IN THE HIGH COURT OF SOUTH AFRICA

(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No. : 3343/04

In the matter between:-

BONITA BUITENDACH	First Plaintiff
MIA THEO RESETTE BUITENDACH	Second Plaintiff

and

ROAD ACCIDENT FUND	Defendant

HEARD ON: 22 SEPTEMBER 2006

JUDGMENT BY: RAMPAI J

DELIVERED ON: 18 JANUARY 2007

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[1] The plaintiff jointly sued the defendant for damages in order to recover compensation following the injuries which the first plaintiff sustained in a road accident. The proceedings primarily concern the first plaintiff. She was a minor at the time. The second plaintiff was her mother and natural guardian. At the instance of the defendant, Willem Johannes Smit, was later joined as a third party to this action. The parties agreed to have the merits and the quantum separately adjudicated. By agreement *inter partes*,

therefore, I sanctioned the separation in terms of Rule 33(4).

[2] The above ruling in essence entailed that a determination be made of the issues as contained in paragraph 4 and paragraph 5 of the plaintiff's summons as opposed to the issues contained in paragraph 4 of the defendant's plea. In addition the ruling required that I also make a determination of the issues as contained in paragraph 10 and paragraph 11 of the defendant's third party notice as opposed to paragraph 6 of the third party's plea. The defendant's third party plea, it must be stressed right from the onset, concerns the defendant's claim and not the plaintiff's claim.

[3] Four persons testified during the hearing. Two of them testified on behalf of the plaintiffs. They were the first plaintiff herself, Bonita Buitendach and Willem Johannes Smit, in other words the third party. The remaining two witnesses, Zenzile Peter Makhanda and Silone Petrus Khamali testified for the defendant. No evidence was adduced on behalf of the third party. I reserved judgment after hearing argument.

[4] A cursory resumé of the pleadings will do. In the first place the plaintiffs alleged that a road accident took place in Bloemfontein on 13 July 2001. The collision was between a motor vehicle with registration number PKW 170 FS driven by the said Makhanda, the first insured driver and a motor vehicle with registration number OB 250185 driven by the said Smit, the second insured driver. The first plaintiff was a front passenger in the latter motor vehicle. These averments were admitted by the defendant.

[5] The plaintiffs further alleged that the aforesaid collision was occasioned by the exclusive negligence of the first insured driver or the exclusive negligence of the second insured driver or the joint negligence of both drivers.

[6] The plaintiffs stated eight grounds on which they relied for the negligence they attributed to the first insured driver. The most important of them all, in my opinion, was that the first insured driver crashed into the rear of the second insured driver's stationary motor vehicle. *Vide* paragraph 4 of the summons. The defendant denied all the eight grounds relied upon.

[7] The plaintiffs stated seven grounds as regards the alleged negligence of the second insured driver. Of the seven grounds, the most important in my opinion, was that the second insured driver changed lanes and in the process swerved in front of the first insured driver's motor vehicle. *Vide* paragraph 5.1.6 of the summons. The defendant essentially admitted almost all the seven grounds of negligence the plaintiffs attributed to the second insured driver.

[8] In the second place, the defendant pleaded that the said collision was caused by the sole negligence of the second insured driver and denied any negligence whatsoever the plaintiffs attributed to the first insured driver. The principal ground of the second insured driver's negligence was that he changed lanes and swerved in front of the motor vehicle driven by the first insured driver at the time which was both unsafe and inopportune. *Vide* paragraph 4 of the defendant's plea read with paragraph 10 as well as

paragraph 11 of the third party notice.

[9] In the third place, the third party pleaded against the defendant's claim that the exclusive negligence of the first insured driver was the sole cause of the accident. He relied on four grounds. He specifically denied there was any negligence on his part. He alleged that the first insured driver sped down the street to beat the traffic lights without paying proper attention to the traffic on the other side of the traffic lights where the motor vehicle driven by the third party was stationary.

