/SG
IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

DATE: 14/01/2009
CASE NO: 34232/2005

UNREPORTABLE

In the matter between:

CORNELIUS JOHANNES ERASMUS PLAINTIFF

And

THE ROAD ACCIDENT FUND DEFENDANT

JUDGMENT

POSWA, J

[1] In his particulars of claim, the plaintiff alleges that a collision occurred on 3 October 2003, along old Warmbath road, at Wonderboom, between his motor vehicle, registration number PKM585GP, of which he was a driver, and a motor vehicle registration number NGR593GP, of which one Lucas Moeng was the driver. He alleges that the cause of the collision was solely Mr Moeng's negligence, in details set out more fully in paragraph 5 of the particulars of claim. In consequence of the collision, the plaintiff suffered injuries and consequential damages in the total amount of R302 940.81.

[2] In his plea, the defendant denies being responsible for the collision, whose occurrence he admits. In the alternative, he pleads as follows:

> "3.2 **<u>Alternatively</u>** in the event of it being held by the above Honourable Court, that a collision occurred as alleged by the Plaintiff and that the driver of the insured vehicle was negligent (which is denied), then the Defendant pleads that **such negligence was not the cause of the collision**. The Defendant pleads that the collision was caused by the sole negligence of the Plaintiff, him (*sic*) being negligent in one or more or all of the respects detailed in sub-paragraphs 3.2.1 to 3.2.7" (emphasis, except for the word "alternatively", added).

The defendant proceeds further as follows:

> "3.3 Further **<u>alternatively</u>** and in the event of the above Honourable Court finding that the driver of the insured vehicle acted negligently, as alleged (which is denied) and that such negligence contributed to the cause of the collision (which is also denied) then, and in that event, the Defendant avers that the Plaintiff was also negligent and that his negligence contributed to the cause of the collision. Particulars of the Plaintiff's negligence are set out in the preceding sub-paragraph."

The defendant further denies allegations with regard to injuries and damages suffered by the plaintiff.

Separation of Issues

[3] At the commencement of the proceedings, the parties informed the Court that they agreed to separate the merits from quantum and that the action should proceed, at this stage, only on the merits. Only in the event of the plaintiff being successful on the merits will the question of quantum be dealt with, in a separate trial. A bundle of documents, exhibit "A", was provided by the parties, for use during the proceedings on the merits. The parties agreed that:

> "The documents are what they purport to be and can be used without formal proof but the contents thereof remain in dispute."

Number of Witnesses

[4] The plaintiff was the sole witness for his case whilst the defendant called Moeng, the driver of the ambulance, motor vehicle registration number NGR593GP at the time of the collision, and one of his passengers (a front passenger) at the time of the collision, one Mr David Henry Pickford.

Common Cause Aspects

[5] The following are common cause between the parties:

1. A collision occurred, on 3 October 2003, at approximately 12:00 on a road commonly known as the Old Warmbaths Road.

2. At the vicinity of the collision, along Old Warmbaths Road, the road had a tarred surface, with a single lane in either direction;

3. The opposite lanes were separated by a solid white line;

4. There was a wide gravel shoulder on either side of the road;

5. Across the road, on the right-hand side of the plaintiff, as he was travelling southerly, is a business Canopy, Corner;

6. At the time of the collision the plaintiff was the sole occupant of his motor vehicle;

7. The plaintiff‘s motor vehicle was a white 1400 Nissan bakkie, whilst the motor vehicle driven by Mr Moeng was a white IVECO Ambulance;

8. The collision occurred whilst the plaintiff was executing a turn to his right, at a 90 degree angle, in the general direction of the Canopy Corner; across the line of travel of oncoming vehicles;

9. The left front corner of the ambulance collided with the driver’s door on the right-hand side of the bakkie;

10. The collision occurred on the tarred surface of the road;

11. After the collision the momentum of the two motor vehicles carried them forwards until they came to a standstill on the western side of the road, in the vicinity of the Canopy Corner;

12. Page A21-26 (in exhibit “A”) depicts the position of the ambulance after the collision;

13. Seeing that the motor vehicles were entangled after the collision, it became necessary to move the bakkie in order to release the plaintiff, who was trapped in his motor vehicle, as well as to ascertain his injuries – the bakkie ended up in the position in which it is in A26 photo 11, in front of the ambulance;

14. The collision occurred at approximately 12:00; and

15. The collision occurred during sunny weather and visibility in respect of both drivers was unimpaired.

PLAINTIFF’S TESTIMONY

[6] The plaintiff stated that he was in the employ of the Bon Accord Irrigation Board, where he had been in employment for about fourteen years as at the time of his giving testimony, on 23 August 2007. He knew the road along which the collision occurred very well. Just before

the collision, at about 12:00, on 3 October 2003, he was driving in a southerly direction on his way to Pretoria. He planned driving into the Canopy Corner, on his way to Pretoria, so as to purchase a canopy for his new bakkie, one other than the one he was driving at the time of the collision. He reduced his speed from about 70 kmh to about 20 kmh, so as to turn right into Canopy Corner, and was in second gear moving very close to the centre line with his right front wheel. He had, by then, switched his right-hand side indicators, before turning, next to the solid white line and commencing to turn across the road, to his right. He had observed, in his rear view mirror, that there was a distant motor vehicle following him. He did not immediately cross the white centre line because he was awaiting two motor vehicles, moving in the opposite direction, to drive past. Immediately after the two motor vehicles had passed, he proceeded to execute his turn to the right. He wanted to turn into the main entrance to the Canopy Centre and he was executing his turn with that purpose in mind. Whilst his motor vehicle was still in motion, in second gear, the collision occurred. Although he became confused after the collision and could not remember much about it, he testified that he knows that the two motor vehicles ended on the gravel shoulder of the road on the opposite side, in the vicinity of the Canopy Corner.

[7] **During cross-examination** the plaintiff stated that he formed his intention to visit the Canopy Centre before leaving home. He intended executing the turn quickly. He was adamant that he had not forgotten

the events that took place before the collision, notwithstanding the fact that he was, immediately after the collision, confused. He said that he believed that any motor vehicle approaching from behind, at that point, would do so on the left-hand side of the bakkie. There was enough room on his left-hand side for a motor vehicle that intended to pass him. It could either move completely on the shoulder of the road or partly on it and partly on the tarred surface. Any motor vehicle coming behind him, including the ambulance that collided with him, should have seen his indicators, his general movement and the fact that he was busy negotiating a turn. The plaintiff repeated that he waited for two motor vehicles moving in the opposite direction before crossing the barrier line and affirmed his earlier testimony that the collision took place across the barrier line, on the opposite lane. He confirmed that the damage on his bakkie, as depicted in, *inter alia*, photos 1 to 6, on A21 to 23 (exhibit "A") correctly reflect damage to his bakkie, immediately after the collision.

[8] The plaintiff conceded that the barrier line was intended to prevent collisions, by ensuring that motor vehicles did not move across it and that, it would have been safer if he had not turned across it but further down, turning where there was a broken line. He also conceded that, having looked for the first time in the rear view mirror and noticed a motor vehicle at a distance behind him, he did not, immediately before crossing the barrier line, look again in the rear view mirror. He further conceded the possibility that, by that time, the ambulance was in a

heedden spot behind him. He could not say, however, whether the ambulance was the motor vehicle that he had picked up at a distance behind him when he looked at his rear view mirror.

The Defendant's Version During Cross-examination of the Plaintiff

[9] It was put to the plaintiff that he was travelling on the left-hand side gravel shoulder of the road and that he suddenly negotiated a turn, moving across the road at the time when the ambulance was very close. The plaintiff denied these submissions.

THE DEFENDANT'S TESTIMONY

[10] The first witness called on behalf of the defendant was **Mr Moeng**. He testified that he was employed by the City of Tshwane, as an Ambulance driver, on the day of the collision. He was a qualified paramedic.

[11] On 3 October 2003, at about 12:00, he drove an ambulance, the motor vehicle already described in this judgment, with two passengers, viz., Mr Pickford, who was seated on the front seat of the ambulance, and Mr Tsotsetsi, who sat on a seat behind, in the rear portion or compartment of the ambulance. They were on their way from the Jubilee Hospital, where they had dropped a patient and were returning to the ambulance depot. It was a clear day, with good visibility and the road was not busy. It was actually quiet on the road. He saw a white Nissan bakkie ahead of him, initially describing it as being "parked" on

the left gravel shoulder of the road. Defendant's counsel, obviously detecting that the evidence given by Mr Moeng, on that aspect, was incorrect, repeated the question, whereafter Mr Moeng said the bakkie was travelling very slowly at the time. The bakkie was travelling in the same direction as he was. It was totally off the tarred surfaced road.

