



“SPECIAL INTEREST”

CASE NO.: (P) I 1478/2006

SUMMARY

**JOHANNES JURIE JACOBUS VAN DER BERG versus MOTOR VEHICLE
ACCIDENT FUND**

DAMASEB, JP

18/02/2009

Delict: Negligence:- Heavy duty truck proceeding on a narrow urban street followed by a motorcycle –

Discussed:- Responsibilities of the respective drivers in avoiding accident.



“SPECIAL INTEREST”

CASE NO.: (P) I 1478/2006

IN THE HIGH COURT OF NAMIBIA

In the matter between:

JOHANNES JURIE JACOBUS VAN DER BERG

PLAINTIFF

and

MOTOR VEHICLE ACCIDENT FUND

DEFENDANT

CORAM: DAMASEB, JP

Heard on: 17th – 20th/07/2007; 21st – 25th/01/2008

Delivered on: 18th February 2009

JUDGMENT

DAMASEB, JP: [1] The plaintiff sues the Motor Vehicle Accident Fund (MVA) for damages resulting from the alleged negligent driving of a truck driver employed by Transnamib Ltd. He claims damages for bodily injuries, hospital and medical

expenses, general damages inclusive of loss of earning capacity, pain and suffering, loss of amenities of life and permanent disfigurement and disability. He suffered the following injuries according to his particulars of claim:

- “1. Bruises of the left lateral thoracic and abdominal walls;
2. A humerus fracture;
3. A broken pelvic bone;
4. A left haemo thorax;
- 5.
6. Five rib fractures on the left side;
7. The spleen had to be removed;
8. A retro-peritoneal haematoma.”

[2] The parties agreed to separate the merits from the quantum and my task is to determine whose negligence caused the accident.

[3] It is common cause that the accident took place on 23rd March 2000 at about 16H00 in Mariental’s Marie Brandt Street between a motorcycle and a Transnamib truck. That is where the agreement ends. As will presently become apparent, there are two diametrically opposed versions of how the accident took place. The two protagonists being the plaintiff (who was the driver of the motorcycle at the material time) and one Reinhold Gowaseb (the “truck driver” or “Gowaseb”) who was the driver of the Transnamib truck.

[4] The plaintiff’s particulars of claim allege that the accident happened because the truck driver failed to exercise proper control over the truck; failed to apply brakes timeously or at all; failed to keep a proper look out for other road users, and misled the plaintiff by indicating that he was going to turn right but at the last minute

turned to the left without warning the plaintiff, and thus colliding against the plaintiff's motorcycle which by then was attempting to pass the truck on the left. It is alleged that the truck driver could have averted the collision by the exercise of reasonable care.

[5] The defendant denies the particulars of negligence and counters that it was in fact the plaintiff who was negligent in that he sought to pass the truck to the left knowing that the truck driver had indicated that he was going to turn left; and that the plaintiff failed to keep a safe distance from the truck. Significantly, it is denied that there was a collision between the truck and the motorcycle and that it was the motorcycle driven by the plaintiff which collided against the truck. The defendant also denies that the plaintiff suffered any of the injuries He says he did.

[6] I will now summarise the protagonists' respective versions of how the accident happened: According to the plaintiff, it was just after 16H00 on the day of the accident when he was on his motorcycle proceeding from the Hardap Scheme towards the BI motor way which leads from Windhoek to Mariental, i.e. south to north. Where the road from the Hardap Scheme joins the BI he stopped as he saw a heavy truck approach. He saw that this was a Transnamib truck. The truck having passed, he turned into the BI and proceeded north to south following the truck towards the town of Mariental. When he entered Marie Brand Street in Mariental the truck was still in front. He testified that as he approached the point where Conradie Street joins Marie Brand, he saw the right indicator of the truck go on - signalling that the truck would be turning to the right. He assumed that the truck was going to turn into Charney Street which runs between the Mariental Hotel and

Pep Stores as shown on the sketch-plan (exhibit "E") received in evidence. The truck then moved "totally" to the right lane while he proceeded in the left lane on Marie Brand.

[7] When he had just caught up with the truck and was parallel with it at about the area near the horse of the truck's rear wheel (he driving in the left lane and the truck in the right lane) he said he saw "something" (which he thought was an indicator light showing the truck was turning left) and applied his brakes causing a skid mark of approximately 9 meters long. As he put it:

"I first thought it was the indicator sitting on the right top of the truck but there is no indicator on that door. It could have been the mirror when he turned left it made a flash, so I applied full brakes and then the truck started turning sharply to the left in my direction".

[8] He testified that the motorcycle had come "nearly at standstill" when the left bumper of the truck struck against the bike's fork. The impact threw him off the bike and he landed on his back close to the Transnamib depot entrance. The truck then drove over his body with the front left wheel. He lost consciousness and when he came to found himself under the truck's diff and the left rear double wheels of the truck's horse standing on his right leg. At that point one Peter Hamilton came and enquired about his well-being. Hamilton, he said, asked the truck's driver to move the truck slightly to release him (plaintiff) from the weight of the truck. The plaintiff also added that one Daantjie Louw arrived at the scene and asked if he was alright. He then passed out.