[10] In the light of the above summarised allegations as extrapolated from the pleadings, it becomes patently clear that the crucial issue is how the collision happened. This is the single and most important factual dispute between the plaintiffs and the defendant. The same issue is also a bone of contention between the defendant and the third party

[11] There are many facts which are not in dispute. The accident occurred at or about 16h45 in Church Street. Makhanda, a member of the police service, was driving a blue Toyota Corolla owned by the SAPS. Smit, a member of the civilian society, was driving a red Ford Laser owned by his mother. The scene of the accident was in the vicinity of the intersection formed by Church Street and Harvey Road. The point of collision was on the inner lane of the southbound carriageway as would more fully appear from exhibit "A", the photo album. The two sedans were travelling southwards. Makhanda's Toyota Corolla sedan collided with Smit's Ford Laser sedan from behind. The Toyota was damaged in front and the Ford at the back. The first plaintiff was injured.

[12] After the collision the final rest positions of the sedans were in a straight line parallel to a cement traffic island separating the two carriageways. A stationary white minibus taxi with a trailer was seen on the same inner lane of the southbound carriageway of Church Street. It was right in front of the Ford Laser at the time it was seen. The police attended the

scene, interviewed the two drivers, took photographs, obtained statements from the drivers as well as the passengers, compiled the statutory accident report and the key thereto. *Vide* exhibits "B", "C", "D", "E" and "F".

[13] The extent of the defendant's delictual liability towards the first plaintiff depends on three possible scenarios. From the above facts and the pleadings one of the following scenarios may emerge after the analysis of the evidence. Firstly, if the plaintiff proves 1% of the alleged negligence on the part of Makhanda, the defendant will be liable to compensate the first plaintiff 100% of all such damages as the first plaintiff may prove in the quantum mini trial later. There is no statutory ceiling as to the quantum she can recover. *Vide* section 17(1) Act No. 56/1996. The same legal position will obtain if both drivers are found to have been negligent. However, if the plaintiff fails to prove that the said first insured driver was negligent in any manner whatsoever, the plaintiff will recover nothing from the defendant through Makhanda's avenue, since the court would then have found no causal connection between the victim and the particular driver on the basis of which the defendant can be held liable.

[14] Secondly, if the court finds that the accident was occasioned by the exclusive negligence of the second insured driver and that the first insured driver was not at all negligent, then the plaintiff will still recover some compensation from the defendant through Smit's avenue of negligence. In this instance, however, the defendant's

delictual liability will be limited to R25 000,00 only and in respect of special damages only. Section 18(1)(b) would apply to the plaintiff since she was a social passenger in the offending vehicle that was driven in a negligent manner by Smit. The slightest degree of at least 1% negligent attributable to Smit will be enough.

[15] Thirdly, if the court finds that neither the first insured driver nor the second insured driver was negligent, then in such a rare but conceivable event, the plaintiff will not recover anything from the defendant. In such a scenario the liability of the defendant would be virtually zero. This would be so because the requisite connective cause of action would be missing between the plaintiff and the defendant. Unless the court makes such a finding therefore, the plaintiff will be entitled to a ruling in her favour on the merits.

[16] As regards costs the parties agreed at the pre-trial conference that it was not necessary to have the case transferred to any other court. Therefore they accepted this court as a competent forum for the adjudication of their dispute. This entailed that the High Court tariff of costs will be applicable. See paragraph 6 Rule 37 minutes on p. 98.

[17] The plaintiff bears the onus of establishing on a balance of probabilities that the negligence of Makhanda, the first insured driver, alternatively Smit, the second insured driver, was the primary cause of the accident. Similarly the defendant bears the onus of proving that the negligence of the third party was also the cause of the collision.

[18] In the case of **NATIONAL EMPLOYERS' GENERAL INSURANCE CO LTD V JAGERS** 1984 (4) SA 437 (ECD) at p. 440 D – G Eksteen J said:

> "It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as

> heavy as it is in a criminal case, but nevertheless where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false."

