NORTH WEST HIGH COURT, MAFIKENG

CASE NO. 62/2009

In the matter between:

DINTOE JOHANNES SEBATE PLAINTIFF

and

ROAD ACCIDENT FUND DEFENDANT

JUDGMENT

GUTTA J.

A. INTRODUCTION

[1] The plaintiff instituted an action against the defendant for damages arising out of a motor vehicle collision that occurred on 07 April 2007 between a stationary vehicle, with registration number FCP 986 NW and a motor vehicle with registration number DWL 592 NW, driven by Mr January Phenius Sithole ("the insured driver").

[2] It is common cause that the plaintiff sustained the following injuries as a result of the collision:

2.1 lacerations over the occiput;
2.2 an acute neck sprain;
2.3 an acute back sprain;
2.4 soft tissue injury of the right knee;
2.5 an undisplaced fracture of the left ankle

[3] Both the quantum and the merits were in dispute. The parties agreed to admit the expert witnesses' reports for both the plaintiff and the defendant without calling the experts to testify. The police Accident Report ("the AR") and the sketch plan was also admitted by agreement between the parties. It was further agreed that should the Court find apportionment of damages, that the defendant will pay the plaintiff's past medical expenses on condition that the plaintiff submits the original certificate to the defendant.

B. MERITS

[4] The plaintiff was the first to testify. The plaintiff is employed as a Warrant Officer at the Marikana Police Station.

[5] He testified that, at approximately 20h00, on 07 April 2007, he was travelling in his red Datsun 1400 bakkie, from his home in Marikana and had turned at the intersection leading to Mabitse village from the N4 highway ("the N4").

[6] He experienced problems with his motor vehicle and could not start it. He decided to push the vehicle to Mabitse village, which was approximately 800m away. The right wheels were partly on the tarred road and the whole body of the vehicle was on the side of the road.

[7] While he was pushing his vehicle, another vehicle emerged from the opposite direction, which was a police vehicle. The plaintiff was on the left side of the road and the police vehicle stopped on the right side of the road, opposite him. The police vehicle parked on the side of the road. The two vehicles were facing opposite directions. He testified that when the police vehicle stopped, it had its headlights and the blue light on.

[8] The plaintiff explained to the driver of the police vehicle, Sergeant Otlabusa Richard Lehihi ("Sgt Lehihi"), that he had a breakdown and intended pushing the vehicle to the nearest village. He testified that another motor vehicle emerged in the same direction in which the plaintiff was travelling. The police officer warned him that a motor vehicle was approaching. He was standing at the back of his vehicle and it was too late to go either left or right and he jumped on the back of his bakkie, to avoid being bumped.

[9] The vehicle collided into the back of the bakkie, causing the plaintiff to lift upwards, fall onto the ground and sustain injuries.

[10] In examination in chief, counsel for the plaintiff, Adv Scholtz asked the plaintiff whether he had anything to indicate that he was standing on the road and the plaintiff replied that he had his hazard lights on while standing behind the vehicle.

[11] The plaintiff testified that the vehicle that collided into him was travelling at the speed of 100 to 110km per hour and that the speed limit was 60km per hour.

[12] The plaintiff was admitted to Ferncrent Hospital, where he was discharged after a few days. He did not return to work immediately after the discharge.

[13] He testified that he can no longer participate in sports, he experiences headaches and pain in his ankle.

[14] In cross-examination, counsel for the defendant, Adv Swart referred the plaintiff to the inconsistencies in his description of where he stood before the collision occurred, namely:

14.1 in the particulars of claim, it is alleged that the plaintiff was standing behind the stationary motor vehicle when the insured driver's vehicle collided with him;

14.2 in the plaintiff's statement prepared on 27 November 2007, he stated that he was behind his vehicle when the Toyota Venture

collided with him, before he could get out of the way;

14.3 Dr Booyse, the orthopaedic surgeon, in his medico-legal report, stated that the plaintiff was standing on the side of the road when he was hit by a motor vehicle;

14.4 the industrial psychologist, Dr Fourie, stated that the plaintiff was a pedestrian when he was involved in a motor vehicle accident;

14.5 Esther Sempe, an industrial psychologist, stated that:

> "Mr Sebate reported that he had come out of his car and was standing on the pavement when the accident occurred. A venture that had lost control drove to his car. He was alerted by his colleagues about the impending danger. He jumped on the bonnet of his car. He was thrown to the tar road by the impact."

[15] The plaintiff did not provide a satisfactory explanation for the above inconsistencies.

[16] The second witness called by the plaintiff was Sgt Lehihi. He testified that he was in the police motor vehicle with Constable Seketi. They were from Mabitse village, at approximately 20h00, when he saw the plaintiff pushing a red Datsun 1400. He stopped his vehicle on the side of the road and switched the blue lights of the police vehicle on. He later also testified that the headlights of the vehicle were also flickering from side to side.