[9] It is important to return to the matter of the movement of the truck before the accident happened. When asked by his counsel how much of the truck he saw move to the right as they proceeded on Marie Brand, the plaintiff elaborated as follows:

“I couldn’t see the head; it was only the trailer because I was at the back of the trailer. So I saw the trailer started moving [totally] over to the right”

and very close to the parking bays fronting Pep Stores. He added that he was able to see a red car moving south to north in the right lane in the opposite direction.

[10] The plaintiff conceded that in order for the truck to have successfully turned into the Transnamib depot entrance to the left opposite Charney Street, it had to veer to the right lane

“because he had to drive there to get into the gate otherwise that vehicle cant turn there because the road is too narrow”.

[11] The plaintiff made two out-of-court statements after the accident. One as part of the criminal investigation in the wake of the accident, and the other to a traffic officer who was detailed to take particulars of the accident. At the trial he confirmed the contents of both statements as correct. The statements were received as exhibit B and C respectively. In the first statement he said that at about 50 meters before the entrance to the Transnamib depot, the truck driver switched on the right indicator and that the truck moved totally to the right. He said as he made ready to pass the truck to the left he:

“noticed on top of the left door that a light is indicating that the truck is turning to the left now. I applied brakes but it was in vain as the left wheel of the truck then struck the front wheel of the motor cycle”. (My underlining)

Plaintiff’s counsel’s attempt to obtain greater clarity on this matter did not bear fruit.

[12] In the statement to the traffic officer the plaintiff said pretty much the same.

That statement records in part:

“Motorcycle B was travelling north to south when A indicate a right turn and left its lane and proceed over to the right. When B bypassed, the motorcycle A put on his indicator to the left and hit B with the truck bumper and drove over B’s driver with the left front wheel. (My underlining for emphasis)

[13] The common denominator in the two out-of-court statements is that the truck driver at some point indicated whilst in the right lane that he was going to turn left. This element is missing in the oral evidence under oath. In court the plaintiff said, as regards the “flash” light, that he did not know what he saw just before the accident but in any event it was not the left indicator light.

[14] The plaintiff accepted that he could only have overtaken on the left if it was safe to do so and maintained that it was safe to do so when he did. He said that when he caught up with the truck there were 2½ meters separating the truck and the motorcycle. He said the following:

“Mr Hinda: But you agree with me that (intervention) --- If he wanted to turn, yes. Right, it would have to veer to the left in order to make that arch as a truck to turn into Charney Street?

A: Yes, he will have to.

Mr Hinda: And if the truck would have to turn into TransNamib yard that is on your left hand side (intervention)

Mr Hinda: That's right. The double entrance?

Correct. It is required to move little bit to the right in order to execute that arch and turn into TransNamib yard. That would be a fair assessment, isn't it?

A: A little bit, no Sir, but it will have to be turned into the right, ja. Mr Hinda: Yes, in order to make that arch?

A: To make that arch, ja." (My underlining)

[15] Yet later on he said:

"A: I didn't know then the logics of a vehicle that size had to go that side had to go that side to turn in at that gate or that street. He put his indicators onto the right, I passed because he go out on the right lane. I passed because he go on the right lane. I passed in the middle of the road I was just driving straight on. So I reacted on his indicators going to the right. I have got, at that moment, the logistics of or the sense to work out that such a big truck have to move over that side or on that side to turn because he showed he is going to turn to the right." (My Underlining)

[16] In cross-examination he also said:

" A: 'There is no problem with that, the problem for this truck will be the trailer to get into that. That's why he was to veer. So the head, My Lord, is like a car. It can turn just like a car but to get your trailer into that gate that's why he had to veer to the right. Mr Hinda: But you agree with me that that day the trailer was part of the head? It was part of this motor vehicle?

A: Yes, it was part of that whole truck.

Mr Hinda: So the manoeuvring was necessary?

A: For him, yes, afterwards, I understand that."

[17] The plaintiff called three witnesses: One was detective Warrant Officer Johannes Jacobus Le Roux based in Mariental. He was the Scene -of - Crime

Officer who made a sketch plan of the accident scene and prepared a photo plan of it. His version is that he prepared these two items based on pointings out made to him by one Constable Gariseb who has since left the Namibian Police Force. Le Roux came to the scene of the accident about 20 minutes past 16H00 after he received a report about the accident.

[18] It was when he came to the scene Le Roux says pointings out were done for him and he also met one Dantjie Louw who conveyed to him that just before the accident, the Transnamib truck which was involved in the accident was showing the right indicator light and when this was pointed out to him, the truck driver rushed back into the truck and changed to the left-hand indicator light. Under cross-examination Louw testified that he did not effect any arrest of the driver of the truck for doing what Dantjie Louw said he did following the suggestion by Mr Hinda for the defendant that such conduct would amount to obstruction and defeating the ends of justice. Le Roux not only made no such arrest but could also not explain why not. The inference that (even if it was reported to him) he did not take it seriously, is irresistible. The only significance I find in Le Roux's testimony is that he, as scene- of-crime officer, took the photo plan and drew the sketch plan which, there being no objection, were received in evidence as exhibits "A" and "B".

