being maintained by Maasdorp to his right across the then open, flat sandy terrain to at least half of the course of Stoffel Street'*
>
> *and concluded that Maasdorp was not keeping a proper lookout at the time of the collision. This finding, however, is not sufficient to render the defendant liable. Respondent (plaintiff) had to prove that Maasdorp's failure to keep a proper lookout was causally connected with the collision, the critical question being whether Maasdorp 'ought reasonably to have become aware thereafter, at a stage when effective avoiding action could still be taken, that the (bakkie) was not going to stop'. (**Bay Passenger Transport Ltd v Franzen** 1975 (1) SA 269 (A) at 277B-C.) The plaintiff had to prove that had Maasdorp 'reacted when the reasonable man would have reacted, the collision would probably not have occurred'. (**Diale v Commercial Union Assurance Co of SA Ltd** 1975 (4) SA 572 (A) at 578F.)*"

[13] In **Netherlands Insurance Co of SA Ltd v Brummer** 1978 (4) SA 824 (A), a judgment by Muller JA (Miller JA, Diemont JA, Viljoen AJA and Trengove AJA concurring) the court held at 832H-833G (I could not find a translation, but do reflect the pertinent point in the footnotes below) (underlining added):

> "*By ontleding kom die advokaat se betoog daarop neer dat 'n bestuurde wat 'n kruising binnegaan terwyl die verkeerslig vir hom groen is moet uitkyk na links en regs vir enige persoon wat met 'n voertuig of onoordeel kundig of nalatigerwyse die kruising teen 'n rooi verkeerslig kan binnegaan en dat*

hy sy spoed so moet reguleer dat hy 'n botsing met so 'n voertuig kan vermy. Met daardie betoog kan ek nie saamstem nie.[1]

Ek het reeds gesê dat daar nie op die getuienis vasgestel kan word presies waar Matabe se voertuig was toe die verkeerslig vir hom van rooi na groen verander het nie. Verder kan ek net sê dat dit nie verwag word van 'n bestuurder wat, terwyl die verkeerslig vir hom groen is, 'n kruising binnegaan om uit te kyk vir verkeer wat, hetsy onoordeelkundig hetsy nalatigerwyse, onwettig teen 'n rooi verkeerslig die kruising kan betree.

In Serfontein v Smith 1941 WPA 195 het Regter MILLIN verwys na 'n Engelse saak ***Joseph Eva Ltd v Reeves*** *2 KB 393, in welke saak 'n soortgelyke betoog aangevoer is. Daardie betoog is verwerp en in sy uitspraak het SCOTT LJ die volgende gesê (op 410):*

> *"As I said at the outset, the essence of the lighting system is to prevent the presence on what the Judge called 'the restricted 'area' of the cross-roads of any traffic from the red direction when traffic is ordered forward in the green light direction. Its object is not only to prevent collisions but also to prevent unnecessary delay at cross-roads: and if a car with the green just opened in its favour, summoning it forward, had to keep a look-out for traffic from the red direction, it would prevent that automatic resumption of forward movement by the vehicles temporarily held up, which is vital to the free circulation of traffic. To hold that such a car owes a duty to a lawbreaker crossing from the red direction would undermine the whole system of light regulation and defeat an important part of its purpose."*

Sien ook ***Cockrant v Durban City Council*** *1965 (1) SA 795 (N) op 801 - 2;* ***Rondalia Assurance Corporation of SA Ltd v Collins NO*** *1969 (4) SA 345 (T) op 347;* ***Walton v Rondalia Assurance Corporation of SA Ltd*** *1972 (2) SA 777 (D) op 779 - 780. Soos in bogenoemde gewysdes verduidelik moet 'n bestuurder wat 'n kruising binnegaan terwyl die*

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[1] There is no duty on a driver upon entering a robot-controlled intersection against a green light to search for a vehicle entering the intersection illegally, or to reduce speed to cater for such a person.

verkeerslig vir hom groen is, uitkyk vir verkeer wat reeds in die kruising is, bv verkeer wat die kruising binnegegaan het voor die verkeersligte verander het. Hy mag natuurlik ook nie 'n voertuig ignoreer waarvan hy bewus is en wat duidelik op 'n nalatige wyse bestuur word. Maar dit word nie van hom verwag om uit te kyk vir verkeer wat moontlik onwettiglik die kruising teen 'n rooi verkeerslig van links of regs kan binnegaan nie."[2]

[14] In **AA Onderlinge Versekeringsmaatskappy Bpk v Mantje** 1980 (1) SA 655 (A) Trengove JA (Jansen JA, Muller JA, Viljoen AJA en Botha AJA concurring) dealt with a similar case. The flynote reads (underlining added):

"*Duty of motorist entering a robot-controlled intersection after the red light has changed to green - Duty towards a motorcyclist negligently entering the intersection against the red light - Question is whether a reasonably careful motorist could have avoided a collision with him - Not proved that the motorist was the first to enter the intersection - In any case not proved that, if he was in fact negligent, his negligence in any way contributed to the causing of the collision*."[3]

[15] In **SANTAM Insurance Co Ltd v Gouws** 1985 (2) SA 629 (A) a judgment by Viljoen JA (Joubert JA and Eloff AJA concurring) the court held at 635E-F (underlining added) (underlining added):

"... *It was a wide intersection but every motorist who enters an intersection controlled by traffic lights may safely assume, in my view, that the city authorities have, in setting the timing of the traffic lights, duly taken into account the width of the intersection to be traversed*.