[17] He observed that the plaintiff had his hazard lights on. He enquired

from the plaintiff what the problem was and the plaintiff told him that he encountered problems with his vehicle and was pushing his car to Mabitse village as he was afraid to leave his vehicle on the N4.

[18] A car emerged from the direction that the plaintiff was travelling and Constable Seketi told the plaintiff to be careful as the car was approaching at a high speed. Sgt Lehihi estimated the speed to be approximately 80 to 100km per hour.

[19] The plaintiff then jumped onto the back of his vehicle and the vehicle collided into the plaintiff's vehicle from behind.

[20] He testified further that the speed limit on the road was 60km per hour because the road enters the village and there are animals roaming around and there were boards on the road indicating the speed limit. Adv Swart put it to him that there were no speed limit signs and they were not in the village or entering the village, but off the N4, where the speed limit was 120km per hour and that the 60km is only applicable when you enter a built-up area. Sgt Lehihi conceded that he did not see a 60km speed limit sign.

[21] Sgt Lehihi testified that after the collision, the insured driver reported to him that he saw the lights of the car on the side of the road and he thought they were criminals and was afraid to stop.

[22] Sgt Lehihi testified that the insured driver was referring to both the plaintiff's vehicle and the police vehicle when he reported to him. It

was put to Sgt Lehihi in cross-examination that had the insured driver seen the plaintiff, it was absurd that the insured driver would drive straight into another vehicle. Sgt Lehihi's reply was that the insured driver would be in a position to answer that.

[23] The defendant called the insured driver, who testified that on 07 April 2007 at approximately 20h15, he had turned off from the N4 and was travelling towards Mabitse village when he observed a stationary vehicle in the bushes on the opposite side of the road with its lights on facing the direction from which he was coming. The vehicle was a distance of approximately 300 to 400m from him. He testified that the car had its bright lights on and he continued driving because he thought there were criminals in the vehicle because it was parked in the bushes. He testified that he was travelling at 80km per hour.

[24] He testified further that he observed a stationary vehicle on the road in the same path in which he was travelling, when he was too close to the vehicle to stop. The stationary vehicle into which he collided did not have its lights on. Further, because the other car (the police vehicle) had its bright lights on, he was unable to see the stationary vehicle and collided into it.

[25] The insured driver testified that the police vehicle did not have its blue lights on because he would have seen the blue lights from the distance. That if the blue lights were on he would have reduced his speed and stopped and avoided the collision. He testified that it was

only after the accident that the police put the blue lights on and it was only then that he realised that it was a police vehicle.

[26] He testified that the motor vehicle into which he collided was on the road and not as the plaintiff testified, with its left wheels on the gravel and the right wheels on the road surface.

[27] He also testified that from the N4 to point of impact, there are no speed limit signs, and no houses, only bushes.

[28] The insured driver admitted under cross-examination that he was charged with contravention of the Road Traffic Act 93 of 1966 for reckless and negligent driving and that he pleaded guilty. He testified that his legal representative, Mr Rakula, an attorney from the Legal Aid Board ("LAB") in Tlhabane advised him to plead guilty because they had attended Court more than seven times and the matter was not heard and because he was running out of funds. He did not have funds to pay an attorney hence he went to the LAB, he also did not have funds for transport and there are times when his attorney was also not at Court.

C. ONUS

[29] The plaintiff bears the onus to prove that the insured driver was negligent, that is, a reasonable person in the position of the defendant could have reasonably foreseen the ensuing harm and the reasonable person would have taken reasonable steps to prevent harm from occurring. Should the harm be reasonably foreseeable and the

defendant failed to take reasonable preventative or precautionary steps, the defendant will be held to have been negligent.

[30] The plaintiff in his particulars of claim, alleges that the insured driver was negligent in one or more or all of the following respects:

30.1 he failed to keep a proper lookout;

30.2 he drove the vehicle at a speed that was excessive in the circumstances;

30.3 he failed to apply the brakes of the vehicle he was driving timeously, sufficiently or at all;

30.4 he failed to take the rights of other users of the road, and more specifically that of the plaintiff, into consideration;

30.5 he failed to keep the vehicle he was driving under proper control when, by the exercise of reasonable care, he could and should have done so;

30.6 he failed to avoid the collision when, by the exercise of reasonable skill and care, he could have and should have done so;

30.7 he failed to ensure that the vehicle he was driving was roadworthy;

30.8 he drove a vehicle, which was defective and/or not roadworthy, on a public road.

