IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL, PIETERMARITZBURG

CASE NO: 12275/2007

In the matter between:

NORMAN NDODENI MKHIZE **Plaintiff**

and

VISHAAL MATHAPERSAD **Defendant**

S MKHIZE **Third Party**

JUDGMENT

MSIMANG, J :

[1] This is an action for damages arising out of a motor collision that occurred during the early evening of 28 April 2007 upon Longmarket Street, Pietermaritzburg and involving plaintiff's motor vehicle, to wit, an Audi A3, bearing registration letters and number NP 17677 and another vehicle at the time being driven by the defendant. The allegations made in plaintiff's Particulars of Claim is that the cause of the collision was the negligence of the defendant and a number of respects in which it is alleged that he was negligent are set out, which include the allegation that he pulled off a street controlled by a yield sign into the path of travel of the plaintiff's motor vehicle at a time when it was unsafe and/or inappropriate for him to have done so.

[2] In his plea the defendant denies that he was negligent and, in amplification of that denial, avers that the sole cause of the collision was the negligent driving of the driver of plaintiff's motor vehicle and sets out a number of respects in which it is being alleged that the said driver was negligent.

[3] In addition, the defendant caused to be issued a notice in terms of Rule 13 of the Uniform Rules, citing the driver of plaintiff's motor vehicle as a third party and alleging that the sole cause of the collision was the negligence of the said driver or, alternatively, in the event of the Court finding that the defendant was negligent and that such negligence contributed to the collision, and only in that event, that the said collision was caused partly by the negligence of the defendant and partly by the negligence of the said driver. In that notice the defendant accordingly avers that he and the said driver were joint-wrongdoers in respect of the damages that may be suffered by the plaintiff and, in terms of Section 2(8)(a)(ii) of Act 34 of 1956, seeks a separate judgment in favour of the plaintiff and against defendant and the said driver respectively, or alternatively, judgment against the defendant in favour of the plaintiff for the full amount of damages suffered by the plaintiff, an order in terms of Section 2(6)(a) of that Act determining the amount of the contribution the defendant may recover from the said driver and an order authorizing defendant to recover

such contribution from the said driver immediately upon payment of the judgment debt by the defendant to the plaintiff.

[4] The aforegoing constitutes a synopsis of the pleadings with which the parties came to trial in this matter.

[5] At the commencement of the trial and as a result of an earlier agreement concluded between the parties, Counsel requested me to make an order in terms of Rule 33(4) of the Uniform Rules that the issues of liability and quantum be separated and that the trial proceed only on the issue of liability. Having considered the matter I concluded that it would be convenient to deal with the issues in terms of that request and accordingly granted an appropriate order.

[6] The plaintiff's driver was the only witness who testified in support of plaintiff's claim whilst, in addition to his own evidence, the defendant adduced evidence of two eye-witnesses.

[7] From the evidence of the witnesses, the following facts emerged as being common cause between the parties:-

7.1 At the date of the collision Longmarket Street would carry traffic proceeding in one direction, that is, running from West to East;

7.2 In the vicinity where the collision occurred the road comprised of two lanes which were separated by a white broken line;

7.3 At a certain point and on the southern side of Longmarket Street the road was joined by a side road called George Street, forming a T-junction with Longmarket Street;

7.4 The entry of traffic into the intersection from George Street was controlled by a yield sign which would control traffic entering the intersection from the southern side of Longmarket Street and intending to turn East into Longmarket Street;

7.5 Shortly before the collision plaintiff's motor vehicle had been travelling along Longmarket Street proceeding in the easterly direction. The parties are, however, not in agreement as to the lane upon which the said vehicle had been travelling;

7.6 Shortly before the collision the defendant's motor vehicle had been approaching the intersection from George Street, intending to turn East into Longmarket Street;

7.7 Though the parties are not agreed as to the exact location of the point of impact, it is common cause that the impact occurred upon Longmarket Street on the Eastern side of the intersection, a short distance from the same;

[8] The plaintiff's driver's account of the collision is briefly that on 28 April 2007 at about 19h00 – 19h30 he was driving an Audi A3 motor vehicle belonging to the plaintiff from West to East, along Longmarket Street. He

was travelling on the southern lane to which he referred as a right-hand side lane. Though it was already dark there was light emanating from the surrounding street lights. The road was wet as it had been raining. He had his headlights on. He was driving at approximately between 60 and 70 kilometers per hour.

