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D. A. Melamet, S.C. (with him *I. W. B. de Villiers*) for the appellant: When it is uneconomical to repair a vehicle because of the damage sustained by it, there is only one method of proving damages, viz. to determine the difference between the value of the vehicle before and after it was damaged. *Erasmus* v. *Davis,* 1969 (2) S.A. 1; *Enslin* v. *Meyer,* 1960 (4) S.A. 520; *du Plessis* v. *Nel,* 1961 (2) S.A. 97. Since the negligent acts of respondents contributed towards the same damages, they are jointly or severally liable towards appellant for the same damages and consequently they are co-perpetrators as envisaged by sec. 2 (1) of Act 34 of 1956 as regards the damages. The common law distinction between co-perpetrators (persons who co-operated in the commission of a delict) and separate perpetrators (persons who did not co-operate) was removed by the definition of "co-perpetrators" in the said sec. 2 (1). *Annual Survey of S.A. Law,* 1956 p. 193; McKerron, *Law of Delict,* 6th ed., p. 278, 102; van der Merwe & Olivier, *Onregmatige Daad in die S.A. Reg,* p. 179; *Hughes* v. *Transvaal Hide & Skin Merchants,* 1955 (2) S.A. 176. Appellant bases his case on the fact that the separate collisions jointly had one result, viz. that the vehicle was irreparably damaged and it thus becomes practically impossible to distinguish between the damage caused by the separate collisions. The same would happen when a ship sinks as a result of the negligence of the captains of two other ships which collided with the former. Glanville Williams, *Joint Torts & Contributory Negligence,* pp. 16-17. In all the circumstances an equal apportionment of the damage

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would be equitable having regard to the extent of each co-perpetrator's fault in respect of the damage. Alternatively, even if it should be found that the two respondents are not co-perpetrators as envisaged by sec. 2 (1) of the Act, the Court must still apportion the whole of the damage between the respective perpetrators since it is difficult to determine precisely what damage was caused by what person. In the present case

fault ought to be the most important criterion. Kotze, *Die Aanspreeklikheid van Mededaders en Afsonderlike Daders*, pp. 133-5; 126-7; *Prinsloo* v. *Luipaardsvlei Estates & G.M. Co. Ltd.*, 1933 W.L.D. at p. 23; *Jooste* v. *Ally*, 1960 (4) S.A. at p. 33. If it should prove difficult to apportion the fault, it should be apportioned equally. *Glanville Williams, op. cit.* p. 20 and footnote, 1 at p. 20.

If it is found that the above approach is wrong, then the magistrate and the Court *a quo* erred in not allowing the case to be re-opened for the leading of new evidence which could have aided the court in the apportionment of fault between the respondents. Clearly appellant's attorney in the magistrate's court was caught by surprise at the attitude of respondents' attorneys, as appears from his argument regarding re-opening. The magistrate erred in allowing appellant to suffer for the alleged inattentiveness of his attorney. *Coetzee* v. *Jansen*, 1954 (3) S.A. 173; *Witshell* v. *Viljoen's Transport*, 1966 (1) S.A. 702; *Shange* v. *Pearl Assurance Co. Ltd.*, 1965 (1) S.A. 569.

A. S. Botha, for the respondents: Where a plaintiff suffers damage which was caused by the negligent acts of two persons, three different types of cases can be distinguished: (*a*) the two persons could have co-operated in the performance of the same delict which gave rise to the damage: or (*b*) the two persons could have acted independently of each other, but have caused the same damage by their two separate unlawful acts; or (*c*) the two persons could have committed separate unlawful acts and have caused different damages to the plaintiff. Before the enactment of Act 34 of 1956 the common law position in the above three cases was as follows: (*a*) concurrent co-principals in respect of the same delict were held liable *in solidum* for the damages to which plaintiff was entitled. *Naude & du Plessis* v. *Mercier*, 1917 A.D. at pp. 38-40; P. J Kotze, *Die Aanspreeklikheid van Mededaders en Afsonderlike Daders*, at pp. 1-2, 62, 65-6, 80, 113-4, 118, 121-2; McKerron, *Law of Delict*, 6th ed. at 102; van der Merwe & Olivier, *Die Onregmatige Daad in die S.A. Reg*, at p. 169. (*b*) Separate principals whose acts caused the same damage were also held liable *in solidum* to the plaintiff. *Union Government* v. *Lee*, 1927 A.D. at pp. 226, 227; *Botes* v. *Hartogh*, 1946 W.L.D. at p. 160; *Hughes* v. *Transvaal Associated Hide & Skin Merchants (Pty.) Ltd.*, 1955 (2) S.A. at p. 180; *Windrum* v. *Neunborn*, 1968 (4) S.A. at p. 297 *in fin*—p. 288A; *McKerron, op. cit., ibid*; *van der Merwe & Olivier, op. cit, ibid.* (*c*) Separate principals who caused separate damage to the plaintiff, were each only held liable for the separate damage which he caused. *Prinsloo* v. *Luipaardsvlei Est. & G.M. Co. Ltd.*, 1933 W.L.D. at p. 23. Cf. *New Heriot G.M. Co. Ltd.* v. *Union Govt.*, 1916 A.D at p. 442-3. *P. J. Kotze, op. cit.* at p. 53 and Cf. p. 124; Williams, *Joint Torts & Contributory Negligence*

