

IN THE HIGH COURT OF SOUTH AFRICA  
(TRANSVAAL PROVINCIAL DIVISION)

Case No: 1977/2005

Date: 07/08/2007

UNREPORTABLE

In the matter between:

NTININIZA ANNIE GUTSHANI

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

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JUDGMENT

MAVUNDLA, J

[1] It is common cause that on the 25 October 2000 a collision occurred at a robot controlled intersection between motor vehicle with registration number SRC 739 MP (hereinafter referred to as the first insured motor vehicle), which was then driven by the first insured driver, Mr. Willem Johannes Nel, and motor vehicle with registration number BCP235 MP (herein after referred to as the second insured motor vehicle), there and then driven by the second insured driver, Mr. Petrus Mthombeni. The location of the accident was at the intersection of the main road between Nelspruit and Whiteriver and Sabie ILydenburg road, in the district of Nelspruit at Mpumalanga.

[2] It is also common cause amongst the parties, that the plaintiff was, at all relevant times to the collision, a fare paying passenger in the second insured motor vehicle as provided for in section 18 (1) (a) of the Road Accident Fund Act 56 of 1996.

- [3] The pre-trial minutes were handed in as exhibit A. In terms of the pre-trial minutes the parties have agreed that the merits should be separated from quantum and that the matter should only proceed on the merits in terms of Rule 33 (4) of the Rules of the High Court. I subsequently ruled as such and the matter only proceeded on the merits.
- [4]. It is common cause that since the plaintiff was a passenger in the second insured motor vehicle, she only needs to prove 1% negligence on the part of the first insured driver. It is also common cause that the defendant has since conceded negligence on the part of the second insured driver. It is also not in dispute that the second insured driver was subsequently charged with culpable homicide resulting from the aforesaid collision and that he pleaded guilty to having entered into a robot controlled intersection whilst the traffic light was against him.
- [5] What remains in issue in this matter, is whether the first insured driver was contributory negligent in this accident. The alleged respect of his negligence is alleged in the particulars of claim under paragraph 4, and these are the usual allegations of negligence that are generally averred in matters of this nature. I find it not necessary to set out these allegation in detail for purposes of this judgment. It suffices, however, to state that it is alleged, inter alia, that the first insured driver failed to keep a proper look out and that he failed to avoid the collision, when by

the exercise of reasonable care and skill he could and should have done so. It needs mention that the defendant in its plea, has denied that the insured driver was the cause of the collision. It is also denied that the insured driver was negligent in any of the alleged manner. It is further pleaded that the sole cause of the collision was the negligence of the second insured driver.

- [6] Exhibit B was by agreement handed in. It contains inter alia, police accident report, accident plan of the scene of the accident prepared by the police, rough sketches of the scene of the accident, various photos, some aerial, of there scene of the accident. Some of the photographs show the aftermath of the second insured motor vehicle (A Yogi Sip painted minibus) lying on its side, next to a traffic-light pole which has been knocked down, and a body of a female lying between the overturned minibus and the leveled pole, as can be seen on photos, 2, 3, and 4. The deceased, is a female and letter B on these photos refer to her. Photos 7,8, 9 and 10 show the minibus after it had been righted from its overturned position. Photo 1 shows A, Band C. C, is the overturned minibus. B is the deceased and A is the point of impact. This point of impact is on the extreme left lane as one is looking into the photograph. There are two lanes carrying traffic further into the photograph. This point of impact represented by the letter A, is almost in the middle of this extreme left lane although more towards the divide broken line of these two lanes.