[9] When he was approximately thirty metres from the intersection between George and Longmarket Streets, he noticed defendant's motor vehicle travelling on George Street and approaching Longmarket Street. He was under an impression that, at the intersection, the defendant's motor vehicle would yield a right of way to the plaintiff's vehicle. However, when plaintiff's vehicle was approximately between 15 to 20 metres from the intersection, defendant's motor vehicle suddenly entered Longmarket Street, did not turn into the right lane of that street but straddled both lanes of Longmarket Street, seemingly intending to drive through the right lane into the left lane. The driver's initial reaction was to apply his brakes and to swerve to the left in an effort to avoid the collision. At the time the vehicles were approximately 10 metres from each other and his attempts to avoid the collision proved to be in vain as the collision took place on the broken line at the centre of Longmarket Street on the eastern side of the intersection, a short distance from the same. The front centre of his motor vehicle collided with the left rear side of defendant's motor vehicle and the impact caused defendant's motor vehicle to be hurled into the left

lane and to spin around, landing on the left lane, facing the westerly direction. After the impact the plaintiff's motor vehicle remained in the middle of Longmarket Street, facing an easterly direction.

[10] Three copies of colour photographs depicting the damage caused to defendant's motor vehicle as a result of the collision were included in the plaintiff's bundle of documents entered in evidence and marked Exhibit "A". The plaintiff's driver confirmed that the prints depicted the said damage. The damage extends from the left hand side rear fender to the boot of the vehicle. The damage is most serious on the fender which obviously was the point of initial direct impact. The metal making up the fender is so twisted and damaged that the mudguard is not recognizable. The left rear wheel appears to have dislodged from the axle. The rear left lamp appears to have been knocked off its socket and the socket itself is completely covered by twisted metal from the surrounding areas. The boot was not spared the damage. The lock of the boot lid appears to have been forced out, leaving a gaping hole, while the lid itself also appears to have been damaged, with the rubber trimming having been dislodged. The substantial portion of the rear bumper was also detached from the body of the vehicle and was left dangling and unattached to the vehicle.

[11] During cross-examination it was put to the driver that, in view of the seriousness of the damage caused to defendant's motor vehicle, he could not have been travelling at the slow speed suggested in his evidence-in-chief. Though he initially resisted any suggestion that he had been travelling at a speed in excess of between 60 and 70 kilometres per hour, he later realized that he was fighting a losing battle, grudgingly caved in to that suggestion and conceded that he had not looked at the speedometer at the time.

[12] When it was put to him that he had initially been observed by the defendant, whose vehicle, at the time, was stationary at the intersection, travelling on the left hand side lane of Longmarket Street while approximately 70 metres away, that he was approaching the intersection at a very high speed and that, upon his closer approach to the intersection and after the defendant's vehicle had entered the right hand side lane of Longmarket Street and was proceeding along the same in the easterly direction, he had suddenly and inexplicably changed lanes from the left to the right hand side and therefore collided into the defendant's vehicle, the driver of plaintiff's motor vehicle denied all this.

[13] When the defendant and his two witnesses were called upon to give their version of the collision they, in the main, confirmed the version which had been put to the driver of plaintiff's vehicle during cross-examination.

[14] At the completion of the evidence it was evident that the parties presented divergent and mutually destructive versions as to the events leading to the occurrence of the collision. During argument both Counsel were agreed that a preference by the Court of a particular version would provide a resolution to the issue between the parties. It therefore became the common position of both parties that, should the Court prefer the version given by the plaintiff's driver, that would inevitably mean that the defendant was negligent and that his negligence was the sole cause of the collision. The converse conclusion would have to be reached should the Court find credence in the version given by the defendant and his witnesses, which would inevitably lead to the conclusion that the negligent driving of the driver of the plaintiff's vehicle would be the sole cause of the collision.

[15] It must be stated, right at the outset, that the driver of plaintiff's motor vehicle, the defendant and witness Akbar Moosa did not impress as witnesses. They would often refrain from giving direct and concise answers to the questions put to them and, besides, their respective testimonies would be punctuated by bouts of silence. Witness Moosa was particularly guilty of these practices and, in addition, in response to the questions put to him, he would be unnecessarily loquacious and argumentative to such an extent that the Court had to reprimand him and he had to apologise for this conduct a number of times. After having

listened to these witnesses the Court was left with a sense of doubt as to exactly what had transpired on the occasion of the collision.

