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Case No.: I. 54/98

IN THE HIGH COURT OF NAMIBIA

In the matter between:

VANESSA CECILIA GRIFFITHS

PLAINTIFF

and

THE MOTOR VEHICLE ACCIDENT FUND

DEFENDANT

CORAM: HANNAH, J Heard on:

13th-26th February 2001 Delivered

on: 20th March 2001

JUDGMENT

HANNAH, J: On 22nd September, 1994 Clive Gareth Paul Griffiths (the deceased) was driving a Mercedes Benz 200, Registration Number N36661W, along the Otjiwarongo to Omaruru road in a southerly direction. Whilst entering the township of Kalkfeld the vehicle left the road and collided with a tree. The deceased died as a result of injuries which he sustained. Those facts are common ground between the parties.

As a result of the death of the deceased, the husband and, so it is claimed, the breadwinner of the

plaintiff and her five minor children, the plaintiff instituted this action against the defendant for the payment of damages to her in her personal capacity and in her capacity as mother and natural guardian of the minor children.

The action was instituted against the defendant, a juristic person by virtue of section 2(2) of the Motor Vehicle Accidents Act, No. 30 of 1990, on the strength of an allegation that the death of the deceased was caused by the negligence of the owner of the Mercedes Benz. In the original particulars of claim it was alleged that the vehicle "suddenly tore apart in two pieces and left the road" and it was further alleged that the owner:

6.1 allowed the vehicle to be driven in a dangerous state of
..... disrepair which the owner knew or ought to have known existed.

The state of disrepair was a latent nature and not within the knowledge of the Plaintiffs husband."

7. The claim were, however, amended and the allegations just referred to were amplified and extended. It is now alleged in paragraph 5 of the amended particulars of claim that the Mercedes Benz:

(a) tore apart in two pieces and left the road, alternatively
(b) commenced and/or cracking and/or commenced breaking up and left the road and collided with a tree; alternatively

(c) left the road and collided with a tree.

As for the negligence of the owner, it is now alleged:

"7.1 such (both owner "the and/or cu gave or
own or own permitted sto handed out
er or employee(s) er") and/or dy the motor
empl hereinafter cons allowed the an vehicle to
oyee collectively ente motor vehicle d/ other
(s) referred to as d to leave its or parties (or

allo	rally and/or to	was	rally unsafe	fo	and/or to
wed	plaintiffs	in a	and/or unfit	r	plaintiffs
the	husband	dang	for use on a	th	husband
moto	particularly	erou	public or	e	particularly
r	and/or by	s or	other road:	pu	and/or
vehi	allowing the	othe		rp	before
cle	motor vehicle	<u>Alternatively</u>		os	allowing
be	to be driven	state		e	the motor
hand	by plaintiffs	of	7.2 the owner was	of	vehicle to
ed	husband,	disre	negligent in	sel	be driven
out	whilst the	pair	that it failed	lin	by plaintiffs
or to	owner knew	whic	to properly	g	husband;
be	or ought to	h	repair and/or	or	
give	have known	mad	maintain	au	In the alternative to
n to	that the motor	e	and/or inspect	cti	paragraph 7 <i>supra</i>
other	vehicle:	the	the motor	on	(and only in the
parti		mot	vehicle for	in	event of it being
es)	(a)	or	defects before	g	found what is set
for		vehi	allowing the	of	out in the aforesaid
the		cle	vehicle to	f	paragraphs 7, 7.1
purp	contai	unsa	leave its	th	and 7.2 <i>supra</i> does
ose	ned	fe or	custody or	e	not <i>per se</i> constitute
of		unfit	giving or	m	negligence
selli	defect	for	handing out	ot	irrespective of
ng		use	the motor	or	whether the
or		on a	vehicle (or	ve	hereinafter
aucti	s,	publ	allowing the	hi	mentioned steps
onin	latent	ic or	motor vehicle	cl	were taken or not),
g off	or	othe	to leave its	e	plaintiff avers that
the		r	custody or	thi	the owner was
moto	other	road	giving or	rd	negligent in that the
r	wise;	;	handing out	pa	owner acted in the
vehi	and/or	and/	the motor	rti	manner as set out in
cle		or	vehicle (or	es	paragraph 7.1 <i>supra</i>
to		was	allowing the	ge	and further because
third		gene	motor vehicle	ne	the owner failed to
parti			to be given or	ral	inform or take
es			handed out) to	ly	reasonable steps to
gene			other parties		

inform or bring to the inc as if specifically repeated
 knowledge of plaintiff s or here, March, 1998 the parties claim could not be held liable and
 husband or any other po agreed that if plaintiff could the the parties therefore agreed
 prospective purchaser of the rat agreed that if plaintiff could the the parties therefore agreed
 motor vehicle the relevant on
 facts and circumstances by not prove ownership asdefent that the trial of the action
 regarding the condition of the it"
 motor vehicle as set out in ere pleaded in the particulars of dant should be separated into
 paragraphs 7.1(a) to (c) nc
supra, e

the decision was in the plaintiffs favour then the question of liability should be decided and if this decision was also in the plaintiffs favour quantum meruit should then be decided. The separation of the trial in this way was approved by the Court.

And so it came about that from 29th February, 2000 to 2nd March, 2000 Levy, A.J. heard evidence and argument on the question of ownership. On 10th May, 2000 the judge delivered his judgment on this aspect of the case and made the following order:

"(a) Own ership of the Merc

on of ownership and I am now called upon to adjudicate upon the issue of liability. This involves two issues, namely negligence and causation.

I will begin with a summary of the evidence. The plaintiffs first witness was Andre Kandolf.

He purchased the Mercedes Benz N36661W from a firm called Rolling Wheels in 1993. To enable him to pay for it he obtained a loan from First National Bank (FNB). Kandolf said that he was happy with the vehicle but wanted it to look "nice". He therefore took it to a firm of pan and certain welding joints were pointed out to him. Kandolf then set about returning the vehicle to Rolling Asc Wheels or to FNB.

When he received no response from either of these Asc entities he engaged the services of Behrens & Pfeiffer, a firm of attorneys, and they in turn instructed Harry Riegel, a loss adjuster, to examine the vehicle and compile a report. Riegel examined the vehicle and test stra drove it and Pfeiffer

(b) Costs of this hearing to be paid by Defendant.

sec nager, one Kaufmann, and It Muller, who appeared on insur the general category of
 on pointed out Riegel's behalf of the defendant, to theance hearsay evidence and is,
 d conclusions. This led to aco admissibility of the evidencecomp therefore, inadmissible
 qu settlement whereby FNBnv to which I have just referred.any. unless it comes within the
 art repaid Kandolf one half of theeni Mr Muller submitted that theCorb ambit of one of the
 er deposit which he had paid andent evidence falls into the generalett, J.exceptions to the hearsay
 of all instalments and Kandolfat category of hearsay evidenceA., rule. One such exception
 19 returned the vehicle.thi and is inadmissible as it doesdeliv considered by the learned
 94. According to Pfeiffer, who's not fall within any of theering judge was the existence of
 Pfealso testified on behalf of thepoi exceptions to the hearsay rule. the privity or identity of
 iffeplaintiff, about one monthnt In *Union and South West*judg interest. Having considered
 r after the settlement was to *Africa Insurance Co. Ltd* vment the position of the driver of
 shoreached he met Kaufmann anddea *Quntana, N.O. 1977(4(SA* of thethe insured vehicle in an
 we Kaufmann told him that he1 410 (A) the Court wasCourtaction under the 1942 Act,
 d had instructed the personnel inwit concerned with an action, Corbett, J. A. said at 424 A:
 the his office to sell the vehicle as h brought in terms of the MotorPoint
 rep spare parts. He added that he the Vehicle Insurance Act, 29 ofed
 ort had expressly instructed themobj 1942, and the point whichout
 to not to put the vehicle onect arose for decision was that
 FN auction because he would, ion whether an extra-curial such
 B's have sleepless nights if ma statement or admission madeevide
 cre someone should die while de by the driver of the insurednce
 dit driving it. by vehicle was admissible as falls
 ma Mr against the registered into