D. COLLISION WITH OBSTRUCTION AT NIGHT

[31] The plaintiff had the onus to prove that the plaintiff's stationary vehicle was foreseeable by a reasonable driver.

[32] The test for negligence in collision with objects at night was applied in ***Willness v Cape Provincial Administration*** **1992 (1) SA 310 (E) at 3115F**. Held that there was no duty on the driver to travel at such a speed as would have enabled her to stop within the range of her vision.

[33] In ***Johannes v South West Transport (Pty) Ltd*** **1994 (1) SA 200 (Nm)**, the Court held that a stationary vehicle obstructing the traffic lane of a driver on a freeway was not foreseeable. Also a broken down bus and tractor on a rural road were found to be unforeseeable obstructions. See ***Nkula v Santana Assuransie Maatskappy Bpk*** **1975 (4) SA 848 (A)**.

[34] In most cases the Courts have applied the foreseeability test and indeed refused to hold that a motorist who collided with an inconspicuous obstruction after dark, should have foreseen the possibility of encountering the obstruction in the circumstances in which the collision occurred:

34.1 on a rural road where the obstruction was a trailer attached to a bus which had broken down. See ***Hoffman v SAR & H*** **1955 (4) SA**

476 (A);

34.2 on a provincial road passing through a rural area where the obstruction was a tractor being used to drag a lorry out of mud. See ***Santam v Beyleveld*** **1973 (2) SA 146 (A)**;

34.3 along a freeway the obstruction was a stationary motor vehicle standing across the lane in which the motorist was driving. See ***A A Onderlinge Ass v Van Rensburg*** **1978 (4) SA 771 (A)**;

34.4 while driving in an urban area and the obstruction was a pedal cycle without reflections or lights. See ***Seemane v A A Mutual*** **1975 (4) SA 954 A**.

[35] The negligence of a driver who collides with an unlit obstruction at night is judged using the reasonable foreseeability and preventability test, that is, if an obstacle is foreseeable by a reasonable driver, he is required to prevent a collision. See ***Manderson v Century Insurance*** *supra*. **1951 (1) SA 533 (A)**.

[36] A collision at night with an unlighted obstruction does not justify the inference that the insured driver was not keeping a proper lookout unless it is established that the obstruction was capable of being timeously seen by one keeping a proper lookout. See ***Santam v Beyleveld*** *supra*; ***Mthetwa v Shield Ins*** **1980 (2) SA 954 (A) 956–7**.

[37] Hence the next question for consideration is whether the plaintiff's vehicle was foreseeable by the insured driver and was capable of being timeously seen by the insured driver.

E. ANALYSIS OF EVIDENCE

[38] Constable Seketi, the other police officer who was in the police vehicle, completed the AR and sketch plan on 07 April 2008, at 20h15. In the brief description of the accident on the AR, he stated the following:

> "Driver B (Plaintiff) was travelling to Mabitse, while on the way, he encounter a problem on his car. All the lights were off and the engine cannot run. He push his car, on the way he met the police. The police parked next to the road. While busy talking to the police, a venture came behind and collided it on the back. Driver A (Mr Sithole) was on high speed because on his way he suspected two cars as hijackers so, on his way to Mabitse he saw two cars, the other one was on his lane, he then collided with the Datsun because he was on speed and cannot control the car."

[39] The AR and the sketch plan was admitted into evidence by the plaintiff by agreement between the parties. Constable Seketi stated in no uncertain terms that the lights of the plaintiff's vehicle were off and that the plaintiff's vehicle was in its lane. Constable Seketi was not called as a witness. Constable Seketi's report in so far as the fact that the plaintiff's vehicle lights were off and that the plaintiff's vehicle was in the insured driver's lane of travel, is consistent with the version of the insured driver.

[40] When a litigant fails to adduce evidence about a fact in issue, for example, by not calling a witness, he runs the risk of his opponent's

version being believed. Constable Seketi's statement and sketch plan remain unchallenged. See ***Brand v Minister of Justice*** **1959 (4) SA 712 (A)**.

[41] There are numerous inconsistencies and contradictions in the statements made by the plaintiff, his testimony in Court, the statement made by Sgt Lehihi and his evidence, as well as the statement made by Constable Seketi and the AR and the sketch plan drawn by Constable Seketi as set out hereinbelow.

[42] In the sworn statement by the plaintiff dated 27 November 2007, the plaintiff does not say that he put his hazard lights on or that the police put their blue lights or lights that flickered on. He only stated that the headlights of the police vehicle were switched on.

[43] In a statement dated 16 January 2008, the plaintiff stated that he pulled to the side of the road towards his left. That he could not park more to the left as there was a ditch. He got out of his vehicle, first switched his hazard lights on. He did not say that the police vehicle had its blue lights on or lights that flickered from side to side.