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[2] A driver upon entering a robot-controlled intersection against a green must have regard for vehicles in the intersection (such as those who had entered it before the change of lights), and he cannot ignore a vehicle in the intersection that is being driven negligently, but he does not have to search for a vehicle entering the intersection illegally.

[3] At 661C-D the court formulated the question to be asked as:

"... Die vraag wat in die verband beantwoord moet word is of die redelike versigtige bestuurder in Van der Merwe se omstandighede die botsing sou kon vermy het. Hierdie vraag het twee fasette. Die eerste is: op welke oomblik sou so 'n bestuurder vir die eerste keer besef het dat die eiser òf reeds in die kruising is òf dat hy die rooi verkeerslig gaan verontagsaam? En die tweede vraag, wat hiermee saamhang: sou hy op daardie oomblik nog in staat gewees het om 'n botsing met die eiser te vermy? ..."

I agree, with respect, with FANNIN J who said at 779 in fine in the judgment of ***Walton v Rondalia Assurance Corporation of South Africa Ltd*** *1972 (2) SA 777 (D):*

> *"As I understand the law, generally speaking, one expects and is entitled to expect reasonableness rather than unreasonableness, legality rather than illegality, from other users of the highway."*
>
> *..."*

[16] In **Naicker v Moodley** 2011 (2) SA 502 (KZD) Swain J dealt with the duties of the motorist entering the intersection against a green light. The court held at Para 20 (underlining added):

> *"[20] I, however, agree with the decision in* ***Joseph Eva Ltd v Reeves*** *[1938] 2 All ER 115 (CA) ([1938] 2 KB 393), where the following was said:*
>
> *'Nothing but implicit obedience to the absolute prohibition of the red - and indeed of the amber, subject only to the momentary discretion which it grants - can ensure safety to those who are crossing on the invitation of the green. Nothing but absolute confidence, in the mind of the driver invited by the green to proceed, that he can safely go right ahead, accelerating up to the full speed proper to a clear road in the particular locality, without having to think of the risk of traffic from left or right crossing his path, will promote the free circulation of traffic which, next to safety, is the main purpose of all traffic-regulation. Nothing again will help more to encourage obedience to the prohibition of the lights than the knowledge that, if there is a collision on the crossroads, the trespasser will have no chance of escaping liability on a plea alleging contributory negligence against the car which has the right of way. Finally, nothing will help more to encourage compliance with the summons of the green to go straight on than the knowledge of the driver that the law will not blame him if unfortunately he does have a collision with an*

> *unexpected trespasser from the left or right.' [At 120H – 121C.]*
>
> *Consequently, the driver of a vehicle entering the crossing when the traffic lights are in his favour owed no duty to traffic entering the crossing in disobedience to the lights, beyond a duty that, if he saw such traffic, he ought to take all reasonable steps to avoid a collision.* ***The Law of Collisions in South Africa*** *6 ed Leveson p 51. This decision was approved and followed by Millin J in the case of* ***Serfontein v Smith*** *1941 WLD 195 where he said the following:*
>
> > *'(T)he person seeing the green light is in the same position as if there were a policeman waving him on. Not only has he then the right to go, but in the interest of traffic circulation and general safety it is his duty to go on.' [At 200.]*
> >
> > *On the defendant's version, as soon as he saw the plaintiff's vehicle, he did take all reasonable steps to avoid the collision. ...*"

[17] The second plaintiff (I refer to him as "**the bus driver**" on occasion herein) had to prove that the first plaintiff (a) entered the intersection against a red light, or (b) failed to keep a proper lookout when he entered the intersection, or (c) that when he ought to have become aware (or did become aware) of the bus in the intersection, he would have been able to avoid the collision, but failed to do so. Liability is not assumed because a collision had occurred.

[18] Far fewer judgments are available about negligence of the driver who faces an amber light, perhaps because such liability is not usually in issue. **Lekgothoane** referred to one such case, **S v Van Stryp** 1979 (2) SA 707 (E), a judgment by Kannemeyer J (De Wet J concurring). The court held at 709H-710C (underlining added):

> "*However this does not end the matter. When the appellant, on his version, approached the intersection he saw that the light was green. He then saw it turn to amber when about eight metres from the intersection. He did not attempt to stop or to slow down. He only braked when he saw Mrs Mulder's*

motor car. In terms of reg 169 (1) (i) of the ***Cape Road Traffic Regulations*** *a driver faced with an amber light is required to stop,*

