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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."

claim were, however, amended and the		and/or
The		cracking
allegations just referred to were amplified and	(a) tore apart in	and/or
parti	two pieces and left	commenced
extended. It is now alleged in paragraph 5 of	the road,	breaking up
cular	alternatively	and left the
the amended particulars of claim that the	(b) commenced	road and
s of		collided
Mercedes Benz:		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	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
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r and/or by s or other road: pu and/or
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be to be driven state e the motor
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inform or bring to the inc as if specifically repeated
knowledge of plaintiff s or herein, March, 1998 the parties claim could not be held liable and
husband or any other po
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 asdefen 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 of damages 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 learned judge delivered his judgment on this aspect of the case and made the following order:

"(a) The Own ership of the vehicle should be decided. If the vehicle is found to be the property of 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 either 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 drove it and provided Pfeiffer

was. As this report mentions defects and the shock and measuring system. It played a fairly major role at the trial I will discuss, which are described accordingly. The report concludes with the following observations: the vehicle was not beaten and not taken together of bodies from two vehicles. Riegel measured the tread properly. More defects, that causes the resulting body to lose its stability, that the difference in the axle distances causes the vehicle to run out of its tracks and have been welded, that the steering geometry is disturbed. In Riegel's opinion the vehicle was not "traffic safe/roadworthy" as the distance between the front and rear axle was 2570 mm for spare parts. The depth of the tread on the right side of a tyre should be at least 1 mm and, in his opinion, a tyre should be removed when the difference in distance between the two axles is 26 mm. This was done with Riegel's report and the accompanying photographs. Kandolf and his attorney, Pfeiffer, met with officials of FNB in the

sec nager, one Kaufmann, and It Muller, who appeared oninsur the general category of
on pointed out Riegel'sis behalf of the defendant, to theance hearsay evidence and is,
d conclusions. This led to aco admissibility of the evidencecomptherefore, 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, whos 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 wasto *Africa Insurance Co. Ltd* vment the position of the driver of
shoreached he met Kaufmann anddea*Quntana, N.O. 1977*(4(SAof 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-curialsuch
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 asfalls
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ry liability cast upon learned judge concluded at some general pattern of Geierach was that the evidence registered insurers and of the 426 E: 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 liability as was to be found in acceptance of obligation; and that, in the South African Motorists showing Kaufmann's state of mind. What instructions the admission of the admission in the respectful the Kaufmann gave his opinion, his Court should give personnel do not show his pre-appointment or reference the or reasoning andnce state of mind but, in my subsequent adoption, the admission is not conclusion reached in the Of opinion, his statement that receivable in evidence at all." (supra). Pfeiffhe would have sleepless Quntana case (supra). Furthermore, although theer of nights if someone should Court in that case was what die while driving the concerned with an extra-curialKauf Mercedes Benz does. To statement or admission made mannthat limited extent I rule that by the driver of the insuredtold the evidence under vehicle I see no reason whyhim consideration is admissible. the owner or his employeesis should not be in precisely thehears The following admission by same position. ay the defendant was recorded evide in the minutes of a pre-trial nce. conference held on 21st Neither Mr Geier, who Mr February, 2000: appeared for the plaintiff, nor Mr Geier Mr Muller referred the Court to the Quntana case (supra)'s er, in has but, as I understand it, Mrappro action the "T he

Defendant admits that First National Bank, Wesbank Branch Windhoek, was the owner of the 1998 Mercedes Benz, on 9th February, 2001 Mr. A. Kandolf on or about 25 admission by the defendant that subsequently left the repossession yard of Wesbank."

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... that Johannes Pretorius, the
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Pikki tria manager of Motor House CC,
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aforesaid."
front of Levy, A.J. and the
At judgment of the learned judge
should form part of the
present proceedings and I now
turn to the judgment of Levy,
A.J. The learned judge found
that Johannes Pretorius, the
manager of Motor House CC,
used car dealers, had, in or
about the middle of 1994,
visited Wesbank's
repossession yard and seen the
Mercedes Benz 200 with
which this case is concerned.
In his judgment, the learned
judge continued:
"Pret
orius
says
that
he
asked
FNB
if he
could
sell
the
vehic

le 'on their behalf
and they agreed.
He testified that
the vehicle was
taken from the
yard to the auc
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.