- [7] On the rough sketch, the lanes on the Nelspruit side (carrying traffic from the direction of Nelspruit) have been numbered, on my instructions, as lane 1, lane 2, lane 3 and lane 4. Lane 1 is a slipway carrying traffic from the direction of Nelspruit to Sabie and it is separated from lane 2 by a triangular island, thus resulting in that traffic from Nelspruit to Sabie bypassing the intersection. Lane 2 and lane 3 drive through the intersection. The triangular island, of the slipway, its left side is concaved as the result of the fact that the slipway curves from right to left to join the lane carrying traffic from the intersection towards Sabie. The right side of the triangular island, is on the left boundary of lane 2. This boundary measures 2.2 meters. The point of impact is identified with the letter B on this sketch. This point of impact corresponds with the point of impact reflected as A on the above mentioned photographs. From B to the corner of the triangular island, at lane 2 and the road that crosses the Nelspruit White River road (Le. the Sabie heading lane), it is 5 meters. This point of impact, inspector Martlock determined it through the concentrated debris. This point of impact is not so much on the middle of lane 2, but it would be slightly left of the lane separating lanes 2 and 3 as these traverse through the intersection. On the Sabie River road there is an island separating traffic moving from the intersection towards Sabie and that carrying traffic from Sabie towards the intersection. From point B diagonally left to a sport on what I will call the Sabie island, the measurement is 10,5 meters. This sport is 3.6 metes from the end of the Sabie island on the middle of the intersection. From the sport on the island to a sport on

the outside of the road on the White River side, the distance is 12 meters. There is a further distance of 12 meters from this last mentioned spot to letter C. Letter C is where the second motor vehicle, identified with letter D, came to rest. From the point of impact B to C the measurement is about 37,5 meters.

[8] On the White River side, the rough sketch shows a 1.5 meter island separating the left carriage way from the right carriage way. On the left carriage way lane 3 is 4.2meters in breath, while lane 2 is 5 meters. There is a further 3 meters portion of the side of the road. On the Nelspruit side, the total width of the left carriage way is about 11.5 meters consisting of 6 meters of lane 4 and lane 3, and 5.5 meters of lane 2. There is point S, which has been brought onto the rough sketch during the trial and not by Martlock but by Mr. Shabangu, which point is supposed to be the point of impact according to the latter. This point S is at a point that is being traversed by lane 3 in the intersection, while point B is at a point traversed by lane 2.

[9] The photographs at page 57 and 58 show an aerial view of the relevant intersection. The photographs show a dual carriage way, with two lanes on each carriage way, separated by a concrete island which tapers as it progresses towards the intersection. The left carriage way carries traffic from Nelspruit to White River. The right carriage way carries traffic from White River to Nelspruit. It is dissected by a street that carries traffic to and from Sabie. Sabie is towards the left of the left

carriage way. The left lane of the left carriage way, on the Nelspruit side before the intersection, it breaks into two lanes as it approaches the intersection, with its extreme left lane forming a slipway that carries traffic to Sabie, without having to stop at the intersection, while the original lane proceeds right through the intersection. The slipway for purposes of this trial is identified as lane 1, while the original left lane is identified as lane 2. The right lane of the left carriage way is identified as lane 3 as it traverses through the intersection. Lane 3 also breaks into two lanes as it approaches the intersection. This has been made possible because of the tapering middle island separating the left carriage and the right carriage. The resultant additional lane is identified as lane 4, which carries the right turning traffic at the intersection.

- [10] On the opposite side of the intersection, that is on the White River side of the intersection, there is also a middle concrete island which tapers as it approaches the intersection. This island separates the carriage carrying traffic from White River to Nelspruit and the carriage carrying traffic from Nelspruit to White River. Towards the intersection there are four lanes which are essentially the replica of the road on the left side on the Nelspruit side of the intersection with the difference that the extreme left lane does not break into a slip way but it goes through the intersection. This last mentioned lane is for the left turning traffic that comes from the direction of White River. The middle island on the White River side also tapers as it approaches the intersection, thus

creating the fourth lane for the right turning traffic into the Sabie road. This latter lane is where the truck was when it was executing its right turn in the intersection. This lane is directly opposite lane 4 on the opposite side.

[11] The witnesses who testified on behalf of the plaintiff, were inspector Martlock, who was called to and took measurements and photographs at the scene of the accident, Mrs. Emly Mathonsi Maziya who was one of the passengers in the minibus taxi, Mr. Bangani Shabangu, also one of the passengers in the minibus taxi and Mrs. Ernie Ngotshani (Gutshani) who is the plaintiff and was also a passenger in the minibus taxi.