> *"provided that if the vehicle is so close to the stop line when amber appears after green that the stop cannot be made safely, the driver may proceed cautiously against such amber indication."*

In my view the appellant did not exercise the care he should have. A motorist approaching a green light should anticipate the possibility that it may change to amber and so control his vehicle's speed that he will be able to stop in a short distance and only in exceptional circumstances will he be forced to cross when the light is amber, for instance when he is very close to the white line with traffic following him. Had the appellant approached the green light more slowly he would have been able to stop before the intersection, or have entered it at a speed which would have enabled him to stop within the intersection when he became aware of Mrs Mulder's approach. The intersection is some 13 metres wide according to the police plan and the appellant must have covered some seven metres of the intersection before the accident occurred. Accordingly, he had about 15 metres from the point at which he was when the light turned to amber to the point of collision. Accordingly, had he proceeded cautiously against the amber light he could and should, in my view, have been able to avoid the collision. His failure to do so constituted negligence on his part."

[19] The current position seems to be same as under the Cape Ordinance referred to, now set out in Schedule 1 to the **National Road Traffic Regulations**, 2000:

> **Amber means stop**.

[20] A steady yellow (amber) light signal indicates that a driver must stop behind the stop line, as the default position. The exception is if the driver cannot stop safely. In such an exceptional case the driver may proceed with caution into the intersection. The onus to prove the exception rests on the bus driver.

[21] The bus driver did not appreciate this meaning of the signal. During cross-examination he stated that, although he has a PDP licence (a professional driving permit), he was of the view that a light turning to amber at a robot-controlled intersection means "*caution*", "*passop*!" and "*get ready to stop*".

[22] The first plaintiff had to prove that the bus driver entered into the intersection negligently, a task made easier by the admission that he entered the intersection against an amber light. The reason why this happened may be relevant too, factors such as the bus driver potentially travelling at too high a speed under the circumstances, the bus driver failing to anticipate and/or to observe timeously the change to amber, or even the bus driver deciding to take a chance in trying to cross the intersection when he ought to have stopped.

[23] What were the actual facts?

[24] The collision occurred on a Saturday, 10 March 2015 at about 16H15 or 16H30 at the corner of Sauer and Anderson Streets in Johannesburg, a robot-controlled intersection. Both the streets are one-way streets and they cross each other at right angles. The intersection is largely on a level, tarred surface. The speed limit is 60 km/h. Being a Saturday afternoon, traffic was light. Visibility and weather conditions were good. No evidence of any slippery conditions were led.

[25] The first plaintiff was travelling from South to North in Sauer Street at about 16H15. Sauer Street is a six-lane road. He was travelling in the extreme left lane in a luxury 4x4 vehicle. He was on his way to hand in an (academic) assignment that was due on the Monday and was in no particular hurry. He had stopped at a red robot and was waiting for it to turn green. Cars crossed the intersection as he waited. To his immediate right was a taxi, higher than his vehicle and which obscured his view to his right from where the bus was approaching the intersection. He saw more vehicles to the right of the taxi. None of this evidence was in dispute. None of the witnesses on the bus saw the obscured luxury vehicle either and accordingly they confirm that the second plaintiff's view of the approaching bus was obscured.

[26] The light turned green, the taxi on his right commenced to drive. He then too started to drive. There was nothing obscuring his lane. The taxi stopped, and as he passed it, a collision occurred almost immediately with the bus, "*in the blink of an eye*" he said repeatedly. He indicated on a sketch plan drawn by

his counsel the point of impact as on the left side of the middle lane of Anderson Street. This later would be the evidence of the bus driver too, namely that he travelled in the second lane. My notes reflect that the taxi had stopped after travelling about a car length. The evidence that the taxi pulled off and stooped was confirmed by Mr Mtumba, a passenger on the bus.

[27] The bus driver's counsel wanted to know if the first plaintiff heard hooting. It was not put to him that the bus driver would testify that he had hooted (and the bus driver did not give such evidence). The first plaintiff's response was that he was aware of the constant hooting by taxis.

[28] The first plaintiff averred that the bus collided with the right front side of his vehicle. This evidence was disputed in that the it was put to the first plaintiff that the bus driver would testify that it was the first plaintiff who had collided with the bus, and not the other way round. The bus driver averred that the first plaintiff's vehicle collided with the left rear side of the bus, just before the back, left wheel. As will appear below, it seems that the bus driver's version is correct.

[29] The second plaintiff, the bus driver, was travelling from East to West in Anderson Street. It is a three-lane road, that narrows to two lanes after the intersection, the extreme right lane is only a right-turn lay into Sauer Street and as such he would not have travelled in the extreme right lane. He was driving an 89-seater Iveco bus. It was the last bus trip for the day. He would go home thereafter.

[30] Two passengers on the bus (Mr Mtumba and Mr Vilakazi) testified that the bus driver was late, he arrived at 16H07 and not at 16H00. Their evidence was not disputed in cross-examination. When he later testified, the second plaintiff denied their evidence and alleged that he was not late as the bus was meant to leave at 16H15 and not 16H00 as they had testified. No bus timetable or other record was presented.