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ry liability cast upon learned judge concluded at registered insurers and of the relationship between the registered insurer and an authorised driver of the insured vehicle, I am of the view that in terms of our substantive law there is not as between them the privity or identity of interest or obligation necessary to render the admissions of the driver receivable in evidence against the insurer. Primarily, sole liability is cast upon the registered insurer and it is only exceptionally that the driver may become liable, either directly to the claimant or, by way of the right of recourse, to the insurer. When the driver does become liable directly to the claimant it is as an alternative obligor and his liability is quite disparate from that of the insurer. Whatever the precise meaning of 'privity or identity of interest or obligation' may be, it seems to me that it does not relate to such a situation."

under Act 29 of 1942, on the ground of privity or identity of interest or obligation; and that, in the South African Motorists showing Kaufmann's state of mind. What instructions the admission of the defendant in the *res gestae* opinion, this Court should pre-appointment or reference to the subsequent adoption, the admission is not receivable in evidence at all." (supra). Furthermore, although the Court in that case was concerned with an extra-curial statement or admission made by the driver of the insured vehicle I see no reason why the owner or his employees should not be in precisely the same position. The following admission by the defendant was recorded in the minutes of a pre-trial conference held on 21st February, 2000: Mr Muller referred the Court to the *Quntana* case (supra)'s but, as I understand it, Mr Geier's

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he

<p>Defendant admits that FNB employed Branch Windhoek, was the owner of the 1998 Mercedes Benz, on 9th February, 2001 Mr. A. Kandolf on or about 25th February, 2001 until it subsequently left the repossession yard of Wesbank."</p> <p>"W esb an k" is the bra nc h of FN B wh ere Ka uf</p>	<p>and scope of their record of the proceedings in employment as aforesaid."</p> <p>front of Levy, A.J. and the</p> <p>At judgment of the learned judge</p> <p>the should form part of the</p> <p>present proceedings and I now</p> <p>turn to the judgment of Levy,</p> <p>A.J. The learned judge found</p> <p>that Johannes Pretorius, the</p> <p>..... Pikki tried manager of Motor House CC, e Louw used car dealers, had, in or and J Kaufmann about the middle of 1994, were never visited Wesbank's employees repossession yard and seen the of Wesbank's Mercedes Benz 200 with ank/F irst the which this case is concerned. National par In his judgment, the learned Bank during ties judge continued: g September 1994 o and that agreed they acted accordingly at all relevant tha ant times t withi n thethe course</p>	<p>le 'on their behalf and they agreed. He testified that the vehicle was taken from the yard to the premises of Motor House CC where it was for sale on behalf of FNB. At the time he dealt with one Kaufmann and 'Pikkie' Louw both of whom were employees of FNB, the former being the manager of the second-hand car division of that Bank and Wesbank, and the latter, the manager of the repossession yard of Wesbank. He says the agreement was that he would hold and sell the car 'on consignment' for FNB and he undertook thereby that if he made a profit, that is sold it above the reserve price, such profit was to the credit of Motor House CC.</p> <p>Pretorius says he was unable to sell the vehicle and it remained on the floor of Motor House CC until it was taken to Gerry's Auction and Car Sales in Independence</p> <p>Av en ue to be auc tio ne d for an d on be hal f of FN B. It wa s tak en the re wit h six or sev en oth er car s on e to thr ee we eks bef ore the auc tio n sal</p>
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... was held on 15 September 1994. In cross-examination by Mr. ... r Sales held their first auction ... as a witness by the ... defendant. At the material time he was employed as a ... Mercedes Benz was one of the but ... time he was employed as a ... Mercedes Benz when it was ... vehicles auctioned that day no ... car salesman by Autocentre ... on the floor of Motor House Au and the deceased was there in Windhoek. The owner of ... of CC. Pretorius said that he ... successful bidder. The Autocentre at that time was ... the could tell from the spacing of ... on auctioneer, Rolf Vogt, testified At ... Vogt and the Mercedes ... pro the rear door to the rear fender an that the deceased asked him if this Benz spent some time on ... ce that the vehicle had been in an d he could take the vehicle point the floor of their showroom. ... in accident. However, the Ca because he wanted to show it I Presumably, this was after it ... gs witness denied that he had r to his wife and he had an shoul left Motor House's premises ... hel been informed by either Sal appointment with the d en route to Gerry's Auction ... d Kaufmann or Louw that the es Mercedes Benz agent "to menti and Car Sales. ... bef vehicle had been damaged and an service the vehicle 100%". on Berry said that at the ... ore rebuilt. d Although payment for the the beginning of September, ... Le Ge vehicle had not been finalised evide 1994 the deceased came to ... vy, Continuing with the judgment rry' Vogt allowed the deceased to nce Autocentre and enquired ... A.J. of Levy, A.J., the next witness S take it on the understanding of whether the Mercedes Benz to the chain of events Au that he would immediately Johan had been sold. At that stage ... als surrounding the Mercedes cti return Vogt's garage nes it was at Gerry's and Berry ... o Benz was Rolf Vogt. In on registration plates. This Berry arranged for it to be brought ... sho September, 1994 he and the an evidence is admissible in who to Autocentre and the ... ws owner of Motor House CC d order to show why Vogt's was deceased asked to be taken ... tha purchased the business known Ca released the vehicle to the calle on a test drive. Berry agreed

an point just outside Okahandja al accident. He was a friend of what not being driven at a very
d and back. The deceased or the deceased and had known Tims high speed. Titus then felt
wit wanted the vehicle tested at Tit him for about five years prior said the vehicle shaking. He
h high speed and Berry said that us to his death. He said that he in looked up and saw that the
the he drove it up to 200 kph. At wh had had occasion to drive with exam top of the windscreen had
dec 150 to 160 kph there was, he o the deceased on many inatio come loose. He sat back and
eas said, a little vibration on the wa occasions and described him n-in- grabbed the two children as
ed steering wheel but at 170 to s aas a very good driver. chief he realised that something
as 180 kph this vibration pas conce dangerous was about to
a disappeared. On the return sen On the day of the accident therning happen. He then saw that
pas journey the deceased drove ger deceased first drove from the the part of the vehicle
sen for a few kilometres. Berry in Windhoek to Ofjiwarongo accid behind the front seats had
ger said that there are bends or the where he had business to ent. broken as the mat had torn.
he curves on the road to Me transact and it was then their As The deceased tried to
dro Okahandja and the vehicle did rce intention to travel to they control the vehicle but the
ve not pull to one side nor was des Swakopmund via Omaruru. A appro front part had broken loose
the there any noticeable defect to Be person named Moody was ached and the witness could see
Me the windscreen. Except for the nz seated in the front passenger Kalkf sparks. The front part of the
rce vibration on the steering at seat next to the deceased and eld vehicle collided with a tree
des wheel at a certain speed he the he, Titus, sat on the middle of the and at some point in time
Be experienced no problems with tim the back seat with the Merc the witness lost
nz the vehicle. e deceased's two young children edes consciousness. He regained
to of seated on either side. The Benz consciousness when the
a I now come to the evidence of the following is a summary of was police were loading him
fat

