IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED

CASE NUMBER: 65494/12

DATE:9 October 2019

NANDALALL BANTHO **Plaintiff**

V

ALEXANDER FORBES INSURANCE CO. LTD **Defendant**

JUDGMENT

MABUSE J

[1] This matter came before me as a stated case. The crucial issue that this Court was called upon to decide was whether on 3 May 2011 the Plaintiff drove his 2011 Mercedes Benz C200 CGI BE Avantgarde automatic motor vehicle with registration number [….] while under the influence of intoxicating liquor or with the alcohol percentage in his blood stream exceeding the legal limit.

[2] By combined summons issued by the Registrar of this Court, on 30 November 2012, the Plaintiff, Nandalall Bantho, claims an order directing the Defendant to replace the said motor vehicle or payment of money from

the Defendant. The Plaintiff's cause of action arose on 3 May 2011 when he was involved in a motor vehicle accident while he was driving the said motor vehicle as a consequence of which the said motor vehicle was damaged beyond repair.

[3] At the material time of the said accident, the said motor vehicle was covered for such eventualities by Execu-Protect Policy Number 629831-1 issued by Alexander Forbes Insurance Company, the Defendant herein, on certain terms and conditions. One of the specific exceptions in the said contract of insurance between the Plaintiff and the Defendant was that the Defendant would not be liable to compensate the Plaintiff for any loss, damage, injury or accident which occurred while the insured motor vehicle was being driven by the Plaintiff under the influence of intoxicating liquor or while he had a level of alcohol in his blood stream that exceeded the statutory limit. The statutory limit at the material time was, and still is, is 0.05 gram per 100 millilitres.

[4] On 6 May 2011, the Plaintiff, duly notified the Defendant of the said motor vehicle accident and the Defendant duly registered it as claim number 076/272801N D. By a letter dated 9 July 2012, the Defendant repudiated the Plaintiff's claim and furnished the Plaintiff with the following reasons why it was not prepared to entertain the claim:

"We refer to the abovementioned matter and regret to advise that after careful consideration we are not able to entertain the claim based on the following reason(s)

Page 23 of the policy wording: -

Specific exceptions,·

We will not pay for any loss, damage, injury or accident while the vehicle insured by this policy is-

''being driven by you under the influence of intoxicating liquor'' or while you

have a level of alcohol in your blood stream that exceeds the statutory limit. JI

[5] Following the said repudiation of his claim by the Defendant, the Plaintiff issued summons against the Defendant in which he claimed an order in terms of which the Defendant is directed to replace the Plaintiff's motor vehicle or payment of money in respect of the said motor vehicle. In paragraph 10 of his particulars of claim the Plaintiff pleaded that:
"In the premises the Defendant is obliged to indemnify the Plaintiff against his loss, but despite demand, the Defendant has failed/neglected/refused to do so."

[6] In its plea the Defendant then pleaded that:

"5.3 At the time of the accident the Plaintiff was under the influence of intoxicating liquor.

5.4 Accordingly the Defendant is not obliged to pay any amount to the Plaintiff in terms of the insurance policy or otherwise."

COMMON CAUSE FACTS

[7] In their heads of argument both Mr Omar, for the Plaintiff, and Mr Rip, counsel for the Defendant, agreed that the following issues were common cause between the parties; that:

7.1 the Plaintiff entered into a contract of insurance with Mercedes Benz Financial Services South Africa (Pty) Ltd under policy number 629831-1 and was underwritten by the Defendant;

7.2 the Plaintiff's 2011 Mercedes Benz C200 CGI BE Avantgarde automatic motor vehicle was involved in an accident on 3 May 2011 and the motor vehicle was damaged and written off as being beyond economic repairs;

7.3 the parties agreed that in the event of the Plaintiff being successful in his claim that the Defendant would have to compensate the Plaintiff

to the extent of the retail value and the parties agreed that such value is R381,504.00;

7.4 the Plaintiff lodged a claim with the Defendant on 6 May 2011 and the claim was registered under claims reference number 076/272801ND;

7.5 on 9 July 2012 the Defendant repudiated the claim;

7.6 it is common cause that the contract of insurance contained an exception to the effect that the Defendant would not be liable to compensate the Plaintiff for any loss, damage, injury or accident which occurred while the vehicle was being driven by the Plaintiff under the influence of intoxicating liquor or while he had a level of alcohol in his blood stream that exceeded the statutory limit;

7.7 in addition Mr Omar stated in his heads of argument that the following points were also common cause between the parties:

7.7.1 the Plaintiff and Defendant are correctly cited in the particulars of claim;

7.7.2 this Court has jurisdiction to entertain the matter.

