**IN THE HIGH COURT OF SOUTH AFRICA**
**(GAUTENG DIVISION, PRETORIA)**

CASE NUMBER: A799/2012

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED
5/6/2014 .....
DATE SIGNATURE

6/6/2014

In the matter between:

**THE ROAD ACCIDENT FUND** Appellant

**And**

**MAGALAGWANE JONAS MALATJE** Respondent

CORAM: MAKGOBA J, HUGHES J, STRAUSS AJ
HEARD ON: 14 MAY 2014
DATE DELIVERED: 06 JUNE 2014

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J U D G M E N T

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**STRAUSS S, AJ:**

*1)* The Appellant appeals against a judgment of the High Court, North Gauteng, Pretoria in which it was held by the trial court, that a collision between two motor vehicles on 6 June 2004 was caused by the negligent driving of one Daniel Makwane, the driver of the insured vehicle. Leave to appeal was granted by the SCA after the *court a quo* had refused the application for leave to appeal by the Appellant.

2) It is common cause that a collision occurred on the day in question on a public road known as the Ga-Debella to Ga-Moraswi / Ga-Nchabeleng in the Limpopo Province. The respondent was the driver of one of the vehicles involved whilst the appellant, one Daniel Makwane, was the driver of the insured vehicle.

3) By agreement between the parties the Court *a quo* only dealt with the issue of liability and the matter now before us on appeal is against the finding by the Court in favour of the respondent. The sole issue is whether the trial court was correct in coming to the conclusion that Daniel Makwane was solely the cause of the collision, and whether the trial court in finding so, had adopted the proper and correct approach when faced with two mutually destructive versions.

4) The respondent as plaintiff instituted action against the Road Accident Fund as defendant in the Court *a quo*. The respondent claimed damages for injuries suffered as a result of the collision, which occurred on 6 June 2004, at which time the respondent was the driver of a taxi conveying passengers, and whose vehicle collided with that of the insured driver, one Daniel Makwane.

5) The appellant pleaded that the insured driver was not negligent and that the sole cause of the collision was the negligent driving of the respondent.

6) The particular ground of negligence on which the appellant relied were and I pause the mention as set out in paragraph 5.2.10 to paragraph

plea as aforementioned, and pause to mention the specific material facts of negligence as pleaded in paragraph 5.2.10:

> "*He travelled on the incorrect side of the road*".

And paragraph 5.2.11:

> "*He obstructed the lane of traffic in which the driver of the insured vehicle was travelling in a negligent way and at an inopportune moment.*"

7) Forming part of the record were certain documents relevant to the respondent's claim inter alia witness statement contained in the police docket and a sketch plan and key to such plan drafted the South African Police Service in their police investigation of the collision under docket "*Appel, Case CR19/06/2004*". Appel being the place which has jurisdiction over the area in which the road is situated on which the parties travelled on, the specific day. The relevance of this sketch plan will be dealt with later.

8) The respondent ostensibly included this document together with statements of witnesses for the respondent and the driver of the insured vehicle, which all formed part of the police docket and were contained in the trial bundle, as these documents were discovered during the course of pleadings.

9) The respondent proceeded to lead the evidence of one Mr Pine Moraswe who was a passenger seated behind the respondent, the driver of the taxi transporting the passengers on 6 June 2004 around midnight, on the road from Ga-Debella to Ga-Moraswi in the Limpopo Province. The respondent chose not to call the plaintiff, Mr Malatje, himself due to the fact that evidence from the Bar was tendered as well as doctors' medico-legal reports later included in the bundle, that confirmed that the plaintiff had a speech impediment and a hearing problem as a consequence of the *sequelae* of his injuries sustained.

10) There was a discourse between counsel appearing on behalf of the appellant and respondent in regard to the respondent not being called as a witness, as the respondent's counsel stated that the plaintiff himself would not be able to testify although available, and the appellant's counsel arguing that the plaintiff was able to testify and that according to the medical records he could not recall the collision, so he would not be of any assistance, although he would be able to testify.