[19] Another witness for the plaintiff was Daniel Rossouw Louw, a resident grocer of Mariental. He testified that on the fateful day he was walking on a pavement in front of Mariental Hotel when he saw a Transnamib truck approach in the left lane of Marie Brand Street. As the truck came opposite Pep Stores, he testified, the truck signalled to turn right, and the horse moved "totally over the middle lane" to the

right in order to turn into Charney Street. He added that, at that point, he stood still to allow the truck to turn into Charney Street, only to see the horse turn to the left towards the Transnamib gate, with its right indicator still on. Louw testified that he then heard a thump sound. He walked towards the truck and under it saw the plaintiff and with the help of others pulled the plaintiff from under the truck. Louw said that he in anger asked the truck driver how he could indicate that he was turning right, turn right but suddenly make a turn to the left; whereupon the truck driver went back into the cabin of the truck and changed to the left indicator. He testified that he informed both Le Roux and Gariseb about what he saw with respect to the way the truck driver changed the indicator lights.

[20] In cross-examination, Louw repeatedly stated that he only saw the horse move to the right lane and that he never saw the trailer at all or in the right hand lane. Louw's evidence suggests that the truck was actually in the process of turning into Charney Street as the horse was facing directly in that direction. As he said in cross examination:

“Q: I asked you whether the frontal part of the horse was facing Charney Street as if it was entering that? Was it facing Charney Street?”

A: That is correct, yes”

He testified that the horse then turned left towards the Transnamib entrance. He then saw the trailer for the first time and it “was not on the right hand side of the road.” (My underlining for emphasis)

[21] I have two problems with this evidence: the first is that it contradicts the plaintiff's version that the whole truck (horse and trailer) was (from about Conradie Street) on the right hand side which enabled the plaintiff to drive past on the left. Secondly, in suggesting that the horse faced Charney Street just before turning left, it flies in the face of the accepted reality that for the truck to make any turn it needed to have more space compared to an ordinary vehicle. How could the truck turn immediately to the left while facing Charney Street if that is the case? Louw was therefore not entirely truthful in his recounting of the events that led to the accident. The truck driver testified that he drove with the truck on that Street and made the same manoeuvre 4-10 times a day. It defies logic that he would have made the horse face towards Charney Street in the way described by Louw.

[22] The third witness for the plaintiff was Pieter Daniel Hamilton; also a Mariental resident and a garage owner. On the fateful day and about the time the accident happened, he had just parked his car next to Anneleen Book Shop on Marie Brand Street. He saw the truck driven by Gowaseb enter the town of Mariental from the northern direction. He then saw the truck (somewhere between the Shoe Shop and the Book Shop) move over the dotted white lane to the right hand lane of the road. He next testified as follows:

“I got the impression that this truck did two things. One, either swerved out for a vehicle that could be taken out of the parking place unexpectedly on the other side of the road or the driver's intention was to go to the right hand side make a right turn, may be at Charney Street, in a way to allow the vehicles that was at his back, to pass him on the left hand.” (My underlining)

[23] Hamilton testified that the horse of the truck was “over the right hand lane”. He said that logic told him that the trailer has to follow the horse later on. He then entered the Book Shop and did not see what happened further on. He then heard screeching sound of tyres and a loud bang and the yelling of people. When he looked out of the Book Shop window he saw:

“this Transnamib truck was turning with its rear wheels into the entrance of Transnamib gate. Both of the wheels on the rampage, which is concrete, and the trailer more or less with its rear wheels, on the white lane, so it was across the road.” (My underlining)

[24] Hamilton said that he saw a motorcycle under the truck and rushed to the truck. As he tried to establish if someone was under the truck, he “heard someone who was very, very angry about an indicator light.” He looked around and saw no indicator light on. He was then under the truck on the left hand side of the truck. With the help of others he got the plaintiff out from under the truck. At some stage he saw the left hand indicator was on while when he first checked it was not on.

[25] In cross-examination he said when he reached the Book Shop the truck was between the Book Shop and the Hotel on the wrong side of the road. He did not see the motorbike behind the truck. Hamilton was extremely evasive when asked whether he saw the trailer on the “wrong” side of the road. He chose to answer the question in rather hypothetical and delphic terms such as the “trailer will follow”, “the trailer is hooked directly on the horse, and so the point where the trailer is hooked must be on the wrong side of the road, because the horse is on the wrong

side”. (With respect, this is meaningless verbiage not intended to assist the Court but to obfuscate issues).

[26] I found Hamilton a rather talkative and unhelpful witness who clearly intended to mould his evidence to place plaintiff’s case in the best possible light. I will illustrate: When quizzed about overhearing someone talking about the indicator lights the following conversation took place:

“Q: Is what you told His Lorship today. You just heard somebody talking about the indicator lights that’s all?

A: Ja, the indicator lights that are off or something like that or not working or, I, that guy was angry about the indicators.

Q: You can’t remember?

