IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NUMBER: 28899/2010

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED
DATE: 28 October 2014
SIGNATURE: Jansen

28/10/2014.

In the matter between: —

AARON MBIZENI ZUNGU Plaintiff

And

ROAD ACCIDENT FUND Defendant

JUDGMENT

JANSEN J

[1] The trial relates to a collision which occurred between the plaintiff's motor vehicle and an insured motor vehicle driven by a Ms OD Nhlapho (hereinafter

also referred to as the "insured driver") on or about 4 January 2008 on Bushveldt Road, Winterveldt, Pretoria.

[2] The trial lasted three days and the parties were requested to file heads of argument which were received by the court several weeks later.

[3] The trial dealt with the merits of the plaintiff's cause of action only in terms of section 17(1)(a) of the Road Accident Fund 56 of 1996. The parties agreed to postpone the hearing regarding the quantum.

[4] At the commencement of the trial a minor amendment to the defendant's plea was sought, which was not opposed and which was granted.

[5] The court was provided with the following common cause facts: —

[5.1] The description of the parties and their *locus standi.*

[5.2] The date and place of the collision.

[5.3] The condition of the road was good and the surface of the road was dry.

[6] At or near the point of collision a road traversed Bushveldt Road with stop signs on the left and the right of Bushveldt Road. Traffic on Bushveldt Road

had right of way and there were no stop signs for the vehicles on Bushveldt Road.

[7] Bushveldt Road consists of a single lane in each direction at the place where the collision occurred.

[8] Bushveldt Road (the road in which the collision occurred) was clearly marked with a yellow line on the left-hand side and white lines on the right-hand side. A photo depicting the damage to the two vehicles involved in the collision, marked exhibit "**Zungu 1**", was used to indicate the position of the vehicles after the collision occurred as well as the damage to each of the vehicles. A stop street sign, on the right-hand side corner of the said photo, was identified as the stop street on the road joining Bushveldt Road from the left-hand side.

[9] The only issue in dispute was therefore negligence and whether, even were the insured driver to be found to have acted negligently, the collision was, in any event, caused solely by negligence on the part of the plaintiff as pleaded by the defendant. The usual generic allegations regarding, for example, a failure to keep a proper lookout, excessive speed, non-consideration of other vehicles and the non-application of brakes were alleged. No specific attention to detail is apparent from the plea. It was never pleaded that the plaintiff was drunk. There is an unfortunate tendency on the part of practitioners in this field who fail to ascertain the true grounds upon which negligence is alleged in respect

of a specific collision. A shotgun approach is adopted by plaintiffs and defendants, and a boiler plate template is used to draft particulars of claim and pleas thereto. This practice is egregious. Many cases which could otherwise have been settled thus proceed to trial when the true grounds emerge from the evidence for the first time.

[10] The day before the hearing the counsel for the plaintiff sought to introduce photographs of the scene of the collision. Mr Klopper, on behalf of the RAF, stated that the defendant would be prejudiced in that the correct procedure had not been adopted to allow reliance on the photographs. Furthermore, because the collision took place in January 2008 the scene of the collision had changed drastically and speed humps, buildings and the like had been erected. He argued that the photographs would serve no purpose. In the result the court ruled that the photographs could not be introduced as evidence.

[11] Mr Aaron Mbizeni Zungu, the plaintiff, was the first witness to testify.

[12] The plaintiff testified that he worked in Pretoria West and on the day of the collision travelled home from his place of employment per taxi. The plaintiff stated that he finished work at about 16h00 and arrived home at about 17h15 and rested for a short while. He also testified that he never drinks. He testified that he and his girlfriend left the house for town (Makgatho) between 17h00 and 18h00 to refuel their motor vehicle and that the town was only

about ten minutes away from his home. After refuelling they drove back to their house on the same road, namely Bushveldt Road. He was travelling at a speed of 60 to 65 km per hour. It was then that he saw the insured motor vehicle about 30 metres in front of him. (Initially he stated 100 metres but then twice indicated that it was the length of the court (court 8A) which is a distance of 30 metres.) It was put to him that the defendant would testify that the collision occurred at 19h45 to 20h00 which he denied.