int journey prior to the accident. co s contrasts with his evidence-15 broke. The carpet
o One thing which he said heuld in-chief that the speed was notcm was torn and he
the remembered was that thenot very high. He was asked toin could see tar. The
ir steering wheel was shaking asay describe what happened againthe gap in the floor was
ve lot. He could not recall thewh and said that as theymid about 6 cm and ran
hic speed of the vehicle when thiseth approached the township theredle. from the middle of
le. occurred but when iter was a bend and, although itThe the left seat to the
happened the deceasedthe was difficult to put into words,n, drive shaft tunnel.
In applied a tighter grip to thespethere was a "pull" on thehe The back part of the
cro steering wheel. Titus said thated vehicle. This occurred in the saw vehicle broke off
ss- the deceased made noof bend itself and was similar tothatbefore the front part
exacomment and would have the a vehicle going onto a graveljust hit the tree and
mi stopped had it been a problem.Me surface. Then he saw thebeh lifted itself. As for
nat rce windscreen separate itself;ind the sparks he could
ion Titus was also asked aboutdes from the roof one bit at a time.the not say at what
Tit what he saw when theyBe Titus was pressed onfron stage of the incident
us entered Kalkfeld and it isnz this part of hist he saw these but he
wa apparent from his answers thatwa evidence and,pas could remember
s he saw very little. He did not_s although according tosen them.
asksee any speed limit signsfas the witness he couldger
ed although other evidence_t or not say exactly, heseatTitus was then
ab established that there were_slo said that the roofthe asked about a
out three such signs forw. parted from thevehistatement which he
the southbound traffic and heThi windscreen by aboutcle made to the police

onunsel that at that time
 3^r everything was fresh
 d in his mind and that
 O the object of the
 ct exercise was to tell
 obthe police everything
 er he could remember
 , happening. The
 19 statement reads as
 94 follows:
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statement that was then
 sworn to. polic er of things which had not
 Otiwarongo to
 Kalkfeld. 2. Mr. e happened when giving
 Griffiths was
 We driver and out in state testimony in Court he said
 was on the
 Titus's sit. statement ment that at that stage, referring
 around 13h00
 does not accord with mayb to when the police
 approaching
 Kalkfeld. Mr. accounte it statement was taken, he
 Griffiths was
 driving he gave to the was probably could not
 speed approx.
 120 km/h or when roof not remember everything. He
 the car left the
 road and the clear had told the police
 collided against
 the trees which Benz to everything he could
 was on the
 edge of breaking in him. remember. And in re-
 road. Before
 the car hit the front Then examination the witness fell
 two before the tree I felt the
 backside of the and he when back on lack of memory: he
 part struck the tree and he
 car was
 shivering and. With it could not remember the
 Mr. Griffiths
 tried to speed he said it was statement, he could not
 09. regard to speed he said it was statement, he could not
 22 controlled the
 and car, but 120 kph put to remember if it was
 at everytime he
 H aro turned the car
 und which contrasts with his him translated, he could not
 12h was shivering, like it
 15 I was going to
 ag broke in two
 a not say whether the speed of he interpreter and he could not
 pas were five in the
 sen the Mercedes Benz was fast or had remember if he had read it.
 ger the accident
 with took place, I
 Mr. don't know how
 Gri statement that he did not knowed to The police officer who took
 ffith it happened.
 s how the accident happened he add a Titus' statement was called
 and Th
 oth e said that when he made the numb by the defendant. Sgt.

Ka accident. On 3rd October, sch worker, Ludmila Ochurab, Emil struck by flying objects at
iru 1994 he went to Windhoekool were on their way homey wasthe places pointed out by
a and visited Titus at his house.hoswalking along theconfuEmily.
wa He said that he asked Titus totel. Otjiwarongo to Omaruru roadsed
s aexplain everything that hadAt in a northerly direction. as toSgt. Karugub was another
co happened and what is set outab At a certain point they saw awher police officer who attended
nst in the statement is an Englishout vehicle approaching them faste shethe scene of the accident on
abl translation of what Titus told12: and it left the road on the westand 22nd September, 1994. On
e athim in Afrikaans. He then30 side and then crossed back.Lud his arrival he found two
the read the statement back andp. Both Emily and Ludmila ranmila parts of a Mercedes Benz.
timasked Titus whether he wasm. and, according to Emily, shewere The front part was lying
e satisfied and Titus said that heon heard a sound when thewhen against a tree facing north
an was. In cross-examination22 vehicle collided against a tree.they while the rear part was a
d Kairua was asked a fewnd Emily said that a gas cylinderfirst few steps away with the
he questions about theSe struck her on the lower part of saw open part facing south.
att circumstances in which thepte her left leg and she fell. Herthe Karugub said that he looked
en statement was recorded but no,mb leg was broken with a bonevehic for marks on the road and
de suggestion was made that it,er, protruding. With the aid of ale itcould clearly see four tyre
d had been recorded19 photograph she pointed outis notmarks on the tar. He marked
the inaccurately. 94 where she had been when shedispu these on a rough sketch plan
sce she was struck by the gas cylinderted which he drew the
ne Another witness who saw the,an and where Ludmila was when that following day. He saw no
of accident was Emily Doeses.d ashe was struck and injured byboth scratch or scrape marks on
the She was a cleaner at a nearbyco- part of a car seat. Althoughwere the road nor did he see any

brod that the tyre marks appearedtha truct the accident. on ent the front part of the
ke to him to be made by a vehiclet the Mercedes Benz was lying
n broadsiding and, as appearshe It is common ground betweennorth approximately 500 mm
ve from his sketch plan, theyex the parties that a driverern from the tree and the rear
hic come from the west side ofper entering the township ofside portion was lying in the
le the road and head towards thet Kalkfeld from Otjiwarongoof themouth of the junction 16,5
par tree on the east side in a slightwit first passes a 90 kph speedtree metres from the front part.
ts curve. nes limit sign and then two 60 kphto beEmily was struck by the gas
on ses signs. He is then confronteddislo cylinder on the southern
the Apart from the factualcal with a gentle right hand curvedged side of the junction 19,7
roa evidence just summarisedled in the road and beyond thisand metres from the rear portion
d. certain plans of the scene ofby curve there is a minor roadone of the Mercedes Benz and
the accident and a number ofbot leading off to the left (east).on Ludmila was struck by the
In photographs were admitted in, h At the time of the accidentthe seat also on the southern
cro evidence by agreementpar there was a tree on the eastsouth side of the junction 23,06
ss- between the parties. The ties side of the main road a metreern metres from the rear
exaphotographs are of the en or two from the edge of theside portion. One other distance
mi Mercedes Benz when it was dea road and just short of theto bewhich should be mentioned
nat inspected by Riegel in August, vo junction just referred to. Onpartlyis the distance of the tyre
ion 1993, of the ure both sides of this tree theredislo marks on the road which is
Ka Mercedes Benz after the d were short poles placed in theged. given as 31,4 metres.
rug accident and of the scene of to ground with double cablesAfter
ub the accident. It was largely rec threaded through them. Thethe Coming now to the expert
sai with the aid of this material ons crash caused two of the polesaccid evidence, it is clear that the