[12] When Mr Moeng was on the verge of overtaking the bakkie, it suddenly executed a U-turn in front of the ambulance. It should be recalled that it was put to Mr Erasmus that the bakkie negotiated a turn across the road, no mention of a U-turn being made. In the facts that are common cause, mention is made of a 90 degree angle. Be that as it may, Mr Moeng categorically stated that the bakkie executed a U-turn. He made an effort to avoid the collision, by applying brakes and swerving to his right, but could not avoid colliding with the bakkie. The driver of the bakkie who, it is common cause, was the plaintiff, did not give any indication of his intention to turn to the right, either by way of switching on the bakkie's indicator or signalling by hand.

[13] The collision occurred on the southbound lane of the road, along which the ambulance was travelling. Mr Moeng indicated the point of impact with a mark "X" on the southbound lane of the road. It is somewhat to the right of the centre of the lane, quite some distance from the solid white centre line. The left front corner of the ambulance collided with the bakkie's driver's door, on the right-hand side. Mr Moeng had been driving at approximately 62.70 kmh immediately before the bakkie

suddenly turned in the manner described. The skidding and the momentum of the two motor vehicles pushed them across the opposite lane and onto the right-hand gravel shoulder of the road, where they ended.

[14] Mr Moeng told the court that he sustained injuries, in consequence of the collision, having been injured by the ignition key of the ambulance. He was taken through the photo album, commenting on all the photographs, from page A21 to A26, photos 1 to 11. He confirmed that the respective positions of the motor vehicles where as they were after the collision. Because the motor vehicles were entangled and the plaintiff was caught inside his bakkie, the motor vehicles were separated, with assistance of bystanders, to enable the plaintiff to come out. On this aspect I should mention that Mr Moeng makes no mention of his releasing Mr Pickford from the entangled motor vehicles.

Cross-examination

[15] It emerged during his cross-examination that, although Mr Moeng had been in the City Council's employment for four years, as at the time of his giving evidence, he had been driving an ambulance for a year as at the time of the collision. He possessed a Code 10 licence, which is intended for heavy motor vehicles. He stated that such a licence enabled him to drive the ambulance as well. He conceded that driving an ambulance requires driving with utmost precaution but added that

there is no difference between driving an ambulance and an ordinary motor car.

[16] When on the road as an ambulance drivers, they did not work on a time schedule. His was not the only ambulance in use on the day. One would receive a call, just as he did receive a call on that day to drive a patient to the Jubili Hospital. He conceded, however, that there was great demand for ambulances. Time constraints were only to the extent that one could receive a call, whilst in the course of a particular task, to convey a further passenger. An ambulance driver was not permitted to go on his personal errands whilst on the road.

[17] On their way back from the hospital they stopped at the Bon Accord Spar Supermarket, a little distance before reaching the scene of the collision. They did so at the request of Mr Pickford, who felt thirsty and wanted to purchase something to drink from the supermarket. They did not spend much time there. He remained in the ambulance whilst Mr Pickford and Mr Tsotetsi went to the shop. Having initially said he remained in order to be on standby for calls coming through the radio, he later seemed to be uneasy about that reply, categorically saying he had not remained for that purpose but simply because, procedurally, someone must monitor the radio, a difference the court failed to appreciate to the end. Mr Moeng stated that he did not have to make up for the time spent at the Spar.

[18] After leaving the Spar, Mr Moeng drove at the between 60 and 70 kmh. That was not on account of the speed limit in that area, because he saw none. That led to a question by Mr Scholtz, who represented the plaintiff, as to what happens to an ambulance driver who is found to have exceeded the speed limit. Mr Moeng did not reply to that question pertinently but simply stated that he has never exceeded the speed limit and has, therefore, never been caught exceeding it.

[19] Asked who would be liable if, as the ambulance driver, he had caused damage to the motor vehicle, he answered that the municipality would be so liable. That would be the case even where the driver's fault was the cause of the damage. It was not until the Court had had to follow that question up that Mr Moeng ultimately gave some information in that regard. He stated that an investigating officer from the unit would cause such driver to be referred to the policy compliance unit, where he would receive a warning, but nothing else. That is knowledge he obtained after starting work at the ambulance depot.

[20] When he first saw the bakkie, as he was driving along the road after leaving the Spar. It was not a great distance ahead of him and he was, as he subsequently stated in his evidence in chief, driving on the gravel portion of the road. It was about 20 metres ahead, a distance he pointed in Court, which was measured at 17 paces. He repeated what he had said in his evidence-in-chief – after, at first, saying the

bakkie was stationary when he first saw it – that the bakkie was moving very slowly when he saw it.

[21] The Court asked Mr Moeng why he did not see the bakkie much earlier than he did. The question caused Mr Moeng inexplicable difficulty in answering and, after evading it for a while, he eventually said there was no reason for such failure on his part.

[22] Mr Moeng was shown the accident report, which is on page 3 of annexure "A". He recalled seeing that type of form in the possession of the Metro Police when they attended the scene of the accident on the day in question. He, however, had not pertinently seen the one before Court, ie on page 3 of annexure "A". Neither his advocate nor his attorney had ever shown it to him, and, therefore, asked him about it. He was not asked about the circumstances in which he saw it at the scene.

[23] He stated that he did not report the accident. The procedure in such cases, so he stated, was that the unit investigating officer, the Metro Police and the video unit visit the scene. Because, in the present instance, the unit investigating officer attended the scene, he, Mr Moeng, did not find the need to report the accident. All that the unit investigating officer did at the scene was to request him, Mr Moeng, to show him his driver's licence. He asked nothing further about the incident. It would appear that his supervisor was also present at the

scene because, in answer to a question as to who took control over the scene of the accident, he replied that his supervisor did. Having mentioned the arrival of the unit investigating officer, the Metro Police officer and a representative of the video unit, it is not clear where his supervisor emerges from. Mr De Klerk, who represented the defendant, also did not clear this during re-examination. The Court attempted to get more clarity from Mr Moeng and that resulted in his saying that he explained his side of the story to his supervisor. That was in a form that was used internally. All that happened later. He was quite adamant that nobody at the scene asked him anything about the collision.

[24] He was taken from the scene of the collision to the hospital and was never again given an opportunity to explain how the accident happened. This latter reply contradicts his evidence, immediately before it, that he later gave his version of the events to his supervisor.

[25] Mr Moeng was then asked about the following in the section: "BRIEF DESCRIPTION OF THE ACCIDENT", in the accident report:

> "*As alleged by driver of vehicle B, vehicle A was standing on the side of the road facing a southerly direction and made a* ***U-turn directly*** *into oncoming traffic.*" (Emphasis added)

He said that he did not give that or any other description of the accident to the police.

On the assumption that he did not make that report, Mr Moeng was asked whether it would, however, be correct to say that he was the driver of motor "vehicle B", to which he answered affirmatively. He repeated that that description was not given by him. Although he would have given his report in the same way, had he given one, he would have mentioned that motor vehicle A was not stationery but moving slowly when he saw it.

[26] Ms Scholtz, cross-examined Mr Moeng about some visible while sand marks on the road surface, to the eastern end of photo 9, on page 25E. Mr Moeng agreed with Ms Scholtz that such marks were consistent with impressions caused by wheel tyres of motor vehicles that had been travelling on the gravel portion of the road – presumably on account of the obstruction caused by the collision on the road surface – when such motor vehicles returned from the gravel portion to the road surface. He also conceded that there are no similar white marks, as would have been expected if the bakkie had moved from the gravel portion of the road, across the tarred portion of the road and leading to a point in line with where the bakkie ended after the collision.

[27] Asked what he did when he noticed the bakkie moving as he stated, Mr Moeng answered that he "tried" to apply brakes. He was then

pertinently asked whether he succeeded in applying the brakes. He replied that he tried all he could do to apply brakes but that it was too late as the bakkie was too close. The Court then sought to find out whether his reply was that he did not apply brakes and his answer to that question was eventually that he did apply brakes.

[28] In answer to a question by Ms Scholtz, Mr Moeng stated that the accident would not have occurred if he had been driving at a slower speed than he did at the time of the accident. He was then asked whether there would have been a collision if he had gone past on the left-hand side of the bakkie. After asking then that question be repeated, which was done, he agreed that there would not have been a collision if he had so done.