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at pp. 16-17, 20. Sec. 2 of Act 34 of 1956 only applies to the case where (it is alleged that) two or more persons are jointly and severally liable

to another person for the same damage. According to the wording of the section it therefore only applies to the first two cases, (*a*) and (*b*) above and the "co-principals" to which reference is made in the section are consequently only the principals mentioned in these two cases. The section therefore does not affect separate principals who cause separate damage, and the common law has not been changed in this type of case. *McKerron, op. cit.* at p. 278; *van der Merwe & Olivier, op. cit.* at p. 170; Cf. *Annual Survey of S.A. Law,* 1956 at p. 193. An allegation in a plaintiff's pleadings that two defendants are co-principals in terms of sec. 2 (1) of the Act is sufficient to justify the joinder of the two defendants in terms of the section, but when all the evidence in a case has already been led and the Court is requested to make an order in terms of sec. 2 (8) (*a*) (ii) of the Act, it is self-evident that the Court must be able on the evidence, to find that the defendants are objectively speaking (and apart from plaintiff's mere allegation in this respect) actually "co-principals" i.e. that they are jointly and severally liable to plaintiff for the same damage, before such an order can be made. Cf. Boberg in *Annual Survey of S.A. Law,* 1964 at p. 120-2 with reference to *Smit* v. *General Accident Fire & Life Ass. Corp. Ltd.,* 1964 (3) S.A. 739; *Jooste* v. *Ally,* 1960 (4) S.A. at p. 32-3.

In the case of claims for damages it is in general a well-known principle that, if the evidence adduced by the plaintiff is insufficient to justify a precise calculation of the *quantum* of the damage, the court will only make a rough calculation if the plaintiff has placed the best available evidence before it as a basis for such a calculation; should plaintiff fail to adduce such evidence, the court will order absolution of the instance against him. *Hersman* v. *Shapiro,* 1926 T.P.D. at pp. 379-80; *Prinsloo* v. *Luipaardsvlei Est. & G.M. Co. Ltd., supra; Enslin* v. *Meyer,* 1960 (4) S.A. at pp. 523F-24; *Erasmus* v. *Davis, supra* at p. 22F-H. The same principle also applies when a plaintiff wishes to hold two defendants liable for damages and the question is whether the defendants actually caused the same damage and whether they can be held jointly liable, either in terms of sec. 2 (8) (*a*) (iii) of Act 34 of 1956, or outside that section. If the plaintiff fails to adduce the best possible evidence concerning the separate infliction of damage, the court is not empowered to make an order in terms of the said section or to apportion the damages between the defendants in any other way.

The magistrate had a discretion to allow or to refuse the application for the re-opening of appellant's case, which discretion he had to exercise in the light of the relevant circumstances of the case such as, for example, those discussed in *Oosthuizen* v. *Stanley,* 1938 A.D. at p. 333; *Hladhla* v. *President Ins. Co. Ltd.,* 1965 (1) S.A. at p. 621B-C-H. The statements of appellant's attorney during the argument of the applica-

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tion and thereafter, made it impossible for the Court *a quo* on appeal to consider a mistake, error or inattentiveness on the part of appellant's

attorney as a ground for granting the application. *Wolfowitz & Wolfowitz* v. *Fresh Meat Supply Co. Ltd.*, 1908 T.S. at pp. 511-12; *Kannenberg* v. *Gird*, 1966 (4) S.A. at pp. 181G-H-83E. A surprise is not *per se* a sufficient ground for the re-opening of a case: in the absence of an allegation of a mistake or inattentiveness on the part of appellant's attorney the surprise could equally well be the result thereof that the attorney, after consideration, came to the wrong decision that the respondents would raise no arguments against appellant regarding the proof of damages. Cf. *Epstein* v. *Arenstein and Another*, 1942 W.L.D. at p. 61 *in fin* 63. Consequently cases such as *Coetzee* v. *Jansen*, 1954 (3) S.A. at pp. 176F-H; 177E; 178B; *Mitchell* v. *Viljoen's Transport*, 1961 (1) S.A. at pp. 705E; 707G-H, 708E-G are not relevant to the facts of this case. Cf. *Odendaalsrust Gold & Gen. Inv. & Est. Ltd.* v. *Naude*, 1958 (1) S.A. at pp. 384H-85C. Apart from this, the appellant cannot complain if he is held bound by the acts of his legal representative. Cf. *R.* v. *Carr*, 1949 (2) S.A. at p. 699; *R.* v. *Muruwen*, 1953 (2) S.A. at p. 780E. *R.* v. *Matonsi*, 1958 (2) S.A. at p. 456G.

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"In conclusion therefore, according to the pleadings, according to the evidence, there were separate acts of negligence, there were separate collisions; separate sets of damage, and the duty of the plaintiff is to show for what damages the first defendant is responsible and the amount thereof, and for what damages the second defendant was responsible and the amount thereof."

The words "according to the pleadings" are important. As to the words "the duty of the plaintiff" . . .