pla Riegel's evidence can be He said that it was unstable, parts welded at intervals of 50
in conveniently be divided into force vibrating and pulling very had mm and this, in his opinion,
ff two parts. Firstly, there is his des strongly to the right. been should never have been
int evidence arising from his Be Surprisingly, Kandolf, who weld done. According to Riegel,
en inspection of the Mercedes Benz had been driving the vehicle ed to it was done badly and
de Benz in July, 1993 and his test on since the beginning of June, one incorrectly and the stability
d drives of the vehicle at that 19^l 1993, including a fairly long ano of the whole chassis was
to time. Secondly, there is his h trip from Windhoek to er. affected.
rel evidence arising from a report Jul Keetmanshoop and back, said He
y which he compiled dated 2nd y, that he noticed only a little was Riegel said that driving the
on March, 1998. In final 19 pull to the right. It was, he partic Mercedes Benz over an
Riesubmissions Mr Muller was 93 said, soft to drive and that was ularly uneven road would cause
gel critical of Riegel's an "nice". It was "very conc movement of the welded
as qualifications to testify as an d comfortable". rned sections and the more the
her expert and although there is he with vehicle is used the more the
ma some substance to these the Returning to Riegel's the welded joints will weaken.
ins criticisms when it comes to n evidence, he took the Court fact At the time, he said, he was
tay the 1998 report I remain too through a series of that of the opinion that if the
in satisfied that the witness was k it photographs which he took of the vehicle was driven further,
thi competent to express opinions for the Mercedes Benz in July, floor and depending on the roads,
s arising from the 1993 a 1993 and these, he said, panel it would break apart. After
reg inspection and test drives. test showed various defects on the s had assessing all the
ard dri vehicle arising from the been damage/defects he was of
. Riegel first inspected the ve. manner in which two body spot the firm opinion that the

ve his second test drive of the Mercedes-Benz. He said that he also asked about other things concerning welding seams on the Mercedes Benz he drove it at 100 kph and potential causes of vibration. He found it difficult to keep the car steady and pulling to one side or the other. He insisted that they did not alter control when negotiating a tight corner. He agreed that the fact that two parts were not bent. It is apparent from the evidence that they were joined together. That was a clear indication of both causes: varying tyre pressures, this theme which was repeated by those who drove the vehicle for a long time, bent wheels from time to time and it is a total of about 2500 kms, and worn rims, incorrect axle adjustment seems that Riegel has a deep-seated objection to uneven tyre wear. In from Windhoek to Okahandja rotation and, to some extent, once vehicles where two parts cross and back at high speed, that poor tyre wear combined with bad shock absorbers. I will consider whether this witness also agreed that the difficulty experienced by the witness has affected his objectivity referred to by Riegel. If these defects can be rectified. Although later in this judgment.

With regard to the reconstruction of accidents, Riegel was also questioned about the various defects admitted at the outset of his evidence. Riegel is mistaken in his judgment about the various defects admitted at the outset of his evidence. Riegel's recollection of the behaviour mentioned in his 1993 report to the Court raised the question whether it had been established that Riegel was qualified to express an opinion on such a subject. Eventually, Mr Geier

ap nce and it emerged that in theatt nt further and said that had hethe the tree at a point which
pli mid-sixties Riegel had beenornnot driven the Mercedes Benztree. coincides approximately
ed fairly extensively involved iney in 1993 he would not haveRiegewith the roof of the
for reconstructing accidents, thatbutbeen able to give any opinion! Mercedes Benz. Finally,
lea in the following years up untilaft concerning reconstruction. furth Riegel conceded that the
ve 1990 he had been involved iner er vehicle was probably in one
an 25 to 30 of such cases andso In the foregoingagree piece when it hit the tree
d since 1990 had been involvedma circumstances I find itd thatalthough he continued to
wa in approximately 15 more.ny unnecessary to dwell furtheranothinsist that the deceased
s Based on his experience Iyeaon the evidence of Riegel saveer "probably" or "possibly"
gra ruled that he could givers to mention his evidencephoto lost control because of
nte evidence reconstructing thehe concerning an indentation ongraph defects in the vehicle.
d accident. However, althoughco the roof of the Mercedes,
lea he expressed certain opinionsuld Benz. This can be seen inExhi Due to the unsatisfactory
ve in his evidence-in-chief as tonot three photographs of thebit nature of Riegel's testimony,
to the way in which the accidentdo vehicle taken while the twoH53, Mr Geier sought leave to
ad occurred, in cross-a parts were kept at Kalkfeldshow call a further expert and
du examination he said that herec Police Station. Thes that, although Rule 36(9) of the
ce had not been asked to do aons indentation is to the front ofbark High Court Rules had not
fur reconstruction. He said that hetru the roof on the driver's sidehad been properly complied
the had visited the site of thecti and Riegel conceded that ifbeen with such leave was
r accident in 1998 and takenon. this indentation was caused byremo granted. And so Jacobus
evi measurements of pointsHe the tree it would mean that theved Verster was called to give
de indicated by the plaintiffswe vehicle was intact when it hitfrom evidence. He is employed

by construction expert and, having occurred, was one factor to be first considering various a regard to his qualifications taken into account when Mercedes factors. Was it the whole local and experience is well-versed deciding whether speeded seat or just a part? If the al qualified to testify with regard is played a role. In his view, the Benz, former, was the seat bolted out to accident reconstruction. no curve in question could be Verst down? How high was the hor re taken at approximately 180er cylinder projected? Did it ity Verster's evidence ranged over str kph with ease "give and take maintain bounce or slide along the in a number of topics and I will aig maybe a little bit of steering gained ground? What was its So bear in mind his evidence as aht forces". Then, addressing the that it weight? Without answers to uth whole. However, I will tha damage to the Mercedes Benz, woul questions such as these Afr summarise only two aspects n as depicted in various d be Verster said he could not ica of his evidence. With regard cur photographs, Verster said that dang say that high speed was as to the speed of the Mercedes ve you cannot just look at erous involved.

an Benz immediately prior to the d. damage and assume from the to

accident, Verster was prepared Thi extent of the damage that the concl The other part of Verster's ide to accept that speed was s, vehicle was travelling at aude evidence which I intend nt involved but he was not in high speed. He said that at that summarising is his evidence inv prepared to say that such the more scientific approach was this regarding separation of the esti speed was high speed. He said opi required using what he indic Mercedes Benz or part gat that it was clear from the road nio described as "crash analysis ated thereof prior to the collision or engineer's plan, which was n data". As for the fact that par high with the tree. Verster's an one of the plans placed before of of a rear seat and a gas speed opinion was that the roof of d Court, that the road at the Mr cylinder were thrown some with the Mercedes Benz, at least rec point where the accident Ver distance from the rear part of ut at the A pillars, was