[19] At p. 440 G – H the honourable Judge carried on as follows about the correct approach a court has to adopt in dealing with the role of probabilities and credibilities in determining whether the party bearing the onus has or has not discharged such onus:

> "This view seems to me to be in general accordance with the views expressed by COETZEE J in *Koster Ko-operatiewe Landboumaatskappy Bpk v Suid-Afrikaanse Spoorweë en Hawens* (*supra*) and *African Eagle Assurance Co Ltd v Cainer* (*supra*). I would merely stress however that when in such circumstances one talks about a plaintiff having discharged the

> onus which rested upon him on a balance of probabilities one really means that the Court is satisfied on a balance of probabilities that he was telling the truth and that his version was therefore acceptable. It does not seem to me to be desirable for a Court first to consider the question of the credibility of the witnesses as the trial Judge did in the present case, and then, having concluded that enquiry, to consider the probabilities of the case, as though the two aspects constitute separate fields of enquiry. In fact, as I have pointed out it is only where a consideration of the probabilities fails to indicate where the truth probably lies, that recourse is had to an estimate of relative credibility apart from the probabilities."

[20] When a court is called upon to determine which of the two drivers was negligent in the manner he was driving a motor vehicle at the time of the particular accident, the court is essentially called upon to consider the evidence at hand and by a process of inferential reasoning arrive at a certain conclusion. In **RONDALIA ASSURANCE CORPORATION OF SA LTD V MTKOMBENI** 1979 (3) SA 967 (AD) at 972 A – D Galgut AJA said:

> ‘‘Negligence can only be attributed by examining the facts of each case. Moreover, one does not draw inferences of negligence on a piecemeal approach. One must consider the totality of the facts and then decide whether the driver has exercised the standard of conduct which the law requires. The standard of care so required is that which a reasonable man would exercise in the circumstances and that degree of care will vary according to the circumstances. In all cases the question is

> whether the driver should reasonably in all the circumstances have foreseen the possibility of a collision."

[21] The duty of a driver to keep a proper lookout was said to embrace two important practical dimensions:

> "The duty of a motorist to maintain a proper lookout involves not only the physical act of looking, but also a reasonably prudent reaction to whatever might be seen. (See *Corpus Juris Secundum* vol 60A - 284 (3) – note 47.)"

Vide **BRIDGMAN NO v ROAD ACCIDENT FUND** 2002 (1) ALL SA 1 (CDP) p. 9 (f) per Nel J.

[22] The legal principle which obtains where one motor vehicle collides with another motor vehicle ahead is stated as follows:

> "Proof that a motor vehicle in a stream of traffic, collided with the vehicle ahead is *prima facie* proof of negligence. A driver must anticipate the possibility of a vehicle travelling ahead in a stream of traffic stopping suddenly. A following driver is thus under a duty so to regulate his speed and his distance from the vehicle ahead as to be able to avoid a collision should the vehicle ahead stop suddenly. If the driver of the following vehicle is unable to do so and a collision results, the inference is that he was either travelling too closely to the vehicle ahead or too fast or that he was not keeping a proper look-out."

Vide **Cooper: Motor Law**, (1996) ed p. 102 and the authorities there cited.

[23] Whenever one motor vehicle collides with another from behind it necessarily leads a reasonable man or a woman to draw an inference that the rear motor vehicle was travelling too close to the front motor vehicle; or that it was speeding or that its driver was not keeping a proper lookout. See **Cooper** *supra*.

