REPORTABLE
CASE No. SA 13/2008

IN THE SUPREME COURT OF NAMIBIA

In the matter between

THE MOTOR VEHICLE ACCIDENT FUND OF NAMIBIA **APPELLANT**

and

LUKATEZI LENNOX KULOBONE **RESPONDENT**

Coram: Strydom, AJA, Mtambanengwe, AJA, et Damaseb, AJA

Heard on : 20/10/2008

Delivered on: 05/02/2009

APPEAL JUDGMENT

MTAMBANENGWE, AJA:

[1] This appeal is against the judgment of the High Court (Angula AJ) which held that a collision between two motor vehicles on 20 June 2003 was caused by the sole negligent driving of one Ashley Groenewaldt. The collision occurred around 18h00 on the day in question at or near the T-junction between two streets, Bloekom and Tacoma, at Suiderhof Shopping Complex, Windhoek.

Respondent was the driver of one of the vehicles involved while Ashley Groenewaldt was the driver of the other vehicle. As a result of the collision respondent sustained certain injuries in respect of which he claimed damages from the appellant sued by him in its capacity in terms of section 2 of the Motor Vehicle Accidents Act 1990 (Act 30 of 1990).

[2] By agreement between the parties the court *a quo* only dealt with the issue of liability. The matter now before us on appeal is against that finding of fact by the court and the sole issue is whether the trial court was correct in coming to the conclusion that Groenewaldt was solely the cause of the collision.

[3] Bloekom Street runs roughly in a north to south direction and joins Tacoma Street, which runs east to west, at the intersection. Kulobone (whom I shall for convenience refer to as the plaintiff) traveled south on Bloemkom Street and turned right at the T-junction into Tacoma Street. Tacoma Street, on which Groenewaldt's vehicle was traveling from west to east, is a through road. There is a give way sign against traffic entering Tacoma Street from Bloekom Street. Beyond this T-junction Tacoma Street ends up at a T-junction with another street. To the left of traffic on Bloekom Street there is a playing ground for children, to the right there are shops and a parking area and opposite, along Tacoma Street, are houses.

[4] In his particulars of claim plaintiff alleged that Groenewaldt was negligent in various respects including that “he drove too fast in the circumstances”. All the alleged instances of negligence were denied in defendant’s plea. Defendant on the other hand alleged various instances of negligence on the part of plaintiff including that plaintiff “entered an intersection at an inopportune time and as a result presented Mr. Groenewaldt with a sudden emergency” and that plaintiff “drove in total disregard to the right of other drivers by failing to yield for traffic that had right of way and entered the intersection when it was not safe for him to do”. No replication was filed by plaintiff, therefore issue was deemed joined on the basis of the particulars of claim and the plea thereto. Thus, in considering the evidence, I shall have regard to the background I have given above and to the pleadings.

[5] It would appear, according to part of the evidence, that there are two diametrically conflicting versions of how the collision occurred, the version by the plaintiff which, to a certain extent, is supported by his wife, Ms. Mariatta Namasibu Kulobone, the only other witness for the plaintiff, and that of defendant. The main witness for the defendant was Groenewaldt. He was the only witness who was still at the scene when Constable Samuel Albertus Snyder attended the scene after the accident. Constable Snyder was called by defendant but was an independent witness whom plaintiff would have also called if defendant did not do so, as counsel for the plaintiff indicated.

[6] Plaintiff's account is briefly the following: he testified with the help of a sketch plan prepared by Constable Snyder and later produced as exhibit 'D'. He was driving south along Bloekom Street into Tacoma Street. At the give-way stop at the T-junction of the two streets he stopped for about three minutes and twice looked left and right and saw no vehicles on Tacoma Street. He turned right into Tacoma Street and traveled westwards. He had proceeded approximately 12 metres along Tacoma Street when he saw Groenewaldt's vehicle approaching from the west at high speed; Groenewaldt's vehicle was some 50 metres away at that point. The plaintiff admitted under cross examination that he would have proceeded some further metres beyond the 12 metres before the collision took place. He further testified that Groenewaldt's vehicle was indicating to turn left into Bloekom Street and that the collision occurred because Groenewaldt swerved right into his lane. His vehicle was damaged at the right front wheel and was a total write off. He avoided a head-on collision by swerving to the left.

[7] I pause here to say that Plaintiff's evidence, so far, suggests that the accident occurred some distance from the T-junction, somewhere between 12 and 50 metres, and right off centre to the left of the dividing line of the two lanes of Tacoma Street. It is in conflict with a statement plaintiff admitted, under cross examination, to have made to Constable Snyder. That statement is contained in

the Road Traffic Collision Report later produced as exhibit 'C'. There he states:

> "I was traveling in a southern direction with intention to turn right into Tacoma Street, motor vehicle 'A' (Mr. Groenewaldt's vehicle) approached me with high speed from the right and bumped into me."

That statement also differs from what plaintiff said in an affidavit he swore for the purpose of his claim against defendant (later produced as exhibit "A"), where he said:

> "My wife, Marietta Namasiku and I were on our way to church. When we have joined Tacoma Street we kept to our left and hardly 50 metres I saw an over speeding motor vehicle coming. The motor vehicle, driven by Mr. A.M. Groenewaldt hit us. (note my underlining in both statements)

The latter statement tallies with his and his wife's evidence in court, that the collision occurred somewhere after the 12 metre point from the T-junction. Notably, in it there is no mention that he swerved to the left to avoid a head-on collision. Under probing cross examination as to the reason for the omission to mention the swerving to the left, and even in his evidence in chief, plaintiff gave various irreconcilable reasons for the omission. Suffice it to say his evidence on this, and on further answering questions in cross examination, was very evasive.

[8] Plaintiff's evidence as to the point of impact

In his evidence in chief he was specifically asked by his counsel "to indicate to us the point of impact" by placing letter "B" on the sketch plan exhibit "D". If he did as requested, the record does not contain a copy of exhibit "D" showing where he placed letter "B". However, his counsel described the indication as follows:

> "My Lord the witness indicates on the sketch plan that the point of impact was on the southern lane of Tacoma Street."