THE EVIDENCE

[8] MOGATJANE ANNA RAMOSHABA ("RAMOSHABA")

This witness was the Defendant's first witness. By agreement between the parties, the Defendant had first to tender its witnesses' evidence. This witness testified that she was a constable in the South African Police Services ("SAPS") and stationed, since 2009, at Linden Police Station, in Johannesburg. On 3 May 2011 she was doing patrol duty in the company of constable Papola when they received a call from their station about a motor vehicle accident that had taken place somewhere in Randburg. They drove to the scene and on their arrival found a bakkie lying on its side, the driver's side, next to a wall. They also found bystanders at the scene.

[9] She asked the bystanders who the driver of the said bakkie was. Some of

these bystanders pointed out Mr Nandalall Bantho, the Plaintiff, as the driver. The Plaintiff confirmed that he was the driver of the relevant motor vehicle. She introduced herself to him and asked him if the motor vehicle that was lying on its side against the wall was his. He confirmed that it was his. She asked him if he had any injuries and he said no. In the meantime, some neighbours complained that the motor vehicle had damaged their property.

[10] When she spoke to the Plaintiff he looked like a drunk person. The Plaintiff spoke continuously; was unsteady on his feet; could not stand properly on his feet and was disrespectful. She told the Plaintiff that she would take him to the police station where she would arrest him for drunken driving. When she wanted to find out from him who would drive his motor vehicle while he was being driven to the police station the Plaintiff told her that he would leave his motor vehicle there and that his insurance company would make arrangements to tow it away. They took the Plaintiff to the police station where on their arrival she informed the Plaintiff that he was under arrest for reckless or negligent driving and for driving a motor vehicle while drunk. She opened a case docket and, having done so, took the Plaintiff to Hillbrow clinic for Breathalyzer test and for the taking of his blood sample for alcohol test. When they left the police station they had a blood test kit with them.

[11] At the Hillbrow Clinic, they handed the Plaintiff and the blood test kit to a nurse who, having finished with what she did, sealed the blood test kit and handed it back to them. She did not notice when the blood sample was drawn from the Plaintiff. She only remembered when the blood kit bag was sealed and given to her. They took the blood kit back to the Linden Police Station where, on their arrival, she booked it in the SAPS 13 and gave it to captain Maunatlala who put it in a fridge of the said police station and locked the fridge. On the cover of the blood kit bag they record the case number; the occurrence book number and the SAPS 13 number. According to procedure, a member of the SAPS would come and fetch the blood sample and take it to the Forensic Laboratory for testing.

[12] She was referred to page 99 of the Trial Bundle about which she testified

that the document at the said page was a Request For Examination Of Blood Specimen For Alcohol. This document stated that:

''A *blood container containing blood marked with Case Number Linden CAS14/05/2011 is attached, packed in the polystyrene container and sealed with number FA683457 has been dispatched to a laboratory by hand on 2011.05. 10 for examination. An analysis of the specimen is required to establish whether the blood sample contains alcohol and, if any is found to be present, the percentage expressed in grams per 100ml of blood in respect of a blood specimen to be determined The history in short is as follows:(D.U.I)".*

[13] This document was addressed to Forensic Chemistry Laboratory, Joubert Street; North Johannesburg. She told the Court furthermore that she commissioned the document at page 102, which was an affidavit of the medical practitioner, Dr Lukanda Lufuma Kuya ("Dr Kuya"), to whom the Plaintiff and the blood test kit were handed on 3 May 2011 at 02h46. The document at page 96 of the Trial Bundle was identified by her as her affidavit which set out what took place on the day of the motor vehicle accident. The colour of the motor vehicle that was found lying on its side against the wall was charcoal grey. It was in fact a motor car and not a bakkie, as she had originally described it. There are two aspects on which the evidence of this witness may be criticized. Firstly, she initially referred to the motor vehicle she found at the scene as a bakkie. A bakkie, as you know, is an Afrikaans word for van or open truck. During cross examination by Mr Omar and after being shown a picture of the relevant motor vehicle in the papers before the Court, she changed her evidence and testified that the motor vehicle in question was a motor car. When she was asked by Mr Omar why she had initially described the motor vehicle as a bakkie, she told the Court that she had forgotten. Secondly, she told the Court that the blood sample from the Plaintiff was drawn by a nurse when she did not see precisely who did that. She received the blood sample from Dr Kuya and not a nurse. These contradictions do not eviscerate the quality of her evidence though. On the whole her evidence

is credible and beyond reproach.

