REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

CASE NO. 2694/2009

In the matter between:

SDUDUZO DUBAZANE **Plaintiff**

and

ROAD ACCIDENT FUND **Defendant**

JUDGMENT

GORVEN J:

1]On 30 July 2005 a collision took place between two white Hi-Ace vehicles, used as taxis, in the intersection of Commercial Road and what was then called Grey Street in Durban. This is an intersection controlled by traffic lights of two one way roads, each with 5 lanes of travel at the point of intersection. The plaintiff was the driver of one vehicle and one Ntshangase ("Ntshangase") the driver of the other. The plaintiff's vehicle contained a conductor but no further passengers and Ntshangase's vehicle contained 15 passengers, none of which was a conductor. The collision took place at approximately 15h30 on a Saturday afternoon in clear, dry conditions.

2]These events gave rise to the present action for damages on the part of the plaintiff who claims to have been injured in the collision. In its amended plea the defendant specified negligence on the part of the plaintiff and requested the court,

should it find that Ntshangase was causally negligent in relation to the collision, to apportion any damages sustained by the plaintiff in proportion to the respective degrees of negligence of the parties. At the outset of the trial an order was sought by the parties separating the issues in terms of Rule 33 (4). An order was granted that the initial issue to be determined was whether there was causal negligence of the respective parties in relation to the collision on 30 July 2005 referred to in paragraph 4 of the Particulars of Claim and, if so, the respective degrees of negligence. All further issues were held over for later determination.

3]The plaintiff was the only witness called in support of his case. His conductor has since died. He stated that, on approaching from the N3 freeway, he reduced speed. At all times prior to entering the intersection, the traffic light was green for vehicles travelling in his direction. He entered the intersection while the light was still green at an estimated speed of between 45 and 60 km per hour. He was travelling in the lane second from left and, immediately before the collision and whilst he was in the intersection, the traffic light turned red. Ntshangase's vehicle was travelling in the middle of the five lanes in Grey Street and the traffic in Grey Street approached the intersection from the plaintiff's left hand side. He had seen two other vehicles stopped at the Grey Street traffic lights but only noticed Ntshangase's vehicle whilst it was approximately 4 to 5 paces away. All that he recalled doing to avoid the collision was to drag his steering wheel to the left, in other words, to swerve towards the traffic approaching from Grey Street in an effort to avoid the collision. As a result the collision took place at a time when his vehicle was no longer perpendicular to that of Ntshangase. The right front corner of his vehicle and the front right hand side of his vehicle, to a point up to and including

the driver's door, collided with the mid right hand side of the vehicle of Ntshangase.

4]The version of Ntshangase differed. He had collected a full load of passengers and had turned left into Grey Street prior to approaching the intersection. As he approached, the traffic light was red. There were stationary vehicles in some of the lanes ahead of him at the intersection but the most right hand lane was clear. Because he was to turn right into Pine Street after the intersection he changed to the most right hand lane of Grey Street just before reaching the intersection, at which stage the traffic lights turned green. As a result, his vehicle did not come to a complete stop but proceeded into the intersection. He did not look to see whether vehicles from his right hand side, that is the direction from which the plaintiff was travelling, were entering the intersection against what would for them have been a red light. On the right-hand corner of the intersection was a multi-storey building which prevented observation of vehicles approaching from that side prior to reaching the intersection. He estimated that he had entered the intersection at a speed of less than 20 km per hour but certainly no greater than 25 km per hour. He heard the screeching of brakes and immediately thereafter the plaintiff's vehicle collided into his vehicle. He did not see the plaintiff's vehicle prior to the collision but the vehicles collided at right angles at a time when he was approximately halfway through the intersection. The front side of the plaintiff's vehicle collided with the right hand side of his vehicle between the front and rear wheels. He was not in a position to take any evasive action.

5]As can be seen, the two versions coincided in certain respects. First, both accepted that, immediately prior to the collision, the traffic lights were green for

traffic travelling in the plaintiff's direction and red for traffic travelling in Ntshangase's direction. Secondly, the traffic lights changed prior to the collision taking place. Thirdly, there had been stationary traffic at the Grey Street entrance to the intersection prior to the change of the traffic lights. Fourthly, the plaintiff's vehicle collided with that of Ntshangase roughly in the middle right-hand side of his vehicle.

6]Neither driver indicated that the traffic lights were not functioning correctly at the time. The plaintiff was taxed on a sentence which appeared in the report of one of his quantum experts where it was recorded that he had told the expert that the collision occurred as a result of faulty traffic lights. After some difficulties with the interpretation of the word “faulty” it became clear that he denied ever having said that this was the case. Since the person who wrote the report was not called to testify, this must be accepted. In addition, the plaintiff stated clearly in his evidence that the traffic lights were working. Even if nothing is said in this regard, the correct approach to take is set out in *Gomes v Visser* : [1]

‘Traffic lights at intersections have for more than a generation been an important feature of traffic control in cities throughout the world. The lives and safety of motorists as well as the normal flow of traffic depends upon them, and the manner in which they are intended to function, and normally do function, is well known. That being so it is, in my view, proper for a Court to take judicial notice of the fact that when the lights facing in one direction at a right angled intersection are green those facing at right angles to them should be, and probably are, red.