pro with the tree. The A pillars are da s no damage in that area but sense and jerked the steering
ba the metal struts which run ma damage was caused to the. wheel or braked and as a
bly from the front comers of thege front of the roof then the roofVerst consequence lost control.
seproo to the wing of their had to be lifted up at the pointer's From the tyre marks on the
ara vehicle. Verster echoedtha of impact. recon road the Mercedes Benz
ted Riegel's evidence that it cant struct was at some stage on it's
fro be seen from the photographsare Verster said that thision wrong side of the road and
m that there is an indentation ona. conclusion was furtherof thethen yawed back to its
tho the right side of the front partTh supported by what can be seenaccid correct side and collided
se of the roof which, accordinge in photograph H46 of the rightent with the tree.
pillto the witness, indicates forcewit A pillar. It can be seen, hewas
ars being applied to the roof atnessaid, that the A pillar has beenthat In cross-examination
jus that point in the direction ofs' pushed towards the centre ofthe Verster was constrained to
t the rear of the roof. In otherco the Mercedes Benz. If the roofroof agree that he had made a
pri words, that part of the roofncl had been attached to the Ajump mistake when identifying
or had been forced towards theusi pillar when the A pillar wased the A pillar in photograph
to rear. However, when oneon pushed into that position itopen, H46. He agreed that what he
the looks at the right side of thewa would have dragged the roofthe had identified as the A pillar
ve roof, i.e. the part of the roofs with it. The roof would notdrive pushed towards the centre
hic running from the right A pillartha have jumped away andr of the Mercedes Benz was
le to the rear, there is no damage.t assustained no damage on theproba in fact the cover of the A
col If the roof was attached to thethe right side. Verster consideredbly pillar. He agreed that the
lidi right A pillar at the point ofre that Titus' description of thegot a right A pillar is depicted in
ng impact one would expectwa roof lifting made a lot offright photograph H47 and it has a

subd been attached to the rooftha d that under suchbeen then he would not have
sta when the impact occurred onet circumstances the possibility simpl come to the conclusion he
nti would see it in the conditionthi did exist. Pursuing this, Mry thatdid.
al shown in photograph H47. s Muller suggested that because the
kin wo of the force of penetration and Merc The defendant called two
k Mr Muller then put to Versteruld the angle involved the treeedes experts, Johannes Strydom
in that the kink on the A pillar ex would have caused the Benz and Martin Slabber.
the proves that the roof was still pla indentation as seen onshud Strydom is a consultant in
mi attached to the A pillar at thein photograph H46 and Versterdered investigation, cause analysis
ddl point of impact. Verster didthe agreed. However, he, thatand reconstruction of motor
e. not disagree with thisind continued to insist that thethe accidents and his
He suggestion contenting himselfent absence of damage on thedeceaqualifications and
fur with saying why did the roofati right side of the roof wassed experience are similar to,
the not sustain damage to theon significant. lost though rather more
r right? Mr Muller then put it toon Verster was then questionedcontr extensive than, those of
agrthe witness that on thethe about his thought processesol Verster. The same
eedprobabilities the roof was stillfro when formulating his opinionand information was made
tha attached at the time of impactnt on how the accident occurred.then available to him as was
t ifand Verster said that he had toof He agreed that step one was tried provided to Verster and he
the agree with that probability. Hethe Titus' account. Step two was to had the added advantage of
A also agreed that the roofroo Riegel's evidence. And stepregai visiting the scene of the
pill would have sagged a little as af three was confirmation by theⁿ accident albeit almost four
ar result of the A pillar bendinghe photographic evidence. Hecontr years after it had occurred.
ha and when it was put to himsaid that if Titus' account had^{ol}

Str set out in the summary of his
 yd evidence which he confirmed
 om in the witness box. His
 's conclusion reads:
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control, swerved
 nclusion he took into account not said, was not in his field. In
 sharply to the right to
 try to gain control
 over the vehicle, per
 the road on the
 the two parts of the Mercedes
 western side of it, and
 at this stage the
 Benz, the yaw marks on the
 spinning anti-
 clockwise damage marks on the
 skidded side-ways
 across both lanes
 of hit the tree on the
 the vehicle, side positions of the
 opini vehicle.
 on two injured pedestrians and
 that At impact with the
 co the the vehicle broke the road
 collis into two parts and
 ion canted into the curve
 occur resting positions as
 red indicated on the his comfortably be negotiated
 as a police plan."
 ng With regard to speed the
 of the Str witness said that there was not
 drive usion
 r of yd enough physical evidence to and Slabber's qualifications and
 the Merc
 om calculate the speed of the so farexperience differ from the
 edes
 Benz sai Mercedes Benz correctly but as the other experts who testified.
 vehic
 le d he adhered to the view that the quest He graduated from
 who
 der tha speed must have been high. ion Stellenbosch University,
 ed
 the t in This view was based on the of the South Africa in 1955 with a
 said
 curve rea matters just mentioned and his roof degree in mechanical
 in
 the chi twenty nine years experience lift in engineering. He then did
 left
 lane ng dealing with motor accidents. g practical training in the
 at a
 high his that, United Kingdom and from
 spee
 d, co Unlike Verster, Strydom did he 1960 lectured in the
 lost

en 1973. From 1973 he worked
gin for various companies
eer involved in the production and
ing design of motor vehicles. The
fac same information made
ult available to Verster and
y Strydom was made available
of to him and, like Strydom, he
me visited the scene of the
chaaccident.

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Based on the information
made available to him and his
visit to the scene of the
accident Slabber reconstructed
the accident as follows:

he tried to negotiate
the right-hand turn
on the approach to
Kalkfeld from
Otjiwarongo. He was
travelling at a high
speed and landed on
the right-hand verge.

To regain control, the
driver tried to cross
back to the left-hand
side of the road.
Regrettably his
corrective action was
to swerve resulting in
a broadside back
across the tarred
section of the road.
The back of the
vehicle started
rotating in an anti-
clockwise direction,
with right-hand rear
tyre making a
distinct broadside
rubber mark on the
road.

At this stage the
driver was still trying
to correct the
situation by turning
the steering to the
right. The result of
this action was that
the front tyres left no
distinct mark on the
road.

The Mercedes Benz
crossed the particular
section of the road at
an angle increasing
from parallel to about
24 degrees at the left-
hand verge of the
tarred section
when

(East
ern
side).
The
vehic
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itself
had
rotate
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appro
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57
degre
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With
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rear
wheel
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collid
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with
the
steel
cable
s
strun
g
from
the
short
suppo

ring poles.
As the vehicle
penetrated the
cables the left-hand
vertical section of
the chromed grill
assembly and the
left-hand headlight
assembly made
contact with the
upper steel cable as
depicted in
photograph 48 on
page 27. The cable
penetrated the front
end of the left-
hand front fender,
folding it
backwards and
causing the buckle
on the upper edge.

As the vehicle
further penetrated
the cable barrier,
three of the support
poles collapsed,
two ahead of the
tree and one
beyond the tree.
The vehicle was
partly constrained
by the cables, until
they snapped. This
resulted in a
further rotation of
the vehicle to a
total rotation angle
of approximately
106 degrees. The
further penetration
of the cables
during this phase,
also caused the
engine hood
(bonnet) to buckle.

The vehicle struck

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will cause the vehicle to rotate further in an anti direction. Penetration of the tree will continue to a maximum point.

The tree had two stems of which one was partially torn off as depicted in photograph 53, page 29. The upper section of the tree branch contacted the leading edge of the roof above the driver's head at a point where the windscreen starts. Refer to photographs 44, 45, 63 and 64.

The construction of the vehicle is such that the section from the front seats forward can be considered as one part with its own centre of gravity, as well as the same for rear section. Impact on the driver's door will then cause a sideways bending action of the vehicle structure. If the induced bending moment due to the impact is high enough, vehicle will start pulling apart from the left-hand side and will totally part due to the momentum of the rear section.

