IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

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

CASE NO.: 54320/17
13/8/2019

In the matter between:

M I MAILA Plaintiff

and

ROAD ACCIDENT FUND Defendant

JUDGMENT

VAN DER WESTHUIZEN, J

[1] The plaintiff instituted an action against the defendant for compensation of damages suffered as a result of injuries sustained in an accident that occurred on 12 August 2016. The collision occurred when the vehicle the plaintiff was driving, collided with a stationary bus in his lane of travel on a freeway in Pretoria. The bus is the property of

PUTCO (Pty) Ltd, and the driver thereof being the insured driver for purposes of this action.

[2] The only issue to be decided at this stage is that of liability, whether the insured driver was negligent and the extent thereof and whether the plaintiff was negligent and the extent thereof, contributory negligence having been pled by the defendant. By agreement between the parties, as recorded in a pre-trial conference minute dated 13 March 2018, the issue of the quantum of damages suffered is to be separated out in terms of the provisions of Uniform Rule 33(4) and to be postponed *sine die*. It was so ruled.

[3] The plaintiff alleges in his particulars of claim that the conduct of the insured driver immediately before the collision and/or the omissions on the part of the insured driver to take certain preventative actions constituted negligence and were accordingly the sole cause for the collision to occur.

[4] The defendant denied that the insured driver was negligent as alleged and pled that the conduct of the plaintiff immediately prior to the collision constituted negligence and that such negligence was the sole cause of the collision. In the alternative, the defendant pled that should it be found that the insured driver was negligent in any manner, such negligence was not the cause of the collision and in the further alternative, should it be found that the insured driver was negligent and that his negligence contributed to the cause of the collision, the plaintiff was also negligent and the plaintiff's negligence contributed to the cause of the collision.

[5] The plaintiff's alleged negligence pled, related to:

(a) he failed to keep a proper look out;

(b) he failed to avoid the collision when, by taking reasonable or proper care when he could, and should, have done so;

(c) he failed to take sufficient account of the presence and/or alternatively visibly intended actions of the insured vehicle;

(d) he failed to take due regard of the other road users, in particular, the insured vehicle;

(e) he failed to exercise proper or adequate control over his vehicle;

(f) he failed to apply the brakes of his vehicle timeously, or at all;

(g) he drove at an excessive speed under the prevailing conditions;

(h) he failed to keep a safe and proper following distance between himself and the vehicle in front of him.

[6] I record the grounds of alleged negligence on the part of the plaintiff fully in view of the argument raised by the defendant's counsel, Ms Ferguson, during argument on the issue of liability. It is submitted that the issue whether the plaintiff had his seatbelt engaged or not, may have contributed to the severity of his injuries sustained. Further, that that issue should also be separated in terms of the provisions of Rule 33(4) for adjudication together with the issue of quantum of damages.

[7] During oral argument, Ms Ferguson applied, in terms of a written notice of amendment, for an amendment of the defendant's plea to include an additional ground of alleged negligence on the part of the plaintiff. The defendant seeks to introduce the following ground as a new paragraph 3.2.9:

"*he failed to wear his seatbelt.*"

It is that issue that the defendant seeks to separate together with the issue of the quantum of damages as recorded earlier.

[8] Mr Beaton, who appeared with Mr van Wyk on behalf of the plaintiff, opposed the proposed amendment. He submitted that no basis for the amendment existed, nor that it has been canvassed in the evidence presented.

[9] A number of pre-trial conferences were held between the parties, some of which were held before the Honourable Deputy Judge President of this Division. In this regard the following is to be noted:

(a) On 13 March 2018, the parties held a pre-trial conference. At that conference the parties agreed to a separation of the issue of liability from the issue of the quantum of damages. No qualification of the extent of the issue of liability was raised by the defendant, nor was any reservation on the part of the defendant recorded in that regard;

(b) At the pre-trial conference held on 10 October 2018, it was further agreed between the parties that the plaintiff bore the duty to begin and the *onus* of proving negligence on the part of the insured driver. It was further agreed that should the plaintiff prove that the insured driver was negligent, the defendant would have the *onus* of proving contributory negligence on the part of the plaintiff. It was specifically agreed by the parties at this pre-trial conference that in respect of the issues of liability what required adjudication were:

(i) The negligence (if any) and the grounds therefor, of the defendant's insured driver and/or insured owner in causing the collision;

(ii) The contributing negligence (if any) and grounds therefor, of the plaintiff in causing the collision.