Earlier in his evidence in chief, talking about the point of impact, plaintiff said that he had come to a "certain pole" on the left side of "the other driver who was coming". The mention of the pole, some distance away from the T-junction, was made while plaintiff was in the process of answering the specific question as to where the point of impact was. All in all the only thing certain in his evidence in this regard is that the point of impact was in the southern lane of Tacoma Street. As to its distance from the T-junction all one gathers, from his vague and imprecise evidence, is that the point of impact was somewhere between 12 metres and 50 metres. However, under cross examination plaintiff seems to confirm that the point of impact was where Groenewaldt indicated it to have been to Constable Snyder; he said (about Groenewaldt):

> "Then when he reached (the) next, to where he was indicating that he should turn, that is where the problem

came, it seems he failed to control his vehicle."

He went onto say:

> "What he did, he just left his lane then straight he came to my vehicle and he bumped my vehicle."

And further he said:

> "But I think he was about to make a sharp corner there, he could not make it, then he has to go back, to my lane."

[9] These statements by the plaintiff under cross examination negate his evidence in chief, and, incidentally the finding by the court *a quo,* that he had long passed the T-junction when the collision occurred. Plaintiff's evidence otherwise supports Groenewaldt's evidence that the point of impact was in the T-junction, and the observation of Constable Snyder at the scene as to where plaintiff's vehicle was after it had been bumped. Further indication as to where the point of impact was is given by the fact that plaintiff did not deny Groenewaldt's version of how and where the collision occurred. That version, as put to the plaintiff, was that Groenewaldt would testify:

> "…that on the day in question he was traveling from West to East in Tacoma Street. At the junction of Bloekom Street and Tacoma Street, he observed your car. You swerved into Tacoma Street and he was at close range and

> he hit you on your right hand side at the wheel of your car as you swerved into Tacoma Street. You had left him with no opportunity to avoid the accident."

[10] That version was in substance first put in defendant's plea as follows:

> "5.2.3 he entered an intersection at an inappropriate time and as a result presented Mr. Groenewaldt with a sudden emergency;
>
> 5.2.4 he drove in total disregard to the right of other drivers by failing to yield for traffic that had right of way and entered the intersection when it was not safe for him to do (so)".

Counsel added that Groenewaldt would say that he could not avoid the accident "because on the right hand side there were vehicles parked on the pavement" and at the park there were children playing "so he could swerve no where "and he hit you on the right side at the intersection of Bloekom and Tacoma Street". (all underlinings mine)

[11] Interestingly, plaintiff only commented on Groenewaldt's claim that there were cars parked on "the right and children playing in the park" (denying both), the rest of his version was left without any denial. What is more significant is that in re-examining the plaintiff, his counsel did not ask

him any pertinent questions anent these essential allegations, nor did he, in chief, ask for plaintiff's comment on the allegations in defendants plea which pertinently raised the issue of how and why and where the collision occurred. All that plaintiff did on being questioned further in this regard, was to agree that he got into Tacoma Street from Bloekom Street because he, Groenewaldt, was indicating to turn into Bloekom Street and the turn was too sharp, and to say that there was enough room for Groenewaldt to go straight or to turn left as there was no other vehicle in Tacoma Street in front of Groenewaldt.

[12] Mrs. Kulobone was the only other witness for the plaintiff. Her evidence, in brief, was as a repetition of plaintiff's particularly in the following respects:

a) That at the give way sign plaintiff stopped and looked left and right;

b) That there were no other vehicles in Tacoma street;

That the collision took place in plaintiffs lane of Tacoma street and

c) That Groenewaldt's vehicle was traveling at high speed

In her case she saw Groenewaldt's vehicle when plaintiff was some 10 metres from the T-junction. She said plaintiff entered Tacoma Street because there was

no vehicle in sight in Tacoma Street. She, however, also said:

> "He (plaintiff) turned this side (west) and then before he came this side we just saw a big white car, which was traveling at very high speed". (Stress mine)

She obviously had difficulties to indicate specific points, especially when asked as to where the point of impact was. However, counsel eventually put what she was saying on record thus:

> "The witness indicated the point of impact close to the intersection at the T-junction of Bloekom Street and Tacoma Street and she indicated the point of impact on the side of the vehicle traveling from east to west. That is the southern lane of the road." (my emphasis)

Later she said it was when plaintiff was "almost …on his side" of the road that they saw "that car". Asked where Groenewaldt's car was "when it bumped them, in your lane or in its lane?" she answered.

> "It was almost in our lane; because he was turning and it was in a speed. He could not turn immediately. Maybe he was trying to make a curve to turn." (the stressing again mine)

[13] I note in passing that in his judgment the learned trial Judge rightly observed that she initially "indicated a point of impact close to the middle of the T-junction", and that under cross examination "she indicated that they had already left the T-junction, and that the point of impact was away from the middle of the T-junction." I note further that her initial indication more or less put the point of impact in the same area where Groenewaldt indicated it to have been and where plaintiff himself seemed to say it was when he said under cross examination:

> "Then when he reached the next, to where he was indicating that he should turn, that is where the problem came, it seems he failed to control his vehicle.

[14] I now turn to the evidence led on behalf of defendant, by Groenewaldt, defendant's only eye-witness of the collision. The main points of his evidence were that as he traveled west to east on Tacoma Street, there was a car in front of him which turned 'right' at the T-junction. That car was some 10 to 12 metres in front of him and after it turned off he observed a bakkie standing at the stop in Bloekom Street. He had the right of way and intended to turn at the next junction. As he was passing the car at the stop (give way) "swerved" into his path. He repeated more or less what appears in the plea and what was put to plaintiff in cross examination. Asked if he attempted to avoid the accident, he said he tried, emphasizing at the same time that there was nothing he could do.

He gave the reason that he could “swerve no where” to be that there was a park on one side where children were and cars parked on the other side. The point of impact he indicated was more or less where plaintiff’s wife initially said it was, but he said it was in his lane.