[13] The plaintiff further testified that on the return journey to his home, returning via the same road (Bushveldt Road), he drove behind another vehicle, the driver of which indicated that she intended turning right at the road which crosses Bushveldt Road and reduced speed. The driver, namely the insured driver, changed her mind and sought to continue to drive straight ahead. In the process, she drove straight into the pathway of the plaintiff's vehicle. The plaintiff testified that he sought to avoid the collision by swerving left but was unable to avoid the collision. He testified that the road into which the insured driver sought to turn was broad but that he had to contend with a river on the left side of the road. He stated that he was not very far behind the insured motor vehicle when its driver indicated that she intended turning right and proceeded to move to the right but then changed her mind and continued straight ahead. As stated, the plaintiff testified that he then sought to pass her on the left by swerving but that his vehicle would have ended up in the river on that side of the road. In any event, given the fact that the insured vehicle

indicated that it was turning right he slowed down to about 50 km per hour and tried to pass the vehicle on the left hand side. The insured driver's motor vehicle continued straight ahead instead. The timing was such that he could not avoid a collision, even though he tried to pass the motor vehicle on the left hand side. He testified that there was enough space to attempt to overtake the insured vehicle on the left-hand side, but had to contend with the river, which was two metres from the side of the road.

[14] He testified that at the time of the impact the insured vehicle was almost stationary, alternatively driving very slowly.

[15] From photographs which had been discovered, and which were marked with the numerals "**5**" and "**6**", the position of the vehicles after the collision was clear from the photograph numbered "**6**". The damage to the motor vehicles was clearly visible. The page with the two photographs was marked exhibit "**Zungu 1**", as stated.

[16] The photograph marked "**5**" depicts the insured motor vehicle with registration number FMV416NW and the photograph marked "**6**", the positioning of the plaintiff's vehicle seen from its right hand side. The front right corner of the plaintiff's vehicle was badly damaged as was the left rear end of the insured motor vehicle. Photograph marked "**6**" also depicts the plaintiff's panel van, facing slightly to the right, behind the insured vehicle, in

the direction to which it was travelling and the insured vehicle stationary, facing left, close to each other with the photograph of the insured vehicle overlapping the photograph of the plaintiff's vehicle from its rear wheel onwards. The insured vehicle came to a standstill before the intersection and the plaintiff's motor vehicle behind her, as depicted on "**Zungu 6**".

[17] The plaintiff testified that his girlfriend, the only passenger, died in the collision.

[18] The plaintiff testified that he "deposed" to an affidavit on 6 March 2008, even though he had no opportunity to read it.

[19] The plaintiff also testified that he was unconscious and spent three months in hospital. He was asked by his counsel whether he was forced to sign the affidavit, and he answered in the affirmative.

[20] In this regard it is deemed necessary, as a general observation, to mention that the common misperception is that all indigenous people are able to understand all the indigenous languages. This certainly is not the case. This court has observed in numerous trials that certain Sotho speaking individuals, for example, are unable to understand Zulu and *vice versa* even though the languages are closely related. Factor in that witness statements are not written in the language of the witness, but in English, and one can readily understand

that confusion reigns. This is an aspect which deserves the courts' attention and which is often overlooked. It is not uncommon for a witness to be handed an English statement to sign which he or she does not understand in the slightest. The court takes judicial cognisance of this fact because it is entirely left to fate whether the relevant police officer(s) who visit(s) the scene of an accident is/are capable of speaking the language of those questioned – at the scene or thereafter. This is an aspect of which this court takes judicial cognisance because in not a single trial where indigenous language witnesses are involved, is it ever alleged that an attempt was made to obtain the services of a police officer who spoke the same language as the witnesses. This is a serious defect in the judicial system which should be rectified. Furthermore, testimony is seldom given that an English statement was sought to be explained to a witness in his or her home language. The police officers go through the motions and seek witnesses to sign statements, mostly drafted by them because the witnesses are often illiterate. This aspect is never taken into consideration and never commented on by courts, and constitutes a serious flaw in the judicial system, which seriously breaches witnesses' and parties' to judicial proceedings' constitutional right to a fair trial. It is simply a question of the police officer who happens to arrive at the scene, without regard being had to the language(s) which he or she speaks or understands, compiling statements which the parties to the proceedings or witnesses are requested to sign. Even the counsel, Mr Klopper, conceded in his heads of argument that the witnesses had difficulties in understanding questions put to them at the

trial by the interpreter and that the language barriers proved to be a real obstacle. Many interpreters proclaim to understand and speak all eleven official languages. They clearly do not. This is a phenomenon which the court observes on a regular basis, with the result that the court had no option but to insist on the services of a different interpreter which were obtained. Only because of the court's knowledge of the language of the witness it was clear to the court that the English translation differed in certain respects from the questions put to the witness and from his actual answers. In such instances, the court sought clarification. The moment the new interpreter (whose services were obtained) and the plaintiff clearly understood each other, the difficulties which had arisen up till then no longer presented themselves.