No qualification was recorded by the defendant.

[10] In the event that the amendment is granted and the issue is separated out to be adjudicated on by the court considering the issue of quantum of damages, and on the evidence presented thus far, at least three of the witnesses who have testified at this trial would have to be re-called. Those would include the plaintiff, the Metro Police Officer and the tow truck operator. The aforementioned second and third witnesses both spoke to the plaintiff whilst trapped in his vehicle. It may further be require that other witnesses, such as the emergency personnel who attended to the plaintiff after the collision, may have to be called to testify.

[11] Ms Ferguson submitted that on the *dictum* in *Mjongi Gusha v The Road Accident Fund*[1] the amendment is necessary and hence the separation of that issue. That *dictum* does not support the defendant's submission. The Supreme Court of Appeal in that matter was required to pronounce on the question where the Road Accident Fund had, prior to the issue of summons, conceded the issue of liability for the plaintiff's damages still to be proven. It was also required to consider if it was open to the Road Accident Fund to apply to amend its plea to allege an apportionment due to the contributory negligence on the part of the plaintiff by not wearing his seatbelt. The Road Accident Fund had, *inter alia*, in its plea in that case denied liability as well as the extent of the injuries sustained. The Supreme Court of Appeal was

[1] Neutral citation: (158/2011) [2011] ZSCA 242 (1 December 2011)

called on to interpret an agreement concluded prior to the issue of summons. The Supreme Court of Appeal found that the Road Accident Fund had not qualified its concession to liability to any extent and held that the amendment could not be allowed.

[12] In this matter, the defendant outright pled that the plaintiff's conduct prior to the collision was the sole cause for the collision. As recorded, the grounds of plaintiff's negligence were extensively stipulated. In the alternative it was pled that plaintiff's stipulated negligence had contributed to the cause for the collision.

[13] The plaintiff's pled negligence was fully canvassed in evidence, particularly during cross-examination of the plaintiff.

[14] The amendment now sought is not qualified at all, although Ms Ferguson submits that it may be relevant only to the extent of the injuries sustained by the plaintiff.

[15] In the present instance the normal requirements for an amendment to pleadings before judgment is given, apply.

[16] Rule 28(10) of the Uniform Rules of Court provides:

> "*The court may, notwithstanding anything to the contrary in this rule, at any stage before judgment grant leave to amend any pleading or document on such other terms as to costs or other matters as it deems fit."*

[17] It is trite that an amendment applied for at a late stage would not be granted where the amendment may result in prejudice to the other party which could not be addressed with an adjournment and an appropriate costs order.[2]

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[2] *Kali v Incorporated General Insurance Ltd* 1976(2) SA 179 (D) at 182A-B

[18] In *Kali, supra,* as in the present instance, the application for amendment was made during argument after both parties had closed their respective cases.[3] Furthermore, in the present instance the plaintiff led his evidence on the basis of the plea as unamended. The issue of the wearing or not of a seatbelt was not in issue during the leading of evidence by either party.

[19] No explanation was provided why the amendment was not sought earlier, bearing in mind that the action was launched during 2017. All the facts were by then already known to the parties.

[20] Where, as here, both parties had already closed their respective cases, the grant of the amendment would require the reopening of their respective cases in order to lead further evidence. That is not an issue that would or could adequately be dealt with by granting a postponement and an appropriate cost order. The prejudice that the plaintiff would suffer by allowing the amendment is insurmountable in the circumstances.

[21] The defendant had the opportunity to deal with the issue of whether or not the plaintiff wore his seatbelt at the time of the collision.

[22] The application for amendment stands to be refused.

[23] On behalf of the plaintiff, who himself testified, the evidence of Mr Bambo, a Metro Police Officer, Mr van Vliet, who is in the employ of a sister company to that which employed the plaintiff, Mr Forbes, a tow truck driver, Mr Madau, a Transport Officer in the employ of Putco Ltd (the insured owner), Mr Nortman, a Technical Manager in the employ of the insured owner, Mr Thlapu, a Training Officer in the employ of the

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[3] *Ibid.*

insured owner, and Mr Grobbelaar, an Accident Reconstruction Specialist, were led.