[12] On behalf of the defendant the witnesses called were Mr. Nel, the driver of the first insured motor vehicle, Mrs. Carrol Meyer. Mrs. Noah Dudi.

[13] I do not intend to repeat the evidence of inspector Martlock. It suffices to state that he confirmed having prepared the rough sketch and having taken the photographs, as I have indicated herein above. He also stated that he did not find the first insured motor vehicle at the scene of the accident, nor did he speak to the drivers of both insured motor vehicles. He says that he determined the point of impact through his observation of concentration of debris on the road as well as the pointing out made to him at the scene by sergeant Sekera. Under cross

examination, he stated that he was not present when the second insured driver testified in his culpable homicide trial. His evidence was not challenged at all.

[14] Mrs. Nokuthula Mathonsi Maziya, the second witness for the plaintiff, testified that she was a passenger in the second insured motor vehicle. She was seated at the third back row seat, in direct lane with the second insured driver. It was round about 11h30. They were about 18 in the minibus taxi, inclusive of the driver. They were driving from the direction of Nelspruit. After going over the river, they then approached a robot controlled intersection. The robot was green and when they were about to enter the intersection, it turned amber. She then saw a truck next to her side on the right side. She did not see this truck before then. On looking to her right side, it is then that she saw the truck next to her and at the same time she heard a sound, the cause of which she does not know. She does not know what happened thereafter. She says that the taxi had already gone past the truck when the collision occurred. She basis this conclusion on the fact that the taxi driver was not injured. She had a child on her lap. After the collision, she regained her consciousness and she looked for the child who was no longer on her lap. She got injured and was taken to the hospital.

[15] Under cross examination, Mrs. Nokuthula Mathonsi Maziya says that she did not take notice whether the truck was moving when she saw it next to her side. When she saw it, it was not very far from the taxi. It

could have been about 1 meter from the taxi. She concedes that the taxi was traveling at high speed, but she did not hear the driver being warned. She says that she was not admitted at the hospital but merely treated and discharged. She said that she is 59 years old. She was confronted with her sworn statement which she made to the police on the 26 October 2000. This statement is reflected in exhibit C, pages 13-14. It was pointed out to her that in the statement she says that the passengers warned the driver but he did not listen. Further in the statement she said that when they came to the Sabie and White River intersection, there was already a truck in (the intersection, to turn into the Sabie road. She said that because it is long time ago, some of the things she had forgotten. She says that when she testified in casu, she had told the Court that she saw the truck turning and it was close to her side. She saw it once and then an accident occurred. She says that if the minibus had stopped the accident would not have occurred. She saw other cars that they had passed along the road, but she did not see other cars that had stopped just before the intersection. She signed the statement but she cannot remember. The last time that she saw the police was at the scene of the accident. It was pointed out that in her statement she did not say anything about the amber light. In response, she says that she did not think about it. It was pointed out to her that Mrs. Ester Sambo in her police statement had said that the driver should have given that truck time to turn and he should have stopped at the robot because it was already late for him to go over the red robot. It was further pointed out to her that Ms Noah Dudu

Lukhulen (Noah Dudi) in her statement to the police she said that the truck was already in the intersection to turn to the right from the White River, and that she warned the taxi driver as to whether he could see the truck and that had the driver listened the taxi would not have collided. She concedes that had the taxi stopped the collision would not have occurred. She says that she did not see the truck before because of the people who were seated before her. She saw the truck already in the intersection before her. When the robot turned amber, she then saw the truck next to her on her right. She says that she went to school as far as standard 1. She can only read Zulu and does not understand Afrikaans. She does not know what it means to make an oath. She says that she spoke to the police at the scene of the accident. The following day she went with her employer to visit her child at the hospital. She says that she did not go to the police on the 26 October 2000. She did not sign under oath. She does not remember when she signed the police statement.