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STEYN, C.J.: The nature, background and circumstances of this dispute appear from the judgment of my Brethren. As regards the general approach to a question of this nature I agree with the view of my Brother VAN WINSEN. As regards the result, much can be said for his conclusion, but if all the relevant considerations on both sides are weighed, it would appear to me that those in favour of appellant outweigh the others. There is, it is true, the important consideration that no satisfactory explanation was advanced why the relevant evidence was not adduced before plaintiff closed his case, but on the other hand I would not like to find that the failure was premeditated. I accept that the failure, as was maintained by plaintiff's attorney himself was not due to a mere oversight or inattentiveness on his part. The course of the proceedings however give rise to the impression that initially he paid no attention to the relevant evidence, because he misunderstood his case as far as a legal aspect was concerned. Consequently he did not see to it that a witness was immediately available, who after examination of the wreck could testify as to the extent of the separate damage caused by each of the two collisions. For this reason also he was surprised when it was argued on behalf of defendants that they could not be held liable jointly for the same damages and that separate damages had not been proved.

It must be conceded I think, that the possibility of prejudice to the defendants as a result of the re-opening of plaintiff's case, cannot be excluded, but against this must be weighed the, in my opinion, much greater prejudice which would be suffered by plaintiff if after absolution he would have to start again, with the delay and wasted costs this would entail. In addition, in the consideration of the prejudice to defendants it is relevant that a new process would also not be without inconvenience and prejudice to them. Even if plaintiff should not succeed, there would be further costs between attorney and client which they could in any event not recover from him; and there is scant reason to suppose that this possible prejudice would be much less than any possible prejudice as a result of re-opening. There also appears to be no reason for any concern that the evidence which plaintiff wished to ad-

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duce would possibly be adapted dishonestly to suit his case. The total of the damages suffered by him is common cause, and the further evidence, although not merely of a formal nature, would merely be aimed at enabling the court to determine the share of each of the defendants therein. If the one defendant had not forestalled him by also closing his case, the plaintiff would, as apparently he intended to do, have lodged his application at the earliest possible time after refusal of absolution, with the least possible dislocation of the proceedings or hindrance to his opponents.

From the magistrate's judgment it appears that he regarded the absence of a satisfactory explanation of the failure, as conclusive and lost sight of important considerations in favour of the application. Taking everything into account, I am of the opinion that he should have granted the application. I therefore agree with the conclusion reached by my Brother HOLMES, and with the order he made.

VAN BLERK, J.A., concurred with STEYN, C.J.

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VAN WINSEN, A.J.A.: On the evening of 6th November, 1966 and on the main road between Pretoria and Johannesburg appellant's car driven by himself collided with a car driven by first respondent. Appellant's car was damaged on the right-hand side as a result of the collision. About ten minutes later, and while appellant's car was still standing at the side of the road a car driven by second respondent also collided with appellant's car which was further damaged and in fact on the left-hand side. The appellant issued one summons in the magistrate's court, Pretoria, against both respondents jointly for damages. In the summons he held them responsible, on the ground of their alleged "exclusive negligence", for payment of the amount R564 being damages suffered by him as a result of both collisions, which are described in the summons as a "double collision".

The amount of the damages claimed was calculated on the basis of the difference between the market value of appellant's car before and after the collision plus costs of repairs to a radio which had been damaged in the car. In a reply to a request for further particulars the appellant indicated that he was not averring that first respondent's negligence contributed to the collision between the vehicles of appellant and second respondent and he further stated that he is not in a position to say for which part of the damages suffered by him each of the respondents is responsible.

In separate pleas, each respondent denied negligence on his part, while second respondent averred that "the collision" with reference to the so-called double collision was attributable to the neglience of first respondent. Second respondent also made alternative averments in his plea which are not relevant here. Both respondents denied liability for damages. Second respondent also instituted a counter-claim against appellant for compensation of damages which he suffered as a result of the collision between his car and that of appellant.

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Plaintiff gave evidence at the trial in connection with the two collisions and gave a description of the damage caused to his vehicle as a result of each of the collisions. According to his evidence most damage was caused by the second collision. After conclusion of the evidence for appellant the parties mutually agreed that it is accepted as proved that the value of appellant's vehicle was R700 before the collision, that it would be uneconomical to repair the vehicle and that the value of the wreck is R150. In addition it was agreed that the damage to the radio in the vehicle at the time of the collision amounted to R14.

Hereafter appellant closed his case and applications for absolution from the instance were made on behalf of both the respondents on the ground thereof that appellant did not succeed in proving for which amount of the damages to appellant's car each of the respondents was responsible. These applications were dismissed by the magistrate and thereafter the case was postponed. On occasion of the resumption thereof first respondent's case was closed, whereupon appellant's attorney immediately applied for the reopening of his case. As reason for this he stated that he wanted the opportunity to lead evidence to show more or less the ratio between the damage caused by the collision between appellant's car and that of the first respondent and the damage caused when second respondent's car collided with appellant's car. This application was opposed by both respondents and it was dismissed by the magistrate. Hereafter second respondent withdrew his counter claim and closed his case. The merits of the case were thereupon dealt with by the magistrate and because he found that appellant did not lead sufficient evidence as regards the damages to which the two respondents were severally liable he dismissed appellant's claim with costs in respect of both respondents. The appellant appealed against this judgment and

the appeal was argued before MARAIS and DE KOCK, JJ. in the Transvaal Provincial Division on various grounds. That Court dismissed the appeal and made certain additional orders, *inter alia,* in connection with costs which are not relevant now. Leave to appeal was refused by the Court *a quo.* The appellant now appeals to this Court by virtue of leave granted to him in terms of the provisions of sec. 21 (3) (*c*) of Act 59 of 1959 and only against that part of the order of the Court *a quo* whereby his appeal against the judgment of the magistrate was dismissed.