[24] The defendant called one witness, in the person of the insured driver, Mr Matlawa.

[25] All the witnesses called on behalf of the plaintiff, apart from the plaintiff himself and Mr Gobbelaar, arrived on the scene at various stages after the collision occurred. It may be prudent to summarise their evidence.

[26] Mr Bambo arrived shortly after the collision occurred. He found the vehicle driven by the plaintiff to have collided with the rear end of a stationary bus and it was partly underneath the bus from the centre to the righthand side of the rear end of the bus. He spoke to both Mr Matlawa and the plaintiff. The plaintiff was still trapped in his vehicle. Mr Bambo completed the Accident Report Form. He testified that all that he found at the scene of the collision was the two vehicles that had collided and nothing else. The cross-examination of Mr Bambo did not elicit any other fact and Ms Ferguson submitted that his evidence did not contribute to any issue that was to be considered by the court.

[27] Mr van Vliet testified that he was employed by a sister company of the company that owned the vehicle driven by the plaintiff and that the plaintiff was in that company's employ. He was requested to attend at the scene of the collision. The traffic was backed-up and it took him some time to arrive at the scene. On his arrival, the vehicle the plaintiff was driving had already been towed away and the plaintiff taken to hospital. He testified that he looked for warning signs, but found none. He also did not find any remnants of warning signs that may have been put out. The hazard lights of the bus were on when he arrived at the scene. In re-examination and with reference to a photograph tendered in evidence and to which he was directed, he testified that the fire extinguisher visible near the rear end of the bus, was undamaged. During cross-examination, he was asked questions in respect of a

video. He testified that he was not shown the video and could not comment thereon. The video was not tendered into evidence.

[28] The tow truck driver, Mr Forbes, testified that he received a report of a collision on Paul Kruger street near the joining thereof with Mansfield Road in a southernly direction. The traffic was flowing, though busy as it was peak hour traffic. The bus and the plaintiff's vehicle were in the second lane of three lanes. A separate and dedicated bus lane was to the far right thereof. He spoke to the bus driver whom informed Mr Forbes that there were no safety signals to put out. The bus driver further informed him that the bus had broken down and that it was a mechanical problem. Mr Forbes did not see that the hazard lights of the bus were switched on. Under cross-examination, Mr Forbes testified that he attends to approximately 30 accidents per month and approximately 3 to 4 collisions a day. Some of the collisions are committed to memory and he could with ease recall those even after a lengthy period had passed.

[29] Mr Mudau, the Transport Officer at the time of the collision to whom a report of the breakdown of the bus was reported, testified. He completed the breakdown report forming part of the trial bundle to which he was referred. The report of the breakdown was made to him by the bus driver, the insured driver, whose name was entered onto the report document. The defect reported to him and which was entered on the said breakdown report, was that of "stalling". Mr Mudau testified that "stalling" meant that the bus in motion cuts out and that it could either be an electrical fault, no diesel or no water. It was reported that the bus was stationary. He did not know the reason for the breakdown and could not comment thereon. Mr Mudau was not cross-examined.

[30] The Technical Manager of the insured owner, Mr Nortman, testified that the busses of the insured owner are all fitted with a system, an engine protection unit that governs the speed and shows the engine temperature and pressure. The said system works on the basis that

once a problem is encountered, the system causes the engine to lose power and the vehicle speed is slowed down. The driver encounters the bus not to function properly in that it appears not to have sufficient power. The speed is slowed down and when “0” km/h is reached the engine cuts out and will not restart again. The bus drivers refer to this effect as “stalling”. The purpose of the system is to enable the driver to steer the bus to a safe area. Mr Nortman was not cross-examined. In argument it is submitted that the evidence of Mr Nortman is that of expert evidence for which no notice was given and hence inadmissible.