[44] Sgt Lehihi made a written statement under oath on 07 April 2007, that is on the same day that the collision occurred. In the statement there is no mention made that he switched the blue lights on or that the plaintiff had his hazard lights on. When questioned, under cross-examination, why he did not mention it, he replied that it was not important for the docket.

[45] Sgt Lehihi also drew a sketch plan on the day of the collision, depicting the plaintiff's vehicle as being on the road before the collision.

[46] When he was cross-examined about the sketch plan he drew with the plaintiff's vehicle on the road, he replied that he took it from Constable Seketi's accident sketch plan. Later he conceded that he drew the sketch plan and the distances of the vehicles, as well as the directions of the vehicles after the collision.

[47] The insured driver's statement, made on 10 April 2007, was that he was driving at 80km per hour. He did not know that there was a vehicle parked in his lane of travel as the plaintiff's vehicle's lights were off and there were no lights or reflector. The police vehicle had its bright lights on and he continued driving and collided with the plaintiff' vehicle.

[48] Under cross-examination, the insured driver was questioned why he did not mention in his statement that he was afraid to stop. He replied that he gave his statement to the police, who prepared the statement and after the police officer wrote the statement, he gave it to him to sign without reading it.

[49] The insured driver's testimony in Court is consistent with what he told Sgt Lehihi, as well as his written statement.

[50] Section 59 of the National Road Traffic Act 93 of 1966 provides that:

"(1) The general speed limit in respect of—

a) Every public road or section thereof, other than a freeway, situated within an urban area;

b) every public road or section thereof, situated outside an urban area; and

c) every freeway;

shall be prescribed.

(2) An appropriate road traffic sign may be displayed on any public road in accordance with Section 57, indicating a speed limit other than the general speed limit which applies in respect of that road in terms of subsection (1). Provided that such other speed limit shall not be higher than the speed limit prescribed in terms of subsection (1) (c).

. . . . . .

(4) No person shall drive a vehicle on a public road at a speed in excess of—

a) the general speed limit which in terms of subsection (1) applies in respect of that road;

b) the speed limit indicated in terms of subsection (2) by an appropriate road traffic sign in respect of that road; or

c) the speed limit prescribed by the Minister, under subsection (3) in respect of the class of vehicle concerned."

[51] It is common cause that the collision took place approximately 1.5km from the N4 highway. The speed limit on national roads is 120km per hour.

[52] It is also common cause that it was not a built-up area where the

collision occurred and that the nearest village was about 1km away. There is no evidence led to prove that the speed limit was 60km per hour.

[53] According to both the plaintiff and Sgt Lehihi, there were no speed limit signs in the area where the collision occurred.

[54] A witness is entitled to estimate speed, but such estimate has to be approached with caution and weighed against the experience, observation, distance of travel of the vehicle and the obvious speed of the vehicle. See ***S v Govender*** **1968 (3) SA 14 (N)**.

[55] The insured driver testified that he was driving at 80km per hour. Sgt Lehihi also estimated the insured driver's speed to be between 80 to 100km per hour. The plaintiff in his testimony, estimated the insured driver's speed to be between 100 to 110km per hour, according to its sound.

[56] Accordingly, one cannot draw a conclusion that the speed limit was 60km per hour and that the insured driver had exceeded the speed limit.

F. CREDIBILITY & PROBABILITIES

[57] There are two different versions before Court. In such a case, the plaintiff can only succeed if he satisfies the Court, that his version is true

and accurate and therefore acceptable, and the version of the defendant is therefore false and falls to be rejected. In deciding whether the evidence is true or not, the Court will weigh up and test the plaintiff's allegations against the probabilities. If the balance of probabilities favour the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced, the plaintiff can only succeed if the Court nevertheless believes the plaintiff's witnesses, is satisfied that the evidence is true and the defendant's version is false. See ***National Employers General Insurance v Jagers*** **1984 (4) SA 437 (E) at 440D–G**; ***African Eagle Life Assurance Co. Ltd v Cainer*** **1980 (2) SA 234 (W) at 237**.

[58] 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. See unreported decision ***Khumalo v Road Accident Fund*** **2007 JDR 0270 (N) at p. 3**.

[59] The duty of this Court therefore is to establish, on the balance of probabilities, which of the two versions is more probable and more likely. The procedure to be adopted in such a case has been aptly set out in ***Stellenbosch Farmers' Winery Group Ltd & Another v Martell et Cie & Others*** **2003 (1) SA 11 (SCA)**, where the Court stated as follows:

> "The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarized 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."