[21] Further, under cross-examination, the plaintiff was questioned about his statement in his evidence-in-chief that the insured driver indicated that she would turn right and moved to the right of the lane, but still remained in the lane. The plaintiff confirmed that this was indeed what had happened. He reiterated that he was forced to seek to pass her on the left hand side because she was blocking the lane. He further reiterated that he was hampered by the river on the left hand side. The plaintiff stated that his passenger flew through the windscreen when he was forced to brake, and died as a result.

[22] Under cross-examination it was put to the plaintiff that the insured vehicle was parked stationary on the gravel, off from the tarmac. The plaintiff denied

this. It was also put to the plaintiff that the alleged river on the left-hand side of the road does not exist. According to him, it did. Whether there was indeed a river at the location where the collision occurred (as far back as 2008) was never clarified in evidence. It was further put to him that he was travelling too fast and did not keep a proper lookout, which he denied.

[23] It was also put to the plaintiff that the driver of the insured motor vehicle had switched off the engine of her motor vehicle. The plaintiff stated that the vehicle was driving very slowly or was stationary. It was also put to him that she would testify that she had switched on her motor vehicle's hazard lights. He stated that he only saw that the right indicator light of the insured motor vehicle had been switched on. It was also put to him that the insured driver saw him in her rear view mirror and that he then collided with her, which collision the defendant stated caused her motor vehicle to spin around.

[24] In cross-examination the version of an eyewitness, a Mr Masango, was also put to the plaintiff. It was stated that he would testify that he was on the scene when the collision occurred.

[25] The plaintiff steadfastly testified that he swerved to the left. He was referred to a police statement that he made which he insisted that he had been forced to sign. He testified that he had signed it but did not agree with the contents

thereof. It was pointed out by counsel for the plaintiff that it had pertinently been discovered without admitting the accuracy thereof.

[26] The plaintiff's evidence at all times was that the insured driver indicated that she would turn right and moved to the right-hand side of the lane, that she turned on her indicator and that the plaintiff expected her to turn right.

[27] It was put to the plaintiff that the insured driver would testify that his entire version was a lie, which he disputed. He was told that the insured driver would testify that it was a Friday night and that she was coming from church and that her motor vehicle was stationary. The plaintiff was adamant that she was still in his lane of travel. It was put to him that the insured driver would allege that she had switched off her motor vehicle's engine. It was further put to the plaintiff that the insured driver would state that her motor vehicle spun around.

[28] The plaintiff was questioned under cross-examination about how many vehicles there were and was told that the insured driver would testify that there were two stationary vehicles in addition to the insured motor vehicle. The plaintiff disputed this fact. When told that the eyewitness Mr Masango would state that there was an open bottle of liquor in the motor vehicle after the collision, he answered that he was a teetotaller. It was also put to the

plaintiff that his breath smelt of liquor and that he was slurring, which he denied.

[29] It was further put to the plaintiff that Mr Masango was seeking to repair a motor vehicle which had broken down. It was put to the plaintiff that Mr Masango had seen him pass about twenty minutes before and when he returned on Bushveldt Road. It was put to the plaintiff that Mr Masango would testify that his motor vehicle made the loud noise of a vehicle travelling at a very high speed, which he denied. It was also put to the plaintiff that Mr Masango required a light to see in order to repair the broken-down motor vehicle on which he was working. The plaintiff, not surprisingly, could not comment on this. At what time Mr Masango actually worked on the broken down motor vehicle is difficult to ascertain on the evidence.

[30] Most importantly, the plaintiff testified that he had not switched on the headlights of his motor vehicle.

[31] The plaintiff then closed his case.

[32] The first witness to give evidence on behalf of defendant was Ms Queen Dimatso Nhlapho (the insured driver). According to her the collision occurred at 19h45. Ms Nhlapho stated that before the collision she had attended church. She stated that she then returned home and phoned Mr Masango as she had no electricity and wished to charge her cellular phone's battery. She

testified that this was at about 19h25. Mr Masango told her that he was on the Bushveldt Road before the T-junction on the opposite side of the road repairing a broken down motor vehicle and that she should drive to that location. Why, is unclear to the court. She further testified that when she reached the T-junction she had switched her motor vehicle off and switched on her hazard lights. Ms Nhlapho testified that Mr Masango came to her and told her that her phone was in his motor vehicle. Accordingly to Ms Nhlapho he told her that she should follow his motor vehicle. Ms Nhlapho testified that only Mr Masango's motor vehicle and not two motor vehicles were at the T-junction as was put to the plaintiff. Ms Nhlapho stated that at the T-junction there was a yellow line on the left hand side close to where she had parked on the gravel with all four of the motor vehicle's tyres on the gravel and none on the tarmac. She also testified that there was no river and she was about seven metres from the T-junction.