[31] The two passengers on the bus also testified that the bus driver was speeding. Their evidence was not disputed in cross-examination. The bus driver's

version of the speed at which he would say he was travelling at, was not put to them for comment. When he later testified, the bus driver alleged that he had travelled at 40 km/h in an area where he was not allowed to travel above 50 km/h. His instruction to the reconstruction expert was that he travelled at 40-50 km/h. During cross-examination the bus driver stated his speed as 35-45 km/h. He was not asked to explain the three versions. Although I question below the conclusion by Mr Opperman, he testified that the bus driver's maximum speed was 55 km/h.

[32] The evidence by the bus driver of deciding to accelerate, suggests that he was not accelerating at the time when he decided to accelerate to get through the intersection (or not at the same rate in any event). It also suggests that he had time to observe the change to amber, decide to accelerate, implement the decision to accelerate, and to cross most of the intersection, all steps which reflect time ticking by. His testimony was that he had observed the light turning green when he entered Anderson Street, which was more than 100 metres away. He must have foreseen a light change to amber and red. He testified that he had not hooted when he entered the intersection with Sauer Street.

[33] The bus driver averred that the robot turned amber as he approached the intersection with Sauer Street. He tried to pass through the intersection "*swiftly*". He thought he a chance to pass through the intersection, especially as (a) he assumed that the other drivers would see the bus and (b) the delay after a light turns green before vehicles react thereto. He had a version that such drivers would have to put their cars in gear, and release the handbrakes, before they commenced to drive. In my view this testimony reflects that the bus driver believed that he could take a chance.

[34] The bus driver's evidence was that he had decided not to stop, but to accelerate in order to clear the intersection in order not to "*inconvenience*" other motorists. He was of the view that if he had decided to brake, he would have stopped in the intersection and blocked the crossing traffic. I have already dealt with the legal position on a light turning amber, and the bus driver's error as to its meaning.

[35] In his evidence-in-chief the bus driver testified that he was 15 feet away from the intersection when the light turned amber, i.e. about four to five metres away. As will appear below, this would have been about 16 metres from the pedestrian line where he said the light turned red. As will appear below, at best for the bus driver, on his version, he would have covered this distance in about two to three seconds (or less if his speed was higher). This version about the distance to the intersection when the light turned amber, was not put to the other witnesses. The first plaintiff's counsel cross-examined the bus driver and, in the end, received a response that the distance was ten metres, not the alleged 15 feet. This still did not materially change the time it would have taken the bus driver to cross over Sauer Street.

[36] The two passengers in the bus had a different version. Mr Mtumba saw that the bus entered the intersection against the red light, and even braced himself for a collision. This is telling evidence. Mr Vilakazi saw that the light was red when they were in the intersection but far enough away to see a vehicle pull off and stop (to avoid colliding with the bus). He was alerted by the hooting of the bus driver. This evidence would place the bus driver much further away from the intersection wen the light turned amber. Neither witness had a reason to lie. Their evidence is consistent with a driver who had started his route late, who speeded, and who decided to take a chance to cross Sauer Street ahead of other vehicles entering it. There is then the evidence of the first plaintiff that the light had turned green for him, and the objective evidence that also the taxi had commenced to drive. I address the assessment of the evidence further later herein.

[37] The bus driver's evidence was that after he heard a noise, he saw in his rear-view mirror the collision with the first plaintiff. He tried to brake, but could not do so. At the same time, he testified that the collision pushed him to his right, and he collided with the building on the right of Anderson Street. It is common cause that the bus was damaged in this collision and that the bus driver had to be rescued through the use of the jaws of life apparatus.

[38] I would have had serious concerns about a version that the luxury vehicle pushed the bus off its course of travel. It seems to be a smaller/lighter vehicle,

which had travelled only a few metres from a standing start, and which had collided with the bus towards its rear. A movement by the bus to its right seems counter-intuitive to me. One thing missing from the expert report by the reconstruction expert was is a finding that the momentum of the collision would have caused the bus to swerve to its right. It was put to Mr Mtumba that the collision with the luxury vehicle caused the bus driver to lose control. He denied this, based on the relevant sizes of the two vehicles. He obviously meant the relative weight of the vehicles.

[39] I address briefly some more detail in the evidence by the two passengers on the bus:

[39.1] Mr Mtumba testified that the bus was late, arrived at 16H07, he asked the driver why he was late, and received a brusque response. This evidence was not placed in dispute and the bus driver did not contradict the evidence in his evidence-in-chief. The first plaintiff's counsel cross-examined the bus driver on this aspect and obtained a denial;

[39.2] Mr Mtumba became concerned as the driver of the bus skipped robots (before joining Anderson Street). Mr Mtumba testified that the bus was being driven at a high speed. The bus entered Anderson Street at a relatively slow speed, but it then accelerated. It is an automatic bus. This puts in issue an assumption of a standing start by the reconstruction expert to calculate the maximum speed of the bus. None of this evidence was placed in dispute;