[15] Mr. Groenewaldt said that his vehicle was damaged on the front left side and that the other car came to a stand still right in the middle of the intersection. Under cross examination Groenewaldt said he was 100% certain as regards how the collision occurred. He repeated that there was a vehicle in front of him that turned off (from Tacoma Street). The only turn off from Tacoma Street at the Shopping Complex is into Bloekom Street. Obviously Groenewaldt was mistaken to say the vehicle in front of him turned “to the right hand side on my right”. He in fact corrected himself under cross examination.

[16] Groenewaldt was asked why it was not put to plaintiff and his wife that there was a vehicle in front of him that turned off before he saw plaintiffs vehicle at the stop, and did he tell his legal representative of this, he insisted he did tell his counsel that and that it was in his statement to the Police. I have already referred to the “Road Traffic Collision Report” Exhibit ‘C”. In it Groenewaldt said.

> “I was traveling in an eastern direction in Tacoma Street. As I approached the junction of Tacoma & Bloekom Street the vehicle in front of me turned off (sic) left. I then

> notice another motor vehicle turn into Tacoma Street from Bloekom Street. I applied brakes and swerved to the right to avoid the accident but bumped into the other vehicle."

Groenewaldt said he was travelling at 55 to 60 km per hour and the vehicle in front of him was 10 to 15 metres ahead, "a good distance in front of me", he said. Asked if he considered the possibility that plaintiff could not see him because of the car in front of him, he said:

> "No I wouldn't because when I got here, that vehicle was already long gone, as I said the vehicle was 10 to 15 metres in front of me so when I got here that was probably still like 10 metres in front of me like further away from me."

[17] When Groenewaldt was further quizzed why that fact was not put to plaintiff, Mr. Ueitele interjected to say, (rightly in my opinion):

> "the other witnesses in their evidence in chief denied that there was no other vehicle". (sic)

The learned trial Judge allowed the question to be put as he thought that it was crucial that the other witnesses should have been given the opportunity to respond. When the question was repeated, Groenewaldt said he didn't know why it was not put but insisted that that other vehicle had already long gone.

[18] I pause here to say that it would appear that both counsel had the Road Traffic Collision Report which mentions the other car, according to Groenewaldt's statement therein. That was reason enough for plaintiffs counsel to canvass this issue with the plaintiff.

As to whether at the speed he said he was doing, he allowed a proper following distance between him and the other car, Groenewaldt said that the car was also slowing down to turn "meaning the car came nearer to me because it was slacking down." He didn't consider plaintiff would start to enter the intersection because he expected he would look left and right before he did. In the end Mr. Mostert put to Groenewaldt that he was the sole cause of the accident because he drove at an excessive speed and, secondly, because he did not keep a correct following distance.

[19] Constable Samuel Albertus Snyder testified as follows: He said on the day in question he was called to attend to the accident. He found the two motor vehicles involved at the scene in the position where they ended up after the collision. He drew a sketch plan of the scene showing in which direction each vehicle was traveling. He himself observed the position where each vehicle ended up after the collision but the point of impact was indicated to him by Groenewaldt. The sketch plain was produced as exhibit "B". He took statements from both drivers, the one from Groenewaldt at the scene and the

one from plaintiff later when plaintiff came to see him after he was discharged from hospital. The two statements are in the Road Traffic Collision Report he compiled (exhibit “C”).

Constable Snyder said he paced the distance between the two vehicles; this distance is reflected as 20 metres. Groenewaldt’s vehicle is shown on the sketch plan as standing past the T-junction facing east slightly more to the right in the southern lane of Tacoma Street. Plaintiff’s vehicle is shown facing west with its front end lying slightly across the middle line in Tacoma Street; its whole body is shown as lying across the entry lane of Bloekom Street i.e. the lane in which it would have traveled to enter Tacoma Street. The point of impact is shown by letter X also opposite the entry lane from Bloekom into Tacoma Street but slightly in the southern lane of Tacoma Street.

[20] Under cross examination Constable Snyder said that he did not take plaintiff to the scene. He also said he found the damage to Groenewaldt’s vehicle to be on the front left part. He stuck to this evidence despite persistent questioning and suggestion by counsel for the plaintiff that he might have been mistaken, and to say so if he was uncertain. As to the position he said he found plaintiff’s vehicle in, he said it seemed that after the impact the vehicle “swerved, turned and stopped”. The rest of the cross examination of this witness sought to have him speculate as to how vehicles involved in an accident behave. He said

he could not rule out the possibility that Groenewaldt "swerved out with the vehicle". He gave the opinion that if Groenewaldt was doing 55 to 60 km per hour the speed was "a bit high", because, he said, there are shops and at the time the collision occurred, there would be lots of people moving and a lot of traffic in the area. It is a busy corner. Lastly he was asked to say whether the point of impact indicated to him by Groenewaldt was not improbable and he said he did not rule out the possibility that Groenewaldt swerved out with the vehicle and he did not think that that point of impact was improbable.

[21] That being the totality of the evidence, I pause here to say that it is most unfortunate that no inspection in *loco* was conducted in this case. The idea was suggested by plaintiff's counsel at a point in the proceedings that the learned trial Judge thought was too late. The reason why Mr. Mostert made the suggestion was that most if not all of the witnesses had some difficulties about directions. It is also most unfortunate that neither counsel nor the court itself made certain that the indications witnesses were asked to make were recorded as exhibits. The record in this respect, and as regards the evidence of nearly all the witnesses is full of unspecified indications reflected as "here, there, this side" etc. This makes it incomplete.

[22] I turn to consider the findings of the court *a quo* on the facts. The court had to decide which of the two versions (so to speak) to accept. It did so by

considering the facts, the credibility of the witnesses and the probabilities in this case. It accepted the version put up by the plaintiff. In doing so the court found the plaintiff and his wife were credible witnesses and Mr. Groenewaldt to have fabricated his evidence in a number of respects, and that the probabilities supported plaintiff's version of how the collision occurred on a number of points.