In **UNION AND SOUTH WEST AFRICA INSURANCE CO LTD v BEZUIDENHOUT** 1982 (3) SA 957 (AD) at 965 A – C Viljoen JA said:

> "Ek stem in die algemeen saam met die betoog. Hierteenoor is ek egter van oordeel dat 'n redelike versigtige motorbestuurder in spitsverkeer nie maar, solank hy in sy baan bly, origens op 'n onagsame wyse outomaties kan voortbestuur teen 'n spoed wat die ander voertuie voor hom handhaaf en nie oplet of ander verkeer skielik stadiger ry of slegs stop nie. Alhoewel die redelike versigtige motorbestuurder nie teen roekelose gedrag van ander motorbestuurders hoef te waak nie (kyk *Griffiths v Netherlands Insurance Co of SA Ltd* 1976 (4) SA 691 (A) te 697B - C) behoort hy desnieteenstaande te voorsien dat die verkeer voor hom, om watter rede ookal, skielik mag stadiger beweeg of selfs tot stilstand kom en het hy 'n plig om sy optrede hiervolgens in te rig. Hoe nader so 'n motorbestuurder aan die voertuig voor hom ry, hoe groter, meen ek, is sy verpligting om waaksaam te wees."

[24] The evidence of the first plaintiff was that the accident took place on the inner lane between the traffic lights and a bridge

over a railway track at or about 17h00 on 18 July 2001. She was from her parental home in Church Street at Ehrlichpark to Hamilton Industria to see her boyfriend's mother. She was a front passenger in the second insured sedan, the Ford Laser. This motor vehicle was travelling from north to south on the inner lane in Church Street. Shortly after crossing Harvey Road the Ford Laser had to stop because there was a stationary motor vehicle on the same inner lane where the second insured motor vehicle was travelling. The first insured vehicle came and crashed into the rear of the stationary motor vehicle. She did not see it as it was approaching their stationary car from behind.

[25] During cross-examination she admitted that she and Smit were lovers then. She denied the suggestion that the Ford Laser was initially travelling fast on the outer lane; that it suddenly swerved from the outer lane onto the inner lane in front of the Toyota Corolla and that it suddenly stopped. She maintained that the Ford Laser was always on the inner lane from the Harvey Road intersection until the scene of the accident at the foot of the bridge. It was a certain minibus taxi with a trailer which forced Smit to bring the Ford Laser to a standstill on the road. There was heavy vehicular traffic on the outer lane which was why Smit had to stop behind a stationary taxi instead of overtaking it on the left. The Ford Laser was ultimately going to turn right in order to leave Church Street. The Ford Laser was moving at a normal speed and not speeding before or at the time of the collision. There was nothing Smit could do to avoid the accident.

[26] Smit, the second insured driver, adduced evidence on behalf of the first plaintiff. He testified that he lived at Pellissier. The second insured vehicle was owned by his mother who worked at Hamilton. He had to pick her up. He and the first plaintiff were lovers then. He first drove to the first plaintiff's home in Church

Street where he picked her up. From there he and the plaintiff drove out together to fetch his mother. He had to stop on the scene because the stationary minibus was obstructing the inner lane where he was driving. He was unable to pass the taxi because of the concrete traffic island on the right hand side and the heavy traffic stream on the left hand side or the outer lane. He noticed in the mirror the first insured vehicle approaching a second insured vehicle from behind at a high speed. All he could do was to apply the brakes of the Ford Laser in order to prevent it from been pushed forward by the force of impact. He did so to prevent a possible secondary collision between the Ford Laser and the taxi trailer. There was nothing he could do to avoid the collision between the two sedans.

[27] During his indirect examination by Mr. J. Zietsman, counsel for the defendant, he answered that the point of impact was approximately 12 metres south of Harvey Road traffic lights. The collision took place soon after he had stopped behind a taxi. He confirmed that he subsequently made two police statements and that he stated the grounds of Makhanda's negligence. He admitted a few differences between his court testimony and his police statement as well as certain discrepancies between his direct examination evidence and indirect examination evidence. He admitted that anyone reading his police statement would get the impression that he did not see the Toyota Corolla before the collision. He denied the suggestion that he changed lanes at the time it was inopportune and unsafe to do so. He, in fact, repeated that he never changed lanes anywhere between Harvey Road and the scene. It was put to him that he came speeding on the inner lane; that he quickly swerved right; that he moved over the lane boundary; that he encroached on the inner lane where the Toyota Corolla was moving and that he unexpectedly slammed the brakes. He denied the suggestion as untrue. The Toyota Corolla jumped the red light, he claimed. He later conceded during intense cross-examination by Mr. J. Zietsman that he made an assumption on this point and that he, in fact, did not see Makhanda disobeying the red traffic lights. He answered that he did not actually see the taxi and that he merely saw the trailer.