Both in this Court and in the Court *a quo* it was submitted on behalf of appellant that because their negligent acts contributed to the same damages respondents were jointly and severally liable to appellant for the total damages and that they were, therefore, co-perpetrators to whom the provisions of sec. 2 (1) of Act 34 of 1956 were applicable.

This submission was—quite understandably—made with little zeal by appellant's counsel and in any event it does not hold water. In the first place it emanates from the wrong assumption of facts, viz. that the negligent acts of both respondents contributed to the same damages. In fact the damages caused by the two collisions can according to

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appellant's own evidence be separated. He deposed before the magistrate that in the first collision the front part of the right mudguard, the right lamp and a right-door handle were damaged, while in the second collision the remaining damage was done, viz. to the left wheels, left doors and the pillar between the two left doors. In addition the appellant, in the course of his argument when he applied for the re-opening of his case before the magistrate, said that evidence was available,

"to give the court an indication . . . precisely what amount of damages approximately was caused by each collision . . ."

It is, therefore, clear that the present case does not fall under the provisions of sec. 2 (1) of Act 34 of 1956. The said section only refers to the case where two or more persons are jointly and severally delictually liable to a third person for the same damages. We are dealing here with a case of individual perpetrators who each individually caused damage to appellant's vehicle. As regards such a case the common law rule remains applicable and each of the perpetrators, provided they acted negligently, can only be held responsible for the damages caused by him. It would be unthinkable, in the circumstances of the present case, to hold second respondent liable for the damage caused by the car of first respondent. See *Prinsloo* v. *Luipaardsvlei Estate and G.M. Co. Ltd.,* 1933 W.L.D. 6 at p. 23 and *New Herriot G.M. Co. Ltd.* v. *Union Government,* 1916 A.D. 415 at p. 442.

It was further submitted on behalf of appellant that the magistrate erred in not allowing the case to be reopened and that the case should be reopened to allow appellant to bring further evidence in connection with the damages. The validity of such a submission is closely related, *inter alia,* with the ground upon which appellant's attorney elects to

base his application for reopening, with the question whether there are accepted legal grounds upon which such an application could be based, and, in conclusion, with the scope of this Court's power to interfere with the discretion entrusted to the magistrate.

As already mentioned before in the course of this judgment appellant's attorney made his application for reopening of his case to lead evidence in connection with appellant's damages immediately after first respondent had closed his case. The grounds on which he based his application also appear from the record. In his argument the attorney referred to appellant's evidence that he had in vain approached two garages to obtain quotations in connection with the repair of his vehicle.

The argument continued as follows:

"The position is that plaintiff is a Bantu and in his circumstances he could not lead further evidence to indicate precisely which part is responsible for which damages. It came as a surprise at the previous trial that the representatives for first and second respondents took the point that plaintiff could not succeed in proving that first defendant is responsible for Rx damages and second defendant is responsible for Ry damages. This happened notwithstanding the fact that plaintiff gave a reasonably clear description to the court of the extent of the damage to his vehicle in each collision. The plaintiff now finds himself in this unenviable position that the court will have to make estimations; the court will not be able to say precisely to the last cent or rand that first defendant is responsible for this amount of damages and that second defendant is responsible for that amount of damages.

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Now, plaintiff after the previous trial, with the assistance of his legal representative, consulted a business in the city which do repairs to damaged vehicles and the person was taken to the place where the wreck of the vehicle stood, and the vehicle was examined and a quotation for the repair of the vehicle was made. The plaintiff wants to call this person to give the court an indication precisely of what amount of the damages approximately was caused by each collision and for which each of the respondents is responsible."

Thereafter the attorney referred to certain decided cases in connection with the case where the omission to lead evidence is due to an error of judgment or inattention on the part of the applicant's legal representative. In conclusion he submitted that the evidence is relevant and that the leading thereof cannot prejudice the respondents.

First respondent's attorney opposed the application for reopening and in the course of his argument remarked that:

"the position is not as my learned friend put it to the court this morning, viz. that it was an oversight that the evidence was not led. All along he argued that the evidence was not necessary".

To this, appellant's attorney responded as follows:

"I do not wish to interrupt my learned friend unnecessarily. The argument placed before you was not that plaintiff committed an oversight, the argument was that the evidence was not available."

After the close of the reply delivered by appellant's attorney the magistrate put the following pertinent question to him and the attorney replied thereto equally pertinently:

"By the Court: The crux of the application is then, Mr. de Klerk, as the court understands it, that you ask for a reopening of the case, not in view of an oversight, but in view of the fact that the evidence was not available?

Mr. de Klerk: Yes, that at the previous trial it was not available."

In the course of the judgment of the magistrate the following remarks appear, *inter alia,* in respect of this application:

"The whole of the argument on behalf of plaintiff why he should be allowed to lead evidence again is not founded on an 'inadvertence' or an oversight. The court, therefore, asked for clarity on the point. 'Inadvertence' or oversight is, therefore, not in question here, but the fact that this evidence which plaintiff wishes to lead now, was not available earlier, was accentuated."

". . . if the court is informed that this evidence was not available earlier it considerably changes the consideration of the matter compared with the position where the court is informed frankly that there was an oversight or even negligence on the part of plaintiff resulting in evidence not having been led earlier. It is, however, stated pertinently that this evidence was not available previously".