[23] Mr. Ueitele for the defendant, submitted that the court *a quo* erred in various respects on the facts and, "ultimately that plaintiff did not discharge the *onus* that rested on him to prove that Groenewaldt's negligence was the sole cause of the collision". In his reply to plaintiffs particulars of claim defendant pleaded in the alternative that Groenewaldt's negligence was not the sole cause of the collision but that the plaintiff's negligence contributed to cause the accident. As said earlier defendant also alleged that plaintiff was negligent in a number of respects.

[24] As I understand the law, even where no counter claim is filed by the defendant, as in this case, where each party alleges negligence on the part of the other, plaintiff in order to fix liability on the defendant, and vice versa, each party must prove what it alleges. In other words the saying he who alleges must prove applies to both parties. Thus in the present instance to escape liability entirely, defendant must prove that plaintiff was the sole cause of the collision.

[25] The alleged errors that the court *a quo* is said to have committed are listed in Mr. Ueitele's written submissions. I will refer to them and consider their impact on the Court *a quo's* judgment seriatim. Mr. Ueitele referred to a number of legal principles which have been distilled from decided cases to guide an appellate court in an appeal purely upon fact. It is not necessary to repeat them in this judgment; they were discussed at length by Davis, A J.A. in Rex v Dhlumayo and Another 1948(2) SA 677 (A.D) at 695-705, a useful summary of which the learned judge of Appeal made at 705-6. Suffice it to say that I will be guided by these principles and will refer to any of them I find applicable at various stages in the consideration of this appeal.

[26] Mr. Ueitele also referred to the well known remarks by Eksteen A. J.P. in National Employers General Insurance v Jagers 1984 (4) SA 437 (C) at 440 E-G - that where there are two mutually destructive stories the plaintiff can only succeed

> "……if he satisfied the Court on a preponderance of probabilities that his version *is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of*

the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false".

[27] The first error said to have been committed by the court *a quo* relates to the statements in the court *a quo's* judgment where the Court says:

1.1 "……the so-called undisputed evidence …… was not put to the plaintiff and his witness when they testified in order to afford then (sic) an opportunity to admit or dispute it……..".

1.2 "The undisputed evidence listed above was not the only evidence not put to the Plaintiff and his witnesses when they testified. It was also not put to the Respondent and his witness that Groenewaldt would dispute that the collision took place in the lane of travel of the Plaintiff that Groenewaldt would dispute that his vehicle collided with its right front part against the Plaintiff's vehicle, but that (he) would say that it collided against the Respondent's vehicle with its left front part;"

[28] The court *a quo* remarked that Mr. Ueitele "tabulated what he termed" the

'undisputed evidence': that the plaintiff's vehicle was damaged at the right side front wheel; that Constable Snyder found the plaintiff's vehicle directly opposite the yield sign facing west with part of the plaintiff's vehicle being in the northern lane of Tacoma street; Constable Snyder found the vehicle of Groenewaldt about 20 paces to the east of plaintiff's vehicle and it was facing east. He, therefore, submitted that in the light of that evidence "it was highly improbable that Groenewaldt's vehicle could have left the northern lane of Tacoma street and collided with the plaintiff's vehicle in the southern lane".

The court *a quo* said it had a problem with the "so-called undisputed evidence" in that it was not put to the plaintiff and his witnesses when they testified in order to afford them an opportunity to admit or dispute it. It said that what was put to the plaintiff did not cover those undisputed facts.

[29] In his written submission Mr. Ueitele gave the reason for submitting that the court *a quo* erred in that regard as follows: that Groenewaldt's version was put to the plaintiff, when defendant pleaded that plaintiff entered the intersection at an inopportune time thus presenting Groenewaldt with a sudden emergency; that Snyder testified that the sketch plan he drew was shown to plaintiff and he raised no objection to it; that at page 8 of the record there is a letter to plaintiff alleging that plaintiff was the sole cause of the accident since he did not give right of way to oncoming vehicles. Mr. Ueitele accordingly submitted that implicit

in all these versions was a denial that the collision occurred in plaintiff's lane of travel. So he contended that defendant's case was put to plaintiff and plaintiff did not deal with those allegations.

[30] I pause briefly to remark that the letter referred to above (at p. 8 of the record) was produced as annexure "A" to plaintiff's particulars of claim. In my analysis of the evidence I note that when Groenewaldt's version was put to plaintiff and he was asked to comment, he did not deny these allegations. In any event the issues were defined in the pleadings and it was incumbent on counsel for the plaintiff, in the first place, to have plaintiff's attention drawn to what was alleged in the pleadings and have him comment thereon, he did not have to wait for counsel for the defendant to put those issues to the plaintiff again. To ignore defendants pleadings, as the judgment of the court *a quo* appears to do, would be a negation of the role pleadings are supposed to play, and an unnecessary prolongation of the procedure of putting evidence before the court. By not filing a replication plaintiff put the matters alleged in the plea in issue.

[31] It is important at this stage to refer to similar findings by the court *a quo.* In paragraphs (21) and (22) the court *a quo* dwelt on this issue of what it considered was not put to plaintiff. It referred to Navachab Gold Mine v Isaacs 1996 NRH where at 85B-C Hannah J quoted Claassen J's statement in Small v

Smith 1954 (4) SA 434 (SWA) at 438 E-G. In the latter case Claassen J said:

> "It is, in my opinion, elementary and standard practice for a party to put to each opposing witness so much of his own case or defence as concerns that witness and if need be to inform him, if he has not been given notice thereof, that other witnesses will contradict him, so as to give a fair warning and an opportunity of explaining the contradiction and defending his own character. It is grossly unfair and improper to let a witness evidence go unchallenged in cross examination and afterwards argue that he must be disbelieved." (my emphasis)

Hannah J said the Nawachab case supra at 88B-C

> "The rule that an opposing party must put its case to the other party's witnesses in respect of matters which are not common cause is not to be found in formal rules of court, but is, as I have already pointed out, based on considerations of fundamental fairness and a court should be slow to reject a witness's evidence on such matters where it has not been challenged and the witness has not been given an opportunity to deal with the conflicting version which the opposing party's witnesses give in due course." (my stressing)

[32] In the context of the present case the portions I have underlined in the quoted passages from the two Judgments are meant to show not only that plaintiff was given sufficient notice, warning and opportunity to deal with the so-

called conflicting versions of defendant, but that he failed to avail himself of the opportunity to deal with or deny defendant's version in regard to the point of impact in relation to its distance from the T-junction. Besides that, plaintiff's wife's evidence indicating "a point of impact close to the middle of the T-junction, (see paragraph (11) of the judgment) which corroborates Groenewaldt on the point, cannot just be brushed aside.