[33] Ms Nhlapho then contradicted herself and testified that only after the collision she switched her motor vehicle off and exited her motor vehicle and went to the plaintiff's motor vehicle and saw that the driver's legs were trapped and spoke to him. She stated that the rear of her motor vehicle was dented. She testified that her current rank is that of a police captain and that her rank as at the date of the collision was that of a warrant officer.

[34] Under cross-examination Ms Nhlapho denied that she was on the road on which the plaintiff was travelling but was on the gravel shoulder of the road. She stated that during the collision her motor vehicle spun around and ended up in the middle of the T-junction facing the direction from which the plaintiff's vehicle was approaching. She said that part of her motor vehicle was on the gravel but mostly on the tarmac. She said she cannot really testify as to how far the plaintiff's motor vehicle was behind her – but estimated about four metres. She admitted that she had made a statement and that the signature was hers but stated that she signed it without perusing it. Ms Nhlapho stated that the investigating officer had written the statement and admitted that the signature was hers.

[35] However, when reminded of her position at the time of the collision (warrant officer) and her obligation as an officer of this Court, she admitted the contents of the statement. As argued by counsel for the plaintiff, this paints the picture of someone who knows what happened on the day of the collision but somehow does not wish to tell the truth.

[36] It was put to her that it was negligent of her to switch on her motor vehicle's indicator to turn right and not to turn, which she denied. She denied that this was what happened.

[37] Ms Nhlapho was shown exhibit "**Zungu 1**" which evidenced the damage to her motor vehicle and then suddenly conceded that when the collision occurred she was still inside the road and not outside the road. She testified that after the collision, the plaintiff's motor vehicle proceeded straight on and came to a standstill on the adjoining road where it joins Bushveldt Road from the left, having its two front wheels on the adjoining road and the remaining part on the gravel next to the road.

[38] Ms Nhlapho stated that the plaintiff was the one speeding and weaving on the road, and that she clung to the steering wheel when she saw him in her rear mirror. She said this occurred when Mr Masango went back to collect her charged cellular phone from his motor vehicle. (How this tallies with her version that he told her to follow his motor vehicle is also unclear.) She further testified that when the collision occurred the plaintiff had already left the tarmac, after which the collision occurred.

[39] During cross-examination the highly relevant question was posed to Ms Nhlapho namely why she would allegedly be clinging to her steering wheel as she had nothing to fear because on her version she was parked on the gravel should and not the tarmac. Ms Nhlapho's answer was that she was afraid of the speed at which the plaintiff was driving.

[40] Ms Nhlapho testified, contrary to what was put to the plaintiff as her version, that there was only one other motor vehicle – that of Mr Masango. It was put to her that it had been stated that her version would be that there were two motor vehicles after the intersection – that of Mr Masango and the motor vehicle which had broken down. She insisted that when she arrived the other motor vehicle had left. She also changed her version and stated that the collision occurred at about 21h00. It was put to her that she had stated it had happened at about 20h00. She stated that she did not know what had happened to the time, but that the collision occurred somewhere between 20h45 and 21h45. It was put to her in cross-examination that on her version in chief it was about 19h45 to 20h00. She stated that the time of the collision had not been written down.

[41] Ms Nhlapho testified that she waited for two minutes for Mr Masango to arrive (in chief she testified that it was ten minutes). Mr Masango allegedly approached her from the other side of the T-junction to tell her that her cellular phone was in his motor vehicle and that he would fetch it. She was asked why he had not brought her cellular phone to her because he knew what she wanted. She stated that he told her that she should follow him in her motor vehicle. The fact that she probably switched on her engine to follow

Mr Masango may also explain why she moved into the lane of travel of the plaintiff.[1]

[42] Ms Nhlapho was asked why she stopped before the T-junction. She stated because there was no place to park and that Mr Masango had told her to stop at the T-junction. How this tallies with her evidence that she was parked on the gravel shoulder on her one version, and on the second version on the tarmac is difficult to follow.

[43] Ms Nhlapho testified that she alighted from her motor vehicle after the collision. She also testified that she phoned the ambulance and the police and was asked how she did that without a phone. She stated that she had two phones and one, which was charged, was in her possession. This renders her version about the other cell phone which she allegedly could not charge due to lack of electricity somewhat suspect.