". . . and this is a very strong opinion of this court that the evidence which is applied for this morning, leave to lead that evidence; that evidence was indeed available earlier and could have been led . . ."

It is clear from the reasons that the magistrate refused the application for reopening because he was of the opinion that the evidence which appellant's attorney wanted to lead was already available to appellant before he closed appellant's case. In this Court it was argued that the magistrate, notwithstanding the persistent denial of inadvertence on the part of appellant's attorney, should have come to the conclusion that inadvertence was indeed the reason why evidence in connection with damages had not been led before he closed his case.

This submission does not appear to me to be realistic. For all the magistrate knew, the fact that the evidence concerned was not led could be attributed to inadvertence or there could have been another reason for that, e.g. the reason advanced by the attorney, i.e. that the evidence was then not available. The actual reason why the evidence was not

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led is a question of fact and it is appellant's attorney in the first instance who is obliged to furnish a reply thereto. The magistrate cannot be said to have erred by accepting the attorney's answer in this connection. Should he have known despite the attorney's denials, that inadvertence was actually the ground for his application? Then he would rightly have come to the conclusion that this ground, by his repudiation, was abandoned by appellant's attorney. If the attorney abandoned the ground, the appellant cannot now rely thereon. See e.g. *Wolfowitz and Wolfowitz* v. *Fresh Meat Supply Co. Ltd.,* 1908 T.S. 506 at pp. 511-2 and *Kannenberg* v. *Gird,* 1966 (4) S.A. 173 (C) at pp. 182-3.

A further argument that the appellant should not be held bound by the conduct of his attorney does not hold good in the circumstances of this particular case. In the case of *R.* v. *Muruven,* 1953 (2) S.A. 779 (N) at p. 780 BROOME, J.P., remarked as follows: "....."

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See also the remarks of SCHREINER, J.A. in *R.* v. *Matonsi,* 1958 (2) S.A. 450 (A.D.) at p. 456. The present case does not fall under the exceptions to this rule.

The magistrate, as he was indeed invited to do by appellant's attorney approached the application, *inter alia,* on the basis of the availability or not of the evidence concerned at the time of the hearing of appellant's case and he found that the evidence was indeed available then. I agree with the judgment of the Court *a quo* that this finding is correct.

MARAIS, J., remarks as follows in this connection in his judgment:

"Where the attorney for the appellant told the magistrate in the inferior court that the evidence was indeed not available, he perhaps referred to the availability of the evidence in the physical sense, but certainly not to the real and juridical availability of evidence. The wreck, as the magistrate correctly points out, was available all the time, and it was possible, as the attorney himself admits, for an expert to determine to a certain extent, taking into consideration the evidence on record, approximately the damage caused by the first defendant and that caused by the second defendant."

It therefore amounts to this that in the exercise of the discretion conferred on him by Rule of the Magistrate's Court 28 (11), the magistrate refused on an acknowledged legal ground to allow appellant to reopen his case.

The question arises whether the magistrate by refusing the application for reopening did not err, in that he allegedly, and without taking other considerations into account, depended exclusively on the consideration that available evidence was not adduced and that appellant's legal representative failed to advance an acceptable explanation for such omission. In the course of his argument appellant's attorney referred to certain considerations in point, in connection with his application, as e.g. the availability or not of the evidence, inadvertence as a possible explanation for not adducing such evidence, the relevancy

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of the evidence which he intended to adduce, the possibility of prejudice to his opponent in case the application is granted and the desirability of reaching finality.

In his judgment in connection with the application for reopening the magistrate refers to three of the above-mentioned factors—

"which are of assistance to the court in considering the application",

to wit, that a satisfactory explanation was furnished why the evidence was not adduced earlier, that the reopening will not prejudice the parties and that the evidence concerned is of fundamental importance to the case. From the wording of his judgment it cannot, in my opinion, be inferred that he regarded each of these factors as a separate condition for the granting of the application. The use, with reference to these three factors, of the word "must" in the magistrate's judgment and also the use at the end thereof of the word "requisite" should be read in the context of the judgment as a whole. He considered the three factors and came to the conclusion that two were possibly present, but that the application was unsuccessful because no acceptable explanation was given for the omission to lead the evidence concerned. From his judgment I come to the conclusion that after consideration of the three factors he thought that the latter consideration, in the circumstances

of this case, was the most important and it was for this reason that he dismissed the application.

It was, however, submitted that the application was not only refused on the said ground and in this regard reference is made to his "reasons for judgment" which was prepared some two months after dismissing the application for reopening. In this regard the magistrate says, *inter alia,* that the granting of the application would create a real danger of prejudice to the two respondents because they would be faced by a new cause of action. Where they were joined in the summons, the appellant now endeavours to hold them responsible separately. In addition the magistrate says in his "reasons" that before an application for reopening can be granted

"the evidence tendered must be presumably to be believed and (be) such that it would be practically conclusive".

On behalf of appellant it is advanced for consideration that it must be accepted that the two reasons mentioned also served as grounds for the dismissal of the said application and that in these reasons the magistrate erred.

If the magistrate's judgment and his "reasons" are read together it appears from the last-mentioned document that in this he was giving additional reasons for the refusal of the application for reopening. What is stated in his "reasons" in connection with the two additional considerations did not in the circumstances of the present case, serve as grounds for the dismissal of the application. What actually served as a ground is the reason mentioned in his judgment and which is referred to above and in my opinion the magistrate did not err in this respect.