A: Wait, wait, give me a moment, please give me a moment. I have to recall what it was about, why was he so angry about the indicator, give me a chance. It was something like the [damn] indicator off or on the wrong side on or something like that. That [damn] indicator off or on I can’t remember exactly what it is.”

This while from his evidence in chief I got the clear impression that he was conveying to me that he heard someone complain about indicators; he then checked (as he was standing close to the left indicator of the truck) and did not see any indicator on. When he later came back from the motorbike he saw that the truck’s left indicator was on. He was indubitably implying that there was tampering with the indicator lights of the truck. What he now says in cross-examination is not as definitive.

[27] When asked whether he checked (at the time when he said he did not see an indicator light to the left of the truck flashing) if the right indicator light was not on (in view of his curiosity aroused by the person he said he heard talking about indicator lights) Hamilton gave the following extraordinarily evasive answer:

“A flasher light is or an indicator light is one moment on, the next moment off, one moment on the next moment off, so what’s the possibility that I missed it when it was off, so I think I made myself quite clear when I said I could have missed it, because one moment it is on the next moment it is off, the next moment it is on (intervention)

Mr Hinda: You made yourself clear that you may have?

A: The next moment, one moment it is on then it’s off, then it’s on again then it’s off again then it’s on again then it’s off again so what’s the possibility that I could miss it when it goes off.

Mr Hinda: You tell me.

A: Because it is working on and off, on and off.

Mr Hinda: So you are saying that you, it is possible that it was on but you may have missed it whilst it was off. Is that what you are saying?

A: Ja.”

[28] Hamilton, I regret to say, left me with the uncomfortable feeling (from his demeanour) of a man who did not appreciate sufficiently the solemnity of the occasion and the gravity of judicial proceedings. I therefore find it unsafe to rely on his evidence in so far as it was intended to buttress the allegation that the truck driver tampered with the indicator lights after the accident.

The defendant’s case

[29] Reinhold Gowaseb (the truck driver) testified on behalf of the defendant. He said that he had received 2 months training skills in ‘defensive driving’ as a truck

driver, repeated thereafter yearly. He was at the material time employed by Transnamib as a driver and based in Mariental. He had lived in Mariental for 3 years and had driven on Marie Brand Street many times doing the same manoeuvre he was involved in when the accident happened. He saw the plaintiff's motorbike at the junction of the road from Hardap Scheme and the BI. He was aware that the motorbike joined on the BI and was driving behind the truck towards the town of Mariental. Approaching Mariental, he turned into Marie Brand Street. As he approached the entrance to the Transnamib depot, he checked in his mirrors, saw nothing behind, and signalled his intention to turn left, slowed down and veered the horse to the right and turned to the left. He added:

“The horse and the trailer, they are long things. You cannot just turn like as if you turn with a small car, you must swerve a bit and then you turn in. If you turn as if you turn with a small car, then I will bump all the other things with the back side of the car, because it is long, the trailer.”

[30] Gowaseb testified that as the truck's horse entered the Transnamib depot, he heard a thump sound as if “something was bumped into” and the screams of people. He said that he then immediately applied the brakes. He also heard somebody exclaim “Eina” to signify that they had been injured. He alighted from the truck and then saw the plaintiff under the truck. Someone asked him to move the truck so the plaintiff could come loose. He did so. The plaintiff was pulled out from under the truck and loaded on to an ambulance. He denied that he indicated that he was turning into the right lane just after he passed Conradie Street. He also denied that he had moved the truck “totally” to the right just after passing Conradie Street. He said it was not possible for him to drive on the right side whilst cars were approaching in the opposite direction in the lane to his right, adding there were in

fact cars moving in the right hand lane. He said that had he actually been driving in the right hand lane as alleged, the motorbike could have passed with ease on the left lane.

[31] Gowaseb also denied Louw's allegation that the horse was facing Charney Street just before he made the arch-turn to the left. He said if indeed that was the case, the truck would have made a jack- knife and the trailer and the horse would then collide against each other. He denied being confronted by Louw about the fact that his right indicator light was on when he turned to the right and rushing back into the truck to change it to the left. Gowaseb said he was unable to say which parts of the truck and the motorbike collided against each other. He said though that if, as suggested by the plaintiff, the front left part of the horse rammed against the motorbike's fork, he never saw such a thing. He also denied that the left front wheel of the horse struck the wheel of the motorcycle. He also denied that the point of impact was point D in photo No. 2 of the photo plan. He stated that the "flash" referred to by the plaintiff just before the accident would have been the left hand indicator of the truck as from that position the plaintiff could not have seen the right hand indicator.

[32] Gowaseb testified that just before he turned into the Transnamib depot, he checked in the mirrors and did not notice the motorbike behind him. He said that he looked into the mirrors, realised it was safe and then swerved the horse "a bit to the right side" and then started to turn to the left to enter the Transnamib depot. He testified that it was impossible for the trailer to have veered to the right together

with the horse, suggesting that the trailer had remained in the left hand lane when the horse moved to the right.