[31] Mr Thlapu testified that he is a bus driver instructor. He testified that bus drivers are obliged to undergo refresher courses that he *inter alia* instructs in that respect as well. With reference to a course attendance register contained in the trial bundle and dated 16 May 2007, he testified that the driver of the insured vehicle attended that refresher course. He further testified with reference to a training manual, the relevant page thereof contained in the trial bundle, that it is required of bus drivers to put two triangles out at a distance of 45 metres behind and in front of the bus in the event of a breakdown of the bus. Under cross-examination it was solicited from Mr Thlapu that he would not expect the driver to venture into oncoming traffic to set the triangle at the specified distance. He however testified that it is expected of the driver to set it down at an appropriate distance.

[32] The plaintiff testified that he was a driver by profession and was at the time of the collision six years in the employ of his employer at that time. He was travelling in the middle of three lanes behind other vehicles at approximately 70 km/h. He testified that the traffic, although dense, was moving along and that the average speed of the vehicles travelling with him was approximately 70 km/h. He was following a bigger type of vehicle than his, which probably had a canopy on, and his view was obscured in respect of what was in front of the vehicle he was following. He further testified that he was following at a distance of 1 to 1½ car lengths behind the bigger vehicle. The vehicle in front of him

"cleared off" with no indication of any trouble ahead. However, after the vehicle in front of him cleared off, and at a distance of approximately 7 to 10 metres in front of him, he for the first time saw the stationary bus. He attempted to swerve to his right and applied the brakes. There was insufficient space to pass by safely and he collided with the rear end of the bus, at a place from the centre to the right-hand side of the bus with the left front side of his vehicle. He was trapped in his vehicle and loss consciousness. He testified that the hazard lights of the bus were not on and there was no triangle in between him and the bus prior to the collision. He further testified that he did not see any fire extinguisher that was put out between his vehicle and the bus. Under cross-examination, it was put to the plaintiff that had he travelled at a slower speed and kept a distance far in excess of 1½ car lengths, he could have avoided the collision. The plaintiff's response was that his speed was in line with the flow of the traffic and that had he kept a further distance, other traffic would have moved in between his vehicle and the vehicle he was following.

[33] Mr Grobbelaar prepared his report with reference to a set of facts, including photographs, supplied to him on the part of the plaintiff and that he attended with the plaintiff at the area where the collision occurred. The defendant did not dispute Mr Grobbelaar's expertise. The set of facts that was supplied to him was more or less in accordance to those testified by the plaintiff during his evidence in court. Mr Grobbelaar opined:

(a) From the photographs supplied to him, he deduced that the bus was stationary. Had the bus been in motion during the collision, debris would have been strewn behind the bus until it reached a standstill;

(b) In terms of the Road Traffic Act Regulations, a warning triangle should have been placed not less than 45 metres

behind the bus. The plaintiff would then have had a space of 45 metres to avoid the collision;

(c) Due to the fact that the plaintiff swerved to his right and attempted to brake, it is probable that he kept a proper look out;

(d) The fact that the left front of the plaintiff's vehicle collided with the centre to right of the rear end of the bus is indicative that the plaintiff attempted to swerve to his right;

(e) In an addendum to his report, Mr Grobbelaar opined further that the normal proposed following distance is 2-3 seconds at a speed of 60 km/h, i.e. a distance between 33-50 metres;

(f) In rush hour traffic, keeping such a distance would be counterproductive. The driver would probably have fallen further back relative to the other traffic in his lane in particular where other traffic would move into the space of 33-50 metres between the driver and the vehicle he was following;

(g) With the use of diagrams, Mr Grobbelaar opined that it is not possible to determine with sufficient accuracy the distance at which the plaintiff would have been able to see the bus obscured by the bigger vehicle in front of him. However, he demonstrated with graphic simulations the difficulties and rough distances in which the bus would not have been visible in the circumstances of this matter where the plaintiff was behind the bigger vehicle;

(h) As a basis Mr Grobbelaar used an approximate height of 3.1 metres for the bus, 2.1 metres for the in-between vehicle and the plaintiff, seated, with a height of the plaintiff's eyes at 1.1 metres. With those measurements at a distance of 1½ metres behind the bigger vehicle, the plaintiff would not have been in a position to avoid the collision since he required a distance of 45 metres to bring his vehicle to a halt.