[29] He agreed that there was no debris at the point “X”, which he had indicated during his evidence in chief and was now confirming as the point of impact. He added, however, that whether or not there is debris depends on the speed of the motor vehicles. The Court then asked him whether in the manner in which the two motor vehicles collided he would expected the debris at the point of impact and he answered in the affirmative.

[30] During cross-examination on the position and appearance of the motor vehicles in the photographs, Mr Moeng repeated his earlier evidence, agreeing that the photographs correctly depicted the scene. He stuck

to his version that the collision did not take place on the opposite lane. During re-examination, Mr Moeng stated that he was not in a hurry, as he drove to the depot. He was not driving with emergency hazard lights and he was in keeping with the flow of the traffic. He does not know when the photographs in annexure “A” were taken. It is not clear to me why that question was raised in re-examination, seeing that Mr Moeng confirmed that they depicted the scene immediately after the collision. In any event, the Court has no hesitation in finding that the general impression obtained from all the photographs 1 to 11, is that of people attending at a recent motor collision incident. In paragraph 9, for instance, three whitish cones are placed on the left-hand edge of the southbound lane of the road, with motor vehicles travelling in the same direction, southwards, having to drive along the gravel edge of the road and rejoining the tarmac past the last of the three cones. Alongside the ambulance in question, on its right-hand side and facing towards the camera, on the gravel portion of the road, on The Canopy side of the road, is another ambulance, a clear indication that the photos were taken shortly after the collision.

[31] Mr Moeng stated, under re-examination, that although he applied brakes, that did not help avoid the collision. He applied his brakes when the bakkie made a u-turn – again using the expression “U-turn”. Under re-examination, Mr Moeng said that if he had driven along the tarred southbound surface of the road, as he had been driving, and that if he had not swerved to the right, as he did, he would have

collided with the bakkie with the full front of the ambulance. He was not asked about the possibility of moving much further to the left, i.e. to the gravel portion of the road, fully or partially, neither did he volunteer that evidence.

DAVID HENRY PICKFORD

[32] Mr Pickford confirms that he and Mr Tsotetsi were passengers in the ambulance driven by Mr Moeng, on 3 October 2003. He also confirms their respective sitting positions in the ambulance, clear weather conditions and their stopping at the Bon Accord Spar, at his instance on their way back to the depot. He adds that they were driving downwards along the road, after leaving the Spar, when he, all of a sudden, observed the bakkie ahead of them, as if to make a u-turn. He shouted, calling on Mr Moeng to "watch out" or be "careful". Mr Moeng veered the ambulance to the right but was too late to avoid colliding with the bakkie.

[33] When he first saw the bakkie, it was completely on the gravel portion of the road, on the left, as if to make a u-turn. He could make out that the bakkie was turning because there was dust, although it was not moving very fast. There was, otherwise, no indication made by the driver thereof of his intention to turn. Asked more pertinently about that, Mr Pickford said that he believed that he would have made out such indication if it had been made. He confirms that the collision occurred on the southbound lane, and not the opposite lane, as Mr

Moeng was trying to avoid the collision. The collision resulted in the two motor vehicles moving across the tarred road, with the bakkie being pushed along, until they ended on the gravel portion across the road, on the right-hand side. He was shown photos 9 and 10 of annexure “E” and he confirmed that the scene depicted thereon is as he remembers it after the accident. He placed a zero in photograph 9 as the point of impact. He had been shown a clean photograph, with the one on which Mr Moeng had marked “X” as the point of impact being separate and marked exhibit “A”. Mr Pickford’s copy was marked exhibit “B”. Whereas “X” was somewhat to the centre of the southbound lane, both “X” and “O” is to the right of “X” and more towards the solid white line dividing the two lanes of the road. Except for the difference I have alluded to between the two points, they are in the same general vicinity, aside each other. It should be pointed out, however, that photograph 9 has the three yellowish cones I previously mentioned in this judgment and it shows parallel lines that move at an angle forwards and towards the right – the left one being fairly continuous up to where it touches the white continuous line separating the two lanes and crosses, ending right behind the left wheel of the ambulance. The right mark cuts before it reaches the solid white line and is visible only faintly across the opposite lane towards the end of the right-hand side rear wheel of the ambulance. The left mark is very distinct in photo 10 where it appears already across the solid line and curving, following the ambulance, up to where its rear, just at the edge of the tarred portion of the opposite lane. The right-hand mark does

not show at all in photo 10. I shall return to this aspect later in the judgment.

[34] When asked if he could remember whether Mr Moeng applied his brakes, Mr Pickford said, in view of the nature of the impact, he is in no position to say whether he did or did not.

[35] Mr Moeng was driving between 65 and 70 kmh before the collision. Asked why he was making that estimation, Mr Pickford said that was because Mr Moeng was driving in third gear. Asked how he knew that he was driving in third gear, he replied that he knew because he is a "compulsive counter", adding that whilst he was waiting outside in the Court passage, to be called as a witness, he actually counted the number of tiles outside. They totalled six thousand, six-hundred and seventy-one (6671). Counting keeps his mind occupied, so he said.

[36] When the bakkie turned and drove across the ambulance's line of travel, it did so at the same speed at which it had been moving on the gravel part of the road.

[37] Although Mr Pickford stated that the bakkie did a u-turn, the movement he described was a ninety degree angle, ending up facing westward. Like Mr Moeng, Mr Pickford stated that the left front corner of the ambulance collided with the bakkie's driver's door, on the right-hand side.

[38] Mr Pickford mentions something not mentioned by Mr Moeng, viz., that he was stuck in the ambulance after the collision. He could not move his legs. Mr Moeng suggested that he and Mr Tsotetsi alighted from the ambulance, so as to push the bakkie away from it. This aspect of his evidence was not pursued. It appears that the two gentlemen from the ambulance joined other people at the scene in separating the two motor vehicles, so as also to assist the plaintiff, who, it would appear, had sustained more injuries than Mr Pickford. In answer to the questions in Court, Mr Pickford informed the Court that their (i.e. the ambulance) section superintendent arrived at the scene, together with other emergency services, Metro Police and an ambulance.

[39] **During cross-examination**, Mr Pickford described himself as a medical technical advisor, who helps with destructions. He was not asked why he was in the ambulance and he also did not offer an explanation. Like Mr Moeng, he stated that there were no time schedules when they were travelling on duty. Because they were not entitled to lunchtime, they were allowed ten to fifteen minutes to themselves whilst en route, to get themselves some refreshments. When they left the Jubilee Hospital, they indicated to the depot that they were now available for the next call. They had received no further call as at the time of the collision.

[40] When he first saw the bakkie it was quite some distance ahead, about 15 metres (a distance measured in Court). He was unable to say at what point or distance Mr Moeng first saw the bakkie. When he called on Mr Moeng to be careful, the bakkie was in front of them. It was at that stage, when he called on him, that Mr Moeng swerved. Mr Moeng's reaction was in consequence of the warning given by him.

[41] Mr Pickford was adamant that the collision occurred in the manner he described and not in that put to him as being the plaintiff's version. Asked about the absence of debris on the photographs, Mr Pickford mentioned that he was employed as a volunteer at the ambulance depot. That answer was not pursued and it remains not clear what the impact thereof is on his evidence. When his superintendent came to him to ask him how he was, Mr Pickford described to him how he was injured in the accident, that was his first experience of an accident whilst he was on ambulance duties. Page 151

[42] He agreed that the job of doing errands in an ambulance is exerting. There is no food and they often need water, which is why he asked that they stop at the supermarket. They had started work at 06:30 that day.

[43] Asked about the photographs, during cross-examination, Mr Pickford said that he first saw them at the office of the defendant's counsel, on the morning of the day on which the case was to commence.

[44] Whereas Mr Moeng had told the Court that the departmental investigating officer arrived at the scene – adding that he knew him from the depot, prior to that day – Mr Pickford said that the investigating officer did not come to the scene. He first spoke to the departmental investigator three to four days afterwards. He explained that on the basis that he had to go for medical attention by a doctor, for the injuries he sustained in the collision.

[45] Shown the accident report, on page 2 of annexure "A", Mr Pickford said that he could not remember details concerning position of the motor vehicles and could not confirm them as they appear. Concerning the description of the accident that has previously been referred to in the judgment, Mr Pickford said it was inaccurate, to the extent that it claimed that the bakkie was stationary. He was then the author of that description of the accident.