On the supposition, however. that he did err, this Court finds itself in the position of the magistrate and it is its duty to give that judgment which the magistrate ought to have given on the application. Attention must be given to the considerations which would apply in this Court in such circumstances.

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The magistrate derives his jurisdiction to deal with such an application from the provisions of Rule 28 (11) of the Magistrate's Court Act, 32 of 1944. The Rule provides that the court may grant leave to anyone of the parties at any time before judgment to adduce further evidence. Except that a magistrate may not grant such leave in the case where it appears that such evidence was intentionally held back from its proper sequence, the rule does not contain any limitation on the exercise of the magistrate's discretion. There is no reason not to accept that the same considerations which are applicable to a Trial Judge—who derives his powers in this regard from the common law—are also applicable to the case where a magistrate exercises his discretion in terms of Rule 28 (11). The discretion is not unlimited. In addition to the fact that the discretion must be exercised judicially, the Courts through the years laid down certain considerations which are intended to serve as guides in the exercise of such discretion. The formulation of such guides serves

a useful, in fact essential, purpose, in so far as they assist in the exercise of the conferred discretion. Indeed, the absence thereof would have created great uncertainty in regard to the object and exercise of this power. Applied judiciously these guides have no hampering or petrifying effect on the discretion of the court.

It also appears from the decided cases that the considerations mentioned therein are not all equally important. The importance of particular considerations does not necessarily remain the same and may vary, according to the circumstances of the particular case. On the other hand it is also clear from the decided cases that in the exercise of the discretion certain considerations are usually regarded as more important than the others. One of the most important considerations according to which an application for the reopening of a case which has already been closed with the object of adducing further evidence, must be dealt with, is that the applicant should advance reasonable and acceptable grounds why the evidence was not led before the closing of the case. The applicant must show that the evidence was not available before the closing of his case, or could not reasonably have been obtained, or, if it was indeed available or obtainable he should advance an acceptable explanation why it was not adduced before the closing of the case. This is an accepted basic rule in the exercise of this discretion, and where it is not complied with, the application is normally dismissed.

It appears from numerous decided cases that this consideration in the exercise of the discretion to reopen a case is very prominent. In *Du Plessis* v. *Ackermann*, 1932 E.D.L. 139 where a party made application to lead further evidence after his opponent's case had been closed and his opponent had already addressed the Court, the Court refused to grant the application on the ground that the evidence had been available before he closed his case. At p. 148 GUTSCHE, J. said the following: "....."

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In the course of his judgment the learned Judge referred apparently with approval to other decided cases where the importance of this consideration was stressed. A similar consideration was, in the circumstances of the case of *Stephens* v. *Liepner*, 1939 W.L.D. 26 at p. 31, regarded as decisive. *Epstein* v. *Arenstein and Another*, 1942 W.L.D. 52 was a case where both parties had adduced their evidence and one party had already delivered his argument. Thereafter his opponent made application to lead additional evidence.

MILLIN, J. at pp. 61-62 said the following about the application: "....."

627 F

HATHORN, J. in the course of his judgment in the case of *May* v. *May*, 1931 N.P.D. 223 when dealing with a similar application made the following remarks at p. 225: "....."

627 G

An application for reopening was dismissed for a similar reason in *Broderick Properties (Pty.) Ltd.* v. *Rood,* 1963 (2) P.H., F 60 at p. 156 and it is stressed in the judgment that: "....."

627 H

See also *Roberts* v. *London Assurance Co. Ltd.* (1), 1948 (2) S.A. 838 (W) at p. 839 and *Bellstedt* v. *S.A. Railways and Harbours,* 1936 C.P.D. 397.

It appears, therefore, that the consideration referred to in these decided cases, may be regarded as one of the basic rules in connection with the exercise of a discretion in regard to the reopening of a case which had already been closed.

628

Apart from the instances mentioned in Magistrate's Court Rule 28 (11) there are naturally in our law a large number of cases, procedural as well as others, where a court is called upon to exercise a discretion. In this connection reference may be made, *inter alia,* to allowing amendments to process, granting of leave to note appeal *in forma pauperis,* condoning the late noting of appeal, the granting of costs and the imposition of punishments. In the exercise of a discretion in all these cases the question arises of the limits, if any, within which the discretion must be exercised. In certain cases basic rules are indeed laid down in connection with the exercise of such discretion, in others not. From the case of *Fripp* v. *Gibbon and Co.,* 1913 A.D. 354 it appears that a "general rule" (*per* LORD DE VILLIERS, C.J., at p. 357) or a "fundamental principle" (*per* SOLOMON, J.A.) exists that costs are granted to the successful party in the case. Similarly it is an essential for the granting of leave to appeal *in forma pauperis* that the applicant must show that he has a reasonable prospect to succeed on appeal. See *Calder* v. *Simon,* 1942 A.D. 337 at p. 340 and *Bezuidenhout* v. *Dippenaar,* 1943 A.D. 190 at p. 195.

The fact, however, remains that a reference to factors which guide the Courts in the exercise of their discretion in cases which have no relation with the case now under consideration cannot be of much assistance. In the exercise of their discretion in the different spheres mentioned the Courts mention considerations which were applicable to the particular cases they dealt with. These considerations are not necessarily applicable to other cases, but are on the contrary frequently related only to the particular type of case in connection with which they were accepted. They are, therefore, not always safe guides to the matter now under consideration.