[28] During a somewhat friendly cross-examination by Mr. P.

Zietsman, which came as no surprise, Smit stated that although it was already dusk a person could still see stationary vehicles on the road. If he was driving on the outer lane he would not have swerved to the right in order to avoid an obstruction on that lane. Makhanda did not blame him for the accident while they were still on the scene. There were about two metre brake marks on the tarmac behind the first insured motor vehicle. This completes the evidence adduced in favour of the plaintiff.

[29] The defendant's case was then opened. The first witness who adduced evidence on behalf of the defendant was Makhanda. He testified that he was a police sergeant. He was on his way from Park Road Police Station to Trade Centre to obtain a statement from a witness. He was with his colleague Inspector Khamali. He drove from north to south down Church Street. He stopped at the intersection of Harvey Road. The traffic lights were red against him. When they turned green he drove off. He was driving on the outer lane towards the bridge. Shortly after crossing the intersection he spotted the second insured vehicle overtaking the first insured vehicle on the left hand side. Suddenly the second insured vehicle changed lanes, swerved to the right hand side, moved over a traffic lane demarcation line, encroached onto the inner lane where he was travelling and quickly stopped. He could do nothing to avoid the accident. He saw the taxi on the same lane, but in front of the second insured motor vehicle after the collision.

[30] During cross-examination by Mr. P. Zietsman he answered that he did not proceed to do his detective work at Trade Centre after the accident. He denied the suggestion that the second insured vehicle, driven by Smit, was moving in front of the first insured vehicle at all material times. He repeated that the Ford Laser was moving on the outer lane immediately before the collision. At the time the Ford Laser overtook him he was not aware of the taxi which had stalled on his inner lane. At that moment he thought the taxi was still in motion. He estimated that he was driving at a speed of 50 – 60 kilometres per hour and Smit at a speed of 80 – 100 kilometres per hour. The point of collision was approximately 16 – 20 metres from the traffic lights. He was not certain whether he slammed the brakes in such a manner that

the Toyota Corolla left the tyre brakes marks on the tarmac or not. He confirmed that his police warning statement did not reflect his complete version. He denied the suggestion that his account was false and Smit's true.
[31] During cross-examination by Mr. Daffue, counsel for the plaintiffs, he denied the suggestion that he put forward a false version in a bid to avoid civil claims or criminal prosecution or internal police disciplinary action. He admitted that he did not know why Smit stopped in front of him. He did not know how much space Smit had between the Toyota Corolla and the taxi to execute the manoeuvre he executed. He denied that he was negligent.

[32] Khamali also adduced evidence on behalf of the first defendant. His direct evidence was substantially similar to the version of Makhanda. He added nothing new as regards the central issue, which was and still is how the second insured vehicle landed on the scene.

[33] During cross-examination by Mr. P. Zietsman he answered that Makhanda told him he was driving in the direction of Rocklands. He did not know why Makhanda had testified that he was on his way to Trade Centre. There were no tyre brake marks caused by Makhanda's motor vehicle on the tarmac. He did not notice whether or not Makhanda applied the brakes. He did not ascertain whether Smit did so or not. He denied that his testimony was untrue.