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

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the was held on 15 September 1994. In cross-examination by Mras r Sales held their first auctione deceased as a witness by the Th Muller Pretorius was asked Ge on 15th September, 1994. The sed defendant. At the material e about the condition of therry' Mercedes Benz was one of the but time he was employed as a rec Mercedes Benz when it was vehicles auctioned that day no car salesman by Autocentre ord on the floor of Motor House Au and the deceased was themore in Windhoek. The owner of of CC. Pretorius said that he cti 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 cee that the vehicle had been in and he could take the vehicle point the floor of their showroom. din 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 e vide 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 dorthe 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 concealed dangerous was about to
a disappeared. On the return sen On the day of the accident thening 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 itselfind 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, heseat Titus 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
19statement reads as
94follows:
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94. Mr.
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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
the driver and out in state testimony in Court he said
was on the
fact's sit. statement that at that stage, referring
around 13h00
does not accord with maybto when the police
approaching
Kalkfeld. Mr. accounte it statement was taken, he
Griffiths was
driving on a
speed approx. 120 km/h when the roof not remember everything. He
Court. Before
the car left the
road and the clear had told the police
collided against
the trees which Benz to everything he could
Mercedes was on the
edge of the
road. actually breaking in him. remember. And in re-
Before
the car hit the front Then examination the witness fell
two before the tree I felt the
backside of the
part struck the tree and he when back on lack of memory: he
car was
shivering and
was asked about this. With it could not remember the
Mr. Griffiths
tried to
regard to speed he said it was statement, he could not
controlled the
car but 120 kph put to remember if it was
everytime he
turned the car
which contrasts with his him translated, he could not
was just
shivering, like it
earlier evidence that he could that remember if there was an
was going to
broke in two
not say whether the speed of he interpreter and he could not
pieces. We
were five in the
the Mercedes Benz was fast or had remember if he had read it.
car. The time
the accident
took place, I
slow. When asked about his decid
don't know how
statement that he did not knowed to The police officer who took
it happened.
how the accident happened head a Titus' statement was called
and Th
said that when he made thenumb 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 iter, protruding. With the aid of ale itcould clearly see four tyre
d had been recorded19 photograph she pointed outis not marks on the tar. He marked
the inaccurately. 94 where she had been when she dispu these on a rough sketch plan
sce she was struck by the gas cylinderted which he drew the
ne Another witness who saw thean 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 kph to 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 crash caused two of the polesaccid evidence, it is clear that the
ons