[33] The next area in which Mr. Ueitele says the court *a quo* erred regards a point, later heavily relied on by the court *a quo* in drawing adverse inferences against Groenewaldt, and in finding the probabilities to be against him. It concerns the question as to which front side of Groenewaldt's vehicle sustained damage as a result of the impact during the collision.

In paragraph (23) of his judgment the learned trial Judge says:

> "According to the plaintiff's version, Groenewaldt's vehicle veered (curved) from its side of the lane into the lane of the plaintiff. His vehicle was bumped by Groenewaldt's vehicle at the right front fender with the right front part of Groenewaldt's vehicle." (my underlining)

There is no evidence by plaintiff or his wife to the effect that Groenewaldt's vehicle bumped their vehicle with the right front part. On the other hand both Groenewaldt and Constable Snyder testified that the damage to Groenewaldt's

vehicle was to the front left side. Constable Snyder's evidence on this point was not what he was told by Groenewaldt, but was from his own observations at the scene.

[34] In paragraph [27] of the judgment, in the context of considering what it called Groenewaldt's two contradictory versions of how the collision occurred, the court *a quo* said:

> "…on either versions I find it improbable that Groenewaldt's vehicle could have been damaged on the left front part. The evidence that Groenewaldt's vehicle was damaged to the left is so improbable if not totally impossible that it leaves me with no doubt in my mind that it is a deliberate fabrication. I reject it."

The court *a quo* goes on to say in paragraph 28 of its judgment:

> "I have no qualms with Groenewaldt's demeanour as a witness. But I cannot accept that he was truthful. It is clear to me that his evidence, viewed in its totality, cannot be true. I have no doubt that his evidence with regard to which side his vehicle bumped against plaintiff's vehicle, objectively viewed, is absolutely false."

Also in paragraph (30) of the judgment the court said:

> "In my judgment the plaintiffs version with respect to the

> damages sustained to the respective vehicles is more probable. I accept the plaintiff's version. I have come to this conclusion quite apart from the fact that Groenewaldt's version with regard to the damage caused to his vehicle had not been put to the plaintiff and the fact that the plaintiff's version was not disputed.

[35] I have some serious problems with these conclusions by the trial court. In the first place, the evidence as to with which side Groenewaldt's vehicle bumped the plaintiffs vehicle is not that of Groenewaldt's alone. He is corroborated by Snyder's evidence as to what he observed at the scene. Secondly, that evidence is not contradicted by plaintiff; there is no plaintiff's version on that point. Thirdly the conclusion is based on probabilities. It has been said that probabilities are based on facts. The facts on this issue are that there is evidence by Groenewaldt which is not challenged by plaintiff, but is corroborated by a witness on whom the court made no adverse credibility finding. In addition it must be pointed out that the court *a quo* questioned Snyder at some length but never raised any doubt as to his evidence that Groenewaldt's vehicle was damaged on the front left part. Counsel for the plaintiff did, to no avail. In S v Ndlovu 1945 AD 369 it was said at 386 that the Court

> "should not speculate on the possible existence of matters upon which there is no evidence or the reasonable existence of which cannot be inferred from the evidence."

In the Dhlumayo case supra Davis A.J.A said at 698-9

> "Clearly, the doctrine of deference to be paid to the finding of the trial Judge on fact must not be pushed too far, for as regard the inference to be drawn from facts as to which there is no controversy the appellate court may be in as good a position as he was to draw them …….. I would indeed add that the appellate court may find itself in as good a position as the trial Judge to draw inferences even where there is a controversy on the facts, that is to say, where, accepting the facts as found by him on the conflict of testimony, it draws inferences from the facts as so found."

At page 699 the learned Judge of Appeal referred to the words of Lord MacMillan in Watt v Thomas 1947 (1) A.E. R 582 at 590:

> "…The judgment of the trial Judge on facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved, or otherwise to have gone completely wrong."

[36] The present case, it seems to me, puts this court at large as to the inferences to be drawn from the facts. I will come back to this later, but now pass on to deal with the next alleged error of the court *a quo.* In paragraph [23] of his judgment the learned trial Judge quoted, as Groenewaldt's first version as to how the collision occurred, his Pol 66 statement to Constable Snyder, and

proceeded to reason in paragraph 24 as follows:

> "First of all, his statement that he noticed the vehicle turn into Tacoma Street to a certain extent corroborated the Plaintiff's version that he had already completed the turn into Tacoma Street when the collision took place. Secondly, his statement that he swerved to the right corroborated the Plaintiff's version that Groenewaldt moved from his side of the road to the right side, i.e. towards the Plaintiff's side. He swerved to the right and collided with Plaintiff's vehicle. I would, however, have expected him to have swerved to the left in order to avoid the collision because Plaintiff's vehicle was on his right hand side. What is important from his statement is that if he swerved to the right, it is improbable that his vehicle would have collided against the Plaintiff's motor vehicle with its front left part and that his vehicle could have traveled in a straight line and come to a standstill in its lane where it was found by Constable Snyders. If his vehicle hit the Plaintiff's vehicle with its left front part, I would have expected it to turn clockwise and not anti-clockwise." (my underlining)

[37] Mr. Ueitele submitted that the statement by Groenewaldt cannot be interpreted as corroborating plaintiff's evidence which was that he was already in Tacoma Street when the collision occurred nor could the second part of Groenewaldt's statement that he swerved to the right be interpreted to mean he moved from his side of the road (his lane) to that of plaintiff's.