[39.3] Mr Mtumba is an experienced driver himself. In his view, had the bus being driven at a normal speed, the second plaintiff would have been able to stop when the light turned amber. None of this evidence was placed in dispute;

[39.4] Mr Mtumba was cross-examined to elicit a speed estimate, but said he could not give such an estimate. I find this probable. The driving

experiences of driving a sedan and being say a passenger on a train, differ;

[39.5] Mr Vilakazi testified that the bus was late, arrived at 16H07, he asked the driver why he was late, and received a brusque response. This part of his evidence was almost verbatim those of the other witness, Mr Mtumba. Mr Vilakazi denied having discussed the evidence with Mr Mtumba. The remainder of their evidence had differences in their observations. As will appear later herein, my view in short is that although I was troubled by the initial similarity in the evidence, the probabilities and the differences in their observations of material aspects do not reflect a concocted version;

[39.6] Mr Vilakazi too testified that the driver drove the bus in such a way that he had become concerned, including skipping a red robot in Jeppe Street. The bus drove (too) fast down Anderson Street. He heard the bus driver hooting before he entered the intersection, saw the stationary vehicles, and saw that the bus was crossing Sauer Street against a red light. None of this evidence was not placed in dispute, save that it was put to Mr Vilakazi that the second plaintiff would testify that he entered Sauer Street when the light was orange;

[39.7] Mr Vilakazi did not see the luxury vehicle, but heard the collision.

[40] I endeavoured to find corroboration for the bus driver's version, but this exercise reflected that his version about when the light changed to amber for him as improbable, as will appear below, and in other respects did not support his case.

[41] One must have significant distrust in the ability of motorists to accurately judge distances whilst driving. The only safe manner to approach evidence about when the light turned red for the bus driver, is by adding an "*about*" to his evidence. Even an "*about*" is difficult, as one covers so much distance per second, even at moderate speeds, and in the normal course one would not be making mental notes about distances travelled when normal events occurred.

I have difficulty in accepting evidence that the bus driver was 10 metres away from the intersection when the light turned amber in the absence of any specially developed skill to make such an assessment with a degree of accuracy. It is notoriously difficult to do. The 10 metres was pointed out in a court room, years after the event.

[42] Patel AJA (Scott JA, Nugent JA, Cloete JA and Comrie AJA concurring) stated in **De Maayer v Serebro and Another; Serebro v Road Accident Fund and Another** 2005 (5) SA 588 (SCA) at Para 16 (underlining added):

> "*[16] A hypothesis advanced by an expert as to how and why a collision occurred is of little value if it is based on unproved assumptions. If the hypothesis is contrary to the proved facts, it is of no value at all. As Ogilvie Thompson AJ said in* ***Van der Westhuizen and Another v SA Liberal Insurance Co Ltd*** *1949 (3) SA 160 (C) at 168:*
>
> > *'In my opinion, however, the strictly mathematical approach, though undoubtedly very useful as a check, can but rarely be applied as an absolute test in collision cases, since any mathematical calculation so vitally depends on exact positions and speeds; whereas in truth these latter are merely estimates almost invariably made under circumstances wholly unfavourable to accuracy.'*
>
> *Or as Van den Heever JA said in* ***Santam Bpk and African Guarantee and Indemnity Co v Moolman*** *1952 (2) PH O16 (A):*
>
> > *'Ons is vergas op 'n rekenkundige vertoog omtrent die relatiewe bewegings en stand van die twee voertuie op verskillende tydstippe. Myns insiens was dit tydverkwisting. Dit het groteliks gesteun op 'n beweerde merk wat S se motor in die pad gemaak het. Die oorsprong van die merk is egter nie bewys nie. Dan steun die berekeninge verder op gissings omtrent snelheid uitgedruk in soveel voet per sekonde. Om die rekenkundige metode op rekbare gegewens toe te pas is slegs om die ongewisse met die onbekende te vermenigvuldig.'"*

[43] The quotation addresses the effect of relying on measurements based on a mark in the road, the origin was not proven and on possible speeds. The last sentence freely translated reads: "*To apply calculations on conjecture is only to multiply the unknown with the mysterious*" or perhaps more literally: "*To apply calculations based on elastic factors is only to multiply the unknown with the unidentified*".

[44] Still calculations could have value if proven facts are relied upon, as a check. Leach JA (Brand JA and Schoeman, Plasket and Saldulker AJJA concurring) held in **Crafford v South African National Roads Agency Ltd** (215/12) [2013] ZASCA 8 (14 March 2013) Para 18:

> "*[18] While I am acutely aware of the difficulties attendant upon attempting to make mathematical calculations in matters of this nature, based as they are on estimates as to positions, speeds and motions which may not be at all reliable, it is nevertheless an exercise 'useful as a check ' that shows how difficult it may be to avoid colliding with a moving kudu while driving along a road at night, even where there is nothing to obstruct visibility alongside the roadway."*

[45] The check in this case was to start at the point where the bus driver said he was when the light turned red, and to work back using his alleged speed and the timing of the light changes to see where he probably was when the light turned amber. The same check could have shown where he probably was if the light had turned red before he entered into the intersection. Key would be the timing of the light changes.