It will indeed be of greater value to pay attention to considerations applicable to cases which are analogous—although not the same—to the case with which we are dealing now. In this connection reference is made to the reopening by the Court of Appeal—both in civil and

criminal law—of cases where judgment had already been passed. The considerations which are applicable in such a case in connection with the civil law were set out by WESSELS, C.J. in the case of *Colman* v. *Dunbar*, 1933 A.D. 141 at p. 161: "....."

629

This exposition of the applicable rules was confirmed in *de Bruin* v. *Director of Education*, 1934 A.D. 252 at p. 257. In *Deintje* v. *Gratus and Gratus*, 1929 A.D. 1 the reopening of a case on appeal was also dealt with and the Court stressed the duty resting on an applicant for reopening: "....."

". . . to show that he has used proper diligence—reasonable diligence in not presenting evidence at the trial that with due diligence might have been available"

pp. 6-7.

See also *Oosthuizen* v. *Stanley*, 1938 A.D. 322 at p. 333.

As regards criminal law it appears both from the provisions of sec. 363 (3) (c) of Act 56 of 1955, and from decided cases like *Rex* v. *Cohen*, 1942 T.P.D. at p. 272; *R.* v. *de Beer* 1949 (3) S.A. 740 (A.D.) at p. 748 and *R.* v. *van Heerden*, 1956 (1) S.A. 366 (A.D.) at pp. 371-2, that the question whether there is a reasonably acceptable explanation why evidence which was available at the trial was not adduced there, plays a most important part in the decision of the Court whether it will allow a criminal case to be reopened with the object of leading further evidence.

Clearly the relative considerations in the case of the reopening of a case on appeal are not in all respects the same as those taken into account by a magistrate when exercising his discretion before judgment has been delivered. It is, indeed, clear that the further the case has progressed the more difficult it will be to convince the court that the case should be reopened. It appears, however, from the decided cases quoted in regard to the reopening of a case, before as well as after judgment that the consideration presently discussed plays an important although not decisive part. Instances do occur, therefore, in our Courts where the Court did not allow such consideration to stand in the way of the reopening of a case which had already been closed. In an *obiter dictum* in *Scrooby* v. *Engelbrecht* 1940 T.P.D. 100 RAMSBOTTOM, J. says (at p. 104) that where a plaintiff neglected to prove before he closed his case that the amount of the costs of repairs which he claimed from defendant as damages, was reasonable, the magistrate, if he was requested to do so, would have allowed plaintiff to have adduced the missing evidence. In *Steenkamp* v. *du Plessis*, 1926 T.P.D. 387 the Court was also of the opinion that the magistrate should have granted leave to plaintiff to reopen his case in order to lead evidence in connection with the reasonableness of the amount which he had claimed for services rendered. In both cases the evidence in question was of a more formal nature. A similar consideration apparently prompted the Court to decide in *Coetzee* v. *Jansen*, 1954 (3) S.A. 173 (T), at p.

177 to allow plaintiff, in the absence of an explanation on his part for his omission, to lead evidence "in order to prove the reasonableness of his damages".

Against the background of these general remarks the Court must now proceed to deal with the question how this Court, where it now finds itself in the place of the magistrate, should exercise its discretion in the particular circumstances of this case. It may be accepted that neither the time when the application for reopening was made, nor the relativeness of the evidence which the appellant wants to lead obstructs the granting of the application.

630

In addition there is no reason to believe that the witness or witnesses whom the appellant wishes to call will not be credible. On the other hand there is no doubt that appellant's attorney neglected to lead evidence which was available. With the magistrate's finding that such evidence was indeed available no fault can be found, for the reasons furnished above. In regard to the reason why the available evidence was not adduced, suffice it for me to refer to what was said earlier in this judgment in this respect. Notwithstanding the numerous speculations in the Court *a quo* as well as in the course of the hearing of this appeal in regard to what the magistrate should have found in connection with the true reason for the failure to lead the available evidence, I am of the opinion that this Court can come to no other conclusion than that which the magistrate arrived at, viz., that no explanation for the omission was furnished. Indeed it appears more clearly from the course this case took that appellant's attorney dismissed in all seriousness the mere thought that the omission was due to his inadvertence. There is, therefore, no doubt that evidence which was available was not led and no explanation for this omission was furnished. It is difficult to avoid the conclusion that the evidence was purposely not adduced because appellant's attorney, taking into account his view of the law, thought that such evidence was not necessary and that he made the application for reopening merely to afford him the opportunity to prove separate damages in case the magistrate would be prepared to grant it on that basis.