After ed with two persons quite a distance with the Benz nuded to rotate and struck the further is an reaction time of a driver first tree on the right hand door. indication that the vehicle travelled at a high speed on impact confronted with the bend instruc Due to the centre of gravity

question, a bend whichk theof a vehicle being more or Slabber described as slight.cable less where the gear lever He said that once the vehicles would be the Mercedes was on the dirt or gravelstrun Benz would then have section on the western side ofg rotated further. Slabber the road the driver wouldfrom went on to explain that the obviously try to get it back onpoles effect would have been that the road. If he had gone back, anone side of the vehicle gradually he should have hadopini would want to open and the

The his no problem but if he turnedon other side close-in. Put fact that rec too sharply he would havewith another way, one part would induced a sideways or yawwhic be under tension and the movement. The vehicle thenh other under compression started to rotate and SlabberVerst and if the tension is high as a illustrated the movement ofer enough there will be a the vehicle as it crossed thedisag tearing or breaking apart. road on a plan which he hadreed. Having broken off the rear prepared and with the aid of aThe section spun around and the model car. Slabber thenvehic ended with the open section explained why he was of thele facing south. opinion that the Mercedesconti

Derivations by taking the speed on its speed. Then there was the when Titus, Riegel and Verster
 ali of the vehicle when it entered the fact that two pedestrians were it regarding the lifting of the
 ng the bend as 120 kph. This road struck by objects propelled enter roof of the Mercedes Benz.
 wit speed was given to him and d from the vehicle. Slabber was d He said that it was not
 h presumably comes from Titus' an of the firm opinion that the the possible for the roof to have
 the statement to the police. He d gas cylinder and rear seat bend lifted for 15 cm in the
 sp then considered the damage to hi cushion left the rear part of was middle as described by
 ed the vehicle with a view to s the vehicle when it spun after proba Titus. For the roof to have
 of ascertaining its speed when it two colliding with the tree and bly lifted it would have had to
 the struck the tree. He said that uld both objects were thrown a high e have parted from both A
 Me the damage did not enable him ha considerable distance. This, her. pillars and could not just
 rce to come to any precise ve said, indicates that there was a have lifted in the middle.
 des conclusion regarding speed res high spin on the rear section Slabb both A pillars but remained
 Be but it must have been ult after the collision plus er connected to the two B
 nz, considerable. He also took longitudinal speed. Slabber was pillars which are situated
 Sla account of the possibility that in was of the opinion that the also between the front and rear
 bb the deceased braked once he fur speed of the Mercedes Benz asked doors there would have
 er realised there was a problem the when it collided with the tree, to been a distinct kink in the
 sta and continued to brake once r was somewhere in the region com roof; but no such damage is
 rte the vehicle left the tarred road. ret of 70 kph, maybe more. And ment depicted in any of the
 d When the vehicle returned to ard although he took a speed of on photographs. Further, if,
 his the tarred road it started to ati 120 kph as his starting point the after lifting 15 cm, it was no
 co yaw or broadside as is on he was of the opinion that the evide longer connected to either A
 nsi evidenced by the tyre marks of speed of the Mercedes Benz nce pillars or B pillars there
 of would have been some

indere was no such indication. As the tree penetrated the driver's side, it had penetrated the A pillar. This is the evidence of Titus that the lift door and right A pillar. This, as he illustrated this part of his testimony part of the Mercedes Benz, he said, is established by that evidence in a sketch showing a gap in the roof of severe kink on that A pillar. At the (Exhibit V). The witness at the floor of about 6 cms which the some stage in the penetration, the roof said that the tear marks at the ran from the middle of the left roof process the kink in the A pillar had the top of the A pillar back seat to the drive shaft tunnel, f, became so severe that it tore together with the kink in the k Slabber was of the opinion that the A pillar from the top. The prior A pillar which caused the tear that there was no way in the witness then referred to the tearing plus the deformation and which that could have occurred. er photograph H46 which, he impacts of the door frame all lead to the only stitch or spot welding, he said, clearly depicts a definite fact that the A pillar on the roof along the floor panels the two d it tear at the top of the A pillar. with the right side was still f sills on either side and the is He disagreed entirely with the attached to the roof at the the tunnel in the centre were cle Verster's evidence that it was a tree. time of impact. t it continuously welded as a clean break at the welding. He ha accepted by Riegel in cross-section. He placed a ring around said As for Verster's opinion that d examination. Accordingly, m the top of the A pillar where that damage to the right edge of mo there was no reason for there the the tear occurred. this the roof was to be expected ve to be an opening in the floor, ph Slabber also gave an was if the roof was still attached d panels which are positioned to explanation for the indentation cause at the time of impact, up between each sill and the gra on the front leading edge of d Slabber said that that would 15 tunnel. phs the roof on the driver's side, when be expected if the impact cm tha the indentation relied on by the was further back but not s. Dealing with the evidence of t Pdegel and Verster as a tree when the impact occurred Th Riegel and Verster regarding

agamented on Riegel's 1993eas nt tyres. with al picture that he had

ins report. Some of the pointsier poor painted was not materially

t dealt with were the following.tha With regard to Riegel'sweldi altered. He accepted that the

the Poor tyre treads would notn together of two vehicle ng. result of butt welding is that

A have had any effect on theto stability, Slabber said that the the joint which has been

pilldriveability of the vehiclethe used. The body does not give Slabbwelded would be weaker

ar when driven in dry conditions.oth Slabber explained that their's but only a little bit weaker.

witThe difference in distanceer bodies of different types of

h between the two axles of 26an vehicles vary in stiffness.evide He considered that the

the mm meant that one axle satd it If the weld on the sills and the nce- welded material would be

ve across the vehicle at an angle.co contribute little to the stiffnesschief original strength but this

hic Taking the distance from theuld was would fall within the

le middle of one wheel as 1500ha Slabber was also asked about probecessary safety margin.

rot mm and applying basicve Riegel's conclusion that the d atSlabber was also questioned

ati mathematical principles thean Mercedes Benz was some about the likely result of

ng. angle involved was 0,99°.eff unroadworthy and he said that depthbad welding and he

Slabber said that such a smallest he did not share that in conceded that if cracks

Sla angle would not have anon conclusion. Such defects as cross appear where bad welding

bb influence on the driveabilitythe there were could be adjusted. - has been done you will get

er of the vehicle although itwe Although it was to some exam progressive worsening

als would crab. However, withar extent skew, if he had to use inatioeventually leading to the

o the angle as low as 1° a driverof the vehicle he would live with n butvehicle breaking up.

co would not easily notice it. Itthe that. Any vibration which was the However, he reiterated that

m makes steering to one sidefro experienced had nothing to do gener you would not have

of
 mo move together. He considered the gence, is that Riegel's 1993 it andle away and one week later,
 def
 ve it unlikely that both welded en report, (Exhibit J) correctly ultim because of its condition, the
 da
 me sills and the welded tunnel nt reflects the condition of the ately deceased was killed.