[46] He told the Court that a claim has been lodged for damages he sustained in consequence of injuries he received during the collision. He has, however, never given thought to the question whether or not he would succeed in his claim if the driver, Mr Moeng, was found to be at fault.

[47] As at the time of the accident, he and Mr Moeng had worked together, regularly, for about a year. They worked for a further two and a half

months after the accident, before Mr Moeng was transferred to another deport. They did not discuss the accident, at all, until after they had made their respective statements. Moreover, he and Mr Moeng did not discuss the case, after consultation with counsel because Mr De Klerki had pertinently told them not to discuss it. Immediately after the collision, he, Mr Pickford, did not remember everything about it. Later, the events gradually returned to his mind. He does, however, remember that the collision occurred in the manner he has described it. Although some aspects disappear, certain other specifics remain in one's mind. He excluded the possibility that Mr Moeng gave the description of the bakkie having been stationery, as written in the report. I understand this reply to be based on the fact that, if Mr Moeng had given a report of the accident, it would have been that the bakkie was in motion when they first saw it. He was adamant, however, that that is precisely what the bakkie did. This evidence, of course, endorses the mystery as to who else could possibly have given the police the facts they have in the report, which are identical with Mr Moeng's initial description in his evidence in chief.

[48] Like Mr Moeng, he considered that there were no marks indicative of the bakkie having driven from the gravel section of the road, across the tarred portion. He does not believe that Mr Tsotetsi, who was seated at the rear of the ambulance, made any statement about the accident.

[49] Mr Pickford made his statement, on his return after four days, to the internal Emergency Services investigating officer. He does not know what disciplinary steps are taken where an ambulance driver is responsible for a collision, because he is only a volunteer.

[50] He concedes that the distance between the two motor vehicles when he first saw the bakkie was not long. He is not certain as to whether they could have seen it earlier than they did. Asked if it was necessary for him to shout a warning to Mr Moeng, he answers in the affirmative. However, he explains that on the basis that one does not expect a motor vehicle to behave in the way that the bakkie did, which is why he shouted.

[51] The defendant's case was closed after Mr Pickford's evidence and counsel submitted their respective addresses. At the end of the addresses the Court requested that they produce heads of argument and deal with certain aspects raised by the Court in the course of their addresses.

Relevant Legal Principles for Determining Liability

[52] Both counsel submitted, correctly, that this is a case of the two versions being mutually destructive. Moreover, this entails the proverbial case of a driver, such as the plaintiff in this case, who wishes to turn to the right-hand side, in front of following traffic. Both counsel addressed the Court in detail, with reference to various

authorities, in respect of both aspects, i.e. mutually destructive versions and duties of a driver turning right, in front of traffic behind his or her motor vehicle.

[53] The approach with regard to two stories being mutually destructive was set out as far back as 1931, in *National Employers Mutual General Insurance Association v Gany* 1931 AD 187, at page 199, where WESSELS, J.A., stated the following:

> "*Where there are two stories mutually destructive, before the* ***onus*** *is discharged, the Court must be satisfied that the story of the litigant upon whom the* ***onus*** *rests is true and the other [story] false. It is not enough to say that the story told by Clark is not satisfactory in every respect. It must be clear to the Court of first instance that the version of the litigant upon whom the* ***onus*** *still rests is the true version and that in this case absolute reliance can be placed upon the story as told by A. Gany …*"

This *dictum* has been cited with approval in numerous other cases since then. (*Koster Koöperatiewe Landboumaatskappy Bpk v Suid-Afrikaanse Spoorwee en Hawens* 1974 (4) SA 422 (W), at 425B-427A, where COETZEE, J discusses the reasoning behind this *dictum* as well as some criticism thereof on top such criticism relates to the use of the adjective "absolute" before the phrase "reliance can be placed upon the story as told by" the party that bares the *onus*. In this

regard, CLAYDEN, J, in *International Tobacco Co (SA) Ltd v United Tobacco Co (South) Ltd (1)*, 1955 (2) SA 1 (W) at 13-14 says the following in that regard:

> "*It has been pointed out that this passage puts too high a burden on the litigant upon whom the **onus** lies by its use of the phrase 'absolute reliance'. In **Matland and Kensington Vasco v Jennings, 1940 CPD 489 at p 492**, DAVIES, J, said:*
>
> > *'With the very greatest deference I virtually think that the use by the learned Judge of the word "absolute" cannot be correct … And in a civil case the **onus** is less heavy. For judgment to be given for the plaintiff the Court must be satisfied that sufficient reliance can be placed on his story for there to exist a strong probability that his version is a true one.'*
>
> *Though a 'strong probability' may be less than 'absolute reliance' it still seems, with respect, that an unnecessary adjective has been introduced. In **Ley v Ley's Executors and Others, 1951 (3) SA 186 (AD) at p 192**, GENTLIVRES, C. J, said:*
>
> > *'All these cases show that no matter how serious an allegation on fact may be, the **onus** of proving the fact is,*

in civil cases, discharged on a preponderance of probability …'

That is the test which I propose you apply, with the realisation that the ***onus*** *is on the plaintiff to prove the statements alleged.*"

[54] Referring to the same *dictum* by WESSELS, J.A., in *Gany,* (*supra*), DAVIES, AJA, said the following, in *R v M*, 1946 AD 1023, at 1026:

"*This is in some respects overstated in regard to a civil suit; it certainly applies to a criminal case with a much nearer approach to complete accuracy.*"

[55] COETZEE, J, remarked, in *Koster Koöperatiewe Landboumaatskappy* (*supra*) that the *dictum* in *R v M* (*supra*) is *obiter* and that, therefore, the Appellate Division, as it then was, had not disapproved of the *dictum* by WESSELS, J.A. He goes on to justify the use of the adjective "absolute" on the basis that it has, firstly, to be understood that it applies "where there are two stories mutually destructive". Secondly, it is implicit in the *dictum* that it applies where there are no inherent probabilities in one of the stories. In his view, that is merely a restatement of what already appears earlier in the *dictum*, namely:

"*… that the story of the litigant upon whom the* ***onus*** *rests is true and the other [story] is false.*"

[56] COETZEE, J had occasion to revisit his *dicta* in *Koster Koöperatiewe Landboumaatskappy*, (*supra*), in *African Eagle Life Assurance Co Ltd v Cainer* 1980 (2) SA 234 (W). he stated that he found himself, in a number of cases that he heard after the *Koster Koöperatiewe Landboumaatskappy* case, confronted by the portion of his judgment in that case in which he justified the use of the adjective "absolute". That passage reads thus:

> "*Ek ag my verbonde aan die uitspraak in die **Gany**-saak. Afgesien daarvan dat die Appèlhof nog nooit sedertdien met hierdie benadering weg gedoen het nie, wat nie sonder betekenis is nie, sou ek my graag respekvol met die onderliggende logika daaraan wil vereenselwig, en 'n paar opmerkings oor die verband daartussen en wel bekende bewysmaatstawwe wag.*"

I find it appropriate to quote, in full, what COETZEE, J says in this regard, in *Gainer*. At 237E-238A, he says:

> "*At 426 I had hoped to make it clear what I thought [was] what WESSELS JA meant, and something which does not seem to have been sufficiently clearly stated, judging by the frequency with which this further portion of the judgment is not quoted. **Not there** is that this approach to the problems of proof in this*

type of case ***only applies in cases where there are no probabilities one way or the other****. Where there are probabilities, inherent or otherwise, there is no room for this approach. On the other hand, where there are no probabilities – where, for instance, the* ***factum probandum*** *was whether a particular thing was white or black, with not the slightest evidence as to the preponderance of white or black things in that particular community*, there are clearly no probabilities of any sort*. And, when the testimony of the witnesses is in conflict, the one merely saying the thing was white and the other [saying it was] black, it does not matter logically what the measure of proof is, whether it is on a balance of probabilities or beyond a reasonable doubt. The position is simply that* there is no proof*, by any …,* unless one is satisfied that one witness[‘s] evidence is quite true and that of the other is false. *It is frequently said that the* ***dictum*** *in the Gany case does not apply to civil cases because of the omission of (****sic****) the learned Judge do have regard to the measure of proof in civil cases being on a balance of probabilities. But this criticism is invalid because, unless suitably qualified, it confuses proof with measure of proof.* Where there is no probability there is simply no proof of anything, regardless of the measure by which you measure it unless you believe one person and disbelieve the other*. Until then the chances of it being black or white remain exactly evenly balanced. This is simple logic.*”

[57] I find COETZEE, J's manner of dealing with WESSELS, JA's *dictum*, with respect, rather unduly complicated. My understanding of the remarks of the judges who commented about the *dictum* in question was not that they disagreed with it. All they did was to disagree with the adjective "absolute", to the extent that it suggests something more than proof on a balance of probabilities. That is what COETZEE, J, himself, implies in my understanding, in the phrase "Waar daar immers geen weg … bestaan nie …", at 426D, in *Koster Koöperatiewe Landboumaatskappy*, *supra*. It is quite evident from that and from what he adds in *Cainer*, *supra*, that the adjective "absolute" either has to be removed or explained in the manner that he himself has explained. Proof in civil matters remains on a balance of probabilities. It is, in my view, best to drop "absolute" and eliminate criticism or discussion around the word.