[34] During cross-examination by Mr. Daffue he admitted that by only looking at the photographs, which showed the two motor vehicles one directly behind the other on a straight line parallel to the traffic island, the immediate impression a person could get was that they were travelling in the same direction on the same lane. He denied that Makhanda asked him to make a statement favourable to him about the accident. He also denied he was falsely trying to protect his colleague. He admitted that if he was the driver of the first insured motor vehicle he would have applied the brakes in order to avoid colliding with the second insured motor vehicle from behind. He admitted he would not have bumped the first insured motor vehicle in the circumstances. He also admitted

that if Makhanda had seen the stationary taxi, he would have safely stopped without any incident. He dismissed Smit's version as untrue. The case for the defendant was then closed. No evidence was adduced on behalf of or by the third party. His case was never opened.

[35] Mr. Daffue argued that at all times material to this collision, the second insured motor vehicle and the first insured motor vehicle were both travelling on the same inner lane parallel to the traffic island. Therefore he urged me to reject the version tendered by the defendant and to accept that the collision took place in accordance with the version proffered by the plaintiff. Mr. P. Zietsman, on behalf of the third party, supported Mr. Daffue's submissions. Both of them contended that the collision was caused by the exclusive negligence of the first insured driver, Makhanda. However, Mr. J. Zietsman, counsel for the defendant, differed in a way. Although he conceded that the first insured driver was negligent, he argued that his negligence was not the exclusive cause of the collision. He submitted that the second insured driver was also negligent and that his negligence was the contributory cause of the collision.

[36] It is the plaintiff's case that the two motor vehicles involved were following each other on the same traffic lane from the traffic lights until the point of collision at the foot of the bridge. The second insured driver had to stop on account of a stationary minibus taxi, which was obstructing the traffic lane on which the two sedans were travelling. It is the plaintiff's contention that the first insured motor vehicle collided with the second insured motor vehicle from behind, because its driver, Makhanda, was travelling at a high speed and more importantly because he was not keeping a proper lookout.

[37] On the other hand, the defendant pleaded that the two motor vehicles were travelling on different lanes shortly before the collision. The defendant contended that the second insured motor vehicle was travelling fast on the outer lane; that it changed lanes; that it moved over the lane demarcation line; that it encroached onto the outer lane on which the first insured motor vehicle was travelling and that it then suddenly stopped. It is the defendant's

case that the first insured driver in those circumstances could do virtually nothing to avoid the collision.

[38] It seems to me that the probabilities favour the version of the plaintiff and not that of the defendant. I proceed to examine a few of them. Firstly, there was no obstruction on the outer lane adjacent to the inner lane where the collision occurred. If the second insured motor vehicle was initially travelling on the outer lane at a high speed and executed the reckless manoeuvre, which the defendant alleges it executed, then I have a serious problem. The difficulty I have is that why would Smit have changed from a traffic lane where there was virtually no obstruction to a traffic lane where there was a stationary minibus at a time. It seems unlikely. The space between the stationary minibus and the first insured motor vehicle was dangerously small for any reasonable driver to want to use. There was no immediate off-slip to the right of the inner lane where one could say the second insured driver, Smit, was rushing to in order to exit Church Street.

[39] It appears to be even more improbable that the speeding Ford Laser could have swerved quickly in front of the Toyota Corolla not only in that short space but also could have found it possible, after forcing its way in that confined space, to come to a safe standstill without crashing into the stationary minibus or its trailer. Such reckless driving actions for no apparent reason, appear to be unlikely.

[40] It appears more probable than not that the two motor vehicles were travelling on the same lane at all times immediately preceding the accident. This probability is fortified by the fact that it is apparent that the point of collision between the two motor vehicles involved, was precisely in the middle of the inner lane. Moreover, after the collision the two sedans were lined up in a straight line parallel to the traffic island on their right hand side. The final rest position of the one was almost directly behind that of the other. The linear final rest positions favour the plaintiffs' versions.

[41] Besides the aforesaid objective facts there is another objective fact which tends to support the version of the plaintiff.