I agree with this submission. One only need to read the so-called two conflicting versions as to how the collision occurred to appreciate, first that the said corroboration is an unwarranted straining of the evidence, and, secondly, to see that the two versions are not so conflicting at all except to the extent that some details are omitted or included in one or the other of the two. The rest of the reasoning in this regard seems to me rather speculative.

[38] The impact of these errors

First of all, and to repeat, the said two versions by Groenewaldt are in reality not contradictory. The so called two versions must be read in the context of the letter to plaintiff at p. 8 of the record, paragraphs 5.2.3 and 5.2.4 of the plea and his evidence in chief that he tried to avoid the accident. That he might have exaggerated or even lied that he could "swerve no where" because of the park on one side and the cars parked on the other side, is no warrant for a wholesale categorization or rejection of his evidence as a complete falsehood, nor does the fact that he mentioned a car driving in front of him only in his evidence in chief (whether that be a lie or not) or that this was not put to plaintiff or his wife when they were cross examined.

[39] The overall impact of these errors by the trial Judge is three – fold, in my view:

a) the court overlooked certain serious shortcomings in the evidence for the plaintiff …which, properly considered would show that plaintiff contributed to the causation of the collision.

the court took what I would call a one-sided view of the probabilities, or a view which was not grounded on the facts.

the court's drawing of inferences was affected by these errors.

[40] That the collision occurred in his lane of Tacoma Street is only one part of plaintiff's explanation as to where the accident occurred. Plaintiff is very vague as to what the distance was from the T-junction where the collision took place. His evidence regarding how far he had traveled on Tacoma Street when he first saw Groenewaldt's vehicle approach from the west, and how far it was, means only one thing, - that the collision did not take place in the T-junction. As already pointed out plaintiff was specifically asked to indicate the point of impact, and after his unspecified "heres and theres" all that counsel could make of it was, as counsel put it on record,:

> "Yes, My Lord, the witness indicates on the sketch plan that the point of impact was on the southern lane of Tacoma Street, the lane that the plaintiff was driving in."

And as I have already said, under cross examination plaintiff conceded that from the approximate 12 metres he had traveled along Tacoma Street before he saw Groenewaldt's car, he had moved some metres further before the collision occurred. Two further answers of his under cross examination in fact contradicted the claim and the court *a quo's* finding that plaintiff had "completed" the turn into Tacoma Street when the collision occurred, namely;

a) "Then when he reached the next, to where he was indicating that

> he should turn, that is where the problem came. It seems he failed to control his vehicle

and

> b) "But I think he was about to make a sharp corner, there, he could not make it, then he has to go back to my lane. (my emphasis)

[41] These statements necessarily imply that the collision took place in the T-junction. They support plaintiff's wife's indication of "a point of impact close to the middle of the T-junction", and the undisputed evidence that Constable Snyder found the plaintiff's vehicle directly opposite the yield sign facing west, with part of it being in the northern lane of Tacoma Street (Groenewaldt's lane). Plaintiff's statement to Constable Snyder that he was traveling "in southern direction with intention to turn right into Tacoma Street" when he was approached and bumped by Groenewaldt's vehicle also supports that inference.

[42] Plaintiff testified that when the two vehicles collided the road in front of Groenewaldt was clear. If that evidence is accepted, which the court *a quo* did, the only reasonable explanation why Groenewaldt would curve to the right as plaintiff said he did, or swerve to the right, as Groenewaldt said he did to avoid the collision, would be that plaintiff's vehicle was still in the process of crossing into Tacoma Street. That would also explain why the damage to Groenewaldt's vehicle was to the left front part, as he testified and as Constable Snyder found.

This is strongly indicative of the fact that, seeing Groenewaldt's vehicle approaching and indicating that he intended to turn left into Bloekom Street, as he must have concluded, plaintiff disregarded the "high speed" at which Groenewaldt was traveling, according to him, and according to his wife. In other words he assumed that Groenewaldt intended to turn left into Bloekom Street. His evidence was that he intended to turn at the next T-junction further up the street (Tacoma). To that extent Groenewaldt would have misled the plaintiff. Still it does not completely exonerate the plaintiff; he lived in the area and knew that there was that other T-junction up Tacoma Street, and should have made sure that Groenewaldt did turn off into Bloekom Street before venturing to cross into Tacoma Street. The plaintiff testified that he is a slow driver and that he spent 3 minutes stopping at the give way sign. Wherever he was when he first saw Groenewaldt's vehicle 50 metres away, for the two vehicles to cross in the proximity of the T-junction means that plaintiff was driving very slowly indeed and must have been caught while still in the process of crossing into Tacoma Street.

[43] I do not think that the unexplained fact that Groenewaldt's vehicle came to a stand still 20 metres past plaintiff's vehicle and in the lane he had been traveling can be explained by speculating against the evidence of Groenewaldt and Constable Snyder that Groenewaldt's vehicle was damaged on the right front part. That phenomenon could have been cleared by asking Groenewaldt in cross examination to explain it. He was not asked to do so, instead counsel for

the plaintiff dwelt so much on trying to get Constable Snyder to accept that the damage to Groenewaldt's vehicle must have been on the right hand side, and to say the point of impact indicated by Groenewaldt was improbable. The result was negative in either respect. In the absence of evidence to explain how the vehicles came to rest as found by Constable Snyder, it is unsafe, in my opinion, to speculate on how the vehicles ended that way. Any regular driver on the roads will have come across accidents the end result of which seemed impossible to explain. In light of that observation I find nothing improbable or impossible about the evidence "that Groenewaldt's vehicle was damaged on the front left side."

[44] Although the plaintiff did not allege in his particulars of claim that Groenewaldt was negligent, by indicating that he was about to turn left into Bloekom street but instead continued to go straight through the T-junction, all the witnesses testified about the issue, and cross-examination was addressed thereon. No objection was raised by defendant's counsel against this widening of the issues. Notwithstanding that the defendant had every opportunity to address the issue it never denied the evidence by the plaintiff and his witness and only, when asked by the Court, did Groenewaldt deny that he had his indicator on before coming to the T-junction between Bloekom and Tacoma streets.