[58] For that matter, I find the expression "unless one is satisfied that one witness['s] evidence is true and that of the other is false" somewhat puzzling. There has, in my view, to be a process by which one becomes satisfied that the evidence of the one witness is true and that of the other false. That process must, surely, be the weighing of probabilities. It is not a process based on the … of facts' hunch or belief that one witness is truthful and the other not. That, in fact, is how I understand the passage at 440D-441A, in EKSTEEN, AJP, as

he then was, in *National Employers General Insurance Jagers*, 1984 (4) SA 432 (ECD), which reads:

> "*It seems to me, with respect, that in any civil case, as in any criminal case, the* **onus** *can ordinarily be discharged by* adducing credible evidence *to support a 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 credibility of the witness will therefore be inexplicably bound up with a consideration of the probabilities of the case*** *and, if* ***the balance of probabilities favours the plaintiff****, then the Court will accept his version as being probably true. If, however,* ***the probabilities are evenly balanced*** *in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied*

> *that his evidence is true and that the defendant's version is false.*
>
> *This view seems to me to be in general accordance with the view expressed by COETZEE, J in* ***Koster Koöperatiewe Landboumaatskappy Bpk v Suid-Afrikaanse Spoorwee en Hawens*** *(***supra***) and* ***African Eagle Assurance Co Ltd v Cayner*** *(***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 probabilities*** *that he was telling the truth and that his version was* ***therefore*** *acceptable. It does not seem to me 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 the enquiry, to consider the probabilities of the case****, as though the two aspects constitute separate fields or 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 heard to an estimate of relative credibility apart from the probabilities****.*"

It is evident, from the last sentence of this excerpt, that where probabilities are even the "relative credibility" of the respective

witnesses becomes a factor for determination and for the court to "nevertheless believe" the one party and not the other.

[59] In a Supreme Court of Appeal case, in which no mention was made of *Jagers, supra*, NIENABER, JA sets out the "technique" that is generally employment by the Courts when determining disputes in which stories are mutually destructive. That case is *Stellenboch Farmers' Winery Group Ltd and Another v Martell Et CIE and Others* 2003 (1) SA 11 (SCA), where the following is stated at 14I-15G:

> "*The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a)* ***[credibility]****, the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness'[s] candour and demeanour in the witness-box; (ii) his bias, latent and blatant; (iii) internal contradictions in his evidence; (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extra curial statements or actions; (vi) the calibre and cogency of his performance compared to that of other*

> *witnesses testifying about the same incident or events. As to (b), a witness'[s]* ***reliability*** *will depend, apart from the factors mentioned under (a)(ii), (iv) and (vi) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality and integrity and independence of his recall thereof. As to (c)* ***[probabilities]****, this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as the final step, determine whether the party burdened with the* **onus** *of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.*" [Words in square brackets and emphasis added.]

[60] It is evident from COETZEE, AJP's judgment that a court can, where the probabilities are not helpful, still find in favour of the one or the other party on the basis of "an estimate of relative credibility". The learned Acting Judge President did not indicate how one goes about estimating the relative credibility of the witnesses. I would assume, however, that that relates to matters mentioned by NIENABER, J.A., in *Martell* (*supra*), such as *candour and demeanour*, … or blatant bias,

self-contradiction or contradiction with the evidence of other witnesses who are supposedly presenting the same version as him or her or being in conflict with the case of the party he or she is supposed to support, or contradicting an established fact or his or her own extracurial statements or actions and the calibre and cogency of his or her performance compared to that of other witnesses testifying about the same incident or events.

[61] Applying the principles and techniques mentioned in the above authorities, I now deal with the two versions placed before the Court by the plaintiff, on the hand, and the defendant, through its two witnesses, on the other hand. As already stated the two versions are mutually destructive. The only coincidences are that (1) the left front corner of the ambulance collided with the right front portion of the bakkie, on the driver's door; (2) the collision occurred at a time when the bakkie was negotiating a turn to the right; and (3) the collision occurred on the tarred surface of the road. There is disagreement on, more particularly, the nature of the turn that was being negotiated by the bakkie at the time of the collision and the point of impact on the road.

[62] The plaintiff's version, in summary, is that he was, at all relevant times, driving on the road surface, along the southbound portion of the road and that the collision occurred across the centre line on the opposite lane of the road. There was no motor vehicles immediately behind him when he commenced preparation for turning to the right but he had to

wait for two motor vehicles approaching from the opposite direction before crossing the centre of the road. The only motor vehicle he had seen following his bakkie was a safe distance behind it.

[63] The defendant's version, in summary, is that, when the driver and his passenger first saw the bakkie, it was about 15 paces (according to Mr Pickford) or 17 paces (according to Mr Moeng), ahead of the ambulance, fully on the left hand gravel shoulder of the road, facing the same southerly direction as the ambulance was facing. The bakkie suddenly veered to the right, entered the tarred surface of the road, onto the path of the oncoming ambulance. In attempting to avoid a collision between the two motor vehicles, by swerving to his right, the ambulance driver collided with the bakkie on the same southwards-bound lane of the road.

[64] For reasons I shall give, later in the judgment, I have come to the conclusion that the plaintiff's version as to how the collision occurred and as to the position of the point of impact is quite true and that the defendant's version is false. In arriving at this conclusion, I have considered both the calibre of the respective witnesses and probabilities.

Calibre of Witnesses

[65] The plaintiff, who is Afrikaans speaking, elected to speak English, on learning that the presiding Judge is English speaking and would not be

in a position to conduct the trial in Afrikaans. Although it was always evident that he was not speaking in his home language, the Court was of the impression that the plaintiff was not prejudiced by having had to speak English. He gave his evidence impressively, listening attentively to questions and answering them precisely, without unnecessary elaboration. He spoke in a clear voice and faced the Court at all times. He readily stated that he looked at his rear view mirror only once, quite some time before he ultimately started turning across and before the collision. He volunteered that, if the motor vehicle that he saw at a distance was not, in fact, the ambulance that collided with him, then the ambulance must have been heedden in a blind spot at the time that he was looking into the rear view mirror. I shall return to this aspect later in the judgment.

[66] Mr Moeng, the ambulance driver, was an extremely unimpressive witness. He created the impression of uneasiness in the witness-box, with his voice constantly falling very low, resulting in the Court having to repeatedly request him to speak up. I am mindful of the fact that he gave his evidence through an interpreter. However, the Court being *au fait* the language he spoke, it can be placed on record that the use of an interpreter did not, in any way whatsoever, contribute towards Mr Moeng's weakness as a witness. On a very crucial aspect of the case, the question of where the bakkie was and what it was doing when he first saw it, he contradicted himself as already stated. He initially said that it was parked or stationary on the left-hand side of the road, on the

gravel portion. He later, after a question by the defendant's counsel, who was evidently concerned about that piece of evidence, changed to say that the bakkie was moving slowly.

[67] On yet another crucial aspect of the case, where he was asked what he did on recognising the sudden turning of the bakkie away from the gravel portion of the road, he merely said that he *tried to apply his brakes*, at the same time swerving to the right, but that that was too late. Asked whether the bakkie's driver indicated, in any manner whatsoever, that he was going to execute a turn, Mr Moeng initially said there was no indication whatsoever. He later said he did not see any hand signal which is not consistent with saying there was no indication whatsoever. As I have earlier commended, he, unduly in the Court's view, contradicted himself as to the reason why he remained in the bakkie when Mr Pickford got out to enter the supermarket.

[68] For someone who was never involved in a collision, whilst working as a ambulance driver, it is remarkable that he was able to describe the procedure followed in the event of an ambulance driver being involved in a collision, which procedure included being sent to the policy compliance unit and getting a warning. The Court actually noted that that simple question had to be repeated before the previous answer was ultimately given. Strangely, the authorities at Metro appear to have been satisfied, of Mr Moeng's version must be believed in this

regard, that he was not responsible in any manner whatsoever, for the collision, without interrogating him about how it happened.