pla Riegel's evidence can be said that it was unstable, parts welded at intervals of 50
 into conveniently be divided into force vibrating and pulling very hard mm and this, in his opinion,
 into two parts. Firstly, there is his evidence strongly to the right. It should never have been
 into evidence arising from his. Be Surprisingly, Kandolf, who welded done. According to Riegel,
 into inspection of the Mercedes Benz had been driving the vehicle. It was done badly and
 into Benz in July, 1993 and his testimony since the beginning of June, one incorrectly and the stability
 into drives of the vehicle at that time, 1993, including a fairly long one of the whole chassis was
 into time. Secondly, there is his trip from Windhoek to Er. affected.
 into evidence arising from a report by Jul Keetmanshoop and back, said He
 into which he compiled dated 2nd July, that he noticed only a little was Riegel said that driving the
 into on March, 1998. In final 19 pull to the right. It was, he participated Mercedes Benz over an
 into Riegel's submissions Mr Muller was 1993 said, soft to drive and that was ularly uneven road would cause
 into Riegel's critical of Riegel's an "nice". It was "very concerned movement of the welded
 into as qualifications to testify as an and comfortable". rned sections and the more the
 into her expert and although there is he with vehicle is used the more the
 into make some substance to these the. Returning to Riegel's the welded joints will weaken.
 into his criticisms when it comes to n evidence, he took the Court fact At the time, he said, he was
 into that the 1998 report I remain too through a series of that of the opinion that if the
 into in satisfied that the witness was k it photographs which he took of the vehicle was driven further,
 into thi competent to express opinions for the Mercedes Benz in July, floor and depending on the roads,
 into s arising from the 1993 a 1993 and these, he said, panel it would break apart. After
 into reg inspection and test drives. test showed various defects on the s had assessing all the
 into ard dri vehicle arising from the been damage/defects he was of
 into . 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 examination Riegel was to get evidence-in-chief
hic Mercedes Benz. He said that try also asked about other her. concerning welding seams
le he drove it at 100 kph and drop potential causes of vibration He on the Mercedes Benz he
wa found it difficult to keep ve and pulling to one side or the insist said that they did not alter
s control when negotiating ait. I other. He agreed that theed the fact that two parts were
not bend. It is apparent from the wil following can be potential that joined together. That was a
roa evidence of both Kandolf, l causes: varying tyre pressures, this theme which was repeated
dw who drove the vehicle for aret wheel balance, bent wheel has from time to time and it
ort total of about 2500 kms, and urn rims, incorrect axlean seems that Riegel has a
hy. Berry, who drove the vehicle to adjustment, uneven tyre influe deep-seated objection to
In from Windhoek to Okahandja thi rotation and, to some extent, nce vehicles where two parts
cro and back at high speed, that s poor tyre wear combined with on have been welded together.
ss- neither of these witnesses lat bad shock absorbers. The stabil I will consider whether this
exa experienced the difficulty yer witness also agreed that ality. has affected his objectivity
mi referred to by Riegel. If the in these defects can be rectified. Altho later in this judgment.
nat evidence of these two thi ugh With regard to
ion witnesses is correct then either s Riegel was also questioned he reconstruction of accidents,
Pvi Riegel is mistaken in his jud about the various defects admit at the outset of his evidence
egerecollection of the behaviour gm referred to in his 1993 report to the Court raised the
l of the vehicle or the cause of ent and how they affected the certai question whether it had
ref such behaviour was not. driveability of the Mercedes n been established that Riegel
err inherent, was capable of Benz. He said that the crux of mista was qualified to express
ed rectification and had been In the matter was that two kes opinions on such a subject.
to rectified at least by the time cro sections had been welded in his Eventually, Mr Geier

ap nce and it emerged that in theatt nt further and said that had he 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 evidencephotolost control because of
nte evidence reconstructing thehe concerning an indentation ongraphdefects 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 tonotthree 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 thatalthough Rule 36(9) of the
ce had not been asked to do aonsindentation 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
thehad 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 plaintiffsswe 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 were taken into account when Mercedes factors. Was it the whole loc and experience is well-ed 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 Verster down? How high was the hor re taken at approximately 180 km/h cylinder projected? Did it ity Verster's evidence ranged over 180 km/h with ease "give and take" bounce or slide along the in a number of topics and I will say maybe a little bit of steering gained ground? What was its So bear in mind his evidence as to forces". Then, addressing the that it weight? Without answers to uth whole. However, I will say the damage to the Mercedes Benz, would questions such as these Afr summarise only two aspects as depicted in various documents Verster said he could not ica of his evidence. With regard to photographs, Verster said that they say that high speed was as to the speed of the Mercedes as you cannot just look at the obvious involved.

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

accident, Verster was prepared to say the extent of the damage that the conclusion The other part of Verster's ide to accept that speed was 180 km/h, 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 opinion required using what he indicated Mercedes Benz or part gat that it was clear from the road notes described as "crash analysis of the Mercedes Benz prior to the collision or engineer's plan, which was not data". As for the fact that the high with the tree. Verster's an one of the plans placed before of a rear seat and a glass speed opinion was that the roof of d Court, that the road at the Mercedes cylinder were thrown some with the Mercedes Benz, at least rec point where the accident occurred distance from the rear part of the car at the A pillars, was