[33] In cross-examination, Gowaseb stated that he knew that the motorbike was behind him when he entered Marie Brand Street. Gowaseb repeated in cross-examination that he signalled a turn to the left (not the right as alleged) just after the horse had almost passed Conradie Street. He then slowed down, and swerved slightly to the right. He explained further that he moved the horse slightly to the right opposite Charney Street (which faces the Transnamib depot entrance). From the sketch he drew on exhibit E, the horse had only marginally moved on to the right lane while the trailer remained in the left lane. He said that at the time he moved to the right he did not observe the motorbike, either to the left or right of him. He said that at the point where he turned to the right it was not possible for him to see something in the left mirror.

[34] There was some debate between Ms Chase and Gowaseb whether or not the way in which the witness described the manoeuvre he made to enter the Transnamib yard was possible, Ms Chase suggesting to him that

“to make a left turn at the angle you would almost have to make a complete circle to the left turn and you would actually have to turn to be straight in the Transnamib yard. The angle in which you are testifying that you took the left turn is too sharp for you to have turned left into Transnamib yard. You would be forced at his angle to turn a little bit right to correct the horse slightly ...”.

[35] Ms Chase suggested to the witness that in order to make this manoeuvre, the truck driver had to veer towards the right well before he reached Charney Street.

No expert evidence having been led to guide me on how in such circumstances this particular articulated truck would function, I am unable to resolve this aspect in favour of the plaintiff. (I had expressed my concern to the parties about the fact that no expert evidence was led in this matter.)

[36] Gowaseb was referred to a statement he made under oath 28 days after the accident in which he made no reference to hearing a thump against the lorry at the time of the accident. Gowaseb denied the suggestion that at some stage the “entire horse was on the right hand side of the road and at some point later the trailer was also on, entirely the right hand side of the road before you executed the left turn into Transnamib.” He testified:

“And if it is the case that I was driving on the right hand side and entered Transnamib yard, then the truck would have been in a straight line or nearly a straight line as if I am entering Transnamib yard from Charney Street.”

[37] Although in cross-examination by Mr Hinda for the defendant it was put to the plaintiff that the motorbike bumped into the trailer at the rear, Gowaseb in his own cross-examination said he did not know if the motorbike bumped into the trailer in that way. Ms Chase pointed out to Gowaseb that in both his out-of-court statements he had said that the motorbike bumped against the trailer. He was however emphatic in his denial that the fork of the motorbike hit the front bumper of the truck. He also denied the plaintiff’s evidence that at the point of impact he and the plaintiff looked at each other directly in the eyes. He also denied driving over the plaintiff. He conceded that he was aware, when he turned into Marie Brand Street,

that the motorbike was behind him. He also conceded that before he signalled to make a turn to the left, he did not see the motorbike in the mirror and thought it was “behind the truck, in the middle.” He disputed that the rules of the road

“require that when you are going to execute a left turn, you need to guard against the possibility of an unseen vehicle, particularly a motorcycle, which may be passing on your left at a critical stage of your manoeuvre?”

[38] Having conceded that he knew there was a motorcycle behind him, Gowaseb was asked:

“Q: Yet before you executed your left turn, you didn’t stop to check whether it was safe for you to make a left turn.

A: There was no reason for me to stop and to make sure.”

Ms Chase suggested to Gowaseb the point at which he should have stopped to make sure everything was safe before he turned into the Transnamib depot. She said and he answered:

“Q: When you executed the left hand turn with your horse, you initially testified that the horse was a little bit to the right, over the middle line, facing Mariental (sic) and Charney Street. At some point the horse comes this way before you cross to the left. At some point the horse turns back towards the street you are turning into?

A: That is correct.

Q: And that is the point I put to you, you should have stopped to make sure that it was safe for you to turn left?

A: There is nothing like that. If I look in my mirrors, if I see that everything is safe, I just turn in there, there is no way for me to stop because I have already seen that everything is safe, so I just have to turn in.” (My underlining for emphasis)

[39] Clearly Gowaseb cannot be right. In any event, it does not explain the fact that Gowaseb was aware that the motorbike was behind him and needed to be accounted for before he turned to the left; especially because he almost in the same breath conceded that:

“If you look in your mirror, you can see anything on the sides of your, you can see the sides of the truck but you cannot see something which is behind the truck”.

Precisely because of that the obligation, as put to him by Ms Chase, is so valid.

(Voortrekker Apteek v Serfontein 1979 (3) SA 906(O).)

[40] Ms Chase also correctly agreed with Gowaseb that the motorbike driver in the circumstances had the duty to stop when Gowaseb made the manoeuvre he did and also correctly pointed out to him that that did not excuse him from his responsibility to make sure it was safe before he turned into the Transnamib yard.

[41] Gowaseb said that the fact that he did not see the motorbike was perhaps because it was too close – implying that the motorbike was not keeping a safe following distance.

[42] Gowaseb denied Hamilton's suggestion that after the accident and as the plaintiff lay under the horse, the left indicator light of the truck was not "flashing" at all. He also denied Hamilton's suggestion that the left indicator light only started to flash after the plaintiff was pulled from under the horse. He also denied the proposition that Louw came to confront him in these words:

"What the hell do you think you are doing? You were indicating to turn right but you are turning left?"