[69] It took several questions before Mr Moeng ultimately answered the question as to why he had not observed the bakkie much earlier than he did, ending up with the answer that there was no reason. This, in my view, is very vital aspect of the defendant's version.

[70] In any event, the very answer that there was no reason for not observing the bakkie earlier is, in the Court's view, a serious blemish on Mr Moeng's character as a witness. One would have expected that, as a driver, the fact that he did not see the bakkie earlier than he did would have bothered him, long before he appeared in Court. It should not have taken him that long, therefore, to come to a simple answer that he has no reason. Much more damaging than the manner in which that reply eventually came, is the very fact that he was unable to explain why he did not detect the bakkie much earlier.

[71] His reply that neither his attorney nor his advocate ever tried to find out from him why he had not seen the bakkie earlier does not have a ring of truth. It is also strange that he did not report the accident to anyone, whatsoever. In this regard, it should be noted, at this very stage, that Mr Pickford contradicted Mr Moeng concerning the alleged presence of the internal investigating officer at the scene. It should also be noted that, according to Mr Moeng, he was never given an opportunity, by

anyone whatsoever, to explain how the accident happened, right up to the stage when he gave his evidence in Court.

[72] His evidence about the description of the accident, on the accident report, being akin to his own version in Court and yet not coming from him, is, to say the least, absurd. This is more so because Mr Pickford also says he did not give such an explanation to the police. The police could not have sucked it out of their thumbs.

[73] It took three questions, during his cross-examination, before Mr Moeng finally answered that he did apply brakes before the collision. No explanation emerges from Mr Moeng's evidence as to why he drove at a low speed of between 60 and 70 kmh, let alone the fact that he gave no basis for his estimation of that speed, which is strangely somewhat the same as that given by Mr Pickford, viz., about 65 kmh. It will be borne in mind that there is no reliance by either witness on the presence of a speed limit zone that would have necessitated such a low speed on an open road.

[74] Another aspect of the poor quality of Mr Moeng's evidence is the fact that, when asked, during cross-examination, whether, if he had kept on his lane and had not swerved to the right, there would have been a collision, he answered that he would have avoided it. It was only after the question had been asked a further time that he said that the

ambulance would have collided with the bakkie with its, the ambulance's, full front.

[75] To the extent that he does not mention that Mr Pickford sustained injuries in consequence of the collision, I can only surmise that that is a consequence of his, Mr Moeng's poor memory. I do not see how it would have prejudiced him to mention that, and yet it is quite a significant occurrence when one relates the event. It reflects on his poor memory.

Mr Pickford

[76] Mr Pickford created a better impression than Mr Moeng, from the point of view of demeanour. The following were, in the Court's view, his major failings:

1. His reference to having countered the number of tiles along the passage, outside the Court in an endeavour to explain why he could remember, four years later, that Mr Moeng was driving in the third gear, is absurd.

2. In any event, it is improbable that the ambulance would have been driven in the third gear, for no apparent reason, along a stretch of road that, on the photographs, appears to be level or, according to Mr Moeng's evidence, was slightly downhill.

3. It is remarkable that Mr Moeng did not mention that Mr Pickford warned him about the impending collision before he, Mr Moeng, took evasive measures. This aspect should, however, be decided in Mr Pickford's favour. There is no apparent reason for him to lie about his being injured.

4. It is also strange that Mr Pickford should say he is not sure whether they could have seen the bakkie much earlier than they did. In that regard, he is, in the Court's view, not being candid.

[77] With regard to Mr Moeng's demeanour, the Court has, as already stated, taken into account the fact that he was speaking through an interpreter and discounted that as a factor. The interpretation caused Mr Moeng no problems. His poor demeanour is, however, only part of the problems encountered by the defendant in the presentation of its evidence. The Court's conclusion that the plaintiff's version is true and that that of the defendant is false is based on the following assessment of the facts.

1. Once it is accepted that:

   (a) the defendant's witnesses are unable to help the Court with a reliable account of what happened, from the time when they should have seen the bakkie till when they first saw it; and that

(b) they have been untruthful about what they saw;

the plaintiff's entire version of the events must be accepted, except where any part thereof is improbable.

That is, however, is not the end of the enquiry.

2. On the plaintiff's version, he slowed down, and did not immediately turn right and move across the solid white centre line, because he had to allow for two oncoming motor vehicles, moving in the opposite direction, to pass.

3. That being the case, the following scenario appears to me acceptable;

(a) The ambulance driver should have been aware that the bakkie was moving unusually slowly next to the solid centre line and was indicating to turn right. It will be borne in mind that there is no evidence contradicting the fact that the bakkie was indicating an intention to turn right at the time.

(b) Nothing would have obscured the ambulance driver's view of all the clear signs of the bakkie's intention to turn right;

(c) In the light of the point of impact, as pointed out by the plaintiff, being on the opposite lane, the ambulance driver must, for some unexplained reason, probably fatigue and/or drowsiness, have realised too late that the bakkie was intending to turn right, across the barrier line;

(d) The ambulance driver could not, in view of his having noticed the bakkie too late, avoid the collision.

4. That the ambulance driver did not become aware of the bakkie's intention to turn right, until it was too late, is borne out by the warning that Mr Pickford probably did give to the driver before the latter started taking evasive steps.

5. Whilst, on the basis of authorities, it might be said that, by looking at his rear view mirror only once before crossing the solid centre line, the plaintiff was also negligent, I am of the view that, in the circumstances of this case, such failure by the plaintiff to look once more at the rear view mirror had very minimal causal connection – if any – with the collision. Whilst I doubt very much that the plaintiff would have been able to do anything to avoid the collision – having crossed the centre line after the last of the motor vehicles moving in the opposite direction – had he looked once more and realised that it was on collision course, it is conceivable that he might have taken some

evasive action, such as veering swiftly to his left, which might have had the effect of reducing the impact of the collision.

6. To say the least, the plaintiff would have been able to tell the Court why he, on his part, was unable to avoid the collision, if he had looked again and observed the ambulance's movements.

7. On the facts of this case, it must be discounted that there was another motor vehicle, between the bakkie and the ambulance, which might have been on a blind spot when the plaintiff looked once at his rear view mirror. This is so, in my view, on the basis of either version. The plaintiff would have seen such motor vehicle passing on the left of his bakkie, just before the collision, on his version of the events. The defendant's witnesses do not mention any other motor vehicle ahead of the ambulance, i.e., between the ambulance and the bakkie, before the collision.

8. Because the plaintiff was turning at a portion of the road where drivers would not, ordinarily, expect a motor vehicle to turn, especially in the light of there being the white solid centre line, his obligation to look to the rear, for the second time, before finally making his right turn, was, in my view greater than would be the case if he was turning at an intersection. Whilst, therefore, the Court is not a position to state, categorically, that the plaintiff contributed to the collision, it is also not in a position

to, altogether, exonerate him therefrom. It is, however, quite clear that, by far, the greater cause of the collision is the defendant's driver's inattentiveness as he drove behind the bakkie.

[78] In passing, I should mention that, even if the defendant's account of the events was the preferable one, the defendant would, in my view, still have incurred substantially greater liability for the collision, for the following reasons:

1. Both the driver of the ambulance and his passenger inexplicably saw the bakkie too late;

2. It should have been obvious to the ambulance driver, on the defendant's version, that the bakkie's movements were strange – especially when it is taken into account that there is a complex on the other side of the road, opposite to where the bakkie was seen – and that such movements called for caution;

3. There is no doubt that the ambulance driver took evasive action only after having been warned, by Mr Pickford, of the bakkie suddenly making a u-turn.

I must emphasise, however, that my findings and conclusions are based on the plaintiff's version.

[79] In paragraph 9 of her heads of argument, Ms Scholtz made the following submission:

> "*9. The Honourable Court will therefore be requested to grant judgment in favour of the Plaintiff on the merits and in the event of the Honourable Court reducing the Plaintiff's claim, the Honourable Court will be requested that this is a suitable matter for a 50/50 finding. In the event of the Honourable Court finding that there should be reduction of the Plaintiff's claim in applying an apportionment of damages, the Plaintiff would still be entitled to costs of his action, being substantially successful. The Court will furthermore be requested to allow the costs of these heads of argument.*"

Ms Scholtz arrived at this submission after referring to some of the cases I shall now deal with, regarding the duties of a driver who seeks to turn to the right-hand side.