- [16] This witness is an unsophisticated and poorly educated person, she only passed standard 1. The statement has been written in Afrikaans. She says that she does not understand Afrikaans. I take it that whatever she said to the police at the time, was translated from her language to Afrikaans. There is no indication who was the interpreter and whether the statement was read back and interpreted to her in her language.

[17] Having said that, I accept her evidence that the taxi was traveling fast. I accept her evidence that she did not see other vehicles that had stopped before the intersection when their motor vehicle entered the intersection. This does not necessarily mean that there were no cars at all that had stopped. This must be seen in the context that she was seated on the far right in direct line with the driver. In view of the fact that she had a child on her lap and there were people in front of her, it is understandable when she says that she did not see the truck beforehand until when she saw it next to her on the side. It is understandable when she says that some of the things she does not recall because the accident occurred sometime ago. I however do accept her evidence that the truck was in the intersection. However, one cannot on her evidence determine where precisely was the truck when the taxi she saw it for the first time.

[18] The next witness was Mr Bongani Shabangu. He testified that he is a warder at the Nelspruit prison. He was a passenger in the minibus taxi and was seated in the front seat. He confirmed that the accident occurred on the 25 October 2000 at approximately 11 h30. There were about 15 passengers in the taxi. On the third back row, there was a child almost in the middle seated on someone's lap. Their vehicle was traveling at about 80 to 100 kph on the fast lane. There were two other motor vehicles in front of them and the robot was still green. There was a stationary motor vehicle on the road. When they arrived at the stop lane the robot turned to caution. There was a truck which was not

stationery at the intersection. He saw the truck closer to them. The taxi collided with the truck and overturned and went to collide with a robot. The taxi got damaged on the right rear wheel side on the driver's side. The truck was damaged on the drivers side. The truck had a bulbar. He got injured and was taken to hospital. He did not loose consciousness. He says that the other two motor vehicles that were in front went through the intersection as the robot was green at that stage. He says that it is possible that there was a motor vehicle that moved to the left side and stopped before the intersection but he did not pay attention to it. The taxi could not have stopped at the intersection. He saw the truck waiting for its turn waiting for other vehicles. It was moving slowly. It is a big truck with a mechanical horse and trailer. He confirms that the said truck could be as big as the truck reflected on page 53 on photos 1 and 2. (The truck on these photos has a very long trailer with six sets of wheels at the back, one set of wheels in front, with the horse having a set of wheels at its back and one set in front.). As they were approaching, he saw the truck turning into the Lydenburg road, although it was not straight but diagonally to the Lydenburg road. The mechanical horse had turned slightly in the intersection. He estimates that their vehicle was at that stage a distance of about 1 to 2 % meters and the truck was still moving. He says that it was still possible for the truck to could have still stopped. At the stage when their taxi moved into the intersection and when he saw the truck moving slowly in, he inquired from the taxi driver as to whether he could see that the truck is coming closer, and their driver at that point swerved to his left side. The

right front corner of the truck collided with their motor vehicle. Their motor vehicle had almost passed the truck. He says that the police came to him at the hospital and took a statement from him. He does not remember who took the statement but the person was chased away at the hospital. He did not see the official stamp on the day when the statement was taken from him.

[19] When asked under cross examination why did he sign the statement, he says that the person who took it instructed him to sign it and he was in pain and he then signed it. He knows what it means to take an oath. He says that he started being a warder in 2005. In 2000 he was studying for a B. Administration degree. He was in pain when he signed. It was pointed out to him that in his police statement he had said that the taxi was fast and the robot was green and there was already a truck in the intersection from the direction of White River and it had already turned into the direction of Sabie. He says that when they crossed the stop line, the robot turned caution. Their driver could not stop because the front wheels of their vehicle had already crossed the stop line. When they got to the stop line, the light was still green and when they went over it, the light turned to caution.