[14] The Defendant's second witness was a certain Dr Kuya, who on 3 May 2011 was employed at Hillbrow Clinic by the Gauteng Department of Health (GOH). He told the Court that he had been doing clinical forensic analysis since 2006. In their duties as clinical analysts they see domestic violence, sexual offence cases and sex and age determination. They also take blood samples from people who are alleged to have driven motor vehicles under the influence of intoxicating liquor.

[15] He then testified about the procedure that they follow when a suspect is brought into the clinic for the drawing of a blood sample. According to his testimony, the police or traffic office that brings a suspect to the clinic for the purpose of drawing blood must hand to them Form 308A. They also bring with them a packaged sterilised disposable equipment for taking blood samples. They then check the expiry date on the blood test kit. At the clinic they have a separate room in which they draw blood samples from suspects. When a suspect is brought to the clinic, they ask him or her if he or she knows why he or she is brought there; they ask him or her to lift up his or her sleeve to the upper arm above the elbow; they clean the part of the hand from which the blood specimen is going to be drawn, with sterilised water. Inside the blood test kit there is a cotton wool which is used for cleaning the part of the body from which it is intended to draw blood. This seems to be standard procedure. In their book Forensic Medicine, Second Edition, under the topic Precautions in Taking Specimens at page 408, I Gordon, Emeritus Professor of Forensic Medicine, University of Natal, and formally Chief Government Pathologist, Durban and Dean Faculty of Medicine, University of Natal 1955 - 1971 and H.A. Shapiro, Professor of Forensic Medicine University of South Africa, Visiting Professor of Forensic Medicine, University of Natal, Honorary Consulting Pathologist, National Research Institute for Occupational Diseases, Johannesburg, former Government Pathologist, Cape Town, wrote as follows:

"Thousands of blood samples are taken daily in many clinics as a matter -

of - routine. The accused person is not, therefore, subjected to any particular risk when he submits to this special examination. The only precaution which the medical practitioner must take is to ensure that the needle and the syringe employed have not been sterilised with alcohol. These instruments should be sterilised either by dry heat or else by boiled up in the usual way. For the same obvious reasons, the skin over the side of the vein to be tapped should not be cleansed with alcohol in any form. If these obvious precautions are observed, a blood sample may be taken without medical risk to the patients. "

[16] Inside the blood test kit box there is a syringe and a bottle. Inside the bottle are two chemical agents, namely the fluoride sodium and oxalate potassium. The purpose of the fluoride sodium is to prevent the fermentation of the alcohol once blood is stored in a bottle that contains it. The fluoride sodium can protect the blood for months. The purpose of the oxalate potassium is to prevent the blood from clotting. They draw blood from a suspect with a syringe which is found in the box or blood test kit. The blood in the syringe is then pushed into the bottle with the same syringe. The bottle is then put in the box and the box is sealed. Then you put your name, the name of the police station, the case docket number and the name of the suspect on it. The blood test kit comes with two forms, one that he will stick to the tool kit and the other one that remains at the clinic. He was referred to page 102 of the Trial Bundle. There he identified his affidavit. In this affidavit he stated that on 3 May 2011 at 2h46 he was requested by a police officer to draw blood from Nandalall Bantho. He furthermore stated that he drew blood from the suspect's left arm after cleaning the skin with water and with wet cotton wool at 03h15. The sample of blood was put back in the polystyrene box and sealed with a plastic string and plastic tag number F/A683057. Thereafter he handed the box for safekeeping to officer Ramoshaba at 03h22 on 3 May 2011.

[17] The third and last witness for the Defendant was Mr Ralefeta Chewe ("Mr Chewe"), a forensic microbiologist by training and employed by the

Gauteng Department of Health at Johannesburg forensic pathology and located at 110 Joubert Street in Johannesburg. He has been employed there since 2013 up to date. Mr Chewe holds a Bachelor of Science in Chemistry Degree; Forensic Toxicology Certificate and Total Quality Management Certificate. He did chemistry up to the third level. In order to be employed in his position at the Johannesburg Forensic Laboratory and do the type of work he was doing one must have third level chemistry. It was not in dispute that he was an expert.

[18] He testified that his main duty consists of, among others, analysing samples. If an alcohol sample is brought to them, it will be sent to the alcohol section. There they test many samples in a month, some times more than 100. He was in the alcohol section of the Forensic Science Laboratory from 2013 to 2015. There is a fridge in the access controlled area of the section where they store the samples.

[19] The supervisor would give him, the analyst, a batch. The analyst gives this batch to a Laboratory Assistant, who goes to fetch the samples from the fridge. When these samples are brought to him they are in a sealed polystyrene bag. It has two seals. He checks if the two seals on the polystyrene bag match with the serial number of the police station. If he is satisfied that they match he proceeds to the next step, which is to calibrate the blood sample with a GC (Gas Chromatography). This will give him the alcohol concentration.

[20] To check the presence of sodium fluoride in the blood test kit, the analyst uses another tool, this is to confirm that the sample is still preserved. The sodium fluoride comes with the blood test kit. The purpose of the sodium fluoride is to prevent the alcohol from fermenting. There is also potassium fluoride or oxalate which prevents the blood from clotting. The sample can be preserved for as long as the sodium fluoride is present. Only 1% of sodium fluoride is required to preserve the blood sample. He disagreed with the notion that a sample of blood taken in 2011 will not be suitable for testing in 2014 as by then the sample will have become stale.

[21] He identified the document at page 40 of the Expert Witnesses' Reports Bundle as a report on drunken driving. He testified furthermore that he

compiled it and that the alcohol concentration in the blood specimen he analysed was 0.16 grams per 100 millilitres.

[22] He disagreed with the notion that. the blood sample can only be preserved for 7 to 10 days. He was satisfied about the manner in which the blood sample in this matter had been preserved and dealt with. In respect of such a long delay before testing the sample he explained that the Forensic Science Laboratory had backlog of the tests and for that reason they took long to produce the results. He was satisfied though with the accuracy of the test he conducted on the relevant blood sample.

[23] At the close of the Defendant's case the Plaintiff called his first witness, a certain Ms lgmare Ferreira ("Ms Ferreira"). She testified that she was employed at Delmas Hospital. She had compiled a report which constituted part of the expert bundle. It must be pointed out though that the expert report of this witness was not placed before Court. Only what one may regard as a summary gleaned from such a report was made available to Court. It is also not clear who made such a summary. She testified that in order to protect their integrity blood samples should be kept under strict conditions. She developed her evidence and emphasized that blood samples must have a cold chain maintained from the moment the blood is taken from a person to the time it is stored in a fridge. According to her evidence it must be placed in a fridge with a temperature between 0° to 8°. To maintain this chain, the temperature of the fridges has to be checked twice per day at opening and closing. The blood sample has to be in a stable fridge containing only blood samples and nothing else. Once a month the fridge has to be checked. If it has frozen, it has to be cleaned and defrosted. Even when the blood samples have to be transported the cold temperature has to be maintained.

[24] If not stored properly, the chemical agents will break down into chemical components. They will lose their ability to preserve the blood sample. Yeast may develop inside the sample. The glucose that is inside the sample will break down. The preservative agents are sodium fluoride and potassium oxalate. Potassium oxalate prevents the blood from clotting. The preservation will endure for 7 to 10 days after which it will start to

break down. Therefore, the blood sample must be tested within 10 days, at most, of the taking of the blood sample from a person. The blood sample taken in 2011 and tested in 2014 will lack integrity because it will not be known whether it was stored properly. The test kit has an expiry date of 2 years. The date is printed on the outside of the polystyrene bag and also on the container. After the expiry date the vacuum inside the bag will deplete. As soon as the bag is contaminated, bacteria will set in. 21 Days after the drawing of the blood it will break down. One will still be able to get a result but if the blood sample has fermented, one will not be able to get the correct result. The report of Mr Chewe should be rejected because any chemical reaction might have happened. The blood sample should be tested within 2 hours of the drawing of blood because there are many metabolic reactions which may change the character of the blood.

[25] The second and last witness who testified for the Plaintiff was the Plaintiff himself. He admitted that he was involved in the accident on 3 May 2011. He continued and testified that on the morning of the incident he was driving from Monte Casino in Fourways, Johannesburg, and was heading to his home in Springs. He was driving in Randburg at the time of the accident. The accident took place at 01hOO. He was driving on a flat surface. He approached an incline where there was a T-junction. He stopped at the stop street, reached out for a packet of cigarettes between his seat and his passenger's seat. He drove from the stop street and as he did his foot slipped onto the accelerator pedal. The motor vehicle headed towards the gate in front of him where it capsized and landed on its right side against the wall.

[26] He had not taken any alcohol. The first person that he spoke to was one Gavin de Beer ("De Beer"). De Beer told him that he was the manager of the cluster housing in the neighbourhood of where the accident had taken place. Two paramedics who arrived at neighbourhood of where the accident had taken place. Two paramedics who arrived at the scene later on checked him to see if he had any injuries. He was charged with drunken driving.

[27] DRIVING UNDER THE INFLUENCE OF INTOXICATING LIQUOR

27.1 In order to succeed with the plea that the Plaintiff had driven the insured motor vehicle under the influence of intoxicating liquor the Defendant, who had the onus to prove what it alleged, had to prove that the Plaintiff:

(a) had consumed intoxicating liquor;

(b) was under the influence of intoxicating liquor; and

(c) was under the influence at the time of the driving.

27.2 What is precisely meant by being under the influence of intoxicating liquor? Mr Justice Sturgess, in a case at the Windsor Sessions gave the following definition of drunkenness when dealing with an appeal against the conviction of *"being drunk while in charge of a motor vehicle".·*

"Where the skill and judgment normally required in the manipulation of the motor car, it is obviously diminished or impaired, as a direct result of the consumption of liquor, I am told that he is drunk if in charge of a motor vehicle within the meaning of the Act."

The Judge continued as follows:

"Some people can take very little alcohol, but if they take alcohol when in charge of a car, knowing it is going to diminish their skill and judgment, they cannot complain of the results."

See in this regard **SALJ 1927, 184.**

27.3 In R v Lloyd 1929 EDL 270, it was held that:

"Being under the influence of liquor while driving a motor vehicle", means:

"that the intoxicating liquor the driver has imbibed has influenced him to such an extent that the skill and the judgment normally required in the manipulation of a motor car, is obviously diminished or impaired as a direct result of the consumption of alcohol."

27.4 Finally, in R v Donian 1935 TPD 5 at 9, the Court stated that:

"In my opinion the phrase while "under the influence of intoxicating liquor'; in its context, means that the consumption of the intoxicating liquor must have impaired the driving efficiency of the motorist, for example, by dulling his vision, or by blunting his judgment, or by making his muscular reactions to communications from his brain sluggish. "

[28] In South Africa whether the driver of a motor vehicle is under the influence of intoxicating liquor at a particular time is a matter which the Court has to determine. Yet in this country a lay witness is entitled to express an opinion on it. In this country the Court receives such opinion of a lay witness that a driver of a motor vehicle was under the influence of intoxicating liquor whilst driving. Such a lay witness in this matter who testified that the Plaintiff was under the influence was Ramoshaba. In the first place it must be recalled that Ramoshaba was not present when the motor vehicle accident in question took place. She only went to the scene after the motor vehicle accident had taken place. Furthermore, she did not see the motor vehicle being driven before it caused the accident. Accordingly, her testimony is restricted to her observations upon her arrival on the scene. Before analysing her evidence, it must be pointed out that there were other witnesses who have not been called to testify, like De Beer, who saw the Plaintiff's motor vehicle and who spoke to the Plaintiff; the paramedics who visited the scene and asked the Plaintiff whether he had sustained any injuries. No one of these witnesses was called and no explanation was provided to the Court why these witnesses were not called.

[29] Ramoshaba testified that upon her arrival at the scene of the motor vehicle accident at 01h30 where she found the Plaintiff, Mr de Beer and other unknown bystanders, she noticed, when she spoke to him, that the Plaintiff was under the influence of intoxicating liquor. She arrived at the

conclusion after she had made the following observations:

29.1 the Plaintiff's motor vehicle had overshot a T-junction, where and when under normal circumstances it could and should have turned to its right at the T-junction. It travelled for about 15 to 20 metres from the stop line to where it was stopped by the wall. This is not in dispute;

29.2 the motor vehicle was lying on its right side against the wall. This evidence was not disputed;

29.3 upon arrival she asked who the driver of the relevant motor vehicle was and the Plaintiff told her that he was the driver. She then spoke to the Plaintiff, that is not denied, and the Plaintiff:

29.3.1 spoke non-stop. She noticed some abnormality in the manner in which the Plaintiff spoke; it is accepted though that she spoke to the Plaintiff for the first time on 3 May 2011. But she was concerned about the Plaintiff's manner of speaking;

29.3.2 she observed gross gait abnormality. The Plaintiff was unsteady on his feet. Although the Plaintiff disputed Ramoshaba's evidence that he was under the influence of intoxicating liquor he did not dispute the evidence that he was unsteady on his feet; and that he was disrespectful. During cross-examination she testified that the Plaintiff was struggling to walk; that he could not walk properly; that he walked like a baby and that she smelt alcohol odour of the Plaintiff's breath. This evidence was not disputed. She testified furthermore during her evidence under cross- examination that the Plaintiff was unable to explain how the accident took place. It is necessary that when a witness gives opinion evidence that someone drove a motor vehicle under the influence of intoxicating liquor, such a witness must set out the grounds upon which his or her opinion is based. See in

this regard R v Jacobs 1940 TPD 142 at page **146-147.** In my view, Ramoshaba has done so.

29.3.3 Mr Omar put it to her that the Plaintiff was shocked by the accident. She disputed this statement and responded that she knows the difference between someone who is shocked and someone who is drunk. According to her the Plaintiff was definitely not shocked but was drunk.

29.4 She also testified that the road in which the accident took place was a straight road, imputing thereby that there was no reason why the Plaintiff caused an accident at that relevant spot;

29.5 Ramoshaba conceded that although the accident took place at 01h00 the Plaintiff's blood sample was only drawn at 03h15.

[30] On the other hand, the Plaintiff denied that he was under any influence of intoxicating liquor. His version was, as I have pointed out earlier, that:

"I took off and my foot slid onto the accelerator. I saw the motor vehicle heading towards the gate in front of me. My motor vehicle capsized."

This explanation is, in my view, unreasonable. It was argued by Mr Omar in his heads of argument, that the Plaintiff testified that: *"instead of pressing the brakes, he pressed the accelerator."*

30.1 the testimony of the Plaintiff does not fully explain how an experienced driver who testified that he had been driving for 38 years, caused the motor vehicle accident in question;

30.2 even if his foot slid onto the gas pedal, an experienced and sober driver should still be able, even without looking at the foot pedals of the motor vehicle, automatically to find the brake pedal of his motor vehicle and stop it from moving. On a question by the Court the Plaintiff testified that he applied the brakes of his motor vehicle but still the motor vehicle did not stop. If this is correct, the motor vehicle should have slowed down when he removed his foot from the accelerator and should have stopped when he applied the

brakes of his motor vehicle. He was unable to explain why, when applying the brakes, the motor vehicle did not stop;

30.3 in his evidence-in-chief he told the Court that he saw that the motor vehicle was heading to the gate. He did not testify that he took any steps, like turning to the right to which side he was supposed to turn, or applying the brakes of his motor vehicle to stop it from approaching the wall or gate. If he had applied the brakes of his motor vehicle it would have stopped. The motor vehicle was as good as new according to his testimony. He did not testify that there was anything wrong with his brakes and for that reason it did not stop when he applied his brakes;

30.4 he was sober, according to him, and should have appreciated that the motor vehicle would collide against the wall if he did not stop it. He was aware or should have been aware that the motor vehicle required human intervention to stop it from colliding with the wall or gate. The inevitable inference is that his skill and judgment normally required to manipulate a motor vehicle had been adversely diminished or impaired as a direct result of something;

30.5 he knew that from the stop line he was supposed, as a sober driver, to turn to his right. He has given no explanation at all why he did not then turn to the right from the intersection. He did not claim that it was dark or that he could not see well or that he had an epileptic seizure or was unexpectedly blinded by something. He knew that on his own version he had stopped at the stop sign and that the next move was to turn to his right. It is also not in dispute that he was driving in a straight road before the T-Junction;

30.6 the Plaintiff was involved in a collision. The collision involving the Plaintiffs motor vehicle may, for some good reason, be an indication of his inability to exercise proper control of his motor vehicle;

30.6.1 during cross-examination by Adv Rip, counsel for the Defendant, he admitted that when Ramoshaba asked him how the accident in question took place, he told him

that he did not know;

30.6.2 during cross-examination he conceded that he was obliged by the terms of the insurance agreement between him and the Defendant to report the accident to the Defendant and to give a full explanation in his report of how the accident took place. He admitted that in that report he did not mention that:

30.6.3 his foot slipped onto the accelerator;

30.6.4 he reached for a cigarette;

30.6.5 he lost control of the motor vehicle while it was moving at 10km per hour. It is the duty of the driver of a motor vehicle to exercise proper control of his motor vehicle. He must make sure himself that the motor vehicle and its equipment are in good order. He himself must not drive his motor vehicle in such a way that he loses control of it. He must refrain from driving his motor vehicle at all if he himself is not in a condition to exercise suitable control over his motor vehicle;

30.6.6 he conceded that the impact was so severe that after the accident the motor vehicle was a write-off;

30.7 it was put to him by Mr Rip that:

30.7.1 the fact that the front part of the motor vehicle was in the yard while the back part was outside and the fact furthermore that the motor vehicle drove through a gate showed that it was highly unlikely that at the time of the collision or immediately before the collision he was driving at 10 km per hour.

[31] In conclusion judging by the extent of the damage to the motor vehicle; the position in which the motor vehicle was found on the scene; the distance the motor vehicle travelled from the stop sign to the wall; the Plaintiff's own evidence that he was sober at the time of the accident and his experience

of having been a driver for 38 years, the Court is bound to conclude that he approached the T-Junction at an unreasonably high speed in the circumstances and finally that he failed to stop at the T-Junction, all due to his skill and judgment normally required to manipulate a motor vehicle having been diminished or impaired at the time by the intoxicating liquor he had embarked.

[32] Mr Omar referred me to paragraph [21] of Minister of Safety and Security v Swart (194/11) [2012] ZASCA 16 (22 March 2012) in support of his argument that the mere fact that the Plaintiff *in casu* smelt of alcohol, does not necessarily mean that his mental faculties and abilities to drive a motor vehicle were so seriously affected that he was not fit to drive. In the aforementioned paragraph the Court stated as follows:

"At the risk of repetition the only evidence on which the Second Appellant decided to arrest the Respondent, is the fact that he smelled of alcohol and that his vehicle had left the road and landed in the ditch. "

The crucial difference between the Swart case and the current case is that Ramoshaba did not only testify that the Plaintiff smelled of liquor and that his motor vehicle had crashed into a wall or gate. In addition, she testified about other factors, like for instance that the Plaintiff was not steady on his feet; he could not walk properly; and that she noticed some abnormality in his speech, that the Plaintiff was rude to her and that the Plaintiff could not explain how the accident took place. The said paragraph [21] sets out more of the indicators looked at by the Courts to determine whether a person drove a motor vehicle under the influence of liquor. This is how the Court continued in the same paragraph:

"There is no evidence that the Respondent was unsteady on his feet,· that his speech was slurred; that he could not walk in a straight line or that his eyes were bloodshot. These are the we/I-known indicators of the person who is under the influence of alcohol. "

[33] The conclusion I have reached, based on the evidence of Ramoshaba,

the manner in which the accident in question took place coupled with the absence of a reasonable explanation by the Plaintiff why and how the accident took place, a conclusion that at the material time of the accident, the Plaintiff was driving his motor vehicle under the influence of intoxicating liquor and that the accident took place because the Plaintiffs skill and driving efficiency had been impaired by the intoxicating liquor which had dulled his vision, blinded his judgment, or made his reaction sluggish and was, for those reasons, unable to exercise proper control over the motor vehicle he was driving.

[34] It is as clear as crystal that when, in the cross-examination of Ramoshaba, Mr Omar referred to the motor accident in question having taken place at 01h00 and the Plaintfif's blood being drawn at 03h15 and furthermore when Ms Ferreira testified that the blood sample should be tested within two hours of the blood sample being drawn, they both relied on the provisions of s 65(3) of the Road Traffic Act 93 of 1996, which provides as follows:

> *"65(3) If, in any prosecution for an alleged contravention of a provision of subsection (2), it is proved that the concentration of alcohol in any specimen of blood taken from any part of the body of the person concerned was not less than 0,05 gram per 100 ml at any time within 2 hours after the alleged contravention, it shall be presumed, in the absence of evidence to the contrary, that such concentration was not less than 0,05 gram per 100 ml at the time of the alleged contravention, or in the case of a professional driver referred to in section 32, not less than 0,02 gram per 100 ml, it shall be presumed, in the absence of evidence to the contrary, that such concentration was not less than 0,02 gram per 100 ml at the time of the alleged contravention.* "

[35] In the first place, and here I agree with counsel for the Defendant, it is not common cause between the parties herein that the motor vehicle accident in question took place at 01h00:

35.1 this factor is not among the common cause factors listed by both counsel;

35.2 Ramoshaba could not have known the time of the accident in question because, as I have pointed out in paragraph 27 *supra,* she only arrived at the scene of the motor vehicle accident after the accident had taken place. On that basis she could not have testified about the time of the accident;

35.3 the provisions of s 65(3) were created for the benefit of the State in criminal proceedings. They create a presumption in favour of the State and not a ground for civil action between civilians. Accordingly, and as argued by counsel for the Defendant, it is clear that s 65(3) is designed to apply to criminal proceedings and not to civil actions between private individuals;

35.4 there is no evidence whatsoever that when the parties concluded their insurance contract as set out in paragraph 3 supra, they had in contemplation the provisions of s 65(3) of the Road Traffic Act;

35.5 as indicated in paragraph 22 *supra,* the expert report of Ms Ferreira was not placed before Court but only a summary of such report was. In that summary nowhere is it stated that the blood sample should be tested within two hours of tis drawing. It was evidence unfairly adduced during the hearing. This was unfair and inadmissible because the Defendant would not have been able to deal with it as its expert witness, Mr Chewe, had already testified and left. The Defendant would, under those circumstances, not be able to obtain its expert witness' comments on the blood sample being tested within two hours after it being drawn from a person.

At any rate under the topic, Absorption from Intestines, the aforementioned authors state as follows:

"It is important to appreciate that only alcohol which had been absorbed into the blood stream has an effect on behaviour." See page 394. They continue at page 395 to state the following:

"However, absorption is generally complete in a matter of 1 to 3

hours, irrespective of the concentration of alcohol and the type of beverage. After absorption is complete, there is an equilibrium between the alcohol concentration in the blood and in the tissues. It is from blood samples taken at this period that certain calculations are often made. Shortly after taking a drink e.g. after 15 minutes, the level in arterial blood will be 40 % to 60 % higher than the level in peripheral venous blood, and this may persist for the first hour of drinking. But after absorption has been completed the alcohol level in venous blood is slightly higher than in capillary, (i.e. arterial) blood. Blood samples should therefore only be taken after equilibrium has been established"

evidence as an expert should be regarded as inadmissible. I accordingly make that finding and reject her evidence.

[37] In conclusion this Court accepts the evidence of Mr Chewe and finds that at the material time the Plaintiff drove his motor vehicle while the alcohol percentage in his blood stream exceeded the statutory legal limit of 0.05 gram per 100 millilitres.

This Court therefore makes the following findings with regard to the stated case:

[37.1] the plaintiff drove the insured motor vehicle under the influence of intoxicating liquor;

[37.2] the Plaintiff drove the insured motor vehicle while the alcohol quantity in his blood stream was over the statutory limit.

[38] It follows therefore that the Plaintiffs claim against the Defendant is hereby dismissed with costs.

P MABUSE
JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Plaintiff:	**Attorney Z Omar**
Instructed by:	**Zehir Omar Attorneys**
Counsel for the Defendant:	**Adv CM Rip**
Instructed by:	**Klagsburn Edelstein Bosman De Vries Inc**
Dates heard:	**28-29 August 2019**
Date of Judgment:	**9 October 2019**