(i)
 nt would break simultaneously Mercedes Benz at that time.it

in and if one sill were to break The Mercedes Benz, was Mr Geier submitted that a

on the driver would be aware of according to the report, was knoc reasonable person in the

(ii)
 e it. not "traffic safe / roadworthy" ked same circumstances as

are and, as it could not bedown Kaufmann would have
 a the defendant failed to take
 such steps. could only be used to the foreseen the reasonable

As I indicated earlier in this
 suc judgment the question of Th possibility of harm to **the**

h liability involves two issues, shown to Kaufmann, FNB's sed at deceased, would have taken

as namely negligence and credit manager, in the secondan reasonable steps to guard

the causation. The test for pla quarter of 1994 and Riegel's aucti against that possibility but

flo determining negligence was inti conclusions were pointed out.on. failed to take such steps.

or authoritatively stated by Kaufmann was therefore The Counsel submitted that the

pa Holmes, J.A. in *Krttger v* cas aware of the fact that the decea three parts of the test for

nel *Coetzee* 1966(2) SA 428 (A) e, Mercedes Benz was notsed **negligence have been**

s. at 430 E-F: on "traffic safe/roadworthy" and was **satisfied and that** FNB

Th the was fit only for spares. permi **should be adjudged**

e "For qu Despite this, FNB permitted tted **negligent.**

wh the esti Pretorius, of Motor Houseto V When making his

ole purpo ses of on liabili CC, to remove the Mercedes drive submissions Mr Geier relied

wo ty of *culpa* Benz from its repossessionthe in part on a certain passage

uld arises ne yard for the purpose of selling vehic in the judgment of Levy,

a) a *cliligens gli paterfamilias* in the position

and that Mr
A. Jan employee of FNB and Kaufmann approved
. Kaufmann's junior. Her defendant. But, in any event, that
The evidence concerned the 1 there is no evidence that Kaufmann If Riegel's report was
e deceased's application for do Kaufmann realised or should Kaufmann correct in its conclusion and
lea finance for the purchase of the not have realised that the told the Mercedes Benz was
me Mercedes Benz. The judgment see deceased's application for him indeed in a dangerous
d continues: ho finance was in respect of the that condition then, in my
jud w Mercedes Benz to which he judgment, Kaufmann should
ge "It the Riegel's report referred. woul have taken steps to ensure
set form pla d either that the vehicle was
out admit inti Although not expressly have not disposed of for use on
the by ff concluded in such terms, sleep the road or that anyone
evi Geier can Riegel's report can, in myess acquiring it or, for that
de behal use view, be interpreted as night matter, using it, was made
nce Plaint an concluding that the Mercedes if aware of its dangerous
of that ad Benz was in a dangerous some condition.
on decea mi condition. Not only does it one Pretorius asked FNB if he
e had ssi conclude that the vehicle was shoul could sell the Mercedes
An leted on not "traffic safe/roadworthy" d die Benz on their behalf and
gel form ma but it states that it is only fit while FNB agreed. He was
a appli de for spare parts. Thatdrivi permitted to remove the
Dr finan on Kaufmann saw it in this lightng vehicle from FNB's
eye 13th her is, I think, made clear by the repossession yard for the
r, mber be Pfeiffer's evidence, which IMerc purpose of selling it. One of
1994

the d Pretorius denied that he had but In my judgment, if the
 em been told by Kaufmann or the he evidence establishes that the
 plo other employer with whom he a Mercedes Benz was indeed in
 yeedealt that the vehicle had been a dangerous condition then
 s damaged and rebuilt. It must, act Kaufmann was negligent.
 of in my view, follow from this
 FN that he was also not told that
 B the vehicle was in a dangerous
 wit condition. tru
 h me
 wh As Kaufmann was not called
 om to testify by the defendant the
 Pre evidence of Pretorius to which
 tori I have just referred remains
 us uncontradicted and, in my
 dea view, must be accepted. It
 It therefore find that Kaufmann
 wa not only failed to take any
 s steps to ensure that the
 Ka Mercedes Benz was not
 uf disposed of for use on the
 ma road and failed to pass on
 nn information concerning the
 an vehicle's dangerous condition.

they acted at all
 relevant times
 within the course
 and scope of their
 employment as
 aforesaid."
 The question of negligence
 is entwined with the
 If question of causation
 Kauf because in each the state or
 mann condition of the Mercedes
 was Benz in September, 1994
 negli has to be considered. In this
 gent connection, Mr Geier relied
 FNB, heavily in final submissions
 "Def as his on the direct evidence of
 enda empl Titus. If the Court were to
 nt oyer, accept the evidence of that
 admi must witness as to how the
 ts that er, accept the evidence of that
 Pikki
 e must witness as to how the
 Lou be accident occurred then
 w and J held clearly the death of the
 Kauf held deceased was caused by the
 mann vicari
 were empl dangerous condition of the
 oye ously
 s of vehicle. However, I have to
 Wesb liable
 ank / consider to what extent, if at
 FNB for
 durin his all, Titus is a credible and
 g trustworthy witness. I agree
 Septe
 mber negli with counsel that, when
 1994
 and gence seen in isolation, Titus'
 that

desough particularly when seenpol the Mercedes Benz shiveringknow clear to him in 1994 or
cri against the backdrop -ice "like it was going to broke inhow probably he could not
pti undisputed - that the vehiclestattwo pieces" but there can beit remember everything at that
on separated into two parts. Buttem no real doubt that by 3rdhapp stage.
in Titus' description inent October, 1994 Titus was wellened
exaexamination-in-chief of whatan aware that that was whatall When seen in the light of
mi occurred cannot be consideredd ultimately happened. He saidthe his statement to the police I
nat in isolation. It must behis in cross-examination that hewitne regard the account given by
ion considered and weighedtesthad even been interviewed atss Titus to this Court as highly
- against several factors whichim some stage by NBC reporters. couldsuspect but that is not all.
in- emerge from the rest of theon resortSlabber, who, to my mind,
chi evidence, not least being hisy isTitus did not deny making theto was the epitome of an
ef statement to the police madehis police statement and, in anywere expert witness, dismissed
of on 3rd October, 1994 less thanref event, there was adequateunco Titus' account of a 6 cms
wh a fortnight after the accident. ere proof that he did make it bothnvinc gap appearing in the floor of
at I have already set out thencefrom his own lips when heing the Mercedes Benz from the
occI have already set out thencefrom his own lips when heing the Mercedes Benz from the
urr contents of Titus' statementin identified his signature andansw middle of the left seat to the
ed and I do not intend to repeatthe from the evidence of Sgt.ers drive shaft tunnel out of
ap them. It is perfectly plain thatpol Kairua. When questioned onsuch hand. I find his reasons for
pea what he told the police boreice how he could give a graphicas doing so convincing. In
red little resemblance to what hestatdescription in February, 2001maybmaking this finding I take
pla told this Court some six years^{em} of hovv the accident happened^e itaccount of Riegel's evidence
usi later. Indeed, the only^{ent} whereas in October, 1994 he^{was} which was not in agreement
ble common denominator in his^{to} told the police that he did not^{not} with that of Slabber but I
en

regied to express opinions oncor testimony of Verster that theon itabsence of damage on the
ard matters which fall within therobroof of the Mercedes Benzproveright side of the roof.

the domain of mechanicalora had to be lifted up at the points that

lattengineering but he providedtio of impact with the tree. Thishe The absence of damage on

er'sconvincing reasons for hisn conclusion was based on therroof the right side of the roof of

evi opinions whereas Riegel fellfor presence of the indentation onwas the Mercedes Benz was, in

de back on generalisations suchTit the right side of the front partstill my view, satisfactorily

nceas that it is never allowed byus' of the roof and the absence ofattac explained by Slabber. The

as the manufacturer to cut theevi any damage on the right sidehed impact with the tree

vasbody of a motor vehicle into de of the roof. at theoccurred while the vehicle

tly pieces and weld themnceHowever, in cross-point was rotating. The tree

suptogether. co examination Verster agreedof penetrated the driver's door

eri nce that he had made a mistakeimpa and the right A pillar. The

or. Further, there is the questionrni when identifying the right Act. right A pillar slopes from