pro with the tree. The A pillars are damaged, no damage in that area but sense and jerked the steering
by the metal struts which run down the side of the car. Damage was caused to the wheel or brake and as a
result from the front corners of the front of the roof then the roof was consequently lost control.
The roof was then lifted up at the point of impact. From the tyre marks on the
road surface, Verster concluded that the Mercedes Benz was at some stage on its
side when it was involved in the collision. Verster said that this was on the wrong side of the road and
that there is an indentation on the right side of the front part of the roof which, according to
photograph H46 of the right side of the roof, indicates force was applied to the roof at the A pillar. It can be seen, however,
from the cross-examination of Verster that the A pillar has been pushed towards the centre of the
roof. In other words, that part of the roof which had been attached to the A pillar was pushed towards the centre
of the roof, i.e. the part of the roof which was running from the right A pillar to the left A pillar. He agreed that what he
had identified as the A pillar in photograph H46, which was pushed into that position, was in fact the cover of the A
pillar. If the roof was attached to the right side, Verster considered that the right A pillar at the point of impact
would expect a roof lifting made a lot of noise. 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 becausethe

kin wo of the force of penetration andMerc 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 theBenz and Martin Slabber.

the proves that the roof was stillpla 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 wastried provided to Verster and he

the agree with that probability. Hethe Titus' account. Step two wasto 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 hadol

control, swerved sharply to the right to try to gain control over the vehicle, then the road on the western side of it, and at this stage the vehicle yawed on the spinning anti-clockwise damage marks on the skidded side-ways across both lanes, and hit the tree on the vehicle side position of the vehicle.

"I am of the opinion on two injured pedestrians and when road with which this case is that At impact with the vehicle broke the road into two parts and including the final resting positions as indicated on the police plan." With regard to speed the Str witness said that there was not enough physical evidence to calculate the speed of the Mercedes Benz correctly but he adhered to the view that the speed must have been high. This view was based on the matters just mentioned and his twenty nine years experience dealing with motor accidents. g practical training in the high speed that, United Kingdom and from d, co Unlike Verster, Strydom did he 1960 lectured in the lost

Str set out in the summary of his evidence which he confirmed in the witness box. His conclusion reads:

Titus' would not expect a driver to lose control when negotiating the curve in the road with which this case is concerned. He said that the vehicle could be negotiated comfortably at 140 kph.

Slabber's qualifications and experience differ from the other experts who testified.

He graduated from Stellenbosch University, South Africa in 1955 with a degree in mechanical engineering. He then did practical training in the United Kingdom and from 1960 lectured in the

en 1973. From 1973 he worked	he tried to negotiate	(East	ring poles.	the
gin for various companies	the right-hand turn	ern	As the vehicle	tre
eer involved in the production and	on the approach to	side).	penetrated the	e at
ing design of motor vehicles. The	Kalkfeld from	The	cables the left-hand	an
fac same information made	Otjiwarongo. He was	vehic	vertical section of	an
ult available to Verster and	travelling at a high	le	the chromed grill	gle
y Strydom was made available	speed and landed on	itself	assembly and the	of
of to him and, like Strydom, he	the right-hand verge.	had	left-hand headlight	ab
me visited the scene of the	To regain control, the	rotate	assembly made	out
chaaccident.	driver tried to cross	d	contact with the	10
nic	back to the left-hand	throu	upper steel cable as	6
al	side of the road.	gh	depicted in	de
Based on the information	Regrettably his	appro	photograph 48 on	gre
en made available to him and his	corrective action was	ximat	page 27. The cable	es
gin visit to the scene of the	to swerve resulting in	ely	penetrated the front	on
eer accident Slabber reconstructed	a broadside back	57	end of the left-	the
ing the accident as follows:	across the tarred	degre	hand front fender,	rig
at	section of the road.	es.	folding it	ht-
Ste	The back of the	With	backwards and	ha
lle	vehicle started	the	causing the buckle	nd
nb	rotating in an anti-	rear	on the upper edge.	fro
osc	clockwise direction,	wheel	As the vehicle	nt
h	with right-hand rear	s still	further penetrated	do
unt	tyre making a	on	the cable barrier,	or.
il	distinct broadside	the	three of the support	Thi
	rubber mark on the	tarred	poles collapsed,	s
	road.	sectio	two ahead of the	im
	At this stage the	n, the	tree and one	pac
	driver was still trying	left	beyond the tree.	t
	to correct the	front	The vehicle was	pos
	situation by turning	come	partly constrained	itio
	the steering to the	r of	by the cables, until	n is
	right. The result of	the	they snapped. This	sli
	this action was that	vehic	resulted in a	ght
	the front tyres left no	le	further rotation of	ly
	distinct mark on the	collid	the vehicle to a	ahe
	road.	ed	total rotation angle	ad
	The Mercedes Benz	with	of approximately	of
	crossed the particular	the	106 degrees. The	the
	section of the road at	steel	further penetration	ve
	an angle increasing	cable	of the cables	hic
	from parallel to about	s	during this phase,	le's
	24 degrees at the left-	strun	also caused the	cen
	hand verge of the	g	engine hood	tre
	tarred section	from	(bonnet) to buckle.	of
	when	the	The vehicle struck	gra
		short		vit
		suppo		y,
				wh
				ich