11) The respondent nevertheless chose not to call the plaintiff due to the fact that he would not be able to testify without some difficulty.

12) The trial court did not deal with the fact that the plaintiff himself did not testify and the trial Judge in the circumstances drew no negative inference from the failure of the respondent to testify. I agree that no negative inference has to be drawn from the fact that the plaintiff himself did not testify, as both parties were in agreement that he could or would

not be able to assist the Court, albeit for different factual or medical reasons.

13) Mr Moraswe, the witness, testified that he was seated behind the plaintiff in the motor vehicle and that he is related to the plaintiff, as his cousin. They were travelling after midnight to their village in Ga-Moraswi from a westerly to an easterly direction. At this juncture the respondent's counsel handed in a set of photographs depicting the road leading to Ga-Moraswi (east) and Appel Cross (west). Counsel stated that these photographs were indeed prepared by the appellant. In total 20 colour photographs were handed in and formed part of the record, marked exhibits A1 to A20.

14) The photographs depicted a tar road without any solid or broken lines, either in the middle or on the edge of the road. The surface next to the tar road was gravel and ran past a rural area that depicted houses and a building containing fuel reservoirs next to the road, no street lights were visible on the photographs.

15) In his evidence-in-chief Pine Moraswe, looked at all the photographs, but denied that any of the photographs depicted the scene where the collision took place according to his recollection. He stated that the collision occurred further east on the same road, but that the photographs did not depict the place of collision or point of impact as per his recollection. The witness could therefore not be requested to make any markings on these photographs as to the point of impact or to the position of the vehicles prior to and after the collision in relation to

the road depicted on the photographs. He was quite rightly not requested by counsel to make any markings on these photographs, although now other photographs depicting the place of collision as per him were ever shown to him. It was simply recorded by the Court *a quo* that this was the correct road on which the collision took place. The witness was unaware of the speed limit. He testified that the insured vehicle came from an easterly direction facing their vehicle. He said that the plaintiff remarked during his driving on the said evening, "*he was being blinded by the headlights*" of the oncoming vehicle and that he thereafter proceeded to dim and bright his lights for the approaching vehicle.

16) Pine Moraswe further testified that the oncoming vehicle deviated from its lane of travel and collided with their vehicle in their lane of travel. Their vehicle capsized and ended up on the left-hand side of the road in an easterly direction, thus on their side of the road and not on the opposite side of the road. He testified that after the collision he could not wake the plaintiff. He climbed out of the vehicle and went to the village nearby for assistance. He thereafter proceeded to remove the respondent from the vehicle and took him to hospital in another vehicle whose driver assisted him, and who it later transpired were also people known to him.

17) He testified that the respondent was not intoxicated, that he was with him the whole day and he had not been drinking. He testified that the respondent flicked his lights to the oncoming vehicle to show that he

was being blinded and the respondent also took evasive action by swerving to the left-hand side of the road, without leaving the road in order to prevent the collision.

18) After counsel for the respondent showed him his statement that he had given to the police, he denied signing the statement and no page could be found with his signature thereon. He testified that the policeman wrote down the answers that he gave. He did not read the statement back to him and he did not sign it. He only gave a verbal account to the police of the collision and they wrote it down. On this point the page depicting his signature is not part of the record as his statement ends with the oath being administered and a certain policeman, one Mahlatsi, commissioning the statement and setting out the oath. The statement ends with the oath being administered, but the next page does not continue with further averments for the oath, but is simply the certification of the statement by one Mahlatsi. It is unfortunate that counsel for the respondent did not take this issue any further due to the fact that I surmise that it is due to an incomplete record of the statements handed in during discovery, that the signature of the witness does not appear in the record. It is probable that the statement was indeed signed by the witness, but that this page was simply not included in the documents before Court. Be that as it may, it therefore prevented any subsequent cross examination by the appellant's counsel on his statement as he denied signature thereof.