[43] Gowaseb also denied Louw's suggestion that the horse of the truck had moved totally to the right hand lane just at the end of Pep Stores with the truck's right hand indicator on.

[44] Joseph Seibeb then testified on behalf of the defendant. At the date of the accident he was working at B&C Funerals in Mariental, situated in the Transnamib yard. On the 23rd of March at about 16h00 he was inside his office looking through the window in the direction of Pep Stores on Marie Brand Street at about 10 to 20 metres from the Transnamib depot yard. He said Pep Stores is located opposite the Transnamib gate. He said he saw a Transnamib truck enter the yard of Transnamib with its left hand indicator on and he then saw the motorbike enter from the left. Thereafter, he heard the motorbike brake and observed the motorbike bump against the trailer of the truck. Seibeb testified that the motorbike was moving at high speed when the accident happened. Seibeb also said he never heard Louw mention anything about the indicator lights in his presence.

[45] In cross-examination Seibeb stated that the left hand indicator of the truck started showing when it came in the vicinity of the Bookshop and Pep Stores. He

said the truck was then also moving in the left lane of the road. At that point, he said, he did not see the motorbike. Ms Chase correctly put to Seibeb (and it was apparent to me from the pointings out in Court) that from where Seibeb stood in B&C Funerals, it was not possible for him to see a motorbike in the fashion he described because it would have been obscured by the truck which, as he said, had already driven into the Transnamib yard. This is particularly so if regard is had to the fact that, according to his evidence, the motorbike hit the trailer about the middle of the left hand side of the trailer.

[46] Again, Ms Chase correctly put to Seibeb that if the motorbike collided against the trailer where he said it did, the plaintiff could not have been found at the place he was found under the truck. I must add that the injuries sustained by the plaintiff are consistent more with the plaintiff having been run over by the wheels of the horse than that he collided against the side of the trailer. He could in those circumstances not have been pulled out from under the rear wheels of the horse. For all of the above reasons, Seibeb was not a reliable witness.

[47] The last witness for the defence was Daniel Gariseb, a detective constable in Nampol at the date of the accident. He resigned from the police force in 2002. He was on standby duty between 14:00 and 17:00. He came to the accident after it happened. He observed the plaintiff under the truck and saw many people standing by the accident site. He called for an ambulance. Amongst the people was Hamilton. At the scene he said he spoke to Seibeb who described to him how the accident happened.

[48] Gariseb testified that he did not find Le Roux at the scene. He then left the scene to go to the hospital and back. Upon his return he found Le Roux at the scene, taking photographs of the accident scene. He denied making any pointings out to Le Roux and said that he could not have done so because he was not there at the time of the accident.

[49] Gariseb denied any report being made to him by Louw that the truck driver (before the accident) indicated to turn right but then after the accident changed to the left indicator. He said if that happened he would have noted it in the investigation diary and would have taken a statement from Louw as such alleged conduct by Gowaseb amounted to obstruction or defeating the course of justice.

[50] In cross-examination he conceded that he did not make (or record) any observation about dents or marks on the truck caused by the motorcycle. He also conceded that in his investigation diary he made no mention of seeing indicator lights and when he came to the scene of the accident. Gariseb's evidence does not advance the defendant's case in any meaningful way; except perhaps for the denial that a report was made to him at the scene of the accident that Gowaseb tampered with the indicator lights after the accident.

Discussion

[51] I must decide whether on the probabilities the accident more likely happened in the way asserted by plaintiff or in the way described on behalf of the defendant. As the Supreme Court has said recently, even where there is no counterclaim but each party alleges negligence on the part of the other, each such party must prove

what it alleges. (*Motor Vehicle Accident Fund of Namibia v Lukatezi Kulubone SA* 13/2008 (unreported) at pp16-17 para 24.)

[52] At the end of the oral evidence and before the submissions were received, I expressed to counsel my concern that no expert evidence was as led in this matter. I am being called upon to not only decide which version to accept as far as people's observation of events is concerned about how the accident happened; but also to determine the probabilities in the matter based on how an articulated truck (a piece of machinery) functions and would have reacted in the particular circumstances of this case. Whether the truck would have functioned or reacted in the way suggested by either side requires knowledge of mechanical engineering and is impossible for me to determine without the aid of expert evidence. I will accordingly refrain from drawing any conclusion based on how the truck would have functioned based on its mechanical make-up, except to the extent that there was common ground between the parties on such matters.

[53] I need to state at this point that I have found the respective supporting witnesses of the protagonists unreliable in one or more respects for the reasons that I have stated. Accordingly, I come to a conclusion of the liability for the accident largely on the testimony of the plaintiff and the truck driver.

[54] As the evidence demonstrates, the two versions of the protagonists are mutually destructive. The approach then is that set out in *National Employers General Insurance v Jagers* 1984 (4) SA 437 (C) at 440E-G as follows:

“The plaintiff can only succeed if he satisfied the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff’s allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff’s case any more than they do the defendant’s, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant’s version is false”.