[16] Fortunately, however, the same criticism cannot validly be leveled at the evidence of the defendant's second eye-witness, to wit, Ms. Saria Johannah Smith. It was evident that this elderly and unassuming lady had come to tell the truth as to what she had observed during the evening in question. Though unsophisticated and obviously not versed in matters judicial, she responded to the questions put to her in a direct, concise and convincing manner. She certainly made a good impression to the Court.

[17] In assessing the evidence the trier of fact should, however, be mindful of the fact that demeanour, without anything more, is not sufficient as a basis for the rejection of such evidence. As **Nugent JA** remarked in a recent Supreme Court of Appeal decision :-

> "[14] It has been said by this Court before, but it bears repeating, that an assessment of evidence on the basis of demeanour – the application of what has been referred to disparagingly as the 'Pinocchio theory' – without regard for the wider probabilities, constitutes a misdirection. Without a careful evaluation of the evidence that was given (as opposed to the manner in which it was delivered) against the underlining probabilities, which was absent in this case, little weight can be attached to the credibility findings of the Court *a quo.* " [1]

[18] A convenient point of departure regarding those probabilities in the context of the facts of the present case are the events leading up to the giving of

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[1] Medscheme Holdings (Pty) Ltd and another v Bhamjee 2005(5) SA 339 (SCA) at 345 A-B;

evidence by the two eye witnesses. Witness Moosa is a son-in-law of Ms. Smith. At the time both were resident in a block of flats situate alongside and on the southern side of Longmarket Street and approximately 100 metres from the intersection between George and Longmarket Streets. Neither of them is related to or had had any contact with any of the parties to the proceedings. They testified (and it was not disputed) that they had come to testify under a subpoena. Weighing the probabilities based on these facts, I have been driven to the conclusion that these witnesses were unlikely to deliberately falsify the evidence of what occurred that evening.

[19] Both eye-witnesses testified that the plaintiff's motor vehicle had been travelling at a high speed. This evidence amounts to an observation made by these witnesses and, as it was stated in **Rex v van der Westhuizen** [2] :-

> "In a sense, observation nearly always involves a certain amount of inference. If I were to state that a certain person was angry from my own observation, it is an inference I have drawn from such facts as his expression, his tone of voice, and perhaps other circumstances. If I give evidence that a person is drunk, I naturally do not experience the feelings in the head that he has, but I draw the inference from his speech, his walk, and other circumstances ……"

[20] The circumstances from which Ms. Smith inferred her observation were clearly and concisely set out in her testimony. As she was resident in a block of flats situate alongside the road she would often sit on the balcony

[2] 1929 CPD 484 at 486;

and observe the vehicles driving past. She therefore got to learn to distinguish vehicles travelling fast from those travelling slowly. She could also tell that a vehicle was travelling fast by the loud sound of its engine. On the occasion she had observed the approaching Audi A3 (plaintiff's motor vehicle), and on the basis of her experience in observing the vehicles travelling down the road, she could tell that the vehicle was travelling fast. Her observation to that effect was reinforced by the sound of the engine of the vehicle which was very loud.

[21] It is true that Ms. Smith is not an expert relating to the estimation of speed of motor vehicles. As a matter of fact she testified that she had never before driven a motor vehicle. However, as already indicated, Ms. Smith's evidence on this issue constitutes her own observation based on the circumstances from which she had inferred that observation. It does not amount to a scientific opinion based on a hypothesis or set of facts deposed to by a witness and which have not been observed by an expert. That a lay person is entitled to give evidence of such an observation is now trite. For instance, in **S v Maseko** [3] **Milne JP** remarked as follows :-

> "The evidence of Ms. Schofield was to the effect that the appellant was going very fast. It is true that she only had a brief opportunity to see him – she did not make scientific observation, but really the time has come when one must surely recognize the ability of the average motorist to say, in ordinary circumstances and certainly when testifying to events witnessed by him in broad daylight,

[3] 1983(4) SA 882 (N) at 883; see also Cooper – Delictual Liability in Motor Law (1996) at 468; van der Westhuizen (supra) at 486;

whether a car is going too fast or fast or slowly or at a medium speed."