19) During cross-examination the following was brought to the fore. He was seated directly behind the driver in the Venture used as a taxi and that the other three passengers were seated at the back behind him and were all sleeping. He denied that the respondent sitting in front of him driving the vehicle, obstructed his view in any manner of the road to the front of the vehicle. Even though the blinding of the headlights was communicated to him by the respondent he also noticed the oncoming vehicle's headlights and bright lights himself. He did not know at what speed the respondent was driving and the respondent also flicked his headlights approximately three times to the insured vehicle, at the same time reduced speed and also at some stage swerved to the left without leaving the road. The fact that he reduced speed also now came to the fore for the first time as evidence and he testified that he could see the markings on the road dividing the two lanes of traffic and he saw the oncoming vehicle directly turning towards their vehicle. The oncoming vehicle deviated into their lane of travel, and the right front and right rear wheels of the oncoming vehicle travelled into their lane of travel. He could see this by the lights reflecting on the road, their vehicle's and the oncoming vehicle's lights.

20) He says the impact on their vehicle was on the right-hand side of the front headlamp. He did not know where the impact was on the other vehicle or the make of the insured vehicle. He was further not sure about the impact, but he says he assumed it was more or less a head-on contact and more to the sides of both vehicles on their headlights. After the collision he says the insured driver ended up on the opposite

side of the road from their direction on four wheels next to the road. He says he was concerned with the respondent and he did not assist any other passengers of either their vehicle or any of the occupants of the insured vehicle. He did not proceed to go and look in the appellant's vehicle or try and find any of its occupants or the insured driver.

21) He did not deny that the insured driver's vehicle ended up next to the road on the left-hand side of the road, thus on the appellant's own side of the road. He conceded that the police could have been at the scene of the collision after he had left to take the plaintiff to hospital. He disputed the fact that the collision happened between 18h00 and 19h00 and said that it was after midnight.

22) He said that there was no speed limit of 30 kilometres before the bend on the road which they were travelling coming from the east, as he knows the area. He denied that the respondent was driving at an excessive speed coming around the bend and due to this lost control of his vehicle. He denies that the appellant's driver flicked his lights and that their vehicle encroached into the appellant's lane of travel and collided on the appellant's side of the road. Their vehicle after the collision ended up on their side of the road, capsized, on the gravel next to the road, the appellant's vehicle after the collision ended up on his left hand side of the road also on the gravel not capsized. He denied that the road was wet and that the conditions were not safe.

23) The appellant called the insured driver, Mr Daniel Tlaesego Makwane. He testified that he could not recall the date of the collision, but said that

it was in 2004 around 19h00 in the evening. He was travelling from Bronkhorstspruit driving towards Appel Cross in a maroon Jetta. He says the weather conditions were cloudy and the road surface was wet. He confirms that on the specific evening he was driving from an easterly to a westerly direction. His vehicle's lights were on as it was dark and he was driving at approximately 40 kilometres per hour when the collision took place.

24) The photographs handed in as exhibits A1 – 20 were shown to him and he marked an X on exhibit A7 indicating the point of impact on his side of the road, i.e. the left-hand side, near the building with the fuel reservoirs I referred to earlier . He also indicated on A9 where he first saw the respondent's vehicle and marked it with a Z. In regards to the photographs, it depicts Z to be at the bend of the road and the appellant's vehicle plus-minus 150 metres marked with an "A" on the left-hand side of the road. The witness used exhibit A9 and made his markings indicating when he first saw the vehicle of the respondent when it was approaching in the bend of the road approximately 150 metres ahead. He testified that he saw the vehicle coming at a high speed around the bend with his bright lights on. He applied brakes and swerved to the left-hand side, but the respondent's vehicle swerved into his lane of travel and collided with his vechile on his side of the road.

25) He says that in 2004, there was a white line dividing the road, but currently on the photographs no such white line is depicted. At least this fact is common cause between the parties as confirmed by both the

witnesses who testified in this matter that in 2004 there was a white line. He says he flicked his lights approximately twice.

26) He testified that the respondent's vehicle landed past the point of impact on the left-hand side of the road, off the road, on his side of the road. He marked "D" on A7 as the place where the respondent's vehicle ended up after the collision. "D" was at the same place were the witness had marked A when he first saw the vehicle of the respondent, it indicated a place on the gravel next to the road on the left hand side of his lane of travel. This was never disputed in the cross examination of the witness.