The Ford Laser was damaged at the back. The Toyota Corolla was damaged in front. The damage to the Ford Laser is consistent with damage where a vehicle was struck from behind while stationary or in motion by another motor vehicle travelling on the same lane and in the same direction. Similarly the damage to the Toyota Corolla is consistent with a damage of a motor vehicle which squarely crashed into the rear of another motor vehicle directly ahead of it while in motion or stationary. In short the damage to the motor vehicles appears to be consistent with the version of the plaintiff. Obviously the damage is difficult to be reconciled with the diagonal manoeuvre executed by the second insured motor vehicle according to the defendant's version.

[42] The version of the first plaintiff and her witness, Smit, was logical and clear. It tallies with their police statements. I am unable to make any unfavourable or adverse findings as regards their trustworthiness. In brief, they were good, credible and reliable witnesses. The defendant's witnesses, Makhanda and Khamali, were really not impressive witnesses. Makhanda's testimony that he was on his way to Trade Centre was apparently false. His testimony was at variance with his police statement. To a certain extent there were discrepancies between Khamali's testimony and his police statement. A few unfavourable and adverse findings can be made as regards their trustworthiness. These are apparent from their evidence under indirect examination. I deem it unnecessary to elaborate on them here again.

[43] Khamali was a passenger in the first insured motor vehicle driven by Makhanda. At the foot of the bridge on the same traffic lane on which the Toyota Corolla was travelling, there was a stationary minibus taxi. Khamali did not see it at all before or even after the accident. Now, if Khamali was so inattentive as to where the motor vehicle in which he was a passenger, was travelling the probabilities are great that he did not pay attention to the motor vehicles on the outer lane as well which is where, according to the defendant's version, the second insured motor vehicle in which the plaintiff was the passenger, was travelling. If we accept as we should that he was unconcerned with the traffic movements around him, we cannot therefore find his version of the alleged

manoeuvre executed by the Ford Laser reliable. His observation as to what happened immediately prior to the accident is therefore of little or no probative value.

[44] Makhanda could give no satisfactory explanation why he did not see the stationary minibus or its trailer before the collision. It must be remembered that the taxi and its trailer were at the foot of the bridge the Toyota Corolla was approaching. The minibus and its big trailer were a short distance from the traffic lights directly in front of Makhanda on precisely the same lane on which he was travelling. Before the Ford Laser forced its way between him and the taxi as he alleged, there was no obstruction at all which could have obscured the minibus or its trailer.

[45] From this it can be deduced that Makhanda was not keeping a proper observation of what was going on around him on the road. But more importantly it may well be that Makhanda did not see the minibus taxi because to a certain extent the Ford Laser was partially obstructing his view. His contradictory evidence showed that he was not alert at the time and place. At first he said he did not see the taxi. Later he said he saw it but reckoned it was still moving. All this is immaterial. The bottom line is that Makhanda did not keep a proper lookout as counsels for the plaintiffs and the third party contended. It was also correctly conceded by the defendant's counsel that the first insured driver was negligent. I have tested the plaintiff's version against the general probabilities and I did not find it wanting. I am satisfied that on a balance of probabilities the version put forward by the plaintiffs is probably accurate and true. It is therefore acceptable. **NATIONAL EMPLOYERS' GENERAL**

[46] The plaintiffs have satisfied me that on a preponderance of probabilities the version advanced on behalf of the defendant is false and inaccurate and therefore falls to be rejected. Makhanda, coming up behind, was not paying attention. He was speeding. He either did not brake at all or braked too late. He rammed into the vehicle in which the first plaintiff was a passenger. He had time and opportunity to bring his vehicle to a halt behind the second insured vehicle. He did not react in good time. Smit quickly slammed the brakes of his stationary sedan to prevent it from been violently propelled forward on impact. The warning signs from his brakes glowed. Makhanda probably did not see such warning signs or noticed them too late.

[47] I hold the firm view that it was the negligence of the first insured driver and not the second insured driver which caused the collision. If the taxi driver was negligent, such negligence was negligence *in vacuo*. No contributory negligence can be attributed to the second insured driver. Where, as in the instant case, a moving vehicle rams a stationary vehicle from behind, there is *prima facie* evidence of negligence on the part of the driver of a moving vehicle – *vide* **FIG BROTHERS (PTY) LTD v SOUTH AFRICAN RAILWAYS AND HARBOURS AND ANOTHER** 1975 (2) SA 207 (CPD) at 211 G – H per Baker J.