[46] The second plaintiff presented evidence by a reconstruction expert, an engineer, Mr Opperman. He prepared his report in May 2017, five years after the event. I have some difficulties with the report, but it was valuable too.

[47] The report contained dimensions of the intersection:

[47.1] Anderson Street is 9.6 metres wide, i.e. three lanes of 3.2 metres each. The collision with the first plaintiff occurred in the middle of this street, after the first plaintiff had moved say four to six metres from a standing position (and according to the bus driver pushed the bus to

its right). Four to six metres is a very short distance within which to react;

[47.2] Sauer Street is 12.5 metres wide, i.e. five lanes of 2.5 metres each. This is the distance that the bus had to cross before the alleged amber light for the bus driver became green for the first plaintiff. It is a very short distance;

[47.3] The distance from the intersection between Simmonds and Anderson Streets to the intersection between Sauer and Anderson Streets, is about 144 metres. The second plaintiff joined Anderson Street from Simmonds Street. On any version the bus driver had this distance to pick up speed.

[48] Once one knows that Sauer Street is 12.5 metres wide, one can calculate easily how long it would take to cross it at different constant speeds. If the second plaintiff was accelerating, as he testified, that time would be shorter.

[49] If one knows how long it takes for lights at an intersection to change from orange to red and to green for the street crossing, one could calculate the minimum distance that the bus driver was away from the far side of the intersection (assuming constant speeds) where he testified the light turned red for him. If the second plaintiff was accelerating as he approached Sauer Street, that distance would be shorter.

[50] Mr Opperman relied on the second plaintiff's version, a version that was not put to any of the witnesses for the first plaintiff:

[50.1] The second plaintiff travelled at between 40 and 50 km/h. As reflected above, very importantly would have been when he reached this speed. As stated, the inference was the second plaintiff had stopped accelerating before he took the decision to accelerate again to skip the intersection;

[50.2] When the second plaintiff was 16 metres from the intersection, the light turned amber. This point was indicated at an in loco inspection.

The evidence by the second plaintiff contradicted this version. I have dealt with the evidence of 15 feet versus 10 metres;

[50.3] The second plaintiff had stopped at a red robot at Simmonds Street before joining Anderson Street. One of the bus passengers differed on this point.

[51] Mr Opperman relied to a large degree on a signal timing plan for the intersection that his attorney had obtained from the City Council. According to this plan the light would have remained amber for three seconds, and thereafter red for two seconds before the green light in Sauer Street would come on. An estimated five seconds do not seem to me to be an improbable long period. I have referred to **Gouws.** All drivers know that there is a delay between lights turning amber and red (in this case in Anderson Street) and for lights to turn green (in this case in Sauer Street). We know there is a delay as lights change, as municipalities provide for the safe flow of traffic. They provide for sufficient time to adapt to changes in the colour of the lights.

[52] If one accepts a delay in reaction speed, a stationary driver commencing driving upon the light changing to green, would only have crossed the first lane in Anderson Street after another delay. Mr Opperman testified that 1.6 seconds is accepted. If one accepts the evidence by the first plaintiff that the taxi driver pulled off before he pulled off, the time period between becomes even longer.

[53] The timing plan would have been useful evidence, and Mr Opperman placed significant reliance on the five-seconds delay, but no such admissible evidence was led. Mr Opperman did not know if the plan relied upon reflected delay as at the date of the collision. He was given the plan by his attorney. This material part of the report is based on hearsay evidence.

[54] The Constitutional Court has ruled that hearsay evidence even when not objected to, must still be disregarded. See **President of the Republic of South Africa and Others v South African Rugby Football Union and Others** 2000 (1) SA 1 (CC) Para 105:

> "*We are unable to agree with this reasoning which in our view is clearly fallacious. The averment, that the President had made the comment, was based on double hearsay which prima facie was inadmissible in evidence against him. If it was inadmissible, no regard could be had to it whether the President objected to the evidence or not. …*"

[55] I cannot make a finding in this case that the line has been crossed between a party not objecting to inadmissible evidence and to a party giving tacit consent to the admissibility of inadmissible evidence, if possible in our law.

[56] There is therefore no objective evidence how far away from the intersection the second plaintiff was when light changed to amber, but his evidence of 10 metres cannot be correct. It is a simple calculation that a vehicle travelling at a constant speed of 40 km/h would cover 11.1 metres per second. A vehicle at a constant speed of 50 km/h would cover 13.9 metres per second. One could easily calculate distances over say two, three, four, five, six or seven seconds. As stated, the distance in issue is the width of Sauer Street (12.5 metres) plus the distance that the bus driver testified he was from the intersection when the light turned amber (10 metres). He must have been further away than 10 metres from the intersection when it turned amber.