[55] The reason for the accident, the plaintiff says, was that the truck driver indicated that he was turning to the right, proceeded to veer to the right and moved the entire truck to the right hand lane leaving the left lane clear for the plaintiff to proceed unhindered, only for the truck driver to turn the truck (without warning) back into the left lane on which the plaintiff was proceeding and in this way collided against the plaintiff. The plaintiff’s version that the truck (horse and trailer) moved to the right hand lane is contradicted by his own witness Louw. Louw said it was only the horse that had moved to the right hand lane. Hamilton, as I demonstrated, was evasive on the issue and I do not find his evidence helpful in buttressing the plaintiff’s version.

[56] If the trailer had, as I must find it did, remained on the left hand lane, was it safe for the plaintiff to proceed instead of pulling back until he was sure of the intentions of the driver of the truck?

What were the respective obligations of the parties in this case?

[57] This is how I see it: A vehicle can be overtaken on the left if it is turning to its right or the driver has signalled his intention to turn right; and only when it is safe in all the circumstances to do so. It is not entirely so safe if the vehicle being followed on a narrow urban road is an articulated truck, raising the prospect that it might turn to the left but first requires to make a turn to the right to create sufficient room for manoeuvre in order ultimately to make a turn to the left. For that reason, the vehicular traffic behind an articulated truck proceeding on an urban road must keep a safe following distance that allows the driver to gauge the intentions of the truck driver and allowing him sufficient time to deal with the eventuality of the truck first turning right in order to make an arch turn to the left.

[58] It is potentially hazardous to keep an insufficient following distance with traffic in front of you; *a fortiori* if you are following a heavy duty truck. It is axiomatic that heavy and extra heavy motor vehicles need extra road space to turn. For the traffic moving behind such a vehicle (on especially an urban street) their ability to see and to plan ahead will be improved if they pull back to increase the following distance. On the other hand, while it is sometimes necessary for a heavy duty truck to change position on the road (including straddling the lines and even turning from one lane into or across another lane) in order to make a right or left turn, such a manoeuvre should only be undertaken without endangering other traffic

and if it is not prohibited by a road traffic sign or marking. The appropriate driving signals must be given conspicuously and of sufficient duration to warn other road users who stand to be affected by such a manoeuvre. This reasoning and conclusions *a propos* the obligations on the respective drivers in the circumstances of this case are inspired by *The Namibian Guide to Safe Driving*¹ and are in harmony with the common law. (*Santam Insurance Co. Ltd v Nkosi* 1978 (2) SA 784 (A) at 792 A-C; *Beukes v Mutual & Federal Insurance Co. Ltd* 1990 NR 105 (HC); *Boots Co. (Pty) Ltd v Somerset West Municipality* 1990 (3) SA 216C; *Reemers v AA Mutual Insurance Association* 1962 (3) SA 823 W at 825H.)

[59] The plaintiff was unable to tell the Court at what speed he drove behind the truck at the material time. He could also not tell what distance he kept from the truck. I am thus left to guess if he was keeping a safe following distance. If the skid marks are any guide, he was certainly not driving in a fashion which fits his description “casually” “not rushing” or “not speeding”.

[60] The plaintiff had been resident in Mariental for two years before the accident. He knew that there is a Transnamib depot entrance opposite Charney Street. He knew that the truck he was following was a Transnamib truck. He said that at the time he did not know that the articulated truck he was following needed to make an arch turn to turn into the Transnamib depot entrance. In my view he should have known. According to him, he reacted solely on the circumstance that the truck

¹ Pottas et Tendekule, *The Handbook for the Theoretical Examination for Learner's and Driving Licences* (2007): Approved by the Ministry of Works, Transport & Communication: See pp 18, 55, 56 and 71.

driver indicated he was turning right and in fact veered the truck to the right. The question that arises is: should he have done more than He said he did?

[61] The plaintiff's version that the entire truck had moved to the right is not supported by Louw who was a direct eye witness to the accident. The only respect in which Louw corroborates the plaintiff is that it was the right indicator of the truck which was on just before the accident occurred. I have already shown how the plaintiff's story changed in regard to whether or not at the time of the accident the truck driver had signalled that he was going to turn left. In the out-of-court statements he said he saw the truck driver signal a left turn while in the oral evidence at the trial he backtracked. The plaintiff's sleight of hand is clearly intended to give credence to the version of Louw that when he came at the scene of the accident he found the right indicator of the truck was on. In both his out-of-court statements describing the accident, the plaintiff had without reservation stated that he saw the left indicator of the truck had gone on making him to apply his brakes. If the left indicator was on it puts to paid Louw's allegation that the right indicator of the truck was on after the accident. In view of this very material inconsistency, I come to the conclusion that the truck driver had not been proven to have changed from the right to the left indicator after the accident as alleged by Louw. I reject Louw's version of finding the right indicator on after the accident. I also find that the plaintiff embellished his evidence to fit Louw's version. I find, accordingly, that the truck driver had in fact indicated he was turning left when he was in the right lane.