[80] In their comprehensive heads of argument, for which I am indebted, both counsel have made reference to authorities, on the position of a driver of a motor vehicle who intends to execute a right-hand turn. Ms Scholtz, on the plaintiff's behalf, referred me to the following authorities: *Bata Shoe Co Ltd (South Africa) v Moss* 1977 (4) SA 16

(W); *Brown v Santam Insurance Co Ltd and Another* 1979 (4) SA 370 (W); *Orne-Gliemann v General Accident Fire and Life Assurance Corporation Ltd* 1981 (1) SA 884 (ZAD); *Allen v Standard General Versekeringsmaatskappy Bprk* 1983 (1) SA 28 (W); and *Boots Co (Pty) Ltd v Sommerset West Municipality* 1990 (3) SA 216 (C), all of which dealt with collisions where one of the drivers was executing a right-hand turn. She also referred me to *Marine and Trade Insurance Co Ltd v Pauley* 1965 (2) SA 207 (AD), which deals with a slightly different scenario, i.e. where the driver of a slow-moving truck motor vehicle, which had been driving to the extreme left of the road, suddenly swayed to the right of the road and, thereafter a motor vehicle approaching from the rear of the motor vehicle that swayed collided with the rear of such right-swaying motor vehicle. I propose dealing first with the cases that relate to a motor vehicle that executes a right-hand turn. Before doing so, I should mention that Mr De Klerk, on the defendant's behalf, also placed reliance on *Bata Shoe Company v Moss* (*supra*) and *Brown v Santam Insurance Co* (*supra*).

[81] Because COLMAN, J eloquently states the obligations of a driver who intends to execute a right-hand turn, I quote in full, a long excerpt from his judgment in *Bata Shoe Co v Moss* (*supra*) at 20H-22B. After finding that the plaintiff in that case failed to discharge "its *onus* of proving that the defendant was negligent in failing to give the signal which it was his duty to give", the learned judge went on to say the following:

"*That, however, does not conclude the matter, because it was not enough that the defendant should have given the signal as he said he did. When the driver of a motor vehicle wishes to turn across an adjoining carriage-way at right angles to his previous line of travel, his proposed action is pregnant with danger. He is about to do something which is inherently hazardous and he is therefore fixed with certain important obligations. The first of those is that he must signal clearly his intention to make the turn, and do so in such a manner as to warn approaching drivers, drivers following him, and the driver of any vehicle who may be seeking to overtake him, of the intended change of direction. It is not sufficient, however, that the driver of the vehicle which is about to turn signals his intention to do so, even if the signal is given in good time. His further obligation is to refrain from making the turn until an opportune time, to use the phrase which the Appellate Division has used in that regard. An opportune time in that context is a time when the motorist who wishes to turn can carry out his intention without endangering or even materially impeding the progress of any other person or vehicle lawfully on the road. It is the duty of the driver who wishes to make the turn to satisfy himself by full and careful personal observation that the time is opportune in the sense which I have indicated.*

What I have said is, I think, a fair summary of the law as laid down and applied in the long line of decided cases. For present purposes I need to go no further back than the year 1932. It was in that year that the Appellate Division decided the case of Milton v Vacuum Oil Company of SA Ltd, 1932 AD 197, and enunciated therein the rule that a driver who wishes to turn to his right, across the road in which he has been travelling, must do so at an opportune moment and in a reasonable manner after giving ample warning of his intention to both the vehicles approaching and to those behind him. In Milton's case the Court was concerned with the duties owed by the driver of a turning lorry to the rider of an approaching motorcycle. But the language of WESSELS, JA, at p 205 indicates clearly enough that the duties enunciated are owed to following and overtaking drivers as well as to approaching ones. That indeed had been laid down a few weeks earlier in the Transvaal case of R v Cronhelm, 1932 TPD 86, a case which does not appear to have been brought to the notice o the learned Judges of Appeal who decided Milton v Vacuum Oil Company of SA Ltd. What GREENBERG, J, with the concurrence of BARRY, J, held in Cronhelm's case is fairly reflected in the headnote of the report which reads as follows:

> *'A motorist turning across the traffic in a main street to go down a side street must do more than merely signal by*

> *putting out his hand. It is his duty to see that the way is clear, and he owes this duty to traffic which is following him in the main street as well as to oncoming traffic.'*

That case arose out of a collision in a built-up area but there is, to my mind, no doubt that the principle applies with full force to a motorist who wishes to make a right-hand turn outside a built-up area in such circumstances as those in which the defendant found himself.

In the 45 yeas that have elapsed since Cronhelm's case and the Milton's case were decided many Courts have adopted the same approach to the duties of the motorist turning to his right. As examples of cases in which that was done, I might mention … [The learned judge listed a number of cases and then proceeded.] These cases and others make it clear that the driver who wishes to turn must not merely signal his intention to do so. He must look for approaching and overtaking traffic and, if necessary, he must wait for that traffic to pass. As DOWLING, J., put it in R v Miller, 1957 (3) SA 44 (T): [a judgment with which MARAIS, J concurred.]:

> *'The motorist must make sure that he can execute a right-hand turn without endangering either oncoming or following traffic. Generally speaking he can only do this*

> *by properly satisfying himself that such traffic has observed and is responding to his signal or that it is sufficiently far away or slow moving not to be endangered or unless some special circumstances exist.'*

A little later on the learned Judge went on to say, of the right-hand turn:

> *'It is a manoeuvre inherently dangerous in its nature unless executed with scrupulous care.*'"

[82] Finally, I must refer to the following telling statement from DOWLING, J., in *R v Miller* (*supra*):

> "… it seems to me that the weight of authority in the Transvaal is to this effect that, generally speaking, the motorist may not assume that his signal for a right-hand turn has been observed simply because he has given an adequate signal." 50A

[83] The latter *dictum* by DOWLING, J., was followed by the Full Bench in *S v Swart* 1976 (4) SA 348 (T), at 349E-F. In a number of other cases, in other divisions, such as *R v Fratees* 1932 CPD 308; *R v Hattingh* 1935 NPD 386 and *S v Olivier* 1969 (4) SA 78 (N), it was held that a driver who intends turning to the right and who indicates such intention is entitled to assume that motorists following his or her motor vehicle

noticed his or her indication of an intention to turn to the right. In *Olivier*, *supra*, the Full Bench (consisting of three Judges, of the NPD specifically discussed, *inter alia*, *R v Miller* (*supra*) and *S v Swart* (*supra*) and expressed a different view to that decided in those cases. MILLER, J, in whose judgment FANNIN and LEON, JJ concurred, expressed himself as follows in that regard, at 81H-82G; (I shall again quote at length);

> "*When considering the validity of the proposition that a driver is entitled, in the absence of special circumstances, to assume that his signal has been observed and will be heeded by other users of the road likely to be affected by the movements of his vehicle, it is necessary to bear in mind that, as SCHREINER J.A., pointed out in Moor v Minister of Post and Telegraphs, 1949 (1) SA 815 (AD), at p 825:*
>
> > *'That a driver is entitled to make certain assumptions about the conduct of other drivers, whether he has seen their vehicles or whether their presence is unknown to him, because they are hidden by buildings, hedges or other traffic, is, I think, clear. In fact, every driver whenever he drives along thoroughfares frequented by other vehicles and pedestrians is constantly and legitimately making assumptions as to their probable behaviour.'*

Indeed, every driver also makes repeated assumptions as to the behaviour of his own vehicle. He legitimately assumes, for example, in the absence of any contrary indication or warning, past or present, that the steering mechanism of his vehicle will respond in the accustomed manner to certain movements of the steering wheel. Without this and a host of other similar assumptions, driving a motor vehicle on public roads would be a wholly impracticable undertaking. But the validity or propriety of any assumption made in the course of handling a potentially dangerous instrument must necessarily depend upon the overall situation at that given moment. What may appear, even to the most scrupulous careful individual, to be a safe assumption to make in certain circumstances, may, in only slightly different circumstances, be recognised, even by an inherently irresponsible person, as a speculative or risky assumption. It seems to me that, with reference to the assumption with which we are now concerned, there is a vital difference, for example, between the case where a motorist is driving, of necessity very slowly, in a traffic-laden street and the case where he is driving at speed on an open highway. In the former case, where vehicles are proceeding almost as in a procession, only a few feet or yards separating each vehicle from the one behind it, a driver who wishes to turn to his right down a street intersecting the one along which he is travelling, may well be entitled, in

regards to the vehicles coming on slowly behind him, to do no more than give a clear and timeous signal of his intention to do so. If he assumes that his signal will be seen by the driver of the vehicle behind him who will accommodate his progress to the turn of the vehicle ahead and not run into it as he turns, such assumption may well, in the vast majority of cases, be held to be a legitimate one. But no so, I think in the case of a motorist who is travelling along a national road on which it is a common experience to be overtaken at high speed by other vehicles. Such a motorist would, I think, if he were reasonably diligent, before or at the time of giving a signal of his intention to turn right, make a special point of ascertaining, with the aid of his rear-view mirror, or otherwise, whether there were any vehicles coming on behind him. And, a fortiori, he would also keep a keen look-out ahead for vehicles approaching from the opposite direction and into whose line of travel the proposed right turn would necessarily take him. If the road ahead were entirely free of danger but a vehicle were to be seen by him approaching him from behind at no great distance but at speed, he would in my opinion be taking an unjustifiable risk if, without paying any further attention to the movements of that vehicle, he was simply to execute his right hand turn on the blithe assumption that the driver thereof had seen and understood his signal and would heed it."