That, of course, is no irrebuttable presumption. Any mechanical or electrical device can be faulty at times. But if there is no evidence of mal-function the court trying a civil case should, in my view, take into account as a probability that if the lights facing in one direction were green at a particular point of time, those at right angles to it were red.’

1 1971 (1) SA 276 (T) at 279F – H, approved in *van Vollenhoven v McAlpine* 1976 (3) SA 579 (N) at 581D-G.

In the present case, both the plaintiff and Ntshangase asserted that the lights began as one colour and thereafter changed colour. In all the circumstances there is no basis to doubt that the traffic lights were working properly. This then means that, if the light was green for one, it would have been red for the other. The crucial issue, therefore, is which of the two of them entered the intersection whilst the light was red.

7]Much was made by both parties of discrepancies between the evidence given in court and the accident reports made at the police station by each party concerning the collision. The police members who recorded the information as a result of the reports being made to them were not called to testify. As a consequence, the reports were never proved and no factual findings can be based on them. I therefore set no store by these discrepancies.

8]There are difficulties with the plaintiff's version. The major difficulty is that traffic lights do not change from green to red immediately. They change to amber before doing so. At best for the plaintiff, on his version, he was travelling at 45 km per hour. This translates into a speed of 12.5 m per second. In argument it was accepted by counsel for the plaintiff that the lanes in such roads are 9 m wide. On the plaintiff's version the collision took place when he had progressed across a maximum of 2.5 lanes into the intersection, in other words 22.5 metres. At a speed of 12.5 m per second, that distance would have been travelled by the plaintiff in less than two seconds. Plaintiff’s counsel also accepted that it would take considerably longer than two seconds for the traffic light to change from green to red through amber. It can therefore be seen that the collision could not have taken

place as testified to by the plaintiff. A second difficulty confronted by the plaintiff is the improbability of his having swerved to his left hand side when confronted with the emergency. He would have it that, having seen Ntshangase's vehicle when it was 4 to 5 paces away, he swerved towards it rather than away from it. This is improbable. Even if he did swerve towards Ntshangase's vehicle, the probability of his vehicle having turned a minimum of 45° to the left within the available time is remote in the extreme. This would have been necessary for the impact on the plaintiff's vehicle to have occurred to only the front right-hand corner and the right-hand side as he claimed and no impact to have taken place to the rest of the front of his vehicle.

9]In addition to the improbabilities mentioned above, the plaintiff did not impress as a witness. He was evasive and answered questions in a roundabout way, preferring to give confused and lengthy answers including explanations for his conduct rather than a simple and straightforward answer when one was called for. In his evidence in chief he stated that, before entering the intersection he had noticed that two vehicles were stopped in Grey Street. He was then asked whether, when the collision took place, the robot was still green for him. His reply was that, at the time he was struck, the robot was red. Unsolicited, he gave in support of this answer the explanation that other vehicles from Grey Street had started to cross the intersection. After cross examination he confirmed, in answer to a question posed by the court, that he had stated that other vehicles had begun to enter the intersection from Grey Street at the time of the collision. In response to the next question from the court he accepted that, after he had been cross examined, his evidence was to the effect that the two vehicles in question had not

begun to enter the intersection at the time the collision occurred. This was, of course, a direct and material contradiction on a matter which bore strongly on whether he or Ntshangase had entered the intersection against the red light. If the two vehicles had begun to enter the intersection, it tends to show the probability of Ntshangase having entered the intersection when the light was green for him since these vehicles had stopped in obedience to the red light. In such circumstances it is highly improbable that they would both draw off when the light was still red. In fact, he had used their entry into the intersection to support his evidence that, by the time the collision took place, the light had turned red for him. I am alive to the fact that the interpreter was poor and that this gave rise to some confusion. In evaluating his evidence, I have carefully considered this and come to the view that this did not affect the criticisms of his evidence mentioned above.

10]Ntshangase, on the other hand, impressed as a witness despite enduring the same difficulties with interpretation as did the plaintiff. His evidence became more rather than less clear as the trial progressed. There were also no inherent improbabilities in his testimony.

11]I readily accept what was said by Ogilvie Thompson AJ (as he then was) in *Van der Westhuizen and Another v SA Liberal Insurance Co Ltd* [2] to the following effect:

'In my opinion, however, the strictly mathematical approach, though undoubtedly very useful as a check, can but rarely be applied as an absolute test in collision cases, since any mathematical calculation so vitally depends on exact positions and speeds; whereas in truth these latter are merely estimates almost invariably made under circumstances wholly unfavourable to accuracy.'

2 1949 (3) SA 160 (C) at 168. Approved in *Diale v Commercial Union Assurance Co of SA Ltd* 1975 (4) SA 572 (A) at 576 - 577.

In the first place, however, I have assumed in favour of the plaintiff the slowest of the range of speeds estimated by him. In any event, even the highest estimate of the plaintiff as to his speed is unlikely to have been one unfavourable to him. Secondly, the plaintiff initially stated that the collision took place in the third lane from the entry to the intersection rather than in the first lane as Ntshangase testified. He later conceded that Ntshangase may have been correct in that regard. If so, there would have been even less time for the lights to change after his entry into the intersection. All in all, I am satisfied that, even taking into account the cautionary remarks in *van der Westhuizen's* case, the plaintiff's version that he entered the intersection when the traffic light was green can safely be rejected. There is no basis for rejecting the version of the defendant that Ntshangase entered the intersection when the light was green for him. This is a more probable version of events in the light of an overall conspectus of the evidence. I therefore find that the version of the defendant is to be preferred and should be the basis on which the matter is determined.

12]This does not dispose of the matter since counsel for the plaintiff submitted that, should I make such a finding, an apportionment should take place on the basis that Ntshangase was, on his own version, causally negligent in relation to the collision. This is because Ntshangase conceded not having looked to see whether any traffic was approaching the intersection from the direction in which the plaintiff was travelling. Had he done so, it was submitted, he would have seen that the plaintiff was about to enter the intersection against the red traffic light. His failure to do so, it was submitted, was negligent and contributed to the collision having taken place.

13]Counsel for the defendant urged me to find that there was no basis for such an

apportionment. He submitted that there was no duty on Ntshangase, when he entered the intersection, to observe whether traffic might be entering the intersection against the red light from Commercial Road. In this regard he relied on the recent judgement in *Naicker v Moodley* [3] where the following was said:

'Consequently, the driver of a vehicle entering the crossing when the traffic lights are in his favour owed no duty to traffic entering the crossing in disobedience to the lights, beyond a duty that, if he saw such traffic, he ought to take all reasonable steps to avoid a collision.'

Swain J, in arriving at that conclusion, relied on a dictum to the following effect in the case of *Joseph Eva Ltd v Reeves* :[4]

'Nothing but implicit obedience to the absolute prohibition of the red - and indeed of the amber, subject only to the momentary discretion which it grants - can ensure safety to those who are crossing on the invitation of the green. Nothing but absolute confidence, in the mind of the driver invited by the green to proceed, that he can safely go right ahead, accelerating up to the full speed proper to a clear road in the particular locality, without having to think of the risk of traffic from left or right crossing his path, will promote the free circulation of traffic which, next to safety, is the main purpose of all traffic-regulation. Nothing again will help more to encourage obedience to the prohibition of the lights than the knowledge that, if there is a collision on the crossroads, the trespasser will have no chance of escaping liability on a plea alleging contributory negligence against the car which has the right of way. Finally, nothing will help more to encourage compliance with the summons of the green to go straight on than the knowledge of the driver that the law will not blame him if unfortunately he does have a collision with an unexpected trespasser from the left or right.'

14] This approach finds support in *Netherlands Insurance Co of SA Ltd v Brummer* [5] where Muller JA said the following:

'Soos in bogenoemde gewysdes verduidelik moet 'n bestuurder wat 'n kruising binnegaan terwyl die verkeerslig vir hom groen is, uitkyk vir verkeer wat reeds in die kruising is, bv verkeer wat die

3 2011 (2) SA 502 (KZD) para 20.
4 [1938] 2 All ER 115 (CA) ([1938] 2 KB 393) at 120H-121C.
5 1978 (4) SA 824 (A) at 833E – F.

kruising binnegegaan het voor die verkeersligte verander het. Hy mag natuurlik ook nie 'n voertuig ignoreer waarvan hy bewus is en wat duidelik op 'n nalatige wyse bestuur word. Maar dit word nie van hom verwag om uit te kyk vir verkeer wat moontlik onwettiglik die kruising teen 'n rooi verkeerslig van links of regs kan binnegaan nie.'[6]

15]On the version of the defendant, Ntshangase entered the intersection at a time when the light was green. The plaintiff's vehicle had not yet entered the intersection. It was not a situation where the plaintiff's vehicle was in, but had not yet cleared, the intersection. The plaintiff entered against the red light. There was accordingly no duty on Ntshangase to keep a lookout for vehicles such as that of the plaintiff entering unlawfully.

16]Even if I am wrong in rejecting the version of the plaintiff in favour of that of the defendant, it would certainly not be possible to prefer it to that of the defendant. At best for the plaintiff, therefore, I would not be able to find that one version is more probable than the other. It is trite that in a matter such as this, the onus is on the plaintiff. On this basis the plaintiff would be held to have failed to discharge the onus. However, as mentioned above, I am of the view that the probabilities favour the version of the defendant. In such a case, there should be judgment for the defendant rather than one of absolution from the instance, thus leaving it open to the plaintiff to pursue the claim again.

17]In the result, there will be judgment for the defendant with costs.

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6 See also *Santam Insurance Co Ltd v Gouws* 1985 (2) SA 629 (A) at 634A-635H

DATE OF HEARING: 4 and 5 May 2011

DATE OF JUDGMENT: 13 May 2011

FOR THE APPLICANTS:	Adv RBG Choudree SC, instructed by Naidoo & Associates, locally represented by Malanie Naidoo & Associates.
FOR THE RESPONDENTS:	Adv R Padayachee SC, instructed by Tomlinson Mnguni James.