[48] The concession made in respect of the first insured's negligence effectively disposed of the *lis* between the plaintiffs and the defendant as regards the merits. It follows, therefore, that the defendant is liable to the plaintiff in terms

of section 17(1) as explained in par. 13 *supra*. His negligence was not merely contributory to the collision but, was in fact, the proximate cause thereof. This finding effectively buries the *lis* between the defendant and the third party.

[49] In the circumstances I have come to the conclusion that the collision occurred on the version as put forward by the plaintiff and his witness. According to that version both motor vehicles were travelling on the same lane; the second insured motor vehicle was in front; the first insured motor vehicle was at the back; the minibus taxi stalled and stopped on the same lane on which the Ford Laser and the Toyota Corolla were travelling; Smit became aware of the obstruction and safely brought his motor vehicle to a stanstill; Makhanda who was not keeping a proper lookout did not realise that the Ford Laser immediate in front of him had come to a standstill; he did not see that there was a stationary minibus on the same lane on which he was travelling. At all times material to this collision he thought that the traffic on the traffic lane on which he was travelling was in motion when in fact and in reality it was not. As a result of his failure to keep a proper lookout the Toyota Corolla crashed into the rear of the stationary Ford Laser. On those facts, it seems to me clear that Makhanda was negligent and that his negligence was the sole cause of the collision.

[50] Even if it is accepted that Smit was on the outer lane and that he executed a negligent if not a reckless manoeuvre as alleged by the defendant's witnesses, Khamali conceded that if he were in the position of Makhanda as the driver of the Toyota Corolla he would have been able to take an evasive action in order to avoid the collision. Therefore, even if Smit was negligent as alleged, Makhanda could have avoided the accident if he was keeping a proper lookout. He did not. He did not because he was not keeping a proper lookout. It seems to me that Smit was not negligent as alleged or in any other manner. He became aware of an obstruction on the traffic lane on which he was travelling. He safely brought the second insured motor vehicle to a standstill.

Stopping he had to. There was an obstruction on his path of travel; a heavy traffic stream to his left and a concrete traffic island to his right. He had nowhere else to go. Whether he saw or did not see the Toyota Corolla approaching from behind, it was simply and practically impossible for him to do anything to avoid the collision.

[51] In the circumstances I have come to the following conclusion. The aforesaid collision was caused by the sole negligent driving on the part of the driver of the first insured motor vehicle namely Makhanda. As I see it there is no room for an apportionment of blame between the negligence of Makhanda and Smit. Accordingly Smit is completely exonerated. I can find no negligence of any sort on his part.

[52] The plaintiffs emerged victorious. So did the third party. The latter came to the party on the defendant's invitation. There was no *lis* between him and the plaintiff. Therefore the plaintiff cannot be held responsible for the payment of his costs jointly and severally with the defendant. The defendant's contributory claim against the third party was unsuccessful. No sound reason exists why the general rule of costs should not apply as regards the *lis* between the defendant and the third party.

[53] Accordingly I make the following order:

53.1 The defendant is liable for 100% of the plaintiff's damages as may be proven or agreed upon.

53.2 The defendant is liable for the plaintiff's costs of the action incurred so far.

53.3 The defendant is also liable for the costs of the third party.

IN THE HIGH COURT OF SOUTH AFRICA

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M.H. RAMPAI, J

On behalf of the plaintiff:	Adv. J.P. Daffue Instructed by: Honey Attorneys BLOEMFONTEIN
On behalf of the defendant:	Adv. J. Zietsman Instructed by: Webbers BLOEMFONTEIN
On behalf of the third party:	Adv. P. Zietsman Instructed by: Naudes BLOEMFONTEIN

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