In my opinion there also exists a real danger—as the magistrate pointed out in his "reasons for judgment"—that the respondents will be prejudiced if the application is granted. This is not at all a case where, as appellant's legal representative averred before the magistrate, appellant only wanted to adduce "supplementary evidence". The cause of action as set out in the summons, is averred to be that respondents are jointly liable for the damages which appellant suffered. Now the appellant wants to hold each of the respondents responsible for a specific part of the total loss. Before evidence may be adduced to prove this the appellant will have to apply for an amendment of his summons so that he can alter the particulars of his cause of action. In case of such an application respondents will be entitled to oppose it. If the application

for amendment succeeds the case will have to be postponed to give the respondents the opportunity to ask for further particulars in respect of the new cause of action. After the furnishing of further particulars the respondents have the right to except or to plead. Further discovery and placing on the roll will take place thereafter. Respondents will also have the right to cross-examine appellant and his wife further in connection with the nature and *quantum* of the damages. In part, therefore, the case will have be started *de novo*. As a result of the disappearance of the defence which the respondents had to the claim as it was originally formulated, it is possible that the issues in regard to negligence will play a more important part in the further course of the case. The above-mentioned circumstances indicate that the granting of the application for reopening could prejudice the respondents.

631

The fact that the respondents were of the opinion that—

(*a*) that appellant's case could not succeed in view of the ground on which it was based by his legal representative and

(*b*) that it should have been based on another ground,

does not mean that they may not be prejudiced by appellant's change of attitude. After consideration of all the relative factors I come to the concludsion that this is not a case where this Court should exercise its discretion in favour of the reopening of appellant's case.

In conclusion the question remains whether the magistrate, on the evidence which was led, could have made a finding in regard to the amount of damages for which each of the respondents was severally responsible. The magistrate found that he was not in a position to do that and the Court *a quo* confirmed this conclusion. In this Court it was submitted on behalf of appellant that from the evidence it appears that second respondent is liable for at least half of the damages and that it is only the remaining half which should be apportioned between the two respondents. The evidence which is relative here is that of appellant where he deposed that with the first collision only the right mudguard, the right lamp and the right-door handle of the vehicle were damaged, but that with the second collision extensive damage was caused to the left side of the vehicle, to wit, to both wheels and doors, the pillar between the doors and also the front mudguard. Appellant's counsel referred in this Court to cases where the opinion was expressed that in cases where there is proof of damages, although the evidence in respect of such damages is incomplete, the court must endeavour to assess the damages suffered on the basis of that evidence. So, for example, STRATFORD, J., said the following in the case of *Hersman* v. *Shapiro & Co.*, 1926 T.P.D. 367 at p. 379: "....."

631 G

As far as I could verify, this view was generally qualified by our Courts by the condition that the plaintiff must lead all available evidence

which could assist with the calculation of the damages. Indeed, in the sentence which follows immediately after the above quotation from the judgment of STRATFORD, J., the learned Judge says: "....."

631 H

The general approach that the Court must do its utmost to calculate the damages suffered on the evidence at its disposal was subjected to a similar proviso in the case of *Klopper* v. *Mazoko,* 1930 T.P.D. 860 at p. 865 where TINDALL, J., remarked that: "....."

632 A

Cf. also other Transvaal cases such as e.g. *Prinsloo* v. *Luipaardsvlei Estates & G.M. Co. Ltd.,* 1933 W.L.D. 6 at p. 23; *Arendse* v. *Maher,* 1936 T.P.D. 162 at p. 165; *Lazarus* v. *Rand Steam Laundries* (1946) (*Pty.*) *Ltd.,* 1952 (3) S.A. 49 (T) at p. 51; *Enslin* v. *Mayer,* 1960 (4) S.A. 520 (T) at p. 523. A similar reservation was made by this Court. See e.g. *Versveld* v. *South African Citrus Farms Ltd.,* 1930 A.D. 452 at p. 460; *Erasmus* v. *Davis,* 1969 (2) S.A. 1 (A.D.) at p. 22.

The reason for this reservation is obvious. If it is peremptory for a court to attempt to make a calculation of damages on incomplete evidence in a case where there is indeed conclusive or better evidence of the damages available, it may appear *ex post facto* that the court's calculations do not coincide with the realities and an injustice may easily be done to one of the parties. If the withholding of available evidence in respect of damages is once allowed it may easily happen that a party purposely withholds evidence in the hope that the court's calculation of damages may be more in his favour than the case would have been if he had placed all the available evidence before the Court. The already difficult task which rests on a court in regard to the assessment of damages could be made infinitely more difficult thereby and the factors tending towards uncertainty could be multiplied thereby. The circumstances of the present case serve as an example of the uncertainty created where available evidence is not adduced. In this case there is no doubt that greater damage was caused to appellant's vehicle by the second collision than by the first and as result of both collisions his vehicle is now a wreck and its value depreciated by R550. From the evidence it is impossible to say with any measure of certainty in what ratio the two accidents contributed to the total loss. From the evidence it cannot be inferred why the vehicle is considered to be a wreck. It may be due to the fact that the chassis is damaged beyond repair. If it is indeed the case then it does not necessarily follow that the more extensive damage to the body, which was caused by the second collision is responsible for the irreparable condition of the vehicle. The Court is now faced with this problem that it must guess in this connection while it hears from appellant's attorney himself that he is in possession of evidence which will indicate "precisely which amount of damages approximately was caused by each collision". It cannot be expected of a

court to occupy itself with guessing and speculation in regard to possibilities when tangible and precise evidence is indeed available in respect of the relative investigation. This argument, therefore, also fails.

In my opinion the appeal cannot succeed. It is with regret that I am forced to come to this conclusion, because if the case was approached differently by appellant's legal adviser in the lower court the appellant would possibly have collected damages from one or both respondents. I would dismiss the appeal.

633

RABIE, A.J.A., concurred with VAN WINSEN, A.J.A.

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633 B