[84] In following paragraphs, MILLER, J continues his discussion as to why it is appropriate to expect a right-turning driver to assume after he or she has appropriately indicated his intention to turn right, that drivers of following motor vehicles have observed and heeded his indication (82H-83H). He concludes that aspect as follows:

> "*The driver intending to turn to the right, across a route which may be taken by other traffic, must necessarily bear in mind that he will be undertaking a potentially dangerous operation …*" (83H)

Finally, MILLER, J says the following, at 84A-B/C, on this aspect:

> "*This seems to me to be the ultimate test to apply in deciding whether a right-hand turn of the kind now under consideration was legitimately or culpably undertaken; the enquiry is; was it opportune and safe to attempt the turn at the particular moment and in those particular circumstances? Whether it was opportune and safe or not will depend upon the* ***diligens paterfamilias*** *in the position of the driver at that time and in the circumstances then prevailing would have regarded it as safe. (of Kruger v Coetzee 1966 (2) SA 428 (A) at 430). In that enquiry, assumptions which may have been made by the driver and the extent to which the driver kept under observation other vehicles are, together with other incidents relevant to the*

occasion, factors to be taken very much into account, but no one of these factors will necessarily or even probably provide the answer to the ultimate question."

[85] The reasoning in *S v Olivier*, (*supra*), appeals to me, much more than that in, for instance, *R v Miller*, (*supra*), with regard to the entitlement or otherwise of a driver who has made an indication to turn right to assume that the drivers behind his or her motor vehicle have taken notice thereof. Like CILLIERS, AJ, in *Brown v Santam Insurance Co* (*supra*), at 374A, however, I am ordinarily, bound to follow the approach adopted by the Full Bench in both *R v Miller* (*supra*) and *S v Swart* (*supra*). In the light of SCHREINER, J.A's *dictum*, in *More v Minister of Post and Telegraphs* (*supra*), an Appellate Division decision, I am of the view that the *Miller* judgment is incorrect in this regard and that I am not bound to follow it.

[86] In following the judgment in *R v Miller* (*supra*), BECK, J, in *Orne-Gliemann v General Accident Fire* (*supra*), at 888A, was not called upon to deal with the question as to whether the driver turning right should have ensured that her indication of her intention to do so was seen and heeded by the motorcyclist. The Court, in that case, found that the driver of the motor vehicle had not indicated her intention to turn and that the cyclist, the plaintiff, had also not indicated her intention to overtake. The result was an equal division of blame

between the plaintiff and the driver of the motor vehicle that turned right ahead of his motorcycle.

[87] There is no doubt that HUMAN, J, in *Allen v Standard & General Versekeringsmaatskappy* (*supra*), adopted the Transvaal approach, in terms whereof, the driver who indicates his or her intention to turn right must ensure that such indication has been noticed and heeded by the driver behind him or her. At 632D-633F, the learned Judge clearly adopts the approach stated in *Brown v Santam Insurance Co Ltd* (*supra*). Having observed all the requirements of a driver who intends to turn to the right-hand side of the road, including ensuring that his or her indication of intention to turn to the right has been perceived and heeded by the following motor vehicle, the driver of the right-turning motor vehicle, nevertheless, was involved in a collision with a motorcyclist that was behind the motor vehicle immediately behind his at the time that he last looked. He did not, at any stage, see such motorcycle. By way of indication of recognition of his sign, the motor vehicle behind that of the driver intending to turn right veered to the left, in order to pass his right-turning motor vehicle. The Court found that the motorcyclist, who died in consequence of the collision, had started overtaking at a time when the driver of the turning motor vehicle had already commenced the turn and that the deceased was solely responsible for the collision. What HUMAN, J stated in this regard is correctly captured in the head note, which reads:

> "*Where he has maintained a proper look-out, indicated his intention clearly, and ensured that the drive of the vehicle behind him is aware of his intention, there is no duty upon a motorist intending to turn right to further ensure that the drivers of invisible vehicles, possibly obscured by the vehicle behind him, are also aware of his intention before he turns to the right.*"

[88] In *Boots Co (Pty) Ltd v Somerset West Municipality* (*supra*), COMRIE, AJ, at 224J-225E, adopted the approach stated by MILLER, J, in *S v Olivier* (*supra*).

[89] In arriving at what I consider to be an appropriate approach in arriving at a correct decision, I have considered all the authorities I have referred to in the preceding paragraphs, including those of the Transvaal Provincial Division. Although I have indicated a preference for the reasoning in *Olivier* (*supra*), it appears to me that there is not much difference in the practical application of the two approaches. The real difference is on the question as to whether or not a driver who has indicated his or her intention to turn right is entitled to assume that following drivers have seen and heeded his or her indication to turn right. Even on the basis of the so-called Natal approach, there are situations where a driver may not rely on the assumption that his or her indication has been seen by drivers following behind him or her. There is reference, for instance, in *Olivier*, to what a motorist who drives along a highway, where it is common for motor vehicles to be

overtaken at high speed, to be more cautious than would be the case where motor vehicles are moving slowly. It is specifically mentioned that such motorist would be taking an unjustifiable risk to assume that a motor vehicle that is coming fast behind him or her has heeded his or her indication to turn right, without paying any further attention to its movement.

[90] In the present case and on the present facts, it appears to me that, whilst the plaintiff failed to look for the second time, to ascertain that the motor vehicle he saw behind, much earlier, had both seen and heeded his sign, on his version, the only acceptable version, he could not have expected the motor vehicle he saw to have tried to overtake his motor vehicle over the barrier line, in the face of the two motor vehicles coming from the opposite side and with his own bakkie having perceptibly slowed down against the solid centre line. He would not, therefore, have been relying entirely on the bakkie's indicators but also on these objective factors I have described. It is in that sense that, in my view, his negligence, in failing to ascertain precisely how the motor vehicle behind him – which obviously was the ambulance – reacted towards his entire indications of an intention to turn right, contributed minimally towards the collision. In finding that the plaintiff also contributed, even if minimally, towards the collision, I have taken into account also the fact that, as the authorities state, he was involved in a manoeuvre inherently dangerous in its nature, unless it is executed with scrupulous care. Moreover, he was turning at an inappropriate

sport. To the extent that he did not look at his rear view mirror, for the second time, or in any other way looked behind again, to see what the reaction of the ambulance driver was, he did not execute his turn with scrupulous care, in the sense required by the authorities in this Division and in the manner described in *Olivier*.

[91] I do not, however, share Ms Scholtz's view that the plaintiff contributed as much as 50% towards the collision. There is absolutely no explanation for the ambulance driver's conduct, on any version. Were it not for the stringent requirement on the conduct of a driver turning right, in the manner I have dealt with in great detail, I would not have hesitated to find the defendant 100% liable.

[92] In the circumstances, I make the following order in the plaintiff's favour:

1. The defendant is 80% (eighty percent) liable for the collision.

2. The defendant is ordered to pay costs of these proceedings, including cost of preparation of heads of argument;

3. The parties are at liberty to arrange a date, with the registrar, for proceedings in respect of the *quantum* of damages in this matter.

J N M POSWA
JUDGE OF THE HIGH COURT

34232/2005
Heard on:
For the Appellant: Adv
Instructed by: Messrs
For the Respondent: Adv
Instructed by: Messrs
Date of Judgment: