IN THE HIGH COURT OF SOUTH AFRICA

NATAL PROVINCIAL DIVISION CASE NO. 3357/2002

In the matter between:

FRANS ALBERTUS LUPKE **PLAINTIFF**

and

ROAD ACCIDENT FUND **DEFENDANT**

J U D G M E N T

NDLOVU J

Factual Background

[1] In this matter the plaintiff sued the defendant for a total sum of R905 042, 99 in respect of damages resulting from injuries which the plaintiff allegedly sustained in a motor vehicle collision on 12 May 2000 along the Richmond-Ixopo road (R56) between a vehicle driven by the plaintiff and another vehicle driven by the defendant's insured driver.

[2] The plaintiff alleged in his pleadings that the sole cause of the collision was the negligent driving of the insured driver who was negligent in one or more of the following respects:

1. He failed to keep a proper lookout;
2. he drove too fast under the circumstances;
3. he failed to avoid a collision when, by the exercise of reasonable care and consideration, he should and could have done so;
4. he failed to apply the brakes of the insured vehicle timeously or at all;
5. he failed to keep the insured vehicle under proper control;

6. he drove without the consideration of the other road users, namely the plaintiff."

(Paragraph 5 of the plaintiff's particulars of claim)

[3] In response, the defendant denied the plaintiff's allegations and averred, instead, that the sole cause of the collision was the negligent driving of the plaintiff who was negligent in one or more of the following respects:

1. He failed to keep a proper lookout;
2. he failed to keep a safe following distance between his motor vehicle and the insured driver's motor vehicle;
3. he attempted to overtake the insured driver's motor vehicle at inopportune time and place;
4. he failed to avoid the collision when by the exercise of reasonable care and consideration he should and could have done so;
5. he failed to apply the brakes of his motor vehicle or at all;
6. he drove too fast under the circumstances;
7. he failed to keep his motor vehicle under proper control;
8. he drove without the consideration of other road users;
9. he failed to take heed of the insured driver's signal indicating to overtake a truck which was travelling in the same direction;
10. he failed to hoot or give adequate warning to the insured river which may have avoided the collision."

(Paragraph 5 of the defendant's plea, as amended)

[4] By agreement between the parties, the Court separated the issues of liability and quantum and the matter proceeded on the issue of liability only. (Rule 33(4)). In other words, the Court was required to determine whether the cause of the collision was the negligent driving of the insured driver as alleged in paragraph 5 of the plaintiff's particulars of claim (referred to above), or of the plaintiff as alleged in paragraph 5 of the defendant's plea, as amended (referred to above).

[5] Throughout the proceedings the plaintiff was represented by Mr Leppan. The defendant was initially represented by Mr Padayachee who later withdrew and was replaced by Mr Choudree SC. The plaintiff testified and called three further witnesses, namely his wife Jennifer Jane Lupke, Fale Zenzele Dlamini and Bonginkosi Mandla Mbanjwa. On the other hand the

defendant's case was supported by the evidence of the insured driver Eugene Van der Merwe, Sergeant Zindela Patrick Madondo and Mrs Wilna Badenhorst, the vehicle accident reconstruction specialist.

The Plaintiff's Case

[6] The plaintiff told the Court about his relationship with Eugene Van der Merwe ("Van der Merwe") prior to this incident. He said he had known the Van der Merwe's for about three years and had previously sold a farm to them which, however, he later bought back. Van der Merwe had also worked for him as a welder on the farm but at the time of this incident he was no longer in his employ. According to the plaintiff, he and Van der Merwe were therefore in a good relationship and in fact were friends.

[7] He further told the Court that prior to this incident they had been at his (the plaintiff's) house at Langefontein Farm in Richmond. Van der Merwe was selling a boat at the time and on the day in question (that is, 12 May 2000) the plaintiff had people who had come from Durban to have a look at the boat. Van der Merwe fetched them from the plaintiff's house to go and see the boat and later brought them back. At about lunch time (after the Durban visitors had gone) Van der Merwe left the plaintiff's home and the plaintiff followed him, but not very closely. They were both proceeding to Ixopo and would take the Ixopo-Richmond Road (R56), travelling from a northerly to a southerly direction. The plaintiff was travelling in his Isuzu bakkie with registration number NIX3533 and van der Merwe in his Toyota Corolla with registration number NIX634. The plaintiff pointed out that Ixopo was only about 13 kilometres from his house. He further stated that when Van der Merwe was in his house he had asked for mealies from the plaintiff and the plaintiff had given him two bags of the mealies (with a mass of about 50kg each) which Van der Merwe had then placed in the boot of his vehicle.

[8] The plaintiff testified that when he joined the R56 main road he noticed Van der Merwe already proceeding towards Ixopo and following a truck. The

plaintiff proceeded in the same direction. He also added that he was not in a hurry to get to Ixopo. Eventually he caught up with Van der Merwe and followed him about 2 kilometres behind. He said he was travelling at about 50-60 kilometres per hour when he caught up with Van der Merwe and the truck. He estimated the truck was travelling at about 30 kilometres per hour as it was then on an uphill. He had then reduced his speed to about 30 kilometres per hour as well. The three vehicles continued travelling on the uphill until they reached a flat terrain and he then saw Van der Merwe indicating his intention to overtake the truck and at the same time moving slightly towards the right hand side to overtake. However, Van der Merwe quickly came back again behind the truck. Thereafter they proceeded for about another kilometre until they reached another part of the road where it was clear in front and permissible to overtake. According to the plaintiff, at that stage one was able to see about a kilometre ahead and there was no obstruction impeding overtaking. He referred to the photographs contained in the photograph album (Exhibit "A") depicting that the vehicles were travelling from the direction of Richmond towards Ixopo, which was from north to south.

[9] Seeing that it was then clear to overtake the plaintiff signalled his intention to overtake both Van der Merwe and the truck in front of him. He then overtook the vehicles, but suddenly felt, as he described it, a bump on the left front side of his vehicle which was pushed away and it wavered on the road and went off the road towards the right hand side. He had then collided with Van der Merwe's vehicle. The collision took place at the bend almost opposite the entrance to Ferryby Farm, as shown in the photographs in Exhibit "A". His vehicle veered off and collided with the corner of the railings on the southern side of the entrance mouth.

[10] The plaintiff further told the Court that the sugar cane plantation that was seen at the top right hand corner of photographs 1 and 2 of Exhibit "A" were not there on the day of the collision which, according to him, showed that these photographs were taken some time later. He said after the collision he momentarily passed out but soon regained consciousness again. When he came to he saw Van der Merwe's car being pushed from the road behind

his vehicle into the gap that was towards the entrance to Ferryby Farm. He said as he was still seated injured in the vehicle Van der Merwe came to him and said “I am sorry, I didn’t see you” and at the same time putting his coat over the plaintiff.

[11] As a result of the collision the plaintiff sustained injuries which included a broken leg. The ambulance was called and conveyed him to hospital. His wife had also arrived before he was taken away. He was hospitalised from 12 May 2000 until 24 May 2000.

[12] According to the plaintiff shortly before the collision Van der Merwe had not indicated his intention to overtake the truck. The last time Van der Merwe had made such indication was when he had moved slightly to the right as if he was overtaking the truck but had quickly come back behind the truck. Thereafter the plaintiff had followed behind Van der Merwe for the next ¾ kilometres prior to the collision. However he could not say whether Van der Merwe was aware of his presence behind him. He said immediately before he overtook he had flashed his headlights to indicate to both Van der Merwe and the truck that he was overtaking. That was something he always did when about to overtake a vehicle. He did not see the actual collision but only felt a bump. He thought he might have been parallel to Van der Merwe’s motor vehicle when the collision took place.

[13] He testified that the road consisted of only two opposite carriage ways, each lane being approximately 3.4 metres wide. The truck was travelling in its lane and was approximately the same size as the truck seen in photograph 20 of Exhibit “A”.

[14] The plaintiff further stated that he had been driving extra heavy duty vehicles for the past 43 years from the day of the collision. After this collision he was summoned to the Ixopo Magistrate’s Court to face a charge of reckless or negligent driving which however was subsequently withdrawn by the prosecutor.

[15] Under cross-examination the plaintiff stated that he did not make a statement shortly after the accident because he was in hospital. However when the police came to him for his statement in 2003 he declined to make it for the reason that he wanted to first consult with his lawyer.

[16] He regarded Van der Merwe's apology at the scene of the accident as amounting to an admission of guilt on the part of Van der Merwe. He made his statement through his attorney on 5 December 2001 (filed at page 13 of the defendant's bundle of documents – Exhibit "C").

[17] It was put to him that if Van der Merwe indeed apologised at the scene, as the plaintiff claimed, then the plaintiff would have told the police about it when he was charged in connection with this collision in 2003. He said in every case he referred issues such as these to his attorney. In any event, the police also advised him that he was not compelled to make the statement.

[18] He said he was not sure whether the truck followed by Van der Merwe was a timber truck but he said it was a 12-ton truck and solid (enclosed) at the back, not like the timber trucks he was used to. It was put to him that Van der Merwe would say that there were two trucks which he drove past, the first was enclosed which he overtook and then reached another truck which was a timber truck. The plaintiff said he only saw one enclosed truck and that there was never a timber truck on the road at the time.

[19] Discrepancies were pointed out to the plaintiff about paragraphs 2 and 3 of his statement where he stated, firstly, that he was travelling from Ixopo to Richmond and, secondly, that Van der Merwe was travelling behind a timber truck. He said these paragraphs were incorrect. The correct position was that he was travelling from the direction of Richmond to Ixopo and that the truck was enclosed or "covered in" – the same as his which he used to carry timber and cattle in. He further stated that part of his statement was incorrect because it referred to the oncoming lane as dual lane. As the photograph showed, it was a single lane.

[20] The plaintiff further said that he could not recall whether he read his statement before he signed it. At this point he stated that as a result of this accident he had been affected mentally and that his wife and his doctor could testify on that aspect. Even though the collision occurred some four years prior to him giving evidence in Court he still suffered memory loss and "forgot a lot of things". In short, he admitted that the accident had made his memory poor in the sense that he could no longer remember things in the same way as he used to do before.

[21] He also acknowledged that he was not injured as a result of the impact directly caused by the collision but as a result of the impact when his motor vehicle hit the barrier on its right front. The point of impact was at the corner of the railing (as seen in photographs 1 and 28 of Exhibit "A").

[22] He denied Van der Merwe's version (which was put to him) that the photographs in Exhibit "A" were taken on the day following the collision. The plaintiff insisted that the sugar cane plantation seen on the top right hand corner in photographs 20 and 21 of Exhibit "A" were not there on the day of the accident. He also denied that the shattered/broken pole in photographs 20 and 20(a) were as a result of the impact with his motor vehicle. He disputed further that his motor vehicle caused skid marks which *Mr Padayachee* pointed out to him in photograph 20 and 20(a) leading to the shattered pole.

[23] When it was further put to him that the two visitors from Durban were in fact not fetched by Van der Merwe from the plaintiff's house but that the plaintiff had dropped the men at the crossroad from where Van der Merwe picked them up, the plaintiff said that it was possible. In this regard he conceded that he could have made the mistake through his poor memory. He said he had only presumed that the men were collected by Van der Merwe from his farm because their motor vehicle had remained on the farm. They had left his farm prior to Van der Merwe's departure. He also insisted that he gave Van der Merwe two bags of mealies, not one as suggested to him by counsel.

[24] The plaintiff reiterated that he was not in a hurry on this day. He was proceeding to Ixopo to buy cattle feed. He denied having said to Van der Merwe that he was in a hurry to do licence renewal in Ixopo and from there to rush to Pietermaritzburg to attend to other business commitments.

[25] He further stated that when he caught up with Van der Merwe on the uphill he was probably travelling at about 40, 50 or 60 kilometres per hour.

[26] The plaintiff further insisted that Van der Merwe did not overtake the truck the first time round when he had pulled back behind the truck. This was despite the fact that there was sufficient space for Van der Merwe to overtake and there was no oncoming traffic. It was put to him that Van der Merwe did not overtake first time round because there was an oncoming truck, to which the plaintiff responded he did not see that oncoming traffic. He also did not see Van der Merwe shortly before the impact because he was concentrating on the road.

[27] He said prior to Van der Merwe apologising he had asked him: “what have you done to me?” to which Van der Merwe said he was sorry and that he had not seen the plaintiff. It was put to him that he had not stated in his evidence-in-chief that he had in fact asked van der Merwe that question and that it was therefore a made-up story. He denied the suggestion. He also refuted a further proposition that when Van der Merwe came to him he was unconscious in the motor vehicle. He said that it could not be true because Van der Merwe even spoke to him at the motor vehicle.

[28] He denied any suggestion that he was not wearing a seat belt at the time of the collision. His motor vehicle was a 1990 Isuzu LDV (bakkie) and it was written off after the accident. According to his knowledge Van der Merwe’s insurance admitted liability and, through the plaintiff’s attorneys, paid for the motor vehicle which was not insured. Defendant’s counsel pointed out to the plaintiff that Van der Merwe would deny that his insurance paid for the plaintiff’s motor vehicle.

[29] It was put to the plaintiff that according to Van der Merwe his motor vehicle's front wheels were parallel to the truck's rear wheels when the collision occurred as a result of plaintiff trying to overtake Van der Merwe at that stage. The plaintiff's motor vehicle had then veered off straight to the barrier. In response, the plaintiff said that would have been impossible.

[30] Counsel then referred the plaintiff to paragraph 5 of the statement deposed to on 12 May 2001 by the plaintiff's own witness Fale Dlamini (at page 12 of Exhibit "C"). Dlamini was to testify as an eye witness. In his statement to the police Dlamini said:

> "Motor vehicle B (ie plaintiff's motor vehicle) was trying to overtake motor vehicle A (ie Van der Merwe's motor vehicle) and the truck at the time motor vehicle A was overtaking the truck."

[31] The plaintiff emphatically disputed Dlamini's statement on this point. It was pointed out to him that Dlamini's statement was precisely what Van der Merwe would say actually happened. The plaintiff was adamant that it did not happen that way and further expressed that he remembered that aspect very well. Of course, this assertion tended to contradictd his earlier testimony of suffering from memory loss.

[32] The plaintiff acknowledged that he instructed his attorneys to lodge a claim against the defendant and that as such he would have instructed his attorneys as to how the accident happened. In other words, even the sketch plan attached to his claim would have depicted his version of the matter.

[33] He further said he was travelling at a speed of not more than 40 kilometres per hour. However, when it was put to him that Van der Merwe was travelling at between 60 and 65 kilometres per hour and that the plaintiff's speed was faster than that, his (plaintiff's) answer was that he never looked at his speed (presumably referring to his speedometer).

[34] He conceded that it was not possible for the total width of that road to accommodate three motor vehicles of their size parallel to each other.

[35] As to his previous unrelated hospitalisation, the plaintiff stated that he was admitted at St Anne's Hospital in Pietermaritzburg in April 2000 to have a hernia operation. That was just about one month prior to this accident. However, he could not remember telling Van der Merwe on 28 April 2000 that he was on pain medication for back spine. As far as he knew he was not taking any pain treatment at that stage. It was put to him that according to Van der Merwe, he (the plaintiff) was driving with complete negligence which suggested that he was either under the influence of liquor or some medication. He denied both. It was further put to him that if he was momentarily unconscious (which the plaintiff intimated he was) then he could not have known for how long he was so unconscious.

[36] The plaintiff further reiterated that the photographs in Exhibit "A" could not have been taken on the day following the accident. He reckoned that they could possibly have been taken even after three years because they did not depict the scene as it was on the day of the accident.

[37] The plaintiff also acknowledged that he suffered back injuries from this accident. When he was 19 years old he was involved in a motor cycle accident when he fell off the cycle and sustained broken legs.

[38] He further acknowledged that approximately 2½ years prior to the accident he fell into a hold on the farm. However, in none of the prior incidents did he sustain any back or spinal injury. He denied any suggestion that prior to the accident he had gone to Johannesburg for spinal treatment or any other treatment, for that matter. The only problem he had which was bone-related was arthritis but he denied that he had any walking problem prior to the accident. Such condition started after the accident.

[39] It was further suggested to the plaintiff that nowhere in his pleadings was it alleged that Van der Merwe had driven into his (plaintiff's) motor vehicle. The plaintiff replied that such was the issue handled by his attorneys on his behalf and therefore he could not comment to that.

[40] When questioned by the Court on the issue of him becoming momentarily unconscious (in relation to the time when Van der Merwe came to him at the vehicle) the plaintiff said that Van der Merwe came to him before he fell semi-conscious. It was at that stage that he asked Van der Merwe about what he (Van der Merwe) had done to him.

[41] In re-examination, the plaintiff testified that he was never invited to attend the scene of the collision when the accident reconstruction expert Mrs Badenhorst was investigating the matter. The mass of the two bags of mealies he gave to Van der Merwe free of charge on that day was 100 kg (being 2 x 50 kg).

[42] The plaintiff's wife Jennifer Jane Lupke, did not witness the collision herself but was only called to the scene by the plaintiff, so she told the Court. When she arrived at the scene both the ambulance and the police had not yet arrived.

[43] She found the plaintiff slumped on the seat more on the driver's side towards his left. He was complaining of neck pain and some stabbing feeling on the left side. She said she then put her hand underneath the plaintiff to check what was stabbing him. She discovered it was the seat belt fastened under his body. She unhooked the seat belt.

[44] She further told the Court that she knew Van der Merwe whom she said was also at the scene. Van der Merwe came to her and said "I'm sorry" but she simply ignored him. That was all that van der Merwe said. His car was damaged on the right fender.

[45] Mrs Lupke further stated that prior to this accident, the plaintiff had never complained of any back problem. She was aware that the plaintiff was paid by Van der Merwe's insurance a sum of R15 500,00. In April 2000 the plaintiff underwent a surgical operation. But he was not placed on any medication upon his discharge. On the day in question the plaintiff had not

taken any medication. He was also never admitted in hospital for spinal treatment and never went to Johannesburg for any medical treatment.

[46] She knew Margaret Van der Merwe, who was Van der Merwe's mother. She did not know whether plaintiff ever told Mrs van der Merwe that he had back pain but she reckoned that the plaintiff would not have done so because he did not complain of any pains. Further, the plaintiff had no reason to discuss such things with Mrs Van der Merwe. She further told the Court that from her observation the width of the road (both lanes) at the scene could not accommodate the three vehicles concerned, namely, the Toyota Corolla, the Isuzu bakkie and the truck.

[47] Concerning the sugar cane plantation in photographs 20 and 21 of Exhibit "A" Mrs Lupke said she did not pay particular attention as to whether it was there or not on the day of the accident because as she drove along the plantation (where it was) would not have obstructed her view, any way. She only noticed that there were people planting sugar cane on the right hand side of the entrance to Ferryby Farm. However, later she conceded that the sugar cane appearing in photograph 20 was indeed there on the day of the accident. She said if the plaintiff denied the existence of the cane it was because he did not notice it as it did not obstruct his view.

[48] Under cross-examination Mrs Lupke told the Court that the plaintiff had been on his way to Ixopo to pay for the licence renewal when he was involved in the accident. When it was put to her that the plaintiff denied he had gone to pay for the licence renewal she said that was what she could remember.

[49] She further stated that during April 2000 the plaintiff was hospitalised at St Anne's Hospital for pile and hernia operation. He spent less than 10 days in hospital. When he returned home from the surgical operations he did not take any medication. In April 2005 the plaintiff was only taking medication for controlling high blood pressure and uric acid.

[50] Mrs Lupke was asked again about what Van der Merwe had said when he tried to speak to her. This time Mrs Lupke told the Court that in addition to saying "I'm sorry" he had also said something like "I didn't see him". She was asked why she did not state this in her evidence-in-chief. She said she had probably not carefully listened to *Mr Leppan's* question. Counsel put to her that Van der Merwe would deny that he ever apologised to her.

[51] The next witness was Fale Zenzele Dlamini ("Dlamini"). Both on the day of the accident and when he gave evidence he was employed as a driver by one Martin Bam ("Bam") of Kiaora Farm, in Richmond. Dlamini had a Code 10 driver's licence obtained in 1996. He knew both the plaintiff and Van der Merwe. He had a Standard 4 education. He told the Court that he witnessed the accident. He and his two friends and workmates Bonginkosi Mbanjwa and Mphikeleli Dlamini were standing and hitchhiking on the road in the vicinity of the accident. Of course, it transpired later in his evidence that Mphikeleli was in fact his elder brother and Mvanjwa his distant relative. They were hitchhiking to Richmond. As they were so standing he saw three motor vehicles approaching from the direction of Richmond towards Ixopo. There was a truck in front, followed by a Toyota Corolla and then an Isuzu bakkie behind.

[52] Dlamini testified that he then saw the Isuzu trying to overtake the Corolla and whilst it was parallel to the Corolla then he saw the Corolla trying to overtake the truck, hence the collision occurred between the Corolla and the Isuzu. The Corolla got in front of the Isuzu when the Corolla was trying to overtake the truck. The Isuzu then veered from side to side till it struck the railings on the right hand side - on the other side of the road.

[53] The Corolla remained stationary on the road and its engine had gone off. That was when he saw Van der Merwe getting out of it. Whilst controlling the steering wheel he pushed the Corolla towards the entrance to Ferryby Farm outside the road. At this stage the witness said he was standing on the right hand side of the road next to the Ferryby Farm entrance. He then saw Van der Merwe go to the Isuzu, took off his jacket and placed it over the driver

of the Isuzu who was behind the steering wheel. The Isuzu driver was the plaintiff.

[54] The police arrived at the scene. Whilst he and his companions were standing there Van der Merwe asked them to make statements to the police about what they had seen. Indeed, Dlamini made his statement about what he had seen to Sergeant Ngcobo of the SAPS, Ixopo.

[55] Dlamini said it was not true that Van der Merwe was parallel to the truck when the Isuzu tried to overtake both the Corolla and the truck. He was adamant that what he told the Court was what happened and was also what he told the police. If there was a discrepancy between what he told the Court and what appeared in his statement that could be explained by the fact that the statement was taken in English which he could neither speak nor read. The policeman who took down his statement was also Zulu-speaking as the witness. He did not know in what language the statement was written down. However, the police officer read it back to him in isiZulu and he confirmed it as correct.

[56] The truck which was leading the three motor vehicles did not stop but carried on. Although he could not clearly recall the type or make of the truck he thought it was white in colour and enclosed at the back.

[57] The witness was subsequently subpoenaed to attend Ixopo Magistrate's Court. He did not know who was charged. He went there with his two workmates in Bam's (his employer's) vehicle. At court he was called by the prosecutor to whom he explained how the accident occurred. Both Van der Merwe and the plaintiff were also present at court. He said after the court appearance Van der Merwe came to them and appeared very angry, accusing them of having told lies to the prospector. He said Van der Merwe then threatened him, asking him if he knew that he would die. As a result, the witness and his companions returned to the police and reported Van der Merwe's threats. Whilst at the police station Van der Merwe arrived there and the police talked to him.

[58] Under cross-examination Dlamini stated that he did not pass Standard 4 at school. He was born in 1978. He also stated that never worked for the plaintiff prior to 2000 and he did not know whether or not his employer Bam and the plaintiff were friends. He did not know whether they visited each other, although he acknowledged that their farms were neighbouring each other.

[59] He also said he knew both sergeant Madondo and sergeant Ngcobo of Ixopo police station. It was sergeant Ngcobo who spoke to him at the scene of the accident when he made his statement.

[60] Dlamini further told the Court that prior to attending Ixopo Magistrate's Court he and his two companions did not speak to the plaintiff. However, he could not recall whether any one of them spoke to the plaintiff after they had spoken to the prosecutor. He also did not remember when he saw for the first time his statement that he made to sergeant Ngcobo. He recalled that his statement was read and translated to him and he found that there were aspects of it that he disagreed with. However, he did not recall who read and explained his statement to him. He also did not recall whether he made more than one statement to the police. When he was further asked as to when he met with his attorney and counsel for the first time he said he could not remember. He also said he could not recall all these things because he had many things he was thinking about in his life. Those things were disturbing his mind. When the Court asked him about the "things disturbing his mind" Dlamini stated that it was the fact that his fiancé with whom he had one 5 year-old child had passed away the previous year (that is, 2004).

[61] He recalled that he did meet with the plaintiff's attorneys but could not say when that was. He denied that on the previous week his employer Bam took him to the plaintiff's attorneys. He also did not remember whether or not he came to Pietermaritzburg on the previous Tuesday (2 days prior to the day he testified in Court) to meet with plaintiff's attorney.

[62] Again he was asked whether, besides the statement he made to Sergeant Ngcoco, there was any other statement he made to anyone else in connection with this matter. He said he could not recall. He further stated that he met up with plaintiff's attorneys at the scene of the accident some time after the accident but he could not remember when that was.

[63] The witness denied receiving any money from the plaintiff contained in an envelope. On the day they were coming from the Magistrate's Court and threatened by Van der Merwe he (Dlamini) was the driver of the bakkie (belonging to Bam) in which they were travelling. He did not recall whether there was any money in the vehicle ashtray.

[64] He reiterated that he saw the Isuzu overtaking both the Corolla and the truck at the same time. Then the contents of Mbanjwa's statement were put to him which suggested that it was the Corolla which overtook first and whilst it was parallel to the truck then the Isuzu started overtaking both the truck and the Corolla. He disputed this version.

[65] Then Dlamini's statement which he made to sergeant Ngcobo on the day of the accident was read out to him (and translated). He initially admitted everything in the statement as correct including the following:

> "When the driver of Toyota Corolla trying to overtake the truck the driver of Isuzu bakkie tried to overtake both the truck and the Toyota Corolla at the same time. I saw that Isuzu bakkie knocked the Toyota Corolla on its right hand side and went out of the road then hit railing with its front."

Later, however, he disputed the above quoted part of the statement saying that he had not clearly heard the question.

[66] When asked whether he had read anything to refresh his memory he said he could not remember. When asked how he managed to recall events about the accident yet he could not recall many simple things not specifically related to this case he said it was because there were death threats made to him in connection with this matter. He did not recall the colour of both the Corolla and the Isuzu. In fact he said he was poor in colours.

[67] He denied that during lunch break (of the same day he was giving evidence) he had met with and spoken to the plaintiff and his wife. However, after the matter was adjourned for the day the same question was put to him again on the following day. At that stage he said he could not recall whether he spoke to the plaintiff or not. However, he eventually admitted that he did come across the plaintiff during lunch break on the previous day but he could not remember whether they spoke to each other.

[68] The witness Dlamini also admitted that he had come to Court in the plaintiff's motor vehicle. When asked whether Mbanjwa and Mphikeleli got a lift in the same motor vehicle, he did not want to answer that question and said he was only speaking for himself. When the Court directed him to answer the question he then admitted that Mbanjwa and Mphikeleli were also with him in the plaintiff's bakkie coming to Court.

[69] He further said when he saw the Isuzu overtaking the Corolla he did not recall whether the truck was travelling fast or slowly at that stage. He also did not recall whether there was a loud bang when the collision took place.

[70] The witness denied that at the scene of the accident the police asked from the crowd as to who had witnessed the accident. He said it was Van der Merwe who told them to make their statements to the police. He had then made his statement to sergeant Ngcobo. He confirmed that Ngcobo had warned them to tell the truth. He also confirmed that Ngcobo administered an oath to him before he signed the statement.

[71] The next witness Bonginkosi Mzwamandla Mbanjwa ("Mbanjwa") confirmed that he and his companions Dlamini and Mphikeleli were standing on the road hitchhiking for vehicles proceeding to either Richmond or Ixopo when the accident occurred in front of them. The idea was that any motor vehicle which stopped first and offered them a lift they would take. Hence, Dlamini and Mphikeleli were standing on the side of the road with railings (and entrance to Ferryby Farm) (for vehicles to Richmond) whilst the witness was

standing on the other side of the road opposite Ferryby Farm entrance (for vehicles to Ixopo).

[72] He testified that he saw a truck approaching from the direction of Richmond heading towards Ixopo. It was followed by a Toyota Corolla, behind which was an Isuzu bakkie. He said when the Corolla drove past him the Isuzu was already on the other side in the process of overtaking the Corolla. But before the Isuzu finished overtaking the Corolla he saw the Corolla swerving to the right lane where the Isuzu was travelling. Then the two motor vehicles collided behind the truck. The Corolla had not got completely onto the other lane when the collision occurred. The Isuzu then lost control, veered off and collided with the barrier next to Ferryby Farm entrance. The driver of the Isuzu was the plaintiff and the Corolla was driven by Van der Merwe.

[73] He and his companions made their statements to the police at the scene explaining how the accident took place but he did not recall whether he signed his statement. Subsequently, the police came to him in connection with the matter when he was at work on Bam's farm. The police asked whether he was present when the accident took place. He did recall that at one stage he signed the statement but he did not recall when and where that was. He could not say whether it was at the scene or later when he was approached by the police at work. It was brought to his attention that in fact he made his statement only on 24 April 2003 (about 3 years later) and at Kiaora Farm where he was working.

[74] It was further brought to his attention that in the statement he stated that the collision occurred when the Isuzu tried to overtake the Corolla at the time when the Corolla was trying to overtake the truck. To this he said he did understand that what appeared in his statement differed from what he told the Court. He stated that the true version was what he had told the Court. He did not understand English. As far as he was concerned what he told the police was what he told the Court. At school he went up to Standard 5.

Mbanjwa later attended the Ixopo Magistrate's Court. There he explained to the prosecutor about what happened. He was with Dlamini and Mphikeleli (Michael). Thereafter he was told to go and that the case was finalised. He denied that the plaintiff gave Dlamini R100. Dlamini was driving Bam's motor vehicle in which they were travelled to the Magistrate's Court.

[75] Whilst they were at the shop from the Magistrate's Court, Van der Merwe came to them and asked them why they had told lies to the prosecutor. Van der Merwe further asked them if they knew that they would die. Mbanjwa said he became scared because of the threat. From there they proceeded to the police station to report the incident. Whilst they were there Van der Merwe also arrived and said he had been joking.

[76] The witness was shown photograph 21 of Exhibit "A" and asked if the sugar cane appearing in the photograph was there on the day of the accident. He said it was not there.

[77] He further said that prior to meeting with the prosecutor they had not met the plaintiff. However, under cross-examination, Mbanjwa told the Court that on the day he gave evidence in this Court he had got a lift from the plaintiff to come to Court.

[78] His statement to the police was put to him in which, among other things, he told a similar story as that told by Dlamini in his statement and which tended to support Van der Merwe's version. Mbanjwa disputed this and said that he never made such statement to the police. His statement was taken by sergeant Madondo of the SAPS, Ixopo. He stated that he gave his statement to Madondo in isiZulu. Madondo read it back to him in isZulu and the witness confirmed the statement as it was indeed what he had told Madondo. According to him, that was also what he had told the Court. He did not know whether (if there was any discrepancy in his two statements) it meant Madondo was reading from another paper. He also could not remember whether there was some other document which Madondo asked

him to sign. According to him, it meant Madondo recorded what he had not told him.

[79] That concluded the case for the plaintiff.

The Defendant's Case

[80] In his evidence the insured driver, Eugene Van der Merwe confirmed that on the day in question he was the driver of the Toyota Corolla registration number NX634 which collided with the plaintiff's Isuzu bakkie in the vicinity of Ferryby Farm entrance along the Richmond-Ixopo road (R56). He also confirmed that he knew the plaintiff very well and that he once worked for the plaintiff on the plaintiff's farm. He and the plaintiff had been good friends prior to this incident.

[81] The accident occurred after he had been to the plaintiff's house, returning the two men from Durban who had been to him to see the boat he was selling. He asked the plaintiff for a 50 kg bag of mealies which the plaintiff gave him free of charge, notwithstanding that he had offered to pay. He placed the bag in the boot of his car where there was limited space already due to four large steel sheets which he was carrying to use in making up a welding table for himself. There was also his tool box in the boat.

[82] Before he left the plaintiff's house the plaintiff told him that he would be rushing to Ixopo to pay for licence renewal in respect of one of his bakkies. Thereafter he (the plaintiff) would then proceed to Pietermaritzburg for another commitment. Van der Merwe then left the plaintiff's house to drive back home in Ixopo.

[83] As he was driving up the hill on the Richmond-Ixopo road he saw from his rear view mirror the plaintiff's Isuzu bakkie following him approximately 400 metres behind. He drove past an articulated truck. At that stage he did

not see the plaintiff behind him. He drove up until he completed the uphill and reached the flat stretch of the road where he could see approximately 300-350 metres ahead. Eventually he came up behind a truck with enclosed bin, similar to a "refrigerator truck". When he thought it was safe to overtake the truck he indicated his intention to do so and started overtaking. However, when he had just started executing the overtaking manouvre he noticed an oncoming motor vehicle. He applied brakes and returned behind the truck. At that stage he noticed the plaintiff was close behind him. He realised plaintiff was travelling faster than him.

[84] When he reached the safe place to overtake he checked in his rear view mirror and saw the plaintiff still behind him approximately 60 metres away. He then checked on his right side view mirror and satisfied himself it was safe. He then started overtaking the truck. He came in line (parallel) with the truck's rear wheels. That was uphill and reaching a bend towards the right. As he overtook he noticed that the truck was drifting towards the right hand side slightly encroaching on the right hand side lane where his motor vehicle was. As a result, Van der Merwe said he was forced to move slightly further away towards the right. In other words, he said, the truck was "sort of like cutting that bend". All of a sudden he said he heard the rattling noise from the engine of the plaintiff's Isuzu. When he looked up he saw the plaintiff's motor vehicle against the guard railings.

[85] Van der Merwe confirmed his statement before Court which he made to the police. The statement was made only on 6 May 2003 (almost three years after the accident). The statement was also not attested – neither sworn to or affirmed. He told the Court tat at the scene sergeant Ngcobo wrote down what he told him. He further alleged that at his house on the same day of the accident he was given a form to sign by sergeant Ngcobo. He said according to the form he would be admitting that he was guilty. Hence, he refused to sign the form.

[86] It later transpired that Van der Merwe's statement of 6 May 2003 was in fact taken by his attorney and not by the police. At paragraph 4 thereto Van der Merwe was recorded as saying:

> "I indicated my intention to overtake (the truck) and moved to the right lane. I was abreast of the rear wheels of the truck when I saw Lupke (in his vehicle) on my right. Lupke collided with the right side of my vehicle."

[87] Van der Merwe then demonstrated on the sketch plan (Exhibit "B1") his account of how the three motor vehicles were positioned shortly before, during and after the collision. The demonstration basically indicated that the collision occurred when he overtook the truck and the plaintiff tried to overtake both the Corolla and the truck.

[88] After the collision the Corolla remained on the road and had to be pushed away as it was obstructing traffic. Then Van der Merwe said he went to check on the plaintiff. He found the plaintiff behind the steering wheel lying across the seat towards his left hand side. The plaintiff asked him "What have you done Eugene? What have you done!". He said he replied "What have I done, I haven't done anything". He did not observe any visible injuries on the plaintiff. However, the plaintiff appeared stunned and shocked and he did not have his seat belt on.

[89] Van der Merwe said his motor vehicle was damaged from the right back door right up to the right front fender and bumper and front bonnet. The right front tyre was also damaged. He noticed that the Isuzu was also damaged on the right hand side and the driver's door was even ripped off.

[90] On 31 March 2003 he met Mrs Badenhorst, the accident reconstruction expert, at the scene of the accident. He told her how the collision occurred and he showed her certain photographs depicting the scene (Exhibit "A" pages 11-16, containing photographs 20-31).

[91] Van der Merwe further told the Court that the photographs 20 to 31 in Exhibit "A" were taken by his mother Mrs Van der Merwe who went to the scene with his father (then deceased) two days after the accident. Van der

Merwe himself was not present at the scene when these photographs were taken. The man appearing in photograph 21 wearing a cap and a blue and white diamond shaped jersey was his late father. He said the accident occurred on a Friday. Then on the following day (Saturday) he took his parents to the scene but no photographs were taken on that day. The parents then went alone to the scene on Saturday to take photographs.

[92] He confirmed that subsequently the plaintiff was charged with reckless or negligent driving and appeared at the Ixopo Magistrate's Court. However, when he went there the prosecutor informed him that the witnesses had changed their stories. Hence, the case against the plaintiff was withdrawn. He said he was upset with that outcome and also with Dlamini and two companions for having changed their stories to the prosecutor. He saw them in Bam's vehicle proceeding to a shop. He confronted them and asked why they had lied to the prosecutor He said the third man Mphikeleli indicated he was disassociating himself from Dlamini and Mbanjwa and he even got out of the vehicle saying he had nothing to do with what the other two were saying. Then Dlamini and Mbanjwa accused him of having threatened them with a firearm, which he never did.

[93] Van der Merwe alleged that whilst he was at the motor vehicle driven by Dlamini he had seen a wad or roll of bank notes in the ashtray. He further testified that when sergeant Ngcobo interviewed Dlamini and Mbanjwa at the scene he was closeby. He heard briefly what Dlamini said when explaining how the collision occurred. Dlamini's statement in Exhibit "C" (page 18) was read out to Van der Merwe. He confirmed that indeed Dlamini's statement accorded with his (Van der Merwe's) own version and that it also accorded with what he heard Dlamini tell sergeant Ngcobo at the scene. Dlamini was speaking to Sergeant Ngcobo in isiZulu and Van der Merwe claimed that he was also fluent in isiZulu although "not 100%." He was unable to hear clearly how Mbanjwa described the events when making his statement to sergeant Ngcobo at the scene.

[94] Van der Merwe was then put under cross-examination. Concerning the issue of whether or not his insurance paid for the plaintiff's vehicle he said he had no knowledge about those things which were handled by his mother for him. It was put to him that his insurance paid out the sum of R15 500,00 and that the effect of that was that Van der Merwe was admitting liability. He said his mother had actually queried the insurance for paying out.

[95] He conceded that before he overtook the truck he had realised that the plaintiff wanted to overtake him and the truck. It was put to him that given the fact that his motor vehicle (the Corolla) was carrying a 50kg bag of mealies and four metal plates weighing almost the same mass (approximately 50kg) then the Corolla's performance capacity was compromised and in those circumstances it was up to Van der Merwe to allow the plaintiff who according to Van der Merwe was in a hurry racing to get to Ixopo, to pass the Corolla and the truck. Further, that if Van der Merwe had done so the collision would not have occurred. Van der Merwe replied that he did not deal with "if" situations.

[96] He also said that when he saw money in the ashtray he suspected that the plaintiff might have bribed the witnesses to change their statements. However, he did not go and report to the police about his suspicion because it was something he could not prove. In any event, he said he reported to the prosecutor that he had information that some person had given something to the witnesses in order to change their stories. He also reported to the prosecutor about the money he saw in the ashtray. The prosecutor said nothing could be done because the money could have belonged to the witnesses after all.

[97] Van der Merwe further stated that the plaintiff's Isuzu was out of control even before the collision. It was pointed out to him that this was never put to the plaintiff during his cross-examination by the defendant's counsel.

[98] Van der Merwe also confirmed that the width of the entire road could not accommodate all three vehicles at the same time standing parallel to one

another, that is, the truck, the Corolla and the Isuzu. It was put to him that from his own version the truck was drifting towards the right and had moved approximately half a metre into the right lane and that he therefore ought to have withdrawn from overtaking.

[99] Inspector Zindela Patrick Madondo (who was a sergeant at the time of the incident) told the Court that he received an instruction to take a statement from Bonginkosi Mbanjwa which he duly did on 24 April 2003, in connection with this matter. According to his recollection he took the statement at Mbanjwa'a place of work at Kiaora Farm. They were only two at the time and there was nobody else present. He did not know Mbanjwa prior to that day. Mbanjwa's original statement was shown to him, which he confirmed as being the statement which Mbanjwa made to him on that day. Mbanjwa was relating his story in isiZulu which the witness translated and reduced to writing in English. Thereafter the statement was read back to Mbanjwa in isiZulu and he confirmed it as correct. That was the procedure applied at the police station whenever a person made a statement in isiZulu.

[100] When he was questioned, in cross-examination, as to why he had taken some three years to take the statement from Mbanjwa, Inspector Madondo said he did not know from the two previous investigating officers who had been involved in the matter. He took over investigation of the case on or about 6 January 2003. Dlamini's statement was taken on the day of the accident, that is, 12 May 2000. He conceded that it was possible that he would have read Dlamini's statement in the docket before taking Mbanjwa's statement. However, the witness said it was not possible that he was influenced by Dlamini's statement when he took Mbanjwa's statement because, as he put it, he was not favouring anyone.

[101] Sergeant Joseph Tatazela Ngcobo confirmed that he attended the accident scene on 12 May 2000 and, among other things, he took a statement from Fale Dlamini at the scene. He knew both the plaintiff and Van der Merwe in the area prior to the accident. Dlamini made the statement to him in isiZulu which the witness translated into English when he recorded it. He read it back

to Dlamini who confirmed that it was correctly recorded before he signed it. Thereafter Ngcobo drew a sketch plan and key to it and also compiled the accident report.

[102] Under cross examination Ngcobo excluded any possibility that he might have misunderstood Dlamini when he took the statement. He did not recall Van der Merwe telling him that the plaintiff's Isuzu went out of control prior to the accident. In any event, Van der Merwe had refused to give him a statement about how the accident happened.

[103] Van der Merwe's mother, Margaret May van der Merwe, told the Court that on Saturday (13 May 2000) her late husband and van der Merwe had gone to the collision scene in order for her husband to take measurements on the road. Then on Sunday (the 14th) she proceeded to the scene in company of her husband to take photographs of the scene. She confirmed that her husband was appearing in some of the photographs, such as photo 21. She took the photographs on the directions of her husband. Van der Merwe was not present at the scene when the photographs were taken.

[104] Mrs van der Merwe further testified that she was not aware of any insurance claim by the plaintiff. She did not instruct her insurance company to pay the plaintiff's claim. At some later stage, however, she was informed by her attorneys that the plaintiff's insurance claim had been settled and she queried this.

[105] It was accepted between the parties that Mrs Wilna Badenhorst ("Badenhorst") was indeed a vehicle accident reconstruction specialist based in Johannesburg. She told the Court that in her investigation and determination of accident reconstruction analysis she depended largely on information such as (1) the damage state of the vehicles involved, (2) marks on the road surface, if any, and (3) position of motor vehicles and debris. She would then compile her report.

[106] Badenhorst testified that she was instructed by attorneys representing the plaintiff to investigate this matter and compile a report, which she did. She attended the accident scene on 31 March 2004 where she met the defendant's attorney, Van der Merwe and his mother. Van der Merwe told her how the collision occurred. She requested van der Merwe to indicate certain points to her in relation to the accident. She had also been furnished with the accident report form completed by sergeant Ngcobo.

[107] She further told the Court that she was shown black and white copies of photographs depicting the damage to the Isuzu bakkie only. In this regard, her Report read thus:

> "The relative minimal contact damages to the left hand side of the Isuzu LDV are concentrated to the left front fender and to the left front of the mudguard. No photographs depicting the damages to the Toyota Corolla have been made available to the author. The author was however informed by the Insured driver at the time of the site inspection that the right hand side of his Toyota Corolla sustained contact damage approximately from the right rear door onwards (i.e. towards the front)." (paragraph 5 of the Report)

[108] She told the Court that it would not be correct for the plaintiff to have stated that he was travelling at 30 kilometres per hour at the time of the collision. In her opinion the plaintiff was travelling at a much higher speed given the damage both to the Isuzu and the Armco barrier. She reckoned that much energy would have been required to effect that damage. The width of the driveable road area (between centre line and Armco barrier) was 4.6 metres (that is, 3.4 plus 1.2 metres) which did not allow enough space for both the Isuzu and the Corolla to travel side by side.

[109 The witness was shown the faint marks (alleged be skidmarks) on photos 20 and 20(a) of Exhibit A. She stated that the skidmarks were no more there when she visited the scene, hence she could not measure the distance from the yellow line to the skidmarks. She said it was clear on the photograph that the tyre marks lead up to the Armco barrier. She further stated that, based on the apparent skidmarks in the photograph, she would say that they were probably caused by the Isuzu and that the driver of the Isuzu (that is, the

plaintiff) must have applied brakes after the impact. She explained that, based on the "typical reaction time of approximately 1.6 seconds" (presumably a scientific formula), she had then done a calculation and had come to the conclusion that the plaintiff most probably applied brakes some 28 metres prior to the start of the skidmarks.

[110] Badenhorst also concluded that the collision occurred somewhere prior to the beginning of the entrance to Ferryby Farm but she could not say exactly where it took place. She further concluded that the probable cause of the collision was rather as described by Van der Merwe than by the plaintiff.

[111] Under cross examination, Badenhorst conceded that if the insurance paid the plaintiff and not Van der Merwe that would be inconsistent with her findings. She could not explain why the plaintiff was not present at the site inspection, save to say that she was not responsible for the attendance arrangements. She conceded that if the plaintiff was present she would have received a more balanced picture of how the accident occurred. She also could not dispute the suggestion that the skidmarks that were shown to her could have related to another matter altogether. She further stated that had she got information of damage to both vehicles she would have been able to determine the angle at which they collided. In any event, she told the Court that the damage sustained to the left front of the Isuzu and what "was known to (her)" in relation to damages to the Corolla was consistent to the versions of both van der Merwe and the plaintiff.

[112] This was then the summary of the case for the defendant.

[113] The following facts were either common cause or not seriously placed in dispute:

113.1 On 12 May 2000 at about midday a collision took place along the Richmond-Ixopo road (R56) in the vicinity of an entrance road leading to Ferryby Farm between the vehicle driven by the

plaintiff with registration number NIX 3533 and the vehicle driven by the insured driver, Eugene van der Merwe, with registration number NIX 634.

113.2 The vehicles were both travelling from the northerly towards the southerly direction. (that is, from Richmond to Ixopo direction).

113.3 The truck which the aforesaid vehicles had been following immediately prior to the collision did not stop after the collision.

113.4 The part of the road where the collision occurred -

113.4.1 was tarmac and marked with a broken centre line and a side emergency yellow line;

113.4.2 had a single carriage way on each opposite side;

113.4.3 had a shallow uphill curve towards the right ; and

113.4.4 had the width of approximately 4.6 metres (being about 3.4 metres between the centre line and yellow line plus 1.2 metres between the yellow line and the outside edge.

113.5 After the collision the plaintiff's vehicle veered off the road and collided with the guard rail on the opposite side of the road, which was on the southern side of the entrance to Ferryby Farm.

113.6 The plaintiff sustained certain injuries as a result of the collision.

113.7 The height of the sugar cane growing in the adjacent fields (as seen in the top right hand corner in photographs 20 and 21 of Exhibit A) did not obstruct the view or vision of either the plaintiff or the insured driver on the day of the collision.

113.8 The criminal charge of reckless or negligent driving against the plaintiff was subsequently withdrawn by the State after the prosecutor had consulted with the State witnesses who became the plaintiff's witnesses, namely, Fale Dlamini and Bonginkosi Mbanjwa.

[114] The underlying issue for determination was whether there was negligent driving on the part of either driver which was the sole cause of the collision or, alternatively, whether there was contributory negligence on the part of each driver which resulted to the collision and, if so, to what extent.

The Law, Analysis and Evaluation of Evidence

[115] In terms of section 17(1) of the Road Accident Fund Act 56 of 1996, the defendant is "obliged to compensate any person (the third party) for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself … , caused by or arising from the driving of a motor vehicle by any person at any place within the Republic, if the injury … is due to the negligence or other wrongful act of the driver or of the owner of the motor vehicle" concerned.

[116] The onus was on the plaintiff to show, on a balance of probabilities, that the driving of the insured driver was a direct cause of the plaintiff's injuries aforesaid, or that such injuries were causally connected with the driving of the insured driver at the relevant time, and that such driving was, therefore, a *sine qua non* thereof. (See *Barkett v S.A. National Trust and Acceptance Co. Ltd* 1951 (2) SA 353 (A) at 365; *Wells v Shield Insurance Co. Ltd* 1965 (2) SA 865 (C) at 868-871.)

[117] With regard to the alleged negligent driving of the insured driver, the plaintiff had to prove that:-

117.1a reasonable person in the position of the insured driver –

117.1.1would foresee the reasonable possibility of his conduct causing injury to another person in his or her person, such as the plaintiff, and

117.1.2would take reasonable steps to guard against such occurrence, and

117.2 the insured driver failed to take such steps.

(See *Kruger v Coetzee* 1966 (2) SA 428 (A)).

[118] However, even if the insured driver was negligent in his driving and caused the collision that would not exonerate the plaintiff from contributory blame. For him to be exonerated completely the evidence must show that, objectively speaking, he was in such a position that he could not reasonably have done anything to avoid the collision. The test to be applied is an objective one. In other words, the enquiry is whether a reasonable man in the position of the plaintiff would have acted differently and avoided the collision. In a *dictum* in *Union Government (Minister of Railways and Harbour) v Buur* 1914 (AD) 273 the Court stated:-

> "Men faced in moments of crisis with a choice of alternatives are not to be judged as if they had had both time and opportunity to weigh the pros and cons. Allowance must be made for the circumstances of their position." (at 286)

[119] Again in *Samson v Winn* 1977 (1) SA 761 (C) where the appellant lost control of his motor vehicle which then crashed into another motor vehicle, whilst he was trying to avoid a blow being delivered to him with a panga by a man standing in the middle of the road, the Court stated:

> "This is, to my mind, almost a classical case of a sudden or unexpected emergency; and the conduct of the defendant must be judged according to the standards of a reasonable man placed in similar circumstances." (at 766D-E)

[120] Quite correctly, *Mr Leppan* conceded that the plaintiff's case contained some imperfections. However, he submitted that those imperfections related to detail and not to substance. Indeed, this was one typical case where the Court hardly found any satisfaction in the majority of witnesses who testified. This was a pity. Virtually all the persons who supposedly testified as eye-witnesses to the collision were, for whatever reasons, rendered poor and unsatisfactory – indeed, sometimes even blatantly untruthful - and, therefore, unreliable witnesses.

[121] The plaintiff was about 64 years old (born 12 July 1938) when he testified. In the witness stand he appeared physically weak and frail, a condition which could probably be attributed to a combination of factors,

including the effects of the accident under consideration, his age and confessed pre-existing physical ailments.

[122] He made his statement to the police on 5 December 2001 - slightly over 1½ years after the collision. When it transpired, during cross-examination, that certain aspects of his evidence in Court were inconsistent with his statement to the police (sometimes even inconsistent with objective facts, such as stating in the statement that the road was dual-lane when in fact it was single-lane) he revealed to the Court that the accident affected him mentally in that since then he was suffering from memory loss. When he was further asked to explain what he meant he categorically stated (and the following appears on the record):

> "What do you mean by the accident has affected your memory positively? … Well it – I forget a lot of things. I forget a lot of things.
>
> It has made your memory poor? … Yes.
>
> COURT: Sorry, you said yes, it has made your memory poor ? … Poor, yes.
>
> MR PADAYACHEE: In other words, Mr Lupkhe (*sic*), you cannot remember as you previously were used to? … That is correct."

(Page 68 lines 16 – 23 of the record)

[123] That being the case and notwithstanding the plaintiff being an honest witness (as he appeared to be) in the witness stand, the Court was duty bound to consider and evaluate his evidence with great circumspection. In this regard, therefore, the Court was inclined to accept as credible and reliable the evidence of the plaintiff only to the extent that it was supported by other independent and credible evidence, objective facts and inherent probabilities.

[124] It would appear that the plaintiff did not actually see the collision happening; and, indeed, not even immediately prior thereto. His evidence as to what happened appears in the record thus:

> "I then – because I saw Van der Merwe was following the truck and I could see well ahead of me, I indicated with my right indicator that I was going to

> pass and I flashed my lights, which is a thing that I always do when I overtake. … I was going to overtake both him and the truck. … I proceeded to overtake … I felt a bump on my right hand – a bump on my left hand front of the truck, which pushed – sorry. … My van, my Isuzu, sorry. … I actually sort of half lost control, because it actually pushed it and it wavered in the road, you know this bump wavered the truck. … My truck veered then I collided with the corner of the barrier rail on the south side of the entrance."

(Pages 18-19 of the record)

[125] There was no indication of what speed the plaintiff was travelling at the time of the collision. He said he did not look at the speed (presumably referring to the speedometer). However, in his evidence he stated that he was travelling at about 50 to 60 kilometres per hour when he was following van der Merwe and the truck on the uphill before the bend but at some point he reduced his speed to 30 kilometres per hour. (Page 14 of the record). However, this appeared to be the stage when, according to the plaintiff, van der Merwe had not even made the first attempt to overtake the truck but which he quickly aborted. In his statement dated 5 December 2001 he only mentioned the speed of 30 kilometres per hour.

[126] In any event, it does not appear to me that at the time of the collision the plaintiff was travelling at an excessive speed in the circumstances. Badenhorst testified that the extensive damage sustained by the Isuzu on its right hand side indicated that the plaintiff was probably travelling at a much higher speed. I do not know what Badenhorst meant by a "much higher speed". However, there was no suggestion that the speed which the plaintiff was travelling at was not within the legally permissible speed range in that part of the road and, in particular, given the fact that the plaintiff must, and should, have necessarily increased his speed beyond that of the Corolla and the truck to enable himself to successfully overtake those two vehicles in front of him.

[127] What was significant was the fact that the damage to the left hand side of the Isuzu (the side where the collision impact occurred) was relatively minor, namely, only a somewhat gliding dent on the rear bin panel and the

front fender (as shown in the photographs). It appeared not in dispute that the extensive damage on the right hand side of the Isuzu (as shown in the photographs) was caused by the Isuzu colliding with the guard rail.

[128] Reliable information as to the angle at which the two vehicles collided would also have been of paramount importance in terms of determining whose version was more probable in relation to the cause of the collision. An objective determination in this regard would require, in the main, the examination of damage to both vehicles. Regrettably, it would appear that the police officer who attended the scene, namely, sergeant Ngcobo, did not arrange for photographs of the collision scene, including the position of, and damage to, both vehicles, to be taken on the same day. No plausible explanation for this omission was proffered by Ngcobo when he testified for the defendant. It was, in my view, a material omission in a matter of this nature and this could not be blamed on the plaintiff.

[129] After all, it was significant that the plaintiff made every effort on his part to ensure that the damage to his vehicle was seen by all when he had photographs taken of his damaged vehicle. In this way he showed that he had nothing to hide in this regard. He was apparently not concerned about any adverse inferences that could possibly be drawn from the nature of the damage on his vehicle. Indeed, to my mind, only a favourable inference should, instead, be drawn.

[130] On the other hand, no reason whatsoever was advanced as to why it was not possible to make available photographs, or other real evidence, showing the damage caused to Van der Merwe's vehicle. I will revert to this aspect later on when I deal with the defendant's case.

[131] Having considered the matter, I am satisfied, on the probabilities, that the damage on the left hand side of the plaintiff's vehicle was consistent to have been caused by the collision (between the two vehicles) as described by the plaintiff. In other words, it was more probable that Van der Merwe started overtaking the truck when the plaintiff''s vehicle was already in the process of

overtaking both Van der Merwe's Corolla and the truck. It further appears to me that when the plaintiff overtook the Corolla it was permissible and safe for him to do so. Once he overtook he had obviously landed his vehicle on the opposite lane and thus no longer directly behind the Corolla. Therefore, at that stage the question of whether or not he left a safe following distance fell away.

[132] The evidence of both Dlamini and Mbanjwa calls for rejection outright. They were not at all truthful witnesses. To put it plain, they were, in my view, blatant liars. They both made sworn statements to the police which directly contradicted what they told the Court in their evidence. I do not accept *Mr Leppan's* submission that the statements they made to the police were, after all, ambiguous and equivocal. Granted, the statements revealed a degree of poor proficiency in the English language on the part of the police officers who took the statements. However, I am not concerned about that aspect of the matter. The Court was not involved in the exercise of meticulously marking the police witnesses for grammatical errors in the statements they took from Dlamini and Mbanjwa. I was only interested in the import intended to be conveyed in the statements. I am satisfied that the statements substantially reflected, with a reasonable degree of certainty, what the witnesses intended to convey. In both instances these witnesses (in their statements to the police) clearly implicated the plaintiff and completely exonerated Van der Merwe. There can be no doubt in my mind that they intended to do just that, regardless how poorly thereafter the police officers proceeded to record the statements.

[133] Dlamini made his statement to sergeant Ngcobo at the scene shortly after the accident. It may be significant to note that Dlamini (1) knew both the plaintiff and Van der Merwe prior to the accident; (2) at the time he made the statement only Van der Merwe was present at the scene and the plaintiff had been taken to hospital; and (3) he (together with the other two companions) was told by Van der Merwe to go and make the statement to Sgt Ngcobo. In these circumstances, it seems to me, a reasonable possibility could not be excluded that Dlamini was, directly or indirectly, influenced by Van der Merwe to state what he did in his statement.

[134] Similarly, on the other hand, a reasonable possibility could also not be excluded that when Dlamini changed his story to the prosecutor at Ixopo Magistrate's Court and here in this Court he had, directly or indirectly, been influenced by the plaintiff. In this regard I made the following observations: (1) After he had made his statement to the police, Dlamini had returned to work on Bam's farm which was only adjacent to the plaintiff's farm and as such there was the strong possibility, if not a high probability, that Bam and the plaintiff were friends and this relationship would have had some impact on Dlamini. (2) Dlamini and the other two companions travelled to the Magistrate's Court in a vehicle belonging to Bam who was, as indicated, a probable friend of the plaintiff. (3) At least on one occasion Dlamini and Mbanjwa travelled from Richmond to the Court (in Pietermaritzburg) in a lift on the plaintiff's vehicle together with the plaintiff. It was therefore entirely difficult for the Court to determine which of Dlamini's two diametrically opposed versions was the truthful one.

[135] A further reasonable possibility was that Dlamini never actually witnessed how the collision occurred in the first place. Indeed, the mere fact that he was in the immediate vicinity at the time was not (especially given the serious material contradiction in his version) necessarily sufficient to reliably conclude that he actually saw the collision happening. In these circumstances I am inclined to accept the latter scenario to be the position with respect to Dlamini and reject his evidence accordingly. In any event, I would still have been inclined to question Dlamini's honesty, credibility and reliability, given his demeanour in the witness box when, during cross examination, he pretended not to recall many aspects of the matter and conveniently gave the excuse that his mind was disturbed by the recent death of his fiancé.

[136] Like in Dlamini, a similar situation probably obtained in relation to Mbanjwa. He also did the same when he changed his story (as appearing in his statement to the police) to the prosecutor at Ixopo Magistrate's Court and when he gave his evidence in Court. His statement was taken by Inspector Madondo only on 24 April 2003 – some three years after the accident.

Madondo conceded that after he had taken over investigation of the case (the reckless or negligent driving matter) it was possible that he had read Dlamini's statement (which was in the docket in his possession) before taking Mbanjwa's statement. This factor alone, besides anything else, could have reasonably possibly influenced Madondo to taking Mbanjwa's statement in a manner that ensured conformity to Dlamini's. Hence, I am equally inclined to reject Mbanjwa's evidence as well.

[137] Although she attempted to do so, there was nothing, in my view, which the plaintiff's wife (Mrs Lupke) stated which was of any material or relevant bearing. I am satisfied that her evidence did not advance the plaintiff's case any further.

[138] According to Van der Merwe, the insured driver, it was the plaintiff who tried to overtake both his (Van der Merwe's) vehicle and the truck at the same time when Van der Merwe was already in the process of overtaking the truck. This was just the opposite of the plaintiff's version. Generally speaking, this was a possible scenario; but the question was whether it was probable that it happened here. Firstly, as stated earlier, absent any tangible and reliable evidence as to the nature of damage caused to Van der Merwe's vehicle, it was difficult to have a credible basis on which to sustain a finding as to the probable angle at which the two vehicles were at the time of impact. This position was also confirmed by the defendant's own expert witness, Badenhorst.

[139] Significantly, there seemed also to be some inconsistency between what Van der Merwe told the Court and what he stated in his unsworn and unaffirmed statement dated 6 May 2003 but which he confirmed in Court as correct. (Page 140 lines 5-12 of the record). According to his statement aforesaid the Isuzu first collided with the Corolla and thereafter collided with the guard rail; whereas according to his evidence in Court the Isuzu first went out of control, then struck the guard rail before coming back to the road to collide with the Corolla.

[140] The aforesaid inconsistency in Van der Merwe's versions is demonstrated hereunder.

140.1 In the statement of 6 May 2003 he stated, in part:

> "I indicated my intention to overtake and moved to the right lane. I was abreast of the rear wheels of the truck when I saw Lupke (in his vehicle) on my right. Lupke collided with the right side of my vehicle.
>
> I immediately braked and brought my vehicle to a halt. Lupke's vehicle then collided with the guard rail" (Underlined for emphasis)

(Paragraphs 4 and 5 of the statement aforesaid)

140.2 In his evidence-in-Chief he described the position immediately prior to the collision as follows:

> "You say the truck came towards the right? … It came towards my left side of the vehicle.
> It came towards its right? … No he (the truck driver) came towards the right, but that would have been on the left – my left side.
> Yes? … At that stage I heard Mr Lupke motor … (intervention)
> You heard Mr Lupke's what? … The motor of his Isuzu bakkie. … The engine, ja. …
> Yes? … And then as I looked to the right and I saw Mr Lupke right against the guard rail.
> COURT: You saw him where? … His vehicle was right, almost against the guard rail and the left wheel was – his left wheels were on this side of the yellow line, across there, so he was straddling." (Underlined for emphasis)

(Page 94 lines 9-22 of the record)

And later, in further examination-in-Chief:

> COURT: Now at what stage was the Isuzu in that area or at that spot which you have drawn? … Well he was against the guard rail at that stage, …
> Was it shortly before or after the accident? It was shortly before the accident.? (Underlined for emphasis)

(Page 150 lines 18-23 of the record)

And, under cross examination:

> "Before the accident you said he was out of control. … No, what I am trying to say is when he was against the guard rail, when he tried to

> come back in, that is when he came and hit me." … (Underlined for emphasis)
> (Page 284 lines 22-24 of the record))

And further on:

> Right, so his speed caused him to lose control of this vehicle, even before it struck you. Correct? That's your evidence. … He was running against the guard rail and his speed caused him to lose control of the vehicle.
> Even before it struck you. … Well I wouldn't say at that point, you know. He had no choice, but that was the only way out.
> Answer the question please. His speed caused him to lose control of his vehicle, even before it struck your car. … Well I presume so.
> That's what you are saying, correct? … That's correct.
>
> (Page 285 lines 7-14 of the record)"

[141] What was significant was the fact that it was never put or suggested to the plaintiff, in particular, or any of his witnesses, generally, that the Isuzu first went out of control and struck the guard rail before coming back to collide with the Corolla. In my view, this was a material contradiction which could never have been an innocent or inadvertent mistake on the part of Van der Merwe. It simply added to proof that he was not a truthful and reliable witness. He also seemed, very strangely indeed (on account of being a matured adult himself), to be so dependent on his elderly mother that on a number of occasions he failed to answer questions but, instead, simply stated that it was his mother who could answer the question because she had handled every thing for him.

[142] Further, in his evidence Van der Merwe stated, among other things, that the plaintiff had told him (whilst they were still at the plaintiff's home) that he (the plaintiff) was "rushing" or "racing" to get to Ixopo to obtain a vehicle licence renewal and that from Ixopo he would proceed to Pietermaritzburg for other commitments. Whilst on the road all the time he could see the plaintiff following him. He knew he was being followed by a person who was in a hurry to get to Ixopo. For his part, he was not in a hurry to get home. He was driving a smaller and less powerful car which was loaded in the boot with four huge and heavy steel plates plus at least one 50kg bag of mealies. That being the case, it would indeed have been more convenient and safer if he simply allowed the plaintiff to overtake. I do not comprehend how he failed to see the

plaintiff overtaking if he had had a proper look out on the road using both the rear-view and right-side-view mirrors, and given the fact that he was aware of the "racing" plaintiff behind him.

[143] In any event, given the relative narrow size of the road (consisting of only two single opposite carriage ways) it was hard to imagine, in the circumstances, that the plaintiff would have commenced an overtaking manoeuvre seeing very well that Van der Merwe's vehicle was already in front of him having started to overtake the truck, as Van der Merwe claimed was the case. To my mind, the probabilities are that when Van der Merwe tried to overtake the truck the plaintiff's vehicle was already on the opposite lane in the process of overtaking both Van der Merwe and the truck. Hence, at that stage Van der Merwe got onto the plaintiff's way. In other words, I am satisfied, on the evidence and probabilities, that Van der Merwe never used his rear- and/or right side-view mirrors properly, or at all, immediately before he embarked on his fateful attempt to overtake the truck. This amounted to negligent driving on his part.

[144] It was common cause that there was no oncoming vehicular traffic on the road at the time. It was not in dispute that there were no other objects obstructing the plaintiff's view or vision ahead of him in that vicinity. It was also permissible on that part of the road to overtake when safe to do so.

[145] I am satisfied that sergeant Ngcobo and inspector Madondo told the truth in relation to the contents of the statements they respectively took from Dlamini and Mbanjwa. However, as regards the veracity of the statement itself in each case that was indeed another issue. In the latter regard I have already made a finding that Dlamini and Mbanjwa were not truthful witnesses and their evidence was rejected.

[146] Badenhorst told the Court that there were three main factors on which a specialist such as herself relied upon in investigations of this nature, namely: (1) the nature of damage to both vehicles in order to determine the angle at which the vehicles collided; (2) marks or other debris on the road

surface, if any; and (3) the final resting positions of the vehicles concerned. It seemed, however, that in the present instance it could not credibly and reliably be said that she had any of this information at her disposal. She attended the scene to conduct the inspection-*in-loco* on 31 March 2004 – almost four years after the collision. Only present at the scene were Van der Merwe, his mother and his attorney. She asked Van der Merwe to relate to her how the collision occurred and to do the relevant pointing out, which Van der Merwe duly did. It was basically on this information furnished to her by Van der Merwe that she compiled her report. There was no reason advanced as to why the plaintiff was not invited to attend at the scene in order to indicate his side of the story and thus enable Badenhorst to make a balanced and more reliable report. Significantly, Badenhorst conceded to the reasonable possibility that, in the circumstances, her report could possibly be the fruit of a poisoned tree.

[147] In any event, I found Badenhorst's evidence interesting when she said:

> "The damage sustained to the left of the LDV of Mr Lupkhe (*sic*) and what is known to me about the damage sustained to the Toyota Corolla of Mr Van de Merwe is consistent with both versions."

(Page 37 lines 10 – 13 of the record)
However, this proposition seemed to contradict her own Report in which she concluded that Van der Merwe's version was more probable than the plaintiff's version. (See paragraph 9 of Badenhorst's Report dated 6 April 2004 contained in Exhibit "C")

[148] In any event, one might understand, in my view, the reason why Badenhorst would accept the plaintiff's version as being consistent with what happened. This was because the plaintiff did not only give an account of how the collision occurred and to what extent his vehicle was damaged but he went on and produced photographs showing damage to his vehicle, which Badenhorst found consistent to having been caused during the collision in the manner as described by the plaintiff. On the other hand, however, if Badenhorst did not actually see the damage on Van der Merwe's vehicle

(either physically or in photographs) then what did she mean when she said: "… what is known to me about the damage sustained to the Toyota Corolla ..."? In my opinion, she was probably only referring to the mere information as furnished to her by Van der Merwe and which was not supported by real evidence as in the case of the plaintiff.

[149] Accordingly, I find that the evidence of Badenhorst did not assist the defendant's case in any way. As I have said, her Report was unbalanced and therefore unreliable on account of being based on the one-sided version of one of the drivers, namely, Van der Merwe.

[150] I am inclined to find that the plaintiff's version was more probable than that of the insured driver in relation to the cause of the collision. In other words, I am satisfied that Van der Merwe's negligent driving was the major cause of the collision. However, it seems to me that the plaintiff was not absolutely without blame. He told the Court that about three quarters of a kilometre prior to the collision Van der Merwe had attempted to overtake the truck but quickly came back behind the truck. In other words, it was clear, and the plaintiff was aware, that Van der Merwe also desired and intended to overtake the truck. Hence, the plaintiff ought to have been more cautious and vigilant before overtaking. It did not seem to me he was absolutely so. Therefore, in my view, he was himself not on the proper look out on the road at the relevant time, as he ought to have been.

[151] The plaintiff also told the Court that when he indicated to overtake (using the indicator lights) at the same time he flashed his headlights which, as he put it, was what he always did when he was about to overtake. To my mind, flashing headlights behind another vehicle was not the legally sanctioned or prescribed way of indicating to that other vehicle an intention to overtake it. In fact, in my view, this practice was calculated to causing a mixed or confusing signal to the vehicle in front. Of course, this point was not raised in pleadings by the defendant, but the determination of the presence or absence of negligence on the part of either driver was a legal question and

the Court, I think, was entitled to consider both parties' driving conduct holistically.

[152] Accordingly, I find that the plaintiff was, to an extent not exceeding 30%, also negligent and thus contributed to the cause of the collision.

[153] I am reluctant to award a costs order at this stage. The plaintiff still has to prove damages which he allegedly suffered. In other words, the next phase is not just a formality. Therefore, I am of the view that the issue of costs should be reserved pending proof or agreement on the quantum of damages.

Order

[154] In the result, I make the following order:

1. The collision under consideration was caused by the negligence of both the insured driver and the plaintiff, who contributed thereto as follows: the insured driver was 70% negligent and the plaintiff 30% negligent.
2. Based on the abovementioned apportionment, the plaintiff is entitled to damages that he may prove or which may be agreed upon.
3. The costs are reserved pending proof or agreement on the quantum of damages.

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Appearances:

For the plaintiff : Mr GJ Leppan
Instructed by : Venn Nemeth & Hart Inc
Pietermaritzburg

For the Defendant : Mr R Choudree SC

Instructed by :	Sangham Inc Pietermaritzburg
Last Date of Hearing:	1 September 2008
Date of Judgment :	12 March 2009