27) The police arrived at the scene after approximately five minutes. He did not speak to any of the occupants in the respondent's vehicle although he did proceed to go and look if he could find anybody in the respondent's vehicle to assist, but he waited for the police to come to the scene.

28) In cross-examination of this witness the following evidence came to the fore. After his statement made to the police was put to him and he said that he had signed it, he denied that it was ever read back to him or that the contents thereof were explained to him before he signed it. He said that the police arrived after 19h00. His statement says that the collision occurred at 19h00 and that he was alone in the vehicle. He denied specifically that he was not alone due to the fact that he had a learner's licence and indeed needed someone to accompany him who was in

possession of a valid driver's licence. He also further denied that the collision was around midnight.

29) Questions by the Court brought out the following facts: that he was first at Mohaleng to pick up children and that he had to then fetch his wife. Due to the fact that he had been working the morning he first rested. He was doing piece jobs. Although in his evidence-in-chief he said that he was unemployed. He testified that he was at Mohaleng up until 18h00 the evening. He could not recall the name and surname of the person driving with him and he only gave his nickname. He had been in possession of a leaner's driver's licence for two months. Currently he has no driver's licence.

30) The discrepancy in regard to the speed in his statement to the police that he was driving at 60 kilometers per hour was put to him why he had testified that he was driving 30 to 40 kilometers per hour. He explained that he reduced his speed due to the road conditions and the speed and bright lights of the respondent's vehicle. The trial court asked if he had told the police that he had flicked his lights and that he had swerved out for the oncoming vehicle. He confirmed that he had told the police, but that they did not put everything in his statement. He said that it was not read back to him and that he made the statement at about 20h00 at the police station. I pause to state that if one has regard to his statement no time is depicted on the statement. He continued to deny that the collision occurred after midnight.

31) Thereafter counsel for the respondent continued with cross-examination. It was put to him that the respondent moved to the left and if the respondent indeed moved to the left, how could he then have collided with the appellant's vehicle on the right. It was then put to him that he had encroached on the respondent's lane of travel. At this juncture the appellant's counsel objected to this version being put to him on the grounds that it was not pleaded as a ground of negligence in the summons, and therefore that the appellant had not been made aware that this is the case they had to meet, in that the insured driver had encroached on the lane of travel of the respondent and was therefore negligent.

32) The *Court a quo* rule that, having regard to paragraph 5.5 and 5.6 of the pleadings of the respondent which state that the insured driver "*failed to give regard to other road users, in particular the plaintiff, and that the insured driver failed to avoid the collision when by exercise of reasonable care he could have done so*," was broad enough to include evidence that the insured driver encroached in the lane of travel of the Respondent.

33) He further testified that he only signed his statement the next day and that his statement was never read back to him.

34) That being the totality of the evidence, I pause here to say that it is most unfortunate that no inspection *in loco* was conducted in this case and that the parties could not agree to hand in photographs that depicted the scene of the collision, albeit it different places on the road, photographs

which could be used for the appellant and the respondent to indicate point of impact and the like. The photographs used in the trial court also went missing and after enquiry by the appellants could not be traced by the respondents attorney, however in the appeal the respondent filed together with their heads of argument, photographs which they state were the photographs used in the trial, which they found in their counsels brief. The parties could not agree if these were indeed the photos used in the trial, this court allowed the photos to be handed up and it forms part of the appeal record, it does seem to be the photographs used in the trial court as the markings as previously discussed indicating "A" "Z" and "X" do appear thereon.

35) The court therefore only had one photographic version depicting the point of impact and the position of the vehicles prior to and after the accident, and this evidence is supplemented by the oral testimony of the appellant's insured driver. In contrast to that, the court had the respondent's version not from him directly but from a passenger travelling in the vehicle, who could give no evidence of speed, point of impact, except to say that it was on their side of the road, or positions of the vehicle after the collision, and whose version was not supplemented by any photographs.