[22] Besides, the objective evidence discovered after the collision is confirmative of the evidence witness' estimate of the speed travelled by the motor vehicle, by way of example, the nature and extent of the damage caused to defendant's motor vehicle, the trajectory in which (as well as the distance to which) it was hurled immediately after the collision and the fact that, due to the damage caused to plaintiff's vehicle, it was considered to be uneconomical to repair the same. All these features can reasonably be expected to eventuate from the collision involving, at least, one fast moving motor vehicle. [4]

[23] Having therefore compared the evidence on the issue adduced during the trial with the underlying probabilities of this case, I have found that the evidence of witness Smith accords with those probabilities and that it must be preferred. I accordingly find that, on the occasion, the driver of plaintiff's vehicle was travelling at a speed which, in the circumstances, was excessive.

[24] Defendant's and Moosa's evidence that the plaintiff's motor vehicle had initially been travelling on the left lane of Longmarket Street, and Moosa's evidence that, upon its closer approach to the intersection, it had suddenly switched lanes, and crossed over onto the right lane and that, at the time,

[4] Rex v Freeman 1931 NPD 460 at 468;

defendant's motor vehicle had already entered Longmarket Street and was travelling on the right lane, is corroborated by the evidence of Ms. Smith which I have found to be credible. On the other hand I have found the evidence given by the driver of plaintiff's vehicle not to accord with the probabilities of the case and therefore to be unreliable. I therefore find to have been proven, on a preponderance of probability, that, on the occasion, plaintiff's motor vehicle had initially been driven on the left hand side of Longmarket Street and that, upon its closer approach to the intersection, and at the time when defendant's vehicle had already entered the right lane, it had moved from the left lane and entered the right lane upon which lane it was being driven at the time when the collision occurred.

[25] The test for negligence was propounded in the landmark decision of **Kruger v Coetzee** [5] where **Holmes JA** formulated the test as follows :-

> "For the purposes of liability *culpa* arises if –
>
> (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
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> (ii) would take reasonable steps to guard against such occurrence; and
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> (b) the defendant failed to take such steps." [6]

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5 1966(2) SA 428 (A);
6 Ibid. at 430 E-G;

[26] That a reasonable person in the position of the defendant would have foreseen a reasonable possibility that his conduct in entering a main road from a side road was likely to cause an injury and that such a person would have taken reasonable steps to guard against the occurrence of such an injury, cannot be gainsaid. The issue which is then left for determination is whether the defendant did take reasonable steps to guard against such occurrence.

[27] In the National Road Traffic Regulations, 2000 it is stated that a yield sign :-

> "Indicates to the driver of a vehicle approaching such sign that he or she shall yield right-of-way to all :-
>
> (a) traffic on the roadway which is joined by the roadway on which he or she is travelling; ……."

[28] In **Marfuggi v Queensland Insurance and another** [7] reasonable steps to be taken by a driver in similar circumstances were formulated as follows :-

> "The duty of a driver approaching the through street is to give precedence to all traffic in that street. If there is no traffic in the through street or if there is traffic with which he will not interfere, he is under no duty to stop or slow down." [8]

[29] The facts which the Court have found proven in this matter is that, at the time when the defendant entered the right lane of Longmarket Street from George Street, plaintiff's motor vehicle was travelling on the left lane of

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[7] 1959(3) SA 888 (SA);

[8] Ibid at 890 H; See also Cooper (supra) at 189;

Longmarket Street. As there was no traffic on the right lane upon which he had intended to travel (and upon which he indeed travelled) after entering Longmarket Street and as there was no traffic which was so close as to constitute a danger, the defendant was under no duty to stop or even to slow down.

[30] For the aforegoing reasons, I have been driven to the conclusion that the plaintiff has failed to establish negligence on the part of the defendant.

Plaintiff's action is accordingly dismissed with costs. The costs relating to the Rule 13 Notice should also be borne by the plaintiff.

For the Plaintiff:	Mr. B Nicholson (instructed by Tomlinson Mnguni James)
For the Defendant:	Adv. A Pillay (instructed by Chetty, Asmal & Maharaj)
Matter heard:	23 and 24 March 2009
Judgment delivered:	21 April 2009