(i) With reference to the issue whether a distance of 6 metres were adequate if the triangle and fire extinguisher were put out at that distance behind the bus, Mr Grobbelaar opined that it was a wholly inadequate distance for the plaintiff to avoid a collision;

(j0 Mr Grobbelaar further opined that had a triangle and fire extinguisher been put out at a distance of 6 metres behind the bus, the plaintiff's vehicle would have collided therewith and remnants thereof would have been noticeable. Furthermore, the fire extinguisher would have been severely damaged and would not have remained at the place where it appeared on the photographs. The fire extinguisher, where it appeared on the photographs, was clearly in the line of travel of the plaintiff's vehicle.

[34] That concluded the plaintiff's case.

[35] As recorded earlier, the defendant only tendered the evidence of the insured driver, Mr Matlawa. He testified that he was travelling in the middle lane of three lanes. The bus suddenly got "stuck" and "died". He attempted to restart the engine of the bus but unsuccessfully. He "pressed" the hazard lights. He alighted from the bus and went to the back of the bus to see if he could ascertain the reason. He opened the engine cover, but could not see anything. He had nothing to repair if he

could ascertain the problem. He then went back into the bus and took the triangle and the fire extinguisher and walked again to the back of the bus. He only ventured about six and a half paces where he set up the fire extinguisher and the triangle that leaned against it. The fire extinguisher and the triangle were put out so that traffic following could see that he was "stuck". He was too scared to venture further because of the dense traffic that was travelling fast. He returned to the bus and phoned his employer that the "engine was not running". Whilst in the bus, he felt a thud at the rear of the bus. He went to investigate and noticed that a vehicle had collided with the bus.

[36] Under cross-examination, Mr Matlawa was confronted with an earlier statement that he apparently had made to an official of the defendant. He was adamant that he only consulted with the defendant's legal representative who was in court. He could however not recall the date that he had so consulted. Ms Ferguson objected to the cross-examination of the insured driver on the alleged previous statement as it constituted hearsay evidence. That statement was provisionally admitted as evidence. In that statement much is similar to his evidence apart from that in the statement he indicated that he first put out the triangle and only later added the fire extinguisher to prevent the wind blowing the triangle over. Mr Matlawa denied talking to the tow truck driver and denied that he stated that he did not have any safety signs to put out. He was further adamant that when he phoned his employer that he said the bus was stuck. He denied that he knew the term "stalling" or that he had given that as a reason for the breakdown. He was also adamant that he immediately switched the hazard lights on as soon as the bus "got stuck".

[37] That concluded the defendant's case.

[38] It is submitted on behalf of the defendant that the evidence indicates that there are two irreconcilable versions as to what led to the collision. It is submitted that the evidence of Mr Matlawa is to be preferred to that

presented on behalf of the plaintiff. It is further submitted that on the plaintiff's own version he was clearly negligent in driving at a speed of 70 km/h and not keeping a safe distance from the vehicle in front of him in the prevailing circumstances. Accordingly, the plaintiff was the sole cause of the collision.

[39] In my view, such an approach begs the question. The stationary bus in the middle of three lanes cannot be ignored, whatever the reason for the breakdown. The question remains what was done to alert the following traffic of the obstacle ahead. Had it not been for the said obstacle, no collision would in all probability have occurred.

[40] Primarily it must be determined what was done by the insured driver to alert the following traffic, and whether those actions were sufficient to exculpate the insured driver from any liability.[4] Secondly, it must be determined whether the action or omission on the part of the plaintiff constitutes negligence, and if so, to what extent.

[41] It was readily conceded by Mr Beaton that the plaintiff's case was not one where the plaintiff seeks to argue that he was not negligent in his actions. The submission is that the plaintiff's negligence was not the sole cause of the action, but may have contributed to the collision occurring.[5] However, it is further submitted that the plaintiff's contribution to the collision was far less than that of the insured driver.[6]

[42] In considering the issue relating to rear end collisions, and in particular where there are disputes of facts that are material, the principle enunciated in *Stellenbosch Farmers Winery Group Limited et al v Martell et Cie*[7] finds application. The principle was stated as follows:

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[4] *Von Wielligh v Protea Versekeringsmaatskappy Bpk* 1985(4) SA 293 (K) at 298A-B; see also *Bainton v Road Accident Fund* [2018] JOL 39563 (GJ) at [7]
[5] *Bainton, supra,* at [11]
[6] *Op cit.* at [13]
[7] 2003(1) SA 11 (SCA) at [5]