[57] As the real distance has not been established, I do not accept the conclusion by Mr Opperman that the second plaintiff could not have stopped before the intersection. It cannot be verified with any objective evidence and does not disturb the direct evidence by the eye witnesses.

[58] I have another difficulty with this part of the evidence. Mr Opperman calculated that the second plaintiff would have needed 27 metres to stop at a speed of 40 km/h and 36 metres at a speed of 50 km/h (although an emergency stop could be carried out over as little as 9 metres). He did these calculations based on a speed reached when the breaking process had to commence (after taking into account reaction time). This conclusion is dependent on inter alia the following factors which show that it cannot be relied upon:

[58.1] How long the light remained amber (the uncertainty dealt with already);

[58.2] What distance the bus driver was from the intersection when this happened (the uncertainty and contrary evidence dealt with already);

[58.3] In calculating the distance over which the bus would have been able to stop, Mr Opperman used a figure of 0.7 as the braking coefficient. He testified that this was a figure generally accepted in the industry as many factors may impact on stopping distance. It concerns me that Mr Opperman did not rely on manufacturer specifications in deciding on the 0.7 as a method to check the applicability of an industry standard. If the braking coefficient is higher due to say the quality of the components in the bus, then the stopping distance would shorten. Other factors may lengthen it. Why would an average apply to a stopping distance on a dry, tarred surface?

[58.4] There is also no objective evidence as to the actual speed at which the second plaintiff drove the bus as there was insufficient evidence was in calculating the rate of acceleration of the bus. Mr Opperman used a figure of 0,8 metre per second to conclude that the bus must have travelled below 55 km/h. The 0,8 figure, he testified, is a figure he measured a long time ago when he timed the acceleration of busses. In the absence of checks such as (a) evidence as to manufacturer specifications on acceleration, or (b) calculations based on engine power, mass and the like, I question the reliability of such old data due to technological advances. I make no finding in this regard as there are already too many uncertainties in the assumptions relied upon.

[59] I also do not accept the conclusion by Mr Opperman that the mere fact of a collision proves that the first plaintiff entered the intersection against a red light as the second plaintiff would have been well past the point of impact by the time that the lights turned green. This conclusion is based on the second plaintiff's version (as reflected by Mr Opperman in his final conclusions) about having been 16 metres away when the light turned amber and are based on a five-second delay. In the absence of any objective evidence, it would have more probable that the first plaintiff entered the intersection as a driver would

in the normal course do, namely when the light turned green. In this case two witnesses contradicted the evidence by the second plaintiff relied upon by Mr Opperman. In fact, the evidence that the collision took place more probably reflect that the bus driver entered the intersection against a red light.

[60] Mr Opperman testified that it is likely that the impact was likely a side impact as described by the second plaintiff. This is based on damage to the bus on its left rear before the back wheel, lack of damage to the left front of the bus, and the first plaintiff's evidence as to how his car came to a standstill. This conclusion seems to be correct to me, and is in accordance with the weight of the evidence by the eye witnesses too. I was not provided with any contradictory evidence such as a police report showing damage to the luxury vehicle, or with photographs, or even an insurer's report of the damages to the luxury vehicle.

[61] I took this conclusion into account in evaluating the evidence of the first plaintiff. It seems common cause that he was injured in the accident and had to be hospitalised. The event must have been traumatic, on his version, happened in a split-second. Upon impact the first plaintiff's vehicle was spun around and to his left, and he stopped facing Anderson Street in the direction from where the bus came, very close to where Sauer Street crosses Anderson Street (and he pulled off a very short period previously). The collision occurred years earlier with all the impact on one's brain of dealing with traumatic events. Under those circumstances, an error about the point of impact is understandable, and does not necessarily reflect a lying witness.

[62] A large part of the cross-examination of the first plaintiff and the passengers in the bus focussed on this aspect: Who collided with whom? It seems to me to have been largely irrelevant. The first and second plaintiffs' paths of travel crossed at right angles. If the first plaintiff commenced to move a bit earlier (or accelerated faster), he would have been hit on the right side of his vehicle by the bus. By commencing to move a bit later (or accelerating slower), he would have hit the bus on its left side. The difference is split-seconds. It has very little, if any, evidentiary value.

[63] In assessing the evidence, I am largely guided by probabilities. In **National Employers' General Insurance Co Ltd v Jagers** 1984 (4) SA 437 (E)[4] Eksteen AJP (Zietsman J and Van Rensburg J concurring) held at 440F-G (underlining added):

> "... *In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.*"

And at 440I-441A:

> "... *It does not seem to me to be desirable for a Court first to consider the question of the credibility of the witnesses as the trial Judge did in the present case, and then, having concluded that enquiry, to consider the probabilities of the case, as though the two aspects constitute separate fields of enquiry. In fact, as I have pointed out, it is only where a consideration of the probabilities fails to indicate where the truth probably lies, that recourse is had to an estimate of relative credibility apart from the probabilities.*"

[64] See too **Stellenbosch Farmers' Winery Group Ltd and Another v Martell Et Cie and Others** 2003 (1) SA 11 (SCA) Para 5, a judgment by Nienaber JA (Farlam JA, Brand JA, Heher AJA and Lewis AJA concurring).