[45] On the principles set out in Shill v Milner, 1937 AD 101 at p 106 I am satisfied that the above issue, although not pleaded, was fully canvassed by both parties and in the circumstances defendant was not prejudiced by allowing this evidence to be considered on appeal. (See also Mostert NO v Old Mutual Life Assurance, Co. (SA) Ltd. 2001 (4) SA 159 (SCA) at 180 A-B).

[46] The last observation I think should be made in regard to the findings of fact by the learned trial Judge, is that he found it more probable "that plaintiff's motor vehicle must have been moved or propelled backwards to the T-junction on impact 'at least for some distance'. As I can gather from the judgment the facts on which the conclusion is based are the following

(i) that plaintiff's vehicle had come to a standstill directly opposite the yield sign.

the evidence by the plaintiffs wife that their vehicle had moved 12 metres away from the T-junction towards the west when she saw Groenewaldt's vehicle for the first time at a distance of about 50 metres.

(ii) Plaintiff's vehicle was lighter than Groenewaldt's (the Isuzu pick up)

"the speed at which Groenewaldt drove – 55 to 60 kilometers at impact"

But there are also the following facts.

(i) Plaintiff conceded under cross examination that he first saw Groenewaldt's vehicle approaching from the west after he had traveled more than 12 metres from the T-junction;

(ii) Plaintiffs wife indicated “a point of impact close to the middle of the T-junction”;

(iii) Plaintiff’s evidence under cross examination was that when Groenewaldt “reached (the) next, to where he was indicating that he should turn that is where the problem came…”;

(iii) Constable Snyder was quizzed how it was possible that plaintiff’s vehicle hit by Groenewaldt’s doing 55 kilometers per hour did not move and he said it seemed after the impact that vehicle “swerved turned and stopped,” he could not recall whether he saw skid marks; or any other marks or signs on the road;

(iv) Then the statements by Groenewaldt and the plaintiff in Pol 66 (exhibit “C”).

[47] In light of those facts the court took into account, in contrast to those facts the court did not take into account, it seems to me the probability that plaintiff’s vehicle was propelled back to the T-junction. This is not realistic, it borders on

speculation; the plaintiff clearly testified in chief that he was already in his lane in Tacoma street and had come “next to a certain pole ….which is at the right side of the other driver who was coming” “…it was just at his left side,” and when asked for a clarification his evidence became very unclear. The important point, however, was his mention that he had come to the pole (which is some distance away from the T-junction). He talked, in relation to the pole, of the other vehicle having passed the curve on the road to the Safari Hotel. That curve is a considerable distance even from the Shopping Complex where the T-junction is. The plaintiff’s vehicle could not have been pushed as far back from the pole, or for more than 12 metres without leaving marks on the road, bearing in mind plaintiffs claim that his vehicle was a complete write off.

[48] Paragraph [10] of the judgment *a quo* reflects an incorrect rendering of the evidence, and a glaring omission of an important aspect of what was put to plaintiff as defendant’s case.

(a) the statement –“but <u>when it started indicating its intention to turn left</u> <u>it left its lane and moved into his lane</u>,” is incorrect in regard to the words I have underlined; plaintiff made no such statement in his evidence in chief or under cross examination. In his evidence in chief he said Groenewaldt had his indicator on.

(b) the court *a quo* omitted an important part of what was put to plaintiff; it said what was put was - "that Groenewaldt would testify that he observed the plaintiff's vehicle at the T-junction; that the distance was short, that there were vehicles parked nearby and there were children in the play ground"- whereas what was put to plaintiff was:

> "Mr. Groenewaldt will testify that on the day in question he was traveling from west to east in Tacoma Street. At the junction of Bloekom (sic) and Tacoma Street, he observed your car. You swerved into Tacoma Street and he was at close range and he hit on your right hand side at the wheel of your car as your swerved into Tacoma Street. You had left him with no opportunity to avoid the accident."

[49] As already stated above in this judgment, when asked for his comment, on this, plaintiff merely denied the latter part of what was put to him, and left without comment the rest of the above quoted version of the accident by Groenewaldt. The omission is significant in that the passage above (a) pin points where the collision occurred; (b) it attributes to plaintiff sole causation of the collision, and (c) the omission amounts to an admission that the collision occurred in the T-

junction, that it was caused by plaintiff swerving into Tacoma street when Groenewaldt was very close and that plaintiff's action left Groenewaldt no opportunity to avoid the collision. It is also significant that the learned Judge *a quo* made no mention of this glaring omission. In the Watt case supra Lord Du Parco said at P 591:

> "All the authoritative decisions which relate to the proper attitude of an appellate court towards the findings of fact of the trial Judge naturally tend to lay emphasis on one aspect of the question, either on the fact that the appellate court's duty to see justice done may constrain it to reject the judge's findings, or on the undesirability of deciding a case on a written record against the view of the Judge who heard the evidence, but, though one aspect may be emphasized, the other must always be present to the mind of the court."

De Villiers A.J.A stated in Mans v Union Meat Co. (1919, A.D. 268 at p 271).

> "Now it is trite law that a court of appeal for obvious reasons does not lightly interfere with findings of fact of the trial court. At the same time it is the duty of a court of appeal to retry the case. While, therefore, giving all due weight to the reasons given for any finding of fact, this Court itself is not absolved from the duty of weighing the evidence and coming to an independent conclusion upon the matter. Where the court which heard the case was influenced by the demeanour of any witness and says so,

> the court of appeal is, as a rule, guided by the trial court. Where, on the other hand the court bases its findings upon the conduct of one of the parties such as here, the appeal court is practically in as good a position as was the court below to decide upon the evidence." (my emphasis)

[50] With these statements in mind I proceed to look at what appears to have influenced the court *a quo's* ultimate rejection of defendant's version of how the collision occurred. The court rightly refers to the discrepancies in what it calls the two versions of Groenewaldt as to how the collision occurred. It said these discrepancies were glaring. On the other hand the court, in my opinion, glossed over the discrepancies in the evidence for the plaintiff, or played down important aspects of that evidence where it supports critical aspects of defendant's evidence, such as the omission referred to above, such as the question as to where the point of impact was and the obvious evasiveness of plaintiff particularly in regard the challenge, under cross examination, whether he mentioned in his evidence in chief that "he attempted to avoid the accident, by swerving out of the road." In that last regard the evidence shows that he gave a variety of reasons why he did not give that information. The evidence also shows that plaintiff was very ambivalent, not to say evasive, about where the point of impact was despite specifically being asked by his legal representative to indicate where it was. In light of all these points, it is my opinion that the conclusion by the learned Judge *a quo* that he was satisfied that "the version given by the plaintiff and his witness is true" is completely unwarranted by the

evidence.