[62] The probabilities favour the version that the driver of the truck indicated he was turning right as alleged by the plaintiff. He then began to turn the horse to the right while the trailer remained on the left. Having moved the horse to the right lane he then switched on the left indicator to show he was turning to the left into the Transnamib yard; and this is consistent with the 'flash' seen by the plaintiff when he was parallel with the horse of the truck. The initial act of indicating that he was turning right was negligent as both parties accept that for an articulated truck to make the manoeuvre he had to, he was required to signal a turn to the left and not to the right.

[63] That said, the paradox is this: Although I accept that the truck driver was required in the circumstances to have indicated a left turn when the moment arrived for him to prepare to turn to the left into the Transnamib depot entrance, he would, by so doing have created the same confusion to the plaintiff as he did by indicating he was turning right. The plaintiff might equally have thought that it was safe for him to pass on the right of the truck. The fact that either of the two scenarios would have confused the plaintiff placed an obligation on both the plaintiff and the truck driver to make sure of the safety of the moves each was going to make. The truck driver had the duty to make sure that he did not create a danger to the traffic behind him and to take every reasonable step that there was no traffic behind him that could have assumed that his turning to the right lane made it safe for them to overtake on the left. Having turned to the right after signalling the left indicator, he should (as was suggested by Ms Chase) have brought the truck to a standstill -even if it meant temporarily blocking the traffic in the opposite direction; still

maintaining the left indicator signal as a warning to those behind him, and only then turn to the left.

[64] I find that he failed to do that. It is clear from what Gowaseb said in answer to questions posed by Ms Chase that he did not consider to be under such obligation. He is wrong. He was therefore substantially responsible for the accident. The defendant's case as put by Mr Hinda to the plaintiff (not to Louw who was an eye-witness) is that the truck's horse's bumper did not bump with the plaintiff's motorbike but that the plaintiff's motorbike collided against the tail-end (on the left rear wheel) of the truck. This version is difficult to reconcile with the position of the plaintiff and his motorbike after the accident. In any event, this version is not supported either by the truck driver or Seibeb who says it was on the left side of the trailer.

[65] A reasonable driver in the shoes of the plaintiff would know that an articulated truck would make an arch on a narrow street in order to turn either way. Even by the plaintiff's own admission the truck could not have turned into the Transnamib yard without first moving to the right lane and then arching to the left because the street was narrow. As he put it:

“[T]he problem for this truck will be the trailer...That's why he has to veer. So the head is like a car. It can turn just like a car but to get your trailer into that gate that's why he had to veer to the right”. This He said he understood only after the event. This raises two issues: should this have been obvious to him at the time. If he knew or ought to have known – how should he as a reasonable driver have reacted on the day? The fact that he did not appreciate as much, does it render the truck driver negligent?”

[66] By parity of reasoning (and this much the plaintiff accepted in cross-examination) the truck could only have turned into Charney Street by a similar arch movement from the left to the right. I find that that manoeuvre was impossible if the truck had (already just past Conradie Street), moved 'totally' to the right lane. The plaintiff's assertion that he assumed the truck was turning into Charney Street is therefore difficult to comprehend; and accordingly I reject it.

[67] What is more, the plaintiff, guided by the reality that an articulated truck might, in order to turn left, first turn to the right lane to make an arch-turn toward the left, was required to keep a sufficiently long following distance (and not merrily drive on) to enable him ascertain the intentions of the truck driver and to then plan the next move in a way that was reasonable and safe to avoid an accident. The plaintiff's concession that he does not even remember what following distance he kept is both revealing and damning.

[68] Accepting, as I must, that the motorbike passed the trailer on the left to collide with the left front bumper of the horse, I must reject the possibility that the motorbike bumped against the trailer as pleaded by the defendant. The position where the motorbike and the plaintiff were found, and the injuries sustained by the plaintiff, is consistent with the motorbike being rammed by the left front wheel of the horse as testified to by the plaintiff. The implication of that is that the truck driver did not satisfy himself that it was entirely safe for him to turn to the left before doing so. The further implication of that is that the plaintiff had not only failed to keep a safe following distance behind the truck but he also failed to

anticipate that the truck driver might have intended to make a turn into the Transnamib depot to the left of Marie Brandt Street. Had he so anticipated, he would have pulled back (and if necessary come to a standstill) to gauge the true intentions of the truck driver. It was assuming an unreasonable risk for him to just drive on when the truck driver made the turn to the right while the trailer remained on the left. The plaintiff was therefore contributorily responsible for the accident albeit to a degree lesser than the truck driver.

[69] Having regard to all the circumstances of this case, I determine liability in the ratio of 60% to 40% in favour of the plaintiff; and I also determine the costs of suit in that same ratio. In the result:

- (a) The defendant is 60% liable for the collision between the motorbike of the plaintiff and the Transnamib truck while the plaintiff is contributorily liable to the extent of 40%.
- (b) The defendant shall be liable for 60% of the plaintiff's costs. Such costs to include one instructing and one instructed counsel.

DAMASEB, JP

ON BEHALF OF THE PLAINTIFF: MS. E SCHIMMING-CHASE

Instructed by: DR WEDER, KAUTA & HOVEKA INC

ON BEHALF OF THE RESPONDENT: MR. G. HINDA

Instructed by: TJITEMISA & ASSOCIATES