No of the roof parting from theng pillar in the photographicHe the wing of the vehicle to

t windscreen by about 15 cms the evidence. The position of thewas the roof and when the tree

onl in the middle as described byroo A pillar, as identified by thethen penetrated it would not have

y isTitus in his evidence. Slabberf witness, formed part of hisconst made contact with the right

he said that that was not possiblecan reasoning for the conclusionraine side of the roof. In my

far and even Riegel said that hebe that the roof had lifted prior tod tojudgment, that is the

bet could not imagine thatfou the impact and when the A fall probable explanation for the

ter happening. nd pillar was correctly identifiedback absence of damage on the

qu in Verster did not disagree withon right side of the roof.

alifMr Geier submitted thatthe the proposition that the kinkthe

Verthat the roof had lifted prior to the least on a balance of his ains the evidence of
ste the impact by reference to the ind probabilities, that thistest Riegel concerning
r indentation on the right side ofent was what happened. Ijmo the condition of the
an the front of the roof. Slabberati accept that at theny. Mercedes Benz in
d also dealt with this. It wason time of the impact the July, 1993, the fact
Riecaused, he said, when the treeon A pillar on the rightTha that the curve in the
gel penetrated the A pillar. Inthe side was still attachedt, ofroad being
als cross-examination Versterfro to the roof. cou negotiated by the
o agreed that this was ant rse, deceased when he
soupossibility but I would goof Mr Geier submitteddoe left the road was
ght further. If one has regard tothe that Titus had nos gentle or slight and
to photograph H46 it can be seenroo motive tonot the evidence of
supthat there is a tear at the top off misrepresent thedispRiegel that in his
porthe A pillar as testified to byan events surroundingose opinion the
t Slabber. This is not consistentd Ithe accident but it isof deceased lost
the with the welding seamaccnot necessary for thethe control because of
ir breaking on its own. It is,eptdefendant to establishmat defects in the
res however, consistent with forceSlaa motive. Whateverter vehicle.
pecbeing applied to the A pillarbb his reasons for doingcom
tiv causing it to bend or kink ander'sso, I am satisfied thatplet Riegel's evidence
e dragging the roof down to aeviTitus has placedely. must first be
opi point where it tore away fromde before the Court aThe compared with that
nio the A pillar. In the process thence fictitious account ofre of Kandolf and Berry.
ns tree could well have caused, at what occurred. I rejectrem Riegel was highly

crie test drove it inM And Berry said that allbeen in two, has coloured his
ticJuly, 1993 it was, heer he noticed was a littleweld mind and probably, to some
al said, unstable,ce vibration on theed extent, affected his
of vibrating and pullingdesteering wheel at atoget recollection. It must be
th very strongly to thes speed of between 150her borne in mind that Riegel
e right. He found itBeand 160 kph. To thatand Iwas only called upon to
co difficult to keepnz can be added the factthink report on the accident in
ndcontrol whenw that the deceased,it January, 1998, more than
iti negotiating a bend atas who also test drovelikelythree years after it had
on100 kph. However,"n the Mercedes Benz,that occurred and more than four
of Kandolf, who droveic subsequently saw fitthis, years after he had inspected
th the vehicle for a totale" to bid for it at auctioncouplthe Mercedes Benz. And in
e of about 2500 kms,anand to use it toed his 1998 report he felt free
M and Berry, who droved convey his children andwith to condemn the welding
er the vehicle from"v friends. There are thereforethe joint which held the two
ceWindhoek toer two completely differentfact parts of the vehicle together
deOkahandja and backy pictures of the behaviour orthat as "extremely
s at high speed, did notco performance of the Mercedesthe unprofessional" and to state,
Beexperience thesem Benz. Merc as a "finding" that the weld
nz difficulties. Kandolffo edes joints had come undone as
. said that he onlyrt What emerged clearly fromBenz the vehicle was travelling
W noticed a little pull toabRiegel's evidence was hisultim through Kalkfeld resulting
hethe right and, apartle deep seated dislike forately in the two parts of the
n from that the". vehicles where two parts havebrokevehicle separating. Yet in

evi was continuous welding and mi as was said by Slabber,
 de abandoned his "finding" that sta adjustments must have been
 nce the vehicle broke in two prior ke made to it during the period
 he to colliding with the tree. Inn from Riegel's test drives to the
 ad my view, Riegel's evidence as in time it was driven by Berry.
 mit to the condition or behaviour his
 ted of the Mercedes Benz in July, rec To succeed in this action
 tha 1993 must be approached witholl the plaintiff has to prove
 t a great deal of circumspection. ect that the Mercedes Benz
 the ion was in a dangerous d Benz for some reason
 we On the other hand, the of condition and that as a g not connected with its
 ldi evidence of Berry was simple the result thereof it m condition. In these
 ng and straightforward. He test be e circumstances the
 of drove the vehicle at the ha " n action must be
 the beginning of September, 1994 vio c o t, dismissed.
 tw and, after the accident whichur m t
 o took place a couple of weeksof e n h As for costs, counsel
 sill later, saw pictures of the the e e are agreed that the costs
 s deceased in the newspapers. Me a p of this part of the trial
 an He therefore had good reasonrce l must follow the event.
 d to recall what had happened. des / o a Also, that the
 the In my judgment, Berry's Be i agreement in respect of
 tun evidence can safely be reliednz n costs prior to 29th
 nel upon and either Riegel isor, ti February, 2000 be made

ped tearing and/or
 cracking and/or
 commenced breaking
 up either the road and these
 collided with a tree."
 allegations. Looking at
 I the probabilities as a
 n whole, the accident and
 m the death of the
 y deceased were caused
 j by the deceased losing
 u control of the Mercedes
 d Benz for some reason
 g not connected with its
 m condition. In these
 e circumstances the
 n action must be
 c o t, dismissed.
 m t
 e n h As for costs, counsel
 c e e are agreed that the costs
 e p of this part of the trial
 n l must follow the event.
 / o a Also, that the
 o r d i agreement in respect of
 e n costs prior to 29th
 v e l ti February, 2000 be made
 l o

a I was not asked to make
n any order for payment of
o the qualifying expenses of
o the defendant's two expert
r witnesses.

d

e

r In the result, the
o following orders are
f made:

f

C

o 1. The action is
u dismissed;

u

r 2. The plaintiff is to
t pay the
o defendant's costs

.

H of this part of the
o trial;

o

w 3. The agreement in
e respect of costs
v prior to 29th
e February, 2000 is
r made an order of
o Court.

,

For the Plaintiff:

Advocate H. Geier

Instructed by

Messrs Oliver Law Office

For the

ndant:

M

S.C

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Gover

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Advocate L. C

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Attorn

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(P) A 121/01

U M STRITTER vs AFRICAN GAME (PTY) LTD & OTHER

HOFF, J

HEARD ON: 2001/05/03 DELIVERED
ON: 2001/05/07

PRACTICE

URGENT APPLICATION:

SUMMARY JUDGMENT - Reason why urgent relief was sought inter alia -
absence of applicant.

No reason advanced for absence and no reason advanced why urgent application had not been instituted as soon as cause thereof has arisen. Reason for absence important consideration in order to establish whether court should exercise its discretion in favour of applicant. Court not to be kept in the dark regarding cause of absence. No case made out to be a application as matter of urgency. Application struck from roll.