[51] Lastly I refer to what the court *a quo* said about the demeanour of the witnesses. The learned trial Judge said that he had no qualms about Groenewaldt's demeanour as a witness. He was satisfied with the way both the plaintiff and his witness conducted themselves; they made a favourable impression on him. In this regard the court referred to a statement by Levy J in S v Martinez 1993 NR 1 at 18 A-C 1991 (4) SA 741 Nm at 758 A-C namely:

> "This court hesitates and is loath to condemn a witness because of his or her demeanour in a witness-box. Some people follow occupations which frequently expose them to the public eye and they have learnt to speak with conviction, even when they are lying. Others are able to disguise their feels and emotions and may be so crafty that they can simulate an honest demeanour. On the other hand, some persons who are entirely truthful are shy, withdrawn and nervous by nature and unable to express themselves. They hesitate and sometimes even lean over backwards to be fair. When the witness is a foreigner from a different cultural background, the difficulty is compounded. One has to avoid narrow minded categorization such as "the inscrutability of Orientals".

The sentiment expressed in this passage was, more pertinently, in my opinion, expressed by Mr. Justice MacKenna (in a paper read at the University College,

Dublin on 21 February 1973 and printed in the Irish Jurist Vol IX new series P.1) which was concurred with in its entirely by Lord Devlin at P.63 in his Book entitled "The Judge" 1979:

> "I question whether the respect given to our findings of fact based on the demeanour of the witnesses is always deserved. I doubt my own ability, and sometimes that of other judges to discern from a witness's demeanour, or the tone of his voice, whether he is telling the truth. He speaks hesitantly. Is that the mark of a cautious man, whose statements are for that reason to be respected, or is he taking time to fabricate? Is the emphatic witness putting on an act to deceive me, or is he speaking from the fullness of his heart, knowing that he is right? Is he likely to be more truthful if he looks me straight in the face than if he casts his eyes on the ground perhaps from shyness or a natural timidity? For my part I rely on these considerations as little as I can help.

This

> is how I go about the business of finding facts. I start from the undisputed facts which both sides accept. I add to them such other facts as seem very likely to be true, as for example, those recorded in contemporary documents or spoken to by independent witnesses like the policeman giving evidence in a running down case about the marks on the road. I judge a witness to be unreliable, if his evidence is, in any serious respect, inconsistent with those undisputed or indisputable facts, or of course if he contradicts himself on important points. I rely as little as

> possible on such deceptive matters as his demeanour. When I have done my best to separate the truth from the false by these more or less objective tests I say which story seems to me the more probable, the plaintiff's or the defendant's". (my underlining)

[52] If, as in this case, both stories have some contradiction and one, that of the plaintiff is full of ambiguities apart from evasions, I do not, for my part, see how plaintiff's story can be preferred to that of defendant.

[53] Lastly, the question of over speeding was addressed by the court *a quo.* Its finding was that "having regard to the prevailing circumstances the speed was too high and amounts to negligence on the part of Groenewaldt. The prevailing circumstances as found by the court were:

> (a) "On his own evidence he was following a vehicle which was between 10 to 15 metres in front of him; that there were motor vehicles parked on the pavement and children playing in the park to the left, and there were people walking on the pavement. He observed plaintiff's vehicle approaching the T-junction yet he maintained a speed of 55 to 60 kilometres per hour up to the point of impact."

The court then commented:

> "If his claim that he reduced the speed were to be

> accepted it can only mean that he was driving at a higher speed than 60 kilometres."

[54] First of all Groenewaldt never testified that he observed plaintiff's vehicle approaching the T-junction, but that he saw the vehicle standing at the give way sign. Secondly the court rejected the evidence that there was a car traveling in front of Groenewaldt, so this cannot be one of the prevailing circumstances. Thirdly the evidence that there were cars parked on the pavement or children playing in the park was denied by the plaintiff and rejected by the court; that too could not be one of the prevailing circumstances. Then there is no evidence that Groenewaldt was traveling higher than 60 kilometres per hour. The rejection of the evidence that there was a car in front of Groenewaldt means that, as the plaintiff and his wife testified, the road in front and behind Groenewaldt was clear, there was no other vehicle in Tacoma street at the time. Thus the so-called prevailing circumstances at the time reduce to only one, namely that the road was clear, the plaintiff in fact said that Groenewaldt could have driven straight in his lane. In my opinion the only aspect of negligence by Groenewaldt was the undenied evidence of plaintiff that as he approached the T-junction Groenewaldt's indicator was on signaling an intention to turn left into Bloekom Street. In my opinion, therefore, there was no evidence to justify the finding that Groenewaldt's "speed was too high and amounts to negligence on the part of Groenewaldt". Even Constable Snyder's opinion as to the corner being a busy corner was not in accordance with the prevailing circumstances that the plaintiff

and his wife testified to. In my opinion the conclusion that Groenewaldt's "speed was too high and amounts to negligent driving on the part of Groenewaldt" is a non sequitur.

[55] In the result I would apportion liability for the causation of the collision equally between the Plaintiff and Groenewaldt.

I accordingly make the following order:

1. The finding by the Court *a quo* that Groenewaldt was the sole cause of the collision is set aside.
2. Liability for the causation of the collision is apportioned equally between the Plaintiff and Groenewaldt.

Each party is to bear its own costs of the action.
The respondent is ordered to pay the costs of appeal.

_____
MTAMBANENGWE, AJA

I agree

_____
STRYDOM, AJA

I also agree

_____
DAMASEB, AJA

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