36) I turn to consider the findings of the Court *a quo* on the facts. The Court had to decide which of the two versions, so to speak, to accept. In doing so it had to consider the facts, the credibility of the witness and the probabilities in this case. The trial court accepted the version of the

respondent in doing so the Court found that the passenger in the respondent vehicle was a credible witness, and that the probabilities supported the respondent's version of how the collision occurred.

37) The *Court a quo* also found that the probabilities were in favour of the respondent due to the fact that the appellant's insured driver had no driver's licence, and even though this issue was not addressed in cross-examination, it indicated an absence of skill and also therefore led to an indication of negligence. The Learned Trial Court found that a "learner driver" being in the position of the insured driver on that road after midnight in the condition as it was, accepting that the road was wet and not in a very good condition, would have had difficulty in driving his vehicle in those conditions.

38) The appellant's counsel submitted that the Court *a quo* erred in various respects on the facts and had an incorrect approach to resolve the factual disputes between the two versions. Counsel for appellant argued that the Court had too much regard to the collateral issues put to the insured driver and found him not to be a credible witness on those collateral issues.

39) With regard to the specific ground of negligence not pleaded but testified to under oath, an objection by counsel for appellant was raised against the positive statement put to the witness of the appellant, that he caused the accident due to his flickering lights and the fact that he encroached on the lane of travel of the respondent vehicle. This was the first time in the trial that this version of the respondent came to the fore,

it was never alleged either in the particulars of claim or in replication even, after the appellant pleaded this specific ground of negligence in their plea. The respondent counsel also did not request amendment of the particulars of the claim before judgment.

40) The rule that parties are limited to their pleading is apposite in these circumstances, and the first error of the Court *a quo* was to not uphold the objection of the counsel in regards to this new material fact that was being testified to without it being contained in any pleadings. The appellant was therefore caught unawares and could not prepare its case in reply to this evidence.

41) The Court *a quo* erred in finding that the factual statement that another vehicle encroached on the lane of another could be included as a ground of negligence as pleaded in paragraphs 5.5 and 5.6 of the pleadings of the respondent, which stated that the insured driver "*failed to give regard to other road users, in particular the plaintiff, and that the insured driver failed to avoid the collision when by exercise of reasonable care he could have done so.*"

42) The issue, with respect, should not be if the factual statement of "encroaching on another lane", which is a material fact and is a specific ground of negligence, could be in general incorporated in the maxim "having regards to other road users or exercising reasonable care", but the issue was that it was a material fact on which the respondent relied to prove its case, and the respondent had to prove that fact in order to prove that the appellant insured driver drove in a negligent manner.

43) By neglecting to allege the said fact in the particulars of claim the respondent then at trial attempted, and succeeded in canvassing another issue which was not pleaded.

44) Further to the law in general, Rule 18(4) of the Uniform Court Rules states that "*every pleading shall contain a clear and concise statement of the material fact/s upon which the pleader relies for his claim, with sufficient particularity to enable the opposite party to reply*". A party is limited to its pleadings and cannot direct attention to one issue and at trial attempt to canvass another. The court must be able to determine the real issues, and the tendering of this evidence as a ground of negligence was widening the issues.

45) This is set out in **Nyandeni v Natal Motor in 1974 (2) SA 274 (D), Shil v Milner 1937 AD 101 at p106** and **Mosterd NO v Old Mutual Life Assurance Co SA Ltd 2001 (4) SA 159 SCA at 180 A- B.**

46) What is further important on this material fact of negligence, is that it remained the central issue between the parties and, indeed the most important single and factual dispute between the parties, being the point of impact in relation to the middle line on the road, and which vehicle would then have encroached on the other vehicles side of the road, and moved over the middle line.