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 nued 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 confronted with the bend instruc Due to the centre of gravity high speed on impact with the tree." question, a bend whichk theof a vehicle being more or sufficient Slabber described as slight.cable less where the gear lever moment He said that once the vehicles would be the Mercedes entu bb was on the dirt or gravelstrun Benz would then have m to proper was on the dirt or gravelstrun Benz would then have l it to the ela section on the western side ofg rotated further. Slabber final the road the driver wouldfrom went on to explain that the position obviously try to get it back onpoles effect would have been that on as the d the road. If he had gone back, anone side of the vehicle indicated in the police plan. on 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 the rear ons induced a sideways or yawwhic be under tension and the seat of thetru movement. The vehicle thenh other under compression car as well cti started to rotate and SlabberVerst and if the tension is high as a gas on illustrated the movement ofer enough there will be a bottle in thewh the vehicle as it crossed thedisag tearing or breaking apart. car were ile road on a plan which he hadreed. Having broken off the rear flung from in prepared and with the aid of aThe section spun around and the rear the model car. Slabber thenvehic ended with the open section part of thewit explained why he was of thele facing south. car and nes opinion that the Mercedesconti collid

Derations 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 the cushion left the rear part of was middle as described by
ed the vehicle with a view to 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 And if it had lifted from
Be but it must have been ult after the collision plus Slabb both A pillars but remained
nz, considerable. He also took longitudinal speed. Slabber er connected to the two B
Sla account of the possibility that in was of the opinion that the was pillars which are situated
bb the deceased braked once he fur speed of the Mercedes Benz asked between the front and rear
er realised there was a problem the when it collided with the tree, to doors there would have
sta and continued to brake once er was somewhere in the region com been a distinct kink in the
rte the vehicle left the tarred road. ret of 70 kph, maybe more. And ment roof; but no such damage is
d When the vehicle returned to ard although he took a speed of on depicted in any of the
his the tarred road it started to at 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

and there 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 left door and right A pillar. This, he said, is established by the evidence in a sketch of severe kink on that A pillar. At the (Exhibit V). The witness said that the tear marks at the some stage in the penetration of the roof said that the tear marks at the roof process the kink in the A pillar had the top of the A pillar ran from the middle of the left side of the A pillar to the drive shaft tunnel, f, became so severe that it tore apart 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 witness then referred to the tearing plus the deformation of which that could have been seen in the photograph H46 which, he said, depicts a definite fact that the A pillar on the only stitch or spot welding at the top of the A pillar, with the right side was still along the floor panels the two sides. He disagreed entirely with the attached to the roof at the f sills on either side and the is Verster's evidence that it was a tree. time of impact. He said that there was a clean break at the welding. He said that As for Verster's opinion that the top of the A pillar where that damage to the right edge of the roof was to be expected. This the roof was to be expected to be an opening in the floor. Slabber also gave an explanation for the indentation cause at the time of impact, d panels which are positioned on the front leading edge of d Slabber said that that would be expected if the impact was further back but not the indentation relied on by the witness. Dealing with the evidence of Riegel and Verster as to when the impact occurred 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

pill driveability 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.