[44] Further under cross-examination she stated that she saw that the plaintiff was speeding, allegedly due to his headlights, which were approaching at a fast rate. This, of course, contradicts the plaintiff's version that his headlights were not switched on.

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[1] What was never expressly testified but what the court inferred from Ms Nhlapho's evidence and her demeanour was that she was upset when she phoned Mr Masango only to find out that he was not home. It appeared to the court that Ms Nhlapho and Mr Masango omitted important details which rendered their versions somewhat bizarre.

[45] Ms Nhlapho once again contradicted herself and testified that she never spoke to the plaintiff and that Mr Masango went to the plaintiff's motor vehicle. According to her Mr Masango took her to the hospital. She also testified under cross-examination that she was only at the clinic for a short while.

[46] Ms Nhlapho was once again asked when she first saw the plaintiff's motor vehicle. She stated from where she sat in the witness box to the lift outside court 8A. (Court 8A is 30 metres. The further distance to the lifts is quite far as Court 8A is the last court on the western side of the eighth floor of the High Court building.)

[47] Ms Nhlapho stated that it took her about twenty minutes to drive from block "A" where she lives to the intersection, and that she arrived at about 21h30. It was put to her that she never parked her car on the left side of the road when the collision happened but that she was still driving her motor vehicle very slowly. It was further put to her that she intended to turn right but then changed her direction when she saw where Mr Masango was parked, and that it was then that the collision occurred. She denied these allegations.

[48] Ms Nhlapho pertinently stated that she did not remember "some of the things".

[49] The following witness called for the defendant was Mr Wonder Solly Masango.

[50] Mr Masango stated that he had set off from his home to assist a certain Dinah whose motor vehicle had run out fuel and was standing stationary in the road. She had just closed her shop at 18h30. He testified that he assisted her to pour fuel into her motor vehicle's tank. He testified that he arrived at Dinah's motor vehicle at about 19h45 but that it was not very dark. He emphasised that there were no street lights, and that the houses were far from the tarred road. He stated that the gravel next to the road was very narrow and that there was no river next to the road.

[51] Mr Masango stated that he drove from south to north in Bushveldt Road and that there was an intersection crossing the road from east to west which had stop signs, whereas the road on which he travelled had no stop signs.

[52] Mr Masango testified that he saw the plaintiff's motor vehicle twice – once driving in the direction of Makgatho town and upon its return. At all times he testified that the plaintiff was driving at a very high speed due to the noise that his motor vehicle was making but conceded that the motor vehicle was old and that this could be the reason why it sounded as though it was driving fast. He also testified that the plaintiff was "not driving in a straight line".

[53] Mr Masango stated that he crossed the intersection and parked on the left side of the intersection. He testified that Mrs Nhlapho had phoned him to collect her cell phone which he had charged for her. He further testified that when she arrived to fetch her cellular phone, he proceeded to her motor vehicle, spoke to her and returned to his motor vehicle to fetch her phone. He stated that he had barely taken the phone out of his motor vehicle and was still very close to it when the collision occurred. He testified that after the collision he helped the insured driver out of her motor vehicle and assisted the plaintiff who could not get out of his motor vehicle as he was injured. He testified that there was a half opened bottle of liquor which had spilled out and another one and that the plaintiff was making the "noises of an intoxicated person". He testified that he took Ms Nhlapho's phone which was in her possession and phoned for an ambulance and also phoned the police. He testified that the plaintiff's female passenger had been flung through the windscreen.

[54] Mr Masango testified that he saw Ms Nhlapho and that her hazard lights were on. The collision took place before she could cross the road which crosses Bushveldt Road. He testified that Ms Nhlapho parked close behind him, facing in the same direction in which his motor vehicle faced. He stated that to the left hand side there was a yellow line. He saw Ms Nhlapho was parked outside the yellow line.

[55] When shown exhibit "**Zungu 1**" Mr Masango stated that it accurately depicted the position of the motor vehicles after the collision. He confirmed that the plaintiff's motor vehicle was a panel van and that of the insured driver an Audi. He stated that the panel van had not braked at all.

[56] When asked about the visibility when the collision occurred he stated that he assisted Dinah to pour fuel into the tank of her motor vehicle. He said he did not have to use any artificial light as it was still light enough to see.