[60] In ***Santam Bpk v Biddulph*** **2004 (5) SA 586 (SCA) at paragraph (10)**, the Court stated that:

> "However, the proper test is not whether a witness is truthful or indeed reliable in all that he says, but whether on a balance of probabilities the essential features of the story which he tells are true."

[61] In a Court trial, the question is whether or not the evidence is, or the probabilities, correct and the non-acceptance of a witness' evidence does not necessarily require a finding that she or he is deliberately untruthful. See ***Body Corporate of Dumbarton Oaks v Faiger*** **1999 (1) SA 975 (SCA) at 979–8**.

[62] In deciding whether a witness is credible or not depends mainly on what he says, whether his evidence is consistent with what he said elsewhere or with what other people have said, whether it seems truthful in the light of all the circumstances. See *Law of Evidence*, Lexis Nexis, Butterworths by Schmidt & Rademeyer pp. 3–29.

[63] One also has to have regard to the witnesses' demeanour. Is his demeanour that of a credible person, that is, does he appear to be intelligent, honest, reliable, did he give evidence in a direct and positive manner or was he uncertain or evasive.

[64] Our Courts put more weight on objective facts than on a person's demeanour. See ***Germani v Herf*** **1975 (4) SA 887 (A) 903D**.

[65] The plaintiff's evidence is not consistent with his written statement. The

plaintiff only referred to his hazard lights, when probed in examination in chief. The plaintiff was not a reliable witness.

[66] Sgt Lehihi was, in my view, not a very reliable and credible witness, which fact can be borne from the contradictions in his evidence before Court, his statements and his sketch plan.

[67] The insured driver was a reliable witness who did not contradict himself in cross-examination. His version that he was afraid when he saw the vehicle parked on the other side of the road with its bright lights on is reasonable and probable. In South Africa, where car hijacking theft and robbery is committed daily, it is reasonable for a driver at night, who observes a car parked on the side of the road with its lights on to be wary and afraid. His version is more probable than the plaintiff's.

[68] It is, in my view, improbable that the plaintiff had his hazard lights on as the insured driver would not have driven into the plaintiff's vehicle, if he saw the plaintiff's vehicle. The insured driver would have seen the plaintiff's vehicle at a distance of 400m if the plaintiff had his hazard lights on.

[69] The insured driver was afraid that there were thieves when he saw the vehicle parked on the side of the road with its bright lights on. It is further improbable that had the police had their blue lights on, the insured driver would have felt fearful.

[70] I am of the view, on a balance of probabilities, that the plaintiff's stationary vehicle was not foreseeable by the insured driver or capable of being timeously seen by one keeping a proper lookout, for the following reasons:

70.1 the plaintiff did not have his hazard lights on;

70.2 the plaintiff did not use the red triangle to caution vehicles approaching of possible danger;

70.3 the collision occurred at night in a rural area where there was no street lights or lighting from the surrounding area;

70.4 the plaintiff was stationary in the insured driver's lane of travel;

70.5 the police vehicle flickered or flashed its lights, thereby confusing and instilling fear in the insured driver;

70.6 the police did not put their blue lights on.

G. DUTY OF A DRIVER IN THE CASE OF BREAKDOWN

[71] The question arises whether the plaintiff created a danger on the road.

[72] A motorist has a duty to carry and use reflective triangles in the case of a breakdown, and to use his hazard lights and/or reflective triangles to warn other road users of imminent harm or danger.

[73] A driver will be negligent if he fails to exhibit proper lights on his vehicle and which result in his vehicle not being discernable to approaching traffic. See ***Hodgkin v Murray*** **1948 (3) SA 267 (E)**; ***Blaauberg v Kleynhans*** **1938 CPD 305**; ***Ranatlo v Kurland*** **1930 TPD**.

[74] A person must take precautions if the likelihood of harm occurring would be foreseen by the reasonably prudent person. See ***Manderson v Century Insurance*** **1951 (1) SA 533 A**.

[75] Even when the hazard lights are switched on, a driver who leaves his vehicle on the shoulder of a roadway, demarcated with yellow lines, may still be negligent. See ***Odendaal v Road Accident Fund*** **2002 (3) SA 85 (W)**.

[76] The plaintiff admitted that he had a red triangle in his vehicle and did not use it. The Court also accepts, on a balance of probabilities, that the plaintiff did not have his hazard lights on. Accordingly, I am of the view that the plaintiff created a danger on the road.

H. DUTY OF THE POLICE OFFICIALS

[77] Section 13(3) of the South African Police Service Act 68 of 1995 provides that:

> "(a) A member who is obliged to perform an official duty, shall, with due regard to his or her powers, duties and functions, perform such duty in a manner that is reasonable in the circumstances."