[65] In **Santam Bpk. v Biddulph** [2004] 2 All SA 23 (SCA), Zulman JA (Harms and Heher concurring) held at Para 10 (underlining added):

> "*[10] Sigasa may not have been a satisfactory witness in all respects. However, the proper test is not whether a witness is truthful or indeed*

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[4] Quoted with approval in **Moropane v Southon** (755/2012) [2014] ZASCA 76 (29 May 2014) Para 50 by Bosielo JA (Mthiyane DP, Maya and Theron JJA and Van Zyl AJA concurring);

> *reliable in all that he says, but whether on a balance of probabilities the essential features of the story which he tells are true (cf* ***R v Kristusamy*** *1945 AD 549 at 556 and* ***H C Nicholas Credibility of Witnesses*** *(1985) 102 SALJ 32 especially at 32 – 35). This is particularly so in this case where the trial court rejected Sigasa's evidence on the basis of his veracity as opposed to the reliability of his evidence."*

[66] As reflected earlier, a matter concerning the evidence of the two bus passengers, is that the initial part of their evidence was just too similar for comfort, however, their recollections took different routes thereafter with differences between their evidence where a lying witness could have tailored his evidence.

[67] The evidence by the first plaintiff and the two bus passengers were not inherently contradictory, was evidence by parties who are independent from each other, was for a large part not challenged, and was evidence by persons who were impressive in the witness stand. This is not a matter probabilities and credibility (and reliability) point in different directions. I am satisfied that my findings are based on essentially a true story. I accept the evidence by the first plaintiff and the two bus passengers as probably true.

[68] Was the first plaintiff negligent to enter into the intersection? There is no evidence that he did so against a red light. In my view the plaintiff who saw that the light turned green and who saw that the driver to his right (the direction from where the danger would come) enter the intersection, is entitled to take this pointer, based on the authorities quoted earlier herein. There is no real dispute about the facts required for this finding. He was not negligent in commencing to enter the intersection.

[69] Was the first plaintiff negligent not to stop when the taxi stopped? The first plaintiff testified that this did not alarm him, as taxis stop anytime and anywhere. Mr Opperman further testified about a delay between being alerted and taking action. I heard no evidence that the first plaintiff would have been able to stop in time after the taxi stopped, even if he should have been alerted. He testified that it all happened so quickly that there was no time to react. The

short distance travelled bears this out. The onus was on the defendant to establish negligence by the first plaintiff. It did not do so. To my mind there was no evidence on which I could that he would he have been able to stop when the taxi stopped and avoided the collision.

[70] Accordingly, no negligent conduct by the first plaintiff has been established. Not only did the second plaintiff fail to prove negligence, but he also failed to prove a causal link between the collision in which he suffered his damages and the collision with the first plaintiff. It was clear from the evidence that the bus driver suffered no injury in the collision with the luxury vehicle; He suffered his injuries (and thus his damages) in colliding with the building. He had to prove a casual link with negligence by the first plaintiff, and did not do so.

[71] The negligence of the second plaintiff is stark: He decided to skip a red robot (it probably was red before he entered the intersection), travelling at speed in large, dangerous vehicle, whilst he knew that any second vehicles would enter the intersection from his left. I have addressed the evidence already and only highlight:

[71.1] The bus driver's evidence about his position where he as when the light turned amber and seems improbable and it is probable to have been a significant distance from the intersection;

[71.2] Two witnesses testified about a speeding bus, one where the driving scared them, one of whom saw the bus enter the intersection with Sauer Street against a red light (and the other witness' version does not contradict this);

[71.3] Two witnesses testified about the hooting of the bus driver, consistent with driver relying on his large presence in the intersection to stop other vehicles from entering the intersection in accordance with the rules of the road;

[71.4] The bus driver's own evidence reflects that he took a chance and did not appreciate the meaning of an amber light;

[71.5] The clear evidence by the first plaintiff that the light had turned green for him and the taxi started to enter the intersection (the latter confirmed by a witnesses).

[72] Accordingly, I make the following order:

1. The determination of the quantum of damages suffered by the first and second plaintiffs is separated from liability and postponed sine die;

2. The defendant is liable to compensate the first plaintiff for 100% of the damages to be proven and resulting from the collision which occurred on 10 March 2015;

3. The defendant is ordered to pay the first plaintiff's costs pertaining to this hearing;

4. There shall be absolution from the instance with regard to the second plaintiff's claim against the defendant resulting from the collision which occurred on 10 March 2015;

5. The second plaintiff is ordered to pay the defendant's costs pertaining to this hearing.

DP de Villiers AJ

On behalf of the First Plaintiff:	Name withheld
Instructed by:	Nukeri Inc
On behalf of the Second Plaintiff:	Name withheld
Instructed by:	Koka Attorneys
On behalf of the Defendant:	Adv B Bodhania
Instructed by:	Tasneem Moosa Inc