[57] Mr Masango further contradicted the evidence of the insured driver in alleging: —

[57.1] That he helped her out her motor vehicle;

[57.2] He phoned for an ambulance and police using the insured driver's phone which was in her possession;

[57.3] He went to the plaintiff's motor vehicle and not the insured driver;

[57.4] He also denied the version put to the plaintiff that he required a torch to see inside Dinah's motor vehicle and testified that the existing light sufficed.

[57.5] He testified that the collision occurred at 19h45;

[57.5] He further testified that after the collision he told the insured driver to switch off her engine as it was still on.

[58] Under cross-examination he reiterated that he assisted the plaintiff to get out of the motor vehicle because his legs were trapped. He added that when he got out he was staggering because he was drunk (apparently the thought did not occur to him that the plaintiff might have been staggering because his legs had been trapped and were injured, but this was never put to him by counsel for the plaintiff). He also inferred that the plaintiff was drunk because he was making noises and not screaming as though he was hurt (clearly an assumption on the part of the witness). It was put to him that the plaintiff testified that he never drinks, and he reiterated that the plaintiff was intoxicated.

[59] Mr Masango was further questioned as to the terrain where the insured driver had allegedly parked on the gravel.

[60] The question posed to Mr Masango was whether he agreed that there were only trees, grass and a river, but he denied the existence of trees and a river. The question may then legitimately be posed why the plaintiff's vehicle did not land somewhere in the grass on the left if he somehow collided with the insured driver's motor vehicle on the gravel next to the road. He reiterated that the insured driver's motor vehicle spun around when hit. He estimated that the two motor vehicles were about seven metres apart and reiterated that the panel van continued moving forward until it came to a stop after the road which crosses Bushveldt Road. He testified that the plaintiff's motor vehicle never spun.

[61] Mr Masango stated that he was three metres from his own motor vehicle when the collision occurred.

[62] The plaintiff's version was put to him, namely that the insured driver was driving in the road, switched on her indicator light to turn right, changed her mind and corrected her motor vehicle to move straight and was effectively driving very slowly or was stationary. He denied the entire version.

[63] In re-examination the stop street sign was pointed out in "**Zunga 1**"as well as the fact that the front wheels of the plaintiff's motor vehicle were on the tarmac.

[64] The defendant then closed its case.

Evaluation of the evidence:

[65] The court is faced with two mutually destructive versions. In ***Stellenbosch Farmers' Winery Group Limited and Another V Martell & Cie SA & Others* (427/01) [2002] ZASCA 98 (6 September 2002)** at paragraph [5] (pages 4–5) it was held that when the court is faced with two conflicting versions the court must make findings on the following: —

> " ***(a) the credibility of the various factual witnesses;***
>
> ***(b) their reliability; and***
>
> ***(c) the probabilities.***

As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as

(i) the witness's candour and demeanour in the witness-box,

(ii) his bias, latent and blatant,

(iii) internal contradictions in his evidence,

(iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions,

(iv) the probability or improbability of particular aspects of his version,

(v) 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's reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a

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

[66] In ***Baring Eiendomme Bpk v Roux*** **2001 [1] All SA 399 (SCA)** at paragraph **[6]** the Supreme Court of Appeal adopted the following passage in ***National Employers' General Insurance Co Ltd v Jagers*** **1984 (4) SA 437 (A)** at 440E–441A: —

"***...Where there are two mutually destructive stories,*** [the Plaintiff] ***can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the Defendant is therefore false and mistaken and falls to be rejected. 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.

This view seems to me to be in general accordance with the views expressed by Coetzee J in Koster Ko-Operatiewe Landbou Maatskappy Bpk v Suid-Afrikaanse Spoorweë & Hawens 1974 (4) SA 420 (W) and African Eagle Assurance Co Ltd v Cainer 1980 (2) SA 324. I would merely stress however that when in such circumstances one talks about a Plaintiff having discharged the onus which rested upon him on a balance of probabilities one really means that the Court is satisfied on a balance of probabilities that he was telling the truth and that his version was therefore acceptable. 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 the 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."

[67] Conduct is wrongful if public policy considerations demand that in the circumstances that a plaintiff has to be compensated for the loss caused by the

negligent act of a defendant. It is then that it can be said that the legal convictions of the society regard the conduct as wrongful. The Supreme Court of Appeal has cautioned not to formulate the issue of unlawfulness in terms of "*a duty of care*" but rather to establish whether there was a legal duty on a person or entity *vis-à-vis* a defendant.[2] Inflicting harm is *commissio* which is, per definition unlawful, absent special circumstances.