wit The 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 that the floor panels are stitchin- more or less 80% of its

hic Taking the distance from theuld contribute little to the stiffnesschief original strength but this

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

rot mm and applying basicve Riegel's conclusion that the d at Slabber 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 depth bad 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 inatio eventually leading to the

o the angle as low as 1° a driverof the vehicle he would live with n but vehicle 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 theately deceased was killed.

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

The Mercedes Benz, was Mr Geier submitted that a
 in and if one sill were to break according to the report, wasnoc reasonable person in the
 on the driver would be aware of (ii)
 e it. not "traffic safe / roadworthy"ked same circumstances as

and, as it could not bedownKaufmann would have
 the defendant failed to take
 a repaired, could only be usedto theforeseen the reasonable
 such steps.

As I indicated earlier in this
 suc judgment the question of Th
 h liability involves two issues, shown to Kaufmann, FNB'ssed atdeceased, would have taken
 e
 as namely negligence and credit manager, in the secondan reasonable steps to guard
 pla
 the causation. The test for quarter of 1994 and Riegel'saucti against that possibility but
 inti
 flo determining negligence was conclusions were pointed out.on. failed to take such steps.

ffs
 or authoritatively stated by Kaufmann was thereforeThe Counsel submitted that the
 cas
 pa Holmes, J.A. in *Krttger v* aware of the fact that thedecea three parts of the test for
 e,
 nel *Coetzee* 1966(2) SA 428 (A) Mercedes Benz was notsed **negligence have been**
 on
 s. at 430 E-F: "traffic safe/roadworthy" andwas **satisfied and that** FNB

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

qu
 e "For Despite this, FNB permittedtted **negligent.**

the esti
 wh purpo Pretorius, of Motor Houseto VVhen making his
 on
 ole ses of liabili CC, to remove the Mercedesdrive submissions Mr Geier relied

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

ne
 uld if- yard for the purpose of sellingvehic in the judgment of Levy,

a) a *cliligens* gli
paterfamilias in the position

and that Mr
A. Jan employee of FNB and Kaufmann approved
half to prove a fact against the accepted Benz.
thereof."
. Kaufmann's junior. Her defendant. But, in any event, that
The evidence concerned the 1 there is no evidence that Kauf If Riegel's report was
e deceased's application for do Kaufmann realised or should mann 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
was
set form pla d either that the vehicle was
ally
out admit into Although not expressly have not disposed of for use on
ted
the by ff concluded in such terms, sleep the road or that anyone
Mr
evi Geier can Riegel's report can, in myess acquiring it or, for that
on
de behal use view, be interpreted as night matter, using it, was made
f of
nce Plaint an concluding that the Mercedes if aware of its dangerous
iff
of that ad Benz was in a dangerous some condition.
the
on de cea mi condition. Not only does it one Pretorius asked FNB if he
sed
e had ssi conclude that the vehicle was shoul could sell the Mercedes
comp
An leted on not "traffic safe/roadworthy" d die Benz on their behalf and
the
gel form ma but it states that it is only fit while FNB agreed. He was
and
a appli de for spare parts. That drive permitted to remove the
ed for
Dr finan on Kaufmann saw it in this light ng vehicle from FNB's
ce on
eye 13th her is, I think, made clear by the repossession yard for the
Septe
r, mber be Pfeiffer's evidence, which I Merc purpose of selling it. One of
1994

the d Pretorius denied that he had but In my judgment, if the they acted at all relevant times within the course and scope of their employment as aforesaid." The question of negligence is entwined with the question of causation because in each the state or condition of the Mercedes Benz in September, 1994 has to be considered. In this connection, Mr Geier relied heavily in final submissions "Defenda as his on the direct evidence of nt empl Titus. If the Court were to ts oyer, accept the evidence of that Pikki must witness as to how the Lou be accident occurred then and J held clearly the death of the Kaufmann deceased was caused by the were vicari dangerous condition of the empl ously vehicle. However, I have to consider to what extent, if at all, Titus is a credible and trustworthy witness. I agree with counsel that, when 1994 negligence seen in isolation, Titus' that