47) The approach of the Court, when faced with two mutually destructive and irreconcilable versions, in **Stellenbosch Farmers' Winery Group Ltd & Another v Martel et cie & Others 2003 (1) SA 11 (SCA)** the test is set out:

*"To come to a conclusion on disputed issues the Court must make findings on –*

*(a) the credibility of various factual witnesses;*

*(b) their reliability; and*

*(c) the probabilities.*

*As to (a) the Court's finding on the credibility of a particular witness will depend on its impression of the veracity of the witness. That in turn will depend on the variety of subsidiary factors such as (i) the witness' candour and demeanour, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions, contradictions with what was pleaded or put on his behalf or with established fact or with his own extra curial statements or actions; (v) the probability or improbability of particular aspects of his version and (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events.*

*As to (b) a witness' reliability will depend apart from the facts as mentioned under (a) (ii), (iv) and (v) on (i) the opportunities he had to experience and observe the events in question, and (ii) the quality, integrity and independence of his recall thereof.*

*As to (c) this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In light of its assessment of (a), (b) and (c) the*

*Court will then as a final step determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case occurs when a Court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter, but when all factors are equipoise probabilities prevail."*

*In* ***Selamolele v Makhado*** *1988 (2) SA 372 (V) the court reconfirmed the principle that where there are two mutually destructive version in a civil trial, the correct approach to be adopted in deciding the issue, is to determine which of the two version is more probable than the other."*

48) As to the credibility of the respondent witness, Mr Moraswa, this court cannot remark on his candour as this is solely within the trial court's knowledge, indeed as set out in judgment by the trial court that he was "edgy". I must agree with counsel of the appellant that the remark in regards to him being "edgy" must be seen in the light that he became "edgy" after the court had interposed the cross-examination and asked him several questions, he is a simple man and in all probabilities found the court intimidating even though no bias can be deducted from the court's questions to the witness.

49) The internal contradictions of the appellant's witness were as to speed at the time of the collision, compared to his statement, time of the accident that was clearly incorrect, and the fact that he testified he was unemployed, but later testified that he was doing a piece job on the day.

Also the fact that he was travelling alone in the vehicle and the fact that he did not state in his police statement that the respondent had encroached in his lane.

50) This Court will not rely on the statements as made to the police to find contradictions and to make any findings of credibility based on the contradictions of both witnesses having regard to their evidence and their statements made to the police. Both witnesses testified that they made oral statements after questioning by the police, which answers were written down and in the respondent's case the witness did not sign his statement, and the appellant's witness signed his, but denied that it was read back to him or the contents thereof explained. Thus, having regard to the shoddy police work in taking down the statements of witnesses in this case, as well as the undisputed evidence that both witness statements do not comply with the rules of evidence, this Court cannot have regard to the contradictions put to the appellant's witness in regards to his statement.

51) The respondent's witness also had contradictions and the quality of his evidence was not as good as that of the appellant's witness as he firstly testified to a ground of negligence not pleaded on the papers.

52) The reliability of the respondent's witness warrants some criticism. He had no idea of speed of their vehicle or speed limits on the road, but in cross-examination denied that the speed limit was 30 km on the road, did not even know the make or colour of the appellant's vehicle.

53) His view of the road was obscured by the driver sitting in front of him, it was dark and there were no street lights. In these circumstances one can make no other logical finding than that this would have affected his observation opportunity and the quality thereof.

54) This Court must now consider afresh the probabilities and the improbabilities of both versions of the witnesses in this matter, and I now turn to do so:

55) It is probable that the respondent, proceeding out of a bend in the road, could lose control of his vehicle when driving too fast and more than 30 kilometres per hour, being the speed limit set when entering the bend. This, in contrast to the improbabilities that the appellant's insured driver would for no apparent reason all of a sudden swerve to the right out of his lane and encroach onto the lane of travel of the respondent, on a straight road.

56) The police sketch plan and key compiled by a police officer after the collision indicated that both vehicles were stationary after the collision on the left-hand side of the road in an easterly direction, thus both vehicles were on the left-hand side of the road of the lane of travel of the insured driver, thus corroborating, firstly, the appellant's witness testimony that both vehicles ended up on his side of the road, and in contrast to the total opposite evidence of the respondent, testifying that his vehicle was on his left-hand side of the road opposite that of the appellant's vehicle, also on his left-hand side of the road.