[78] The driver of the police vehicle also had a duty not to exhibit lights in such a manner that it might mislead other road users. See ***Rondalia v Vermaak*** **1970 (2) SA 735 (A)**; ***Coetzer v A A Onderlinge Ass*** **1983 (3) SA 774 (A)**.

[79] Sgt Lehihi conceded under cross-examination that when there is a stationary vehicle which constitutes a danger or when the police approach an accident scene or an unlit motor vehicle, the correct procedure to follow would be to switch the police vehicle's blue light and to park the police vehicle between the vehicle that constitutes a danger and oncoming vehicles, so they can see where the danger is.

[80] As a police officer, Sgt Lehihi and Constable Seketi had a responsibility to avoid a potentially dangerous situation. Firstly, they should not have parked their vehicle on the side of the road with their bright lights on or their lights flickering from side to side. This is confusing to a vehicle approaching at night from the opposite direction and is not a warning to drivers approaching that there is danger ahead and they should reduce speed. Secondly, if I were to accept Sgt Lehihi's version that he first saw the insured driver at a distance of 400m away, then he had the time to park their vehicle behind the plaintiff's vehicle with their blue lights. They should have also instructed the plaintiff to put his hazard lights on and to place the red triangle behind the vehicle and to take whatever steps were reasonable in the circumstances to avoid a collision and to ensure the safety of the driver of the vehicle approaching.

[81] Harm was foreseeable by the police in the circumstances and the police should have taken control of a potentially dangerous situation, which they failed to do.

I. CRIMINAL OFFENCE: PLEA OF GUILTY

[82] Exceeding a prescribed speed limit is a criminal offence, but will not make a driver guilty of negligence. He will be held liable if it is proved that the collision was caused by his negligence. Driving above the prescribed speed limit is generally a factor indicating negligence. See *The Law of Collision in SA*, chapter 2, 7th Ed by H.B. Klopper.

[83] Proof of conviction in a criminal case is not admissible in subsequent civil proceedings as evidence that the person committed the offence. See *the South African Law of Evidence*, by Hoffman & Zaffet 4th Edition pages 93–97; ***Hollington v F. Hewthorn & Co. Ltd*** **[1943] KB 587**.

[84] Accordingly, the fact that the insured driver pleaded guilty in the criminal court will not carry any weight in these proceedings.

J. WAS THERE A DUTY ON THE INSURED DRIVER TO SLOW DOWN?

[85] It is common cause that the insured driver did not slow down because he was fearful that this may be a car hijacking. The only question that

remains for consideration is whether there was a duty on the insured driver to slow down when he saw the stationary vehicle (the police vehicle) on the side of the road flickering its lights or with its headlights or bright lights on.

[86] Adv Scholtz put it to the insured driver under cross-examination that he should have turned his vehicle around if he was afraid of being hijacked, and the insured driver replied that he was on his way home.

[87] This was the direction in which the insured driver was travelling and one cannot expect the insured driver at night to make a u-turn and go back in the opposite direction.

[88] A driver of a motor vehicle has the duty to drive at a reasonable speed. A reasonable speed is the speed at which a reasonable man would travel, taking the prevailing circumstances into consideration.

[89] According to the plaintiff, Sgt Lehihi and the written statements referred to *supra*, the insured driver was driving at a high speed. Even though this Court is of the view that the insured driver had not exceeded the speed limit. I am of the view that the insured driver, who first saw the flickering/flashing lights at a distance of 400m, should have reduced his speed to ascertain if it is indeed a potentially dangerous situation.

[90] On the insured driver's own version, he was blinded by the lights from the police vehicle. In those circumstances, a reasonable driver ought to

have reduced his speed. A reduction of speed would have minimized the damages and injuries to the plaintiff, as the impact would not have been too severe.

[91] For that reason, I find that the insured driver contributed 20% to the injuries sustained by the plaintiff and the defendant is accordingly only liable for 20% of the proven damages.

[92] In the premises, it is respectfully submitted that the collision was caused by the respective negligence of the plaintiff, the driver of the police vehicle and the insured driver as follows:

92.1 the plaintiff – his failure to warn oncoming vehicles of the imminent danger of his stationary vehicle, his failure to display any lights, his failure to push his unlit vehicle off the road, his failure to display reflective triangles, and by jumping onto the back of his vehicle in the face of an oncoming vehicle;

92.2 the police officers in the police vehicle – their failure to warn vehicles approaching of the danger and taking reasonable steps to avoid harm. They were also negligent in parking on the opposite side of the road and by flashing/flickering the lights of their vehicle and in so doing confusing the insured driver;

92.3 the insured driver – his failure to reduce his speed.