the d Pretorius denied that he had but In my judgment, if the they acted at all relevant times within the course and scope of their employment as aforesaid." The question of negligence is entwined with the question of causation because in each the state or condition of the Mercedes Benz in September, 1994 has to be considered. In this connection, Mr Geier relied heavily in final submissions "Defenda as his on the direct evidence of nt empl Titus. If the Court were to ts oyer, accept the evidence of that Pikki must witness as to how the Lou be accident occurred then and J held clearly the death of the Kaufmann deceased was caused by the were vicari dangerous condition of the empl ously vehicle. However, I have to consider to what extent, if at all, Titus is a credible and trustworthy witness. I agree with counsel that, when 1994 negligence seen in isolation, Titus' that

em been told by Kaufmann or the he evidence establishes that the plo other employer with whom hewa Mercedes Benz was indeed in yeedealt that the vehicle had beens a dangerous condition then s damaged and rebuilt. It must,act Kaufmann was negligent. of in my view, follow from thisual FN that he was also not told thatly The minutes of a pre-trial was Benz in the vehicle was in a dangerousins conference held on 9th negli wit condition. tru February, 2001 record that: gent connection, Mr Geier relied h me FNB, heavily in final submissions wh As Kaufmann was not callednta "Defenda as his on the direct evidence of om to testify by the defendant thel in nt empl Titus. If the Court were to Pre evidence of Pretorius to whichha ts oyer, accept the evidence of that toriI have just referred remainsvin Pikki must witness as to how the us uncontradicted and, in myg Lou be accident occurred then deaview, must be accepted. Ithe and J held clearly the death of the It therefore find that Kaufmannve Kaufmann deceased was caused by the wa not only failed to take anyhic were vicari dangerous condition of the s steps to ensure that thele empl ously vehicle. However, I have to Ka Mercedes Benz was notput Wesbliable consider to what extent, if at uf disposed of for use on theup ank / FNB for all, Titus is a credible and ma road and failed to pass onfor durin his trustworthy witness. I agree nn information concerning thesal mbernegli with counsel that, when an vehicle's dangerous conditione. 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. Butem 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
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 yearsem of hovv the accident happenede itaccount of Riegel's evidence
usi later. Indeed, the onlyent whereas in October, 1994 hewas which was not in agreement
ble common denominator in histo told the police that he did notnot 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 the ng 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 aims the evidence of
ste the impact by reference to the ind probabilities, that this test Riegel concerning
r indentation on the right side of ent was what happened. I mo the condition of the
an the front of the roof. Slabberati accept that at the ny. Mercedes Benz in
d also dealt with this. It was on time of the impact the July, 1993, the fact
Riecaused, he said, when the tree on A pillar on the right Tha that the curve in the
gel penetrated the A pillar. In the side was still attached t, of road being
als cross-examination Versterfro to the roof. cou negotiated by the
o agreed that this was ant rse, deceased when he
sou possibility but I would goof Mr Geier submitted doe left the road was
ght further. If one has regard to the that Titus had no s gentle or slight and
to photograph H46 it can be seen roo motive to not the evidence of
sup that there is a tear at the top off misrepresent the disp Riegel that in his
por the A pillar as testified to by an events surrounding ose opinion the
t Slabber. This is not consistent d I the accident but it is of deceased lost
the with the welding seam acc not necessary for the the control because of
ir breaking on its own. It is, ept defendant to establish mat defects in the
res however, consistent with force Sla a motive. Whatever ter vehicle.
pec being applied to the A pillar bb his reasons for doing com
tiv causing it to bend or kink ander's so, I am satisfied that plet Riegel's evidence
e dragging the roof down to ae vi Titus has placed ely. must first be
opi point where it tore away from de before the Court a The compared with that
nio the A pillar. In the process thence fictitious account of re of Kandolf and Berry.
ns tree could well have caused, at what occurred. I reject rem 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
codifficult 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 ataswho 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 childrenandwith 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

ped tearing and/or cracking and/or commenced breaking up either the road and these collided with a tree." allegations. Looking at the probabilities as a whole, the accident and the death of the deceased were caused by the deceased losing control of the Mercedes Benz for some reason not connected with its condition. In these circumstances the action must be dismissed.