[68] General liability in delict based on negligence is proved when: —

> "*(a) A diligens paterfamilias in the position of the defendant –*
>
> *(i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and*
>
> *(ii) would take reasonable steps to guard against such occurrence; and*
>
> *(b) ... Whether a diligens paterfamilias in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend upon the particular circumstances of each case. No hard and fast basis*

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2 ***Telematrix (Pty) Ltd v Advertising Standards Authority*** **2006 (1) SA 461** at paragraph **[14]**; ***Local Transitional Council of Delmas v Boshoff*** **2005 (5) SA 514 SCA** at **522D–E.**

can be laid down. Hence the futility, in general, of seeking guidance from the facts and results of other cases.[3]"

***Swinburne v Newbee Investments* 2010 (5) SA 296 KZD** at paragraphs **[11]** and **[13]**

[69] It is expected in general of the *diligens paterfamilias* to take reasonable care that persons should not be injured. A *diligens paterfamilias* is required to take reasonable steps to guard against foreseeable injury. Whether reasonable steps were taken depends upon the circumstances of each case.[4] The law does not require perfection. It only requires reasonable conduct.

[70] Four basic considerations in each case which influence the reaction of a reasonable man in a situation posing a foreseeable risk of harm to others are: —

[70.1] the degree or extent of the risk created by the actor's conduct;

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3 ***Kruger v Coetzee* 1966 (2) SA 428 (A)** at **4320E–G**;

***Sea Harvest Corporation v Duncan Dock Cold Storage* 2000 (1) SA 827 SCA** at paragraphs **[21]–[22]**.

4 ***Kriel v Premier, Vrystaat* 2003 (5) SA 66 OPA** at **71E–F**;

***Spencer v Barclays Bank* 1947 (3) SA 230 T**;

***Smit v Suid-Afrikaanse Vervoerdienste* 1984 (1) 246 KPA** at **250B–G**.

[70.2] the gravity of the possible consequences if the risk of harm materialises;

[70.3] the utility of the actor's conduct; and

[70.4] the burden of eliminating the risk of harm.[5]

Analysis of the evidence:

[71] The one strange aspect of the plaintiff's evidence was the existence of a river on the left-hand side of the road. The plaintiff's counsel was criticised for not making use of a collision report, a properly drafted sketch plan of the collision and the photos taken by members of the South African police. In the court's experience, illiterate witnesses often find it difficult to read maps or to orientate themselves correctly when looking at photographs. This criticism thus does not take the matter much further. A police report will be based on *ex post facto* observations. In this case the plaintiff, who was the best qualified to testify, testified on his own behalf with reference to the photographs in "**Zungu 1**". In the court's opinion counsel cannot be criticised for having elected to adopt this approach.

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5 ***Ngudane v South African Transport Services*** **1991 (1) SA 756 AD** at **776H–I**;

Pretoria City Council v De Jager **1997 (2) SA 46 AD** at **56 A–C**.

[72] It is unclear whether there was a river. This fact becomes irrelevant however, when the insured driver and Mr Masango's evidence are taken into account because both testified that there was a gravel border next to the tarmac wide enough in which to park the insured driver's vehicle (although Mr Masango at one point testified that the gravel shoulder was not very wide).

[73] Given the fact that the insured driver and Mr Masango maintained that the insured driver's car was stationary next to the road, off the tarmac, it is very difficult to understand how the collision could have occurred on their version. In particular, it is impossible, on their version, for the front right side of the plaintiff's motor vehicle to have sustained damage. It would rather have been the left front side of his motor vehicle which would have sustained damage if he were allegedly so drunk as to weave completely off the tarmac and collide with the insured's motor vehicle.

[74] Furthermore, the left rear side of the insured motor vehicle would not have been hit by the right front end of the plaintiff's motor vehicle. This fact puts paid to the insured motor vehicle driver's version.

[75] There is no inherent improbability regarding the plaintiff's version that she indicated that she wished to turn right, moved to the right hand side of the lane and then moved back to her position in the lane. According to the plaintiff she was stationary or driving very slowly. A driver who is unsure of the direction where he or she has to drive, or who is on the lookout for street signs, a

stationary motor vehicle and the like focuses his or her attention on things other than the prevailing traffic conditions.

[76] The insured motor vehicle driver's version that she clung to her steering wheel when she saw the lights of the plaintiff's motor vehicle allegedly approaching, is also highly improbable if she were parked off the tarmac on the side of the road. This improbability was put to her in cross-examination, but she could only counter it with a feeble response that she was afraid of the plaintiff's motor vehicle because of the fast approaching lights. However, the plaintiff testified that his lights were not switched on – a fact to his detriment as it was getting dark when the collision occurred. It demonstrates the plaintiff's honesty.