J. QUANTUM

[93] The plaintiff claimed damages in the amount of R692 000.00, calculated as follows:

93.1	past hospital and medical expenses;	R 50 000.00
93.2	extended cost of future medical instalment;	R237 000.00
93.3	past loss of earnings;	R 5 000.00
93.4	extended loss of earnings and/or earning capacity	R200 000.00
93.5	general damages for pain, suffering, discomfort, discomfort, lost of amenities of life and disability.	R200 000.00
		R692 000.00

==========

[94] It is common cause that the plaintiff will require further treatment. An undertaking in terms of Section 17(4) of the Road Accident Fund Act 56 of 1996 will cover all future expenses incurred.

[95] On 07 April 207, the plaintiff was admitted to the Ferncrest hospital in Rustenburg, where he received the following treatment:

95.1 lacerations on the occipital sutured;

95.2 a cervical collar was filled;

95.3 x-rays were taken;

95.4 analgesia was provided;

95.5 a below-knee cast was applied on the left lower leg;

95.6 he received physiotherapeutic treatment.

[96] Two medical reports were filed on behalf of the plaintiff from:

96.1 Dr Morule, an orthopaedic surgeon;
96.2 Ms Ester Sampane, an industrial psychologist.

[97] The plaintiff was discharged from hospital on 09 April 2007. He returned to the hospital three weeks later when the cast was removed. According to the report of Dr Morule, the plaintiff continued to use crutches for a further three weeks due to ongoing pain on the right knee and to an extent, the left ankle.

[98] The plaintiff returned to work on 31 May 2007, using one crutch. He did administration work for a period of four weeks before he resumed his full duties as a police officer.

[99] According to Dr Morule, the problems at presentation were a painful neck, pain in the right knee and mild pain in the left ankle. He is unable to play social soccer, or to participate in martial arts, he in unable to walk long distances and has difficulty standing for a long time.

[100] Dr Morule, in his assessment, stated that the plaintiff's fracture of the left ankle was united and the plaintiff walks well, the acute symptoms of the soft tissue injury of the right knee had settled, although there are features

of a partial tear and the whiplash injury or soft tissue injury.

[101] Dr Morule opined that the plaintiff suffered fairly severe pain and shock following the major soft tissue injury involving the head, neck and right knee. That he has ongoing pain in the neck and right knee and will suffer from pain after surgery. The plaintiff does not have chronic pain.

[102] Dr Morule opined that although the plaintiff was completely disabled from the date of the accident, until he returned to work, that he is fit for work and will work until retirement, but it is limited due to disabling pain in the right knee and to a lesser extent the neck. He stated that the plaintiff will require cumulative periods of temporary disability for six months for the rest of his working career to attend general practitioner consultations, physiotherapeutic treatments and being laid off work for persistent symptoms as well as for surgery in the right knee and the neck.

[103] According to the radiologist's report, the plaintiff's fracture has united without modeling deformity.

[104] The plaintiff's industrial psychologist, Ms Esther Sempane, assessed the plaintiff on 04 August 2008, opined that his present complaints were not being able to run and pain in his right knee, poor memory post trauma, which affects his efficiency at work. He becomes anxious and afraid for no reason at work. He suffers from concomitant headaches and has developed irritability post trauma.

[105] Ms Sempane expressed a view that the plaintiff would continue

operating with restrictions on his current position. He will experience reduced productivity with an increase in symptoms. His career advancement has not been affected by the accident and he can still apply for senior positions.

[106] The plaintiff was more recently on 11 August 2011 examined by the defendant's orthopaedic surgeon, Dr F.A. Booyse. The complaints that the plaintiff presented to Dr Booyse were headaches twice a month, lower backache approximately twice a month on the left side, painful left knee when he walks for a long period or exercises, bend and stretches the knee. The ankle also becomes painful after walking for an hour. Dr Booyse, after conducting a clinical examination, found that the plaintiff had a medial meriscal tear in the left knee which requires surgery.

[107] Dr Booyse opined that the injuries will influence the plaintiff's work span and his age of retirement, but deferred to an expert occupational therapist and industrial psychologist.

[108] The defendant's industrial psychologist, Dr L.A. Fourie, assessed the plaintiff on 11 August 2011, who concluded that "the plaintiff's impairment of his capacity to earn an income will not result in the production of a lesser income in the future".

[109] Melloney Smit, an occupational therapist with Gail Vlok evaluated the plaintiff on 08 August 2011. The problem at work was forgetfulness and

there was no physical problems at his present work but should he be transferred to the crime prevention unit, he will be unable to do foot patrol because of symptoms in the left knee. Other problems were pain in the left knee, back pain when walking or sitting for more than an hour and headaches once a week.

[110] The plaintiff reported to Ms Smit that he had sustained an injury to his left knee in the collision and he denied sustaining a fracture of the left ankle.