As for costs, counsel are agreed that the costs of this part of the trial must follow the event. Also, that the agreement in respect of costs prior to 29th February, 2000 be made

evi was continuous welding andmi as was said by Slabber, the plaintiff has failed to prove that adjustments must have been made to it during the period from Riegel's test drives to the time it was driven by Berry. I the probabilities as a whole, the accident and the death of the deceased were caused by the deceased losing control of the Mercedes Benz for some reason not connected with its condition. In these circumstances the action must be dismissed.

de abandoned his "finding" thatsta adjustments must have been made to it during the period from Riegel's test drives to the time it was driven by Berry. I the probabilities as a whole, the accident and the death of the deceased were caused by the deceased losing control of the Mercedes Benz for some reason not connected with its condition. In these circumstances the action must be dismissed.

ncethe vehicle broke in two priorke made to it during the period from Riegel's test drives to the time it was driven by Berry. I the probabilities as a whole, the accident and the death of the deceased were caused by the deceased losing control of the Mercedes Benz for some reason not connected with its condition. In these circumstances the action must be dismissed.

he to colliding with the tree. Inn from Riegel's test drives to the time it was driven by Berry. I the probabilities as a whole, the accident and the death of the deceased were caused by the deceased losing control of the Mercedes Benz for some reason not connected with its condition. In these circumstances the action must be dismissed.

ad my view, Riegel's evidence asin time it was driven by Berry. I the probabilities as a whole, the accident and the death of the deceased were caused by the deceased losing control of the Mercedes Benz for some reason not connected with its condition. In these circumstances the action must be dismissed.

mitto the condition or behaviourhis To succeed in this action the plaintiff has to prove that the Mercedes Benz was in a dangerous condition and that as a result thereof it was not connected with its condition. In these circumstances the action must be dismissed.

ted of the Mercedes Benz in July,rec the plaintiff has to prove that the Mercedes Benz was in a dangerous condition and that as a result thereof it was not connected with its condition. In these circumstances the action must be dismissed.

tha 1993 must be approached witholl the plaintiff has to prove that the Mercedes Benz was in a dangerous condition and that as a result thereof it was not connected with its condition. In these circumstances the action must be dismissed.

t a great deal of circumsppection.ect that the Mercedes Benz was in a dangerous condition and that as a result thereof it was not connected with its condition. In these circumstances the action must be dismissed.

the ion was in a dangerous condition and that as a result thereof it was not connected with its condition. In these circumstances the action must be dismissed.

we On the other hand, theof condition and that as a result thereof it was not connected with its condition. In these circumstances the action must be dismissed.

ldi evidence of Berry was simplethe result thereof it was not connected with its condition. In these circumstances the action must be dismissed.

ng and straightforward. He testbe " n action must be dismissed.

of drove the vehicle at theha c o m m e n c e d a n d / o r d e v e l o p e d

the beginning of September, 1994vio

tw and, after the accident whichur

o took place a couple of weeksof

sill later, saw pictures of thethe

s deceased in the newspapers.Me

an He therefore had good reasonrce

d to recall what had happened.des

the In my judgment, Berry'sBe

tun evidence can safely be reliednz

nel upon and either Riegel isor,

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

d

e

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

f

C

1. The action is
o dismissed;

u

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

.

of this part of the
H trial;

o

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

,

For the Plaintiff: Advocate H. Geier

Instructed by Messrs Oliver Law Office

For the	ndant:	M	S.C
D	Instruc	u	Gover
e	ted by:	ll	nment
f	Advocate L. C	e	Attorn
e		r,	ey

(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.