[77] There is also no reason to believe that the plaintiff was drunk. It was not pleaded at all and can be left out of the equation. In any event Mr Masango's reasons for stating that he plaintiff was drunk do not ring true. One can moan when seriously hurt, especially when on the brink of losing consciousness and it is to be expected that somebody who is severely injured and whose legs were trapped will stumble when getting out of a motor vehicle. Had this been a real defence it would have been pleaded. It was never pleaded, not even in the amended plea handed up on the first day of the hearing. These allegations are therefore highly improbable.

[78] The various contradictions in the evidence of the driver of the insured motor vehicle's evidence and that of the eye witness Mr Masango and the inherent

improbability of their versions causes the court to lend little credence to their versions.

[79] The plaintiff, an unsophisticated man, struck the court as a credible witness who did not contradict himself. The driver of the insured vehicle and the eye witness Mr Masango had forgotten the sequence of what had happened but, in any event, gave a version which was so improbable as to render their version untrue. Why would Mr Masango first speak to the insured driver and not hand her phone to her? Why ask her to follow his motor vehicle? Their entire version sounds far-fetched, save if there were other reasons for their behaviour not mentioned in evidence.

[80] In ***Heef v Nel*** **1994 (1) PH F11 (TPD)** at page 32 Mohamed J indicated that a wide variety of factors must be taken into account in assessing credibility: —

> "***Included in the factors which a court would look at in examining the credibility or veracity of any witness, are matters such as general quality of his testimony (which is often a relative condition to be compared with the quality of the evidence of the conflicting witnesses), his consistency both within the content and structure of his own evidence and with the objective facts, his integrity and candour, his age where this is relevant, his capacity and opportunity to be able to depose to the event he claims to have knowledge of, his personal interest in the outcome of the litigation, his temperament and personality, his***

intellect, his objectivity, his ability effectively to communicate what he intends to say, and the weight to be attached and the relevance of his version, against the background of the pleadings."

[81] In its plea the defendant sought an apportionment of damages in terms of the Apportionment of Damages Act 34 of 1956. On the evidence of the plaintiff, he was not negligent, save, perhaps, for not switching on his headlights or averting the collision. A degree of 20% negligence is the most that can be attributed to the plaintiff, given the evidence. The plaintiff attracts some blame for not having slowed down more and having taken it for granted that the insured vehicle would turn right after she switched on her indicator light. He could have slowed down some more as he conceded. There was ample space to pass her on the left-hand side. Exactly how quickly she moved into his line of travel is unclear because of the plaintiff's version that her motor vehicle was stationary or moving very slowly at the time of the collision.

[82] The question can also be posed, as was set out in the defendant's heads of argument, as to why he sought to overtake the insured driver at all.

[83] The defendant's counsel submitted that the plaintiff acted upon what he expected the insured driver to do as opposed to acting in accordance to what the circumstances permitted.

[84] As stated by the defendant's counsel in his heads of argument the plaintiff could have avoided the collision by merely reducing speed and by carefully

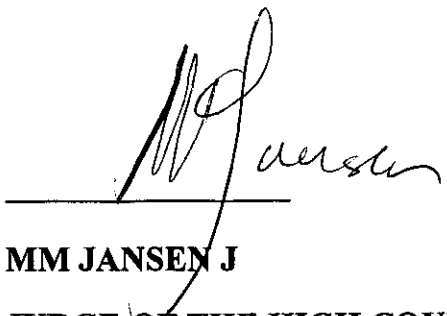
observing the actions of the insured driver as opposed to proceeding to execute a manoeuvre in overtaking the insured driver's vehicle on the left-hand side in circumstances where it was unsafe to execute such a manoeuvre.

[85] As regards costs, it was submitted by the plaintiff's counsel that the defendant requested that the matter be removed from the roll for settlement on 5 October 2012 but apparently was not ready for trial and never made a settlement offer. In the result the matter was set down for trial yet again. It was further argued that the defendant sought the indulgence that the matter be removed from the roll and that it should thus bear the costs. The defendant did not deny these factors and submissions.

Order

In the result, the following order is made: —

1. The defendant is to pay 80% of the plaintiff's proven or agreed damages.
2. That the defendant pay the wasted costs occasioned by the matter being removed from the roll on 5 October 2012.
3. That the defendant pay the costs of the trial as well as the costs of the heads of argument requested by the court.
4. The issue regarding quantum is postponed *sine die*.



MM JANSEN J

JUDGE OF THE HIGH COURT

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