> "*The technique generally employed by the courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (c) this necessitated an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues."*

[43] As recorded above, the evidence of Messrs Madau and Nortman was not disputed. Important issues were not taken up with either of the said witnesses. These include the evidence of Mr Madau that the insured driver reported the problem as "stalling" as opposed to the insured driver's insistence that the bus suddenly "got stuck" and his ignorance of the concept of "stalling". One would have expected that this issue would have been put to Mr Madau for his comment. Likewise, the evidence of Mr Nortman on what the concept of "stalling" meant and that it is a term used by the drivers in that regard, was not questioned. Neither was it put to Mr Nortman what effect a "loose" starter cable would have on the issue of "stalling". It was submitted by Ms Ferguson that it was the duty of the plaintiff to investigate that issue with the plaintiff's witnesses. I disagree with that submission. The defendant was well aware that the insured driver did not know the term "stalling" and further that his evidence was that the bus suddenly "got stuck". The two concepts are clearly not the same. The plaintiff could not have anticipated that the insured driver would give a different reason for the bus suddenly coming to a halt. In my view, the defendant had a duty to clarify the issue.

[44] Irrespective of what the cause of the sudden cutting of the power was, the conduct of the insured driver immediately thereafter needs scrutiny. Clearly a dangerous situation arose.

[45] The insured driver insisted that he switched the hazard lights on immediate when the engine cut out. That evidence is not supported by any of the witnesses who testified. Mr van Vliet was clear that when arrived on the scene, the tow truck and ambulance had already left the scene. When he was at the scene, the hazard lights were on. Non constat that they were switched on immediately after the collision. Neither the Metro Police Officer, nor the tow truck driver noticed that the hazard lights were on.

[46] The insured driver's evidence as to where the hazard lights were situated on the rear end of the bus places them within the lower third part of the rear end of the bus. On the undisputed evidence that the vehicles in front of the bigger vehicle in front of the plaintiff were obscured, clearly leans to the probability that the plaintiff would in any event not have seen them before it was too late.

[47] The evidence of the insured driver relating to the placing of a triangle and a fire extinguisher to warn following traffic is improbable for what follows.

[48] No triangle was found on the scene by any of the independent witnesses, i.e. Mr Bambo, Mr Forbes and also Mr van Vliet. No remnants were visible to any of them and such cannot be gleaned from the photographs presented to the witnesses. On the opinion of Mr Grobbelaar it is highly improbable that any triangle was put out and in any event the distance was wholly insufficient.

[49] It is also highly improbable that the fire extinguisher was put out immediately after the bus coming to a halt, either with or without a triangle. The fire extinguisher bore no damage and no damage can be discerned from the photographs. In Mr Grobbelaar's opinion, that at the speed that the plaintiff was travelling and the short distance it was allegedly place behind the bus and the position thereof *vis-à-vis* the line of travel of the plaintiff's vehicle, it is improbable that it was placed

before the collision. It would have borne severe damage and would have landed, after a collision therewith, at a different position to that indicated on the photographs.

[50] In my view the evidence of the insured driver is highly improbable. In the light of the undisputed evidence of Messrs Madau and Nortman in respect of the report of “stalling” and what that concept entails, it is highly improbable that the insured driver, being employed as such for at least since 2007, would be unaware of the term of “stalling” and what it entails. The insured driver had the opportunity to move the “stalling” bus to a safer place out of the line of following traffic, in particular where there was a dedicated bus lane. His inaction to do so, created a dangerous situation. Furthermore, after creating a dangerous situation, the driver did not place any warning sign behind the bus. He first investigated what the problem was and if that could be remedied. On finding no obvious problem, only then did he attempt to put warning signs out. It is clear that his efforts in this regard were totally insufficient. A distance of 6 paces is clearly insufficient in the particular circumstances. The insured driver did not attempt to warn following traffic in any other manner and was content to return to the bus and wait inside for assistance. An attitude in my view that speaks of unconcern for the safety of other road users. His evidence is further unreliable. He obtusely struggled with the concept of “stalling”. He further feigned lack of knowledge of important facts. His denial of the evidence of witnesses who were wholly independent and who were employed by his employer is telling. His evidence as a whole was crafted as exculpatory.