57) The sketch plan and key and the objective facts depicted therein were not canvassed by any of the parties in the court *a quo*. It seems as if the court *a quo* was also not made aware of the sketch plan. The version as to where the vehicles ended up after the collision was testified to by each party, and this evidence was also mutually destructive of each other due to the fact that the appellant witness testified that both vehicles ended up on the left-hand side of his side of the road on the gravel, and the respondent witness testified that their vehicle was on their left-hand side of the road and the appellant's vehicle further away on the opposite side of the road thus on the right side of their vehicle.

58) The sketch plan points to a probability in favour of the appellant as it is corroboration of an objective party (the police). The respondent's counsel argued that the police plan could not be correct, as the police were not called to testify, the evidence stood in a vacuum before the Court, and should not be considered in light of the fact that the appellant's witness contradicted himself in his evidence and was not a credible witness.

59) He also criticised the appellants witness, due to his police statement being contradictory to his testimony and that the markings he had made on the photographs were inconsistent. The evidence is clear that his statement was not read back to him and he did not read it, and I have dealt with that so the discrepancies does not take a finding on probabilities any further. Therefore, by the same token the correctness

of the Respondent's statement could not be tested due to him not signing his statement, the discrepancies in the appellant's evidence could be explained due to the fact that the appellant's witness did not read his statement.

60) I find that this police plan is admissible evidence, it is prima facie evidence from the police who compiled a plan post collision of the position of the vehicles. I find that having regard to the sketch plan that it is more probable that the respondent's vehicle would have ended up on the left-hand side of the road i.e. the appellant's side of the road, if one has regard to the testimony of the appellant, the point of impact described and marked on the photographs, and the damage on the appellant's vehicle, being on the front right-hand side. It also points to the probable route the vehicle would have taken after impact with the appellant's vehicle in the left lane.

61) It is improbable that the respondent's vehicle, having regard to his evidence, that the point of impact was on his side of the road in his lane, the appellants vehicle would have ended up, on the complete other side of the road, after the collision. It is improbable having regard to sketch plan that the respondent vehicle would end up on the complete opposite side to which he swerved prior to the collision as he testified that he swerved left, thus even further away from the direction of the oncoming appellant's vehicle. The fact that he testified that the vehicle were on different side of the road was disputed by the appellant, but the evidence as per the appellant that the vehicles ended up after the

evidence as per the appellant that the vehicles ended up after the collision on the same side of the road, his left hand side, was not disputed in cross examination.

62) The probabilities favour the appellant further in that his evidence was a direct and first-hand account and testimony of the collision as to speed, distance, point of impact and positions of the vehicles prior to and after the collision. The only direct evidence the passenger in the respondent's vehicle could give was that he saw the headlights on bright and he saw the appellant's vehicle encroaching on their lane, his evidence was not helpful in reaching any conclusion or finding on probabilities.

63) It is also more probable that the view of the witness sitting behind the respondent travelling in the dark, on an unlit road, was obscured by the respondent in front of him.

64) The strange behaviour of the respondent in leaving the scene of the collision immediately with the driver and not waiting for the paramedics or police to arrive, warrants some negative conclusion in that the witness indeed did not want the police to find the respondent in the vehicle on the scene of the collision for some obscure reason.

65) The probabilities in favour of the respondent are that the collision definitely did not occur at 19h00 and that the appellant's insured driver is mistaken about the time, as the medical records of the plaintiff indicate his admission to hospital, at approximately 03h00 am in the morning, which corroborates the testimony of the respondent.

66) On the factual findings the trial court erred in finding that appellant's insured driver was unskilled due to the fact that he only had a learner's license, in the absence of any evidence to that effect, and in the absence of it being put to him in cross-examination.

67) Counsel for the respondent argued strenuously on this point and asked this Court to regard the fact that he did not have a valid driver's license as *prima facie* proof and an indication of him being an unskilled driver. It was argued further that there is rebuttable presumption that the absence of a driver's license indicates lack of skill, and that this Court could also take judicial notice of this fact, which is a clearly wrong.