[111] According to Ms Smit, an improvement in the right knee symptom can be expected after a successful arthroscopy and rehabilitation. She opined that, "the plaintiff should be able to continue working in his present, similar or future aspired capacities should he require a knee arthroscopy to his right knee, left knee replacement or a cervical spine fusion (after successful surgery and rehabilitation)".

[112] Adv Swart submitted that when the plaintiff presented himself to the occupational therapist, there were no complaints about the neck, right knee or left ankle and that this shows that there is no sequelae relating to the injuries sustained in the collision.

[113] It is reasonable to infer that the injury to the right knee as well as the fractured ankle had healed and no longer presented the plaintiff with pain or discomfort as the plaintiff did not mention these injuries when he met recently with the defendant's experts. The complaint with the left knee is not related to the injuries sustained by the plaintiff in the motor

vehicle collision.

[114] Counsel for the plaintiff, Adv Scholtz, elected not to furnish the Court, either in his heads of argument or submissions to Court, with any authorities to support his claim for general damages and merely submitted that the plaintiff has made out a case for general damages.

[115] Adv Swart relied on the case ***Mafilika v Commercial Union Assurance*** **1991 C + BC2 – 2 (W)**, where the plaintiff sustained a soft tissue injury to the neck, stiffness in the neck, mild concussion and injury to the leg, headaches and stiffness for five years. The current 2011 value, as per Robert Koch: *Quantum Yearbook*, of the award is R45 000.00.

[116] Another case referred to is the case of ***Pallas & Another v Lesotho National Insurance*** **1987 3 C + B 705 (E)**, where the plaintiff sustained a comminuted fracture of the right tibia and ankle joint, five fractured ribs, lacerations and bruising. His leg was in plaster for five months and was unable to take any weight on his leg until nine weeks after the accident. He was left with a distinct bowing of and restricted movement of the ankle. He had to give up social tennis and gardening. Osteoarthritis expected to develop in the ankle, necessitating an operation. The current value of the award by Robert Koch: *Quantum Yearbook*, is R38 000.00.

[117] Taking the above cases as well as the medical reports and the plaintiff's evidence into consideration, I am of the view that an amount of

R65 000.00 is fair and reasonable for general damages.

K. FUTURE LOSS OF INCOME

[118] The plaintiff filed an actuarial calculation from the actuaries G A Whittaker of Algorithm.

[119] Mr Whittaker's calculations included a general pre- and post-contingency deduction of 10%. Mr Whittaker estimated that the plaintiff will suffer a loss of income as a result of future periods off work in the amount of R70 328.00.

[120] The defendant did not have any actuarial calculation and did not refer to future loss of income in the heads of argument.

[121] The Court accepts the actuary's contingency calculation and the calculation for loss of future income in the amount of R70 328.00.

L. ORDER

[122] In the result, this Court makes the following order:

a) The defendant is ordered to pay the plaintiff the amount of R37 065.60, which amount is made up as follows:

Past loss medical expenses	R 50 000.00
Future loss of earnings	70 328.00
General damages	65 000.00

	R185 328.00
Less 80%	148 262.40

Total	R 37 065.60
	=========

b) The defendant is ordered to pay interest on the above amount at the rate of 15.5% per annum, calculated from 14 days after the date of this judgment to date of payment.

c) The defendant is ordered to furnish the plaintiff with an undertaking in terms of Section 17(4) of the Road Accident Fund Act 56 of 1996 for the costs of the future accommodation of the plaintiff in a hospital or nursing home for treatment or the rendering of a service or the supplying of goods to him after such costs have been incurred and on proof of payment hereof, limited to 20% of the proven costs.

d) The defendant is ordered to pay the qualifying fees, if any, of the following expert witnesses:

i) G.A. Whittaker, Algorithm Consultants & Actuaries – actuary;

ii) Ms Esther Sempane – industrial psychologist;

iii) Dr R.A. Morule – orthopaedic surgeon.

e) The defendant is ordered to pay on a magistrate court scale, the plaintiff's costs including the costs consequent upon the employment of counsel.

_____

N. GUTTA

JUDGE OF THE HIGH COURT

APPEARANCES

DATE OF HEARING	: 14 SEPTEMBER 2011
DATE OF JUDGMENT	: 08 DECEMBER 2011
COUNSEL FOR PLAINTIFF	: ADV H.J. SCHOLTZ
COUNSEL FOR DEFENDANT	: ADV A.J. SWART
ATTORNEYS FOR PLAINTIFF	: SMIT STANTON INC. (Instructed by VAN VELDEN DUFFEY INC.)
ATTORNEYS FOR DEFENDANT	: VAN ROOYEN TLHAPI WESSELS (Instructed by FOURIE FISMER INC.)