[51] There is no reason why the evidence of the independent witnesses called on behalf of the plaintiff should not be accepted as reliable. They had nothing hide. They were open in their evidence and gave the relevant facts as applicable to their respective positions with the insured owner. The plaintiff himself could not be discredited by the defendant and none was argued. He honestly and openly gave his

evidence. His evidence is reliable in that it is supported by extraneous facts not disputed, and is further more probable with regard to all the facts placed before court than that of the insured driver.

[52] I find that the insured driver's conduct was insufficient in the circumstances and that he was grossly negligent. I further find that his negligence contributed largely to the cause of the collision.

[53] The issue of the percentage to be attributed to the respective negligence that contributed to the cause of the collision, is a vexed one. I find some support in the judgment in *Bainton, supra,* where, under comparable circumstances, an 80/20 finding was made in favour of the plaintiff.

[54] On the issue of costs, I find no reason why the general rule that costs follow the event should not apply.

I grant the following order:

1. The defendant's application for amendment is dismissed;

2. The defendant is liable for 80% of the plaintiff's damages to be proven or agreed upon in this action;

3. Defendant pays the Plaintiff's taxed or agreed party and party costs on the High Court scale, inclusive of the following:

    3.1 the costs on all the issues relating to liability, inclusive of the employment of two counsel where employed, including the costs of preparation of the plaintiff's head of argument (if any);

3.2 the reasonable taxable costs of obtaining the reports of Mr B Grobbelaar, which were furnished to the defendant in terms of Rule 36(9)(b);

3.3 the reasonable taxable attendance, consultation, reservation, preparation and qualifying fees as well as the travelling costs of Mr B Grobbelaar;

3.4 the reasonable taxable transportation, subsistence and accommodation cost of the plaintiff and his witnesses, for attending inspections *in loco*, preparatory consultations and the trials to date;

3.5 the reasonable taxable costs incurred by the plaintiff in respect of all *subpoenas* issued by him;

3.6 the reasonable taxable costs of preparing the trial bundles and copies thereof;

3.7 the reasonable taxable travelling costs, costs of preparing for pre-trial conferences, preparation of pre-trial minutes and the costs for attendance of pre-trial conferences by the plaintiff's attorney and counsel where employed;

3.8 the reasonable taxable costs of Mr B Grobbelaar as well as the plaintiff's attorney and counsel where employed, in regard to *in loco* inspections, preparations for and on trial;

3.9 the reasonable taxable costs of a translator for the trials to date; and

3.10 All reserved costs (if any).

4. The aforementioned taxed or agreed costs, once determined, shall be paid into the plaintiff's attorney's trust account, details of which are as follows:

    4.1. Name: ERASMUS-SCHEEPERS ATTORNEYS TRUST ACCOUNT

    4.2. Branch code: 632 005

    4.3. Account no.: [….]

    4.4. Ref.: M2389/16

5. The following provisions will apply with regard to the determination of the aforementioned taxed or agreed costs:

    5.1 the plaintiff shall, in the event that costs are not agreed, serve a notice of taxation on the defendant's attorneys of record;

    5.2 the plaintiff shall allow the defendant 14 (fourteen) Court days, from the date of the *allocator*, to make payment of the taxed costs;

    5.3 should the defendant fail to timeously pay the taxed costs as provided for in the preceding sub-paragraph, those taxed costs shall carry interest at the rate of 10,25% per annum from the date of the taxation to date of final payment (both days inclusive).

6. The issue of quantum of damages is postponed *sine die*.

7. It is recorded that the plaintiff has not concluded a Contingency Fee Agreement with the plaintiff's attorneys of record, in terms of the Contingency Fees Act, 66 of 1997 or otherwise.

_____
C J VAN DER WESTHUIZEN
JUDGE OF THE HIGH COURT

On behalf of Plaintiff:	R Beaton SC W J van Wyk
Instructed by:	Erasmus-Scheepers Attorneys
On behalf of Respondent:	Ms R Ferguson
Instructed by:	Mothle Jooma Sabdia Attorneys