*68)* Counsel quoted the Law of Collision in South Africa as per H B Klopper in this regard to substantiate his argument in this regards. I quote the relevant passage from the author at page 22 paragraph 4 (4th edition)" *"however it does not necessarily follow that an unskilled unlicensed person or someone with a learners license, is by virtue of the fact of his lack of skill or license ipso facto negligent. Nor can such persons driving skill be judged with mere reference to his driving experience. In our law a person is not negligent merely because he is unskilled. The negligence of the unskilled driver arises when such driver being aware of his lack of skill, nevertheless elects to drive a motor vehicle and causes an accident. Consequently the actions of an unskilled and unlicensed driver generally have to be determined, with reference to the reasonable person test."*

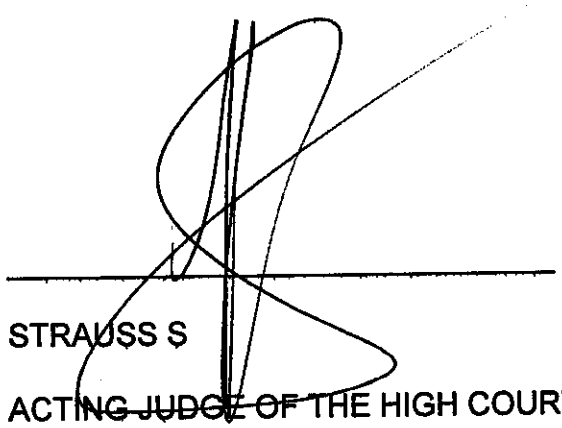
69) I can find nothing in the National Road Traffic Act or in any judicial notice or presumptions, as well as in reported cases that justifies a *prima facie* conclusion that a learner driver is an unskilled driver, especially if no such evidence was elicited in cross-examination.

70) The trial court therefore erred in making such a finding and on that basis finding on the probabilities in favour of the respondent.

**I therefore make the following order:**

**The appeal is upheld with costs.**

**The Court a quo's granting judgment in favour of the respondent on the merits is set aside and substituted with an order that absolution from the instance is granted with cost.**



STRAUSS S

ACTING JUDGE OF THE HIGH COURT

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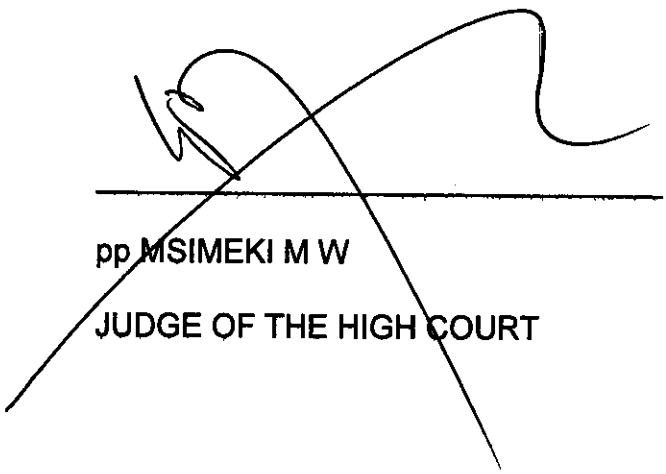

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JUDGE OF THE HIGH COURT

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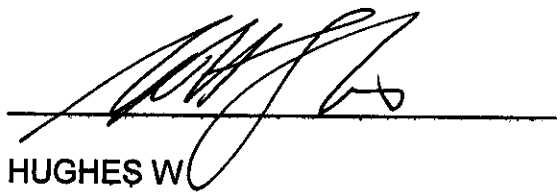

HUGHES W

JUDGE OF THE HIGH COURT

Date of judgment:

Counsel for the Applicant: ADV.: A VOSTER

Attorney for the Appellant: GILDENHUYS MALATJI INC

Counsel for the Respondent: ADV.: M SHOKOANE

Attorney for the Respondent: MR PHALA ATTORNEYS