[20] It must be pointed out that in his statement to the police, he had said that before they came to the intersection, the robot had already cautioned by turning yellow. The taxi driver could not stop and the truck was already in the middle of the intersection about to turn to the right.

The taxi driver was supposed to have stopped because he could not have made it to drive through the robot, because there was a truck turning to its right. He says further in this testament that one lady passenger warned the driver. He too warned the driver who responded by saying where had the truck driver been looking at. He said further in his statement that the driver did not even apply brakes. He says that he knows the taxi driver and that he had heard that he pleaded guilty. On further cross examination he says that what he saw, is that the driver did not drive through a red robot. He says that there were two other cars on the road. They were driving at between 80 and 100 kph as they were approaching the robot. He says that one of these two motor vehicles was about 6 meters in front of their motor vehicle. The two motor vehicles in front drove through the intersection where after the truck then moved forward, into the whole lane they were driving on, as the result the taxi driver swerved to his left. He cannot remember whether there was a motor vehicle that had stopped on the left, although he cannot dispute that, he does not concede it. He does not remember how long they had been driving behind the other two motor vehicles that went through the intersection. He says that the robot was allowing their driver to go through the intersection because it turned caution while he was in the intersection. According to him the point of impact is on letter S. (I have in paragraph 8 supra referred to the position of this point of impact as being along lane 3.)

[21] The police statement of Mr. Shabangu is to be found at pages 2 to 3 of

exhibit E. The typed version of this statement is to be found at pages 4 to 5. The statement at page 3 has the official commissioner's stamp. The date reflected there is the 25 October 2000, at 14:34. Mr. Shabangu states that he was still in pains when the statement was taken. The statement was taken in less than 3 hours of the accident. When statements such as these are taken, in my view, when they are taken while the victims are still fresh under medical treatment to suppress their pain, caution should be exercised in discrediting the maker of such a statement on the basis of such a statement. Besides, Mr. Shabangu has also stated that he does not understand Afrikaans and the statement was not read back to him. In my view, such statements must be written in the language of the person making such a statement and be translated into English by a competent person. It is also preferable that the statement must be taken from the witness or the victim of the accident when they are not under sedative, or still under shock of the accident. It is however understandable that the police would want to take statements as soon as possible and while the affected persons are still available.

[22] Mrs. Ngotshani, who is the plaintiff, is, in my view, a humble unsophisticated and honest witness. She testified that she has not been to school. She does not even know how old she is. She was seated on the row immediately behind the front driver's seat and directly behind the driver, in other words on the extreme right of the second row. The taxi was full. She does not know how may

passengers there were in the taxi. She did not see any children. She was busy attending to the many plastic bags she had with her after the passenger next to her had asked her to shift these. She had to bend down in order to attend to the shifting of the plastic bags. After having attended to this task, she was in the process of sitting upright when she suddenly noticed over her right shoulder the front of a truck almost about 2 meters from the minibus. She screamed and she immediately then heard the truck hitting the rear right tyre. After the collision, when she regained her senses she was informed that she had been taken to ICU at the hospital and she was now being taken to the wards.

[23] Nothing much turn around her cross examination. She stated that there were no many cars on the road although there were some cars. I am of the view, in her simplicity, she is still a good witness who did not try to embellish her evidence. That completed her case.

[24] Mr. Nel was called as the first witness for the defendant. He says that on the 25 October 2000 he was the driver of the Mercedes truck with registration number BCP235 MP, with its combined length of the horse and trailer being 18 meters. He is having an extra heavy duty license. He was from the direction of White River and approached the intersection of Kabokweni, Botanic and Lydenburg, and Nelspruit-White River intersection. The robot was red. He indicated his intention to turn right. He had to wait for green. The road was busy. He moved to the middle of the intersection. When the robots were all red for all

directions, he was in the middle of the intersection. The first car from the Nelspruit direction stopped at the intersection. He then moved forward watching at his right. Shortly then a taxi came into the intersection and collided with the bulbar of the truck and it overturned. The police came and took a statement from him.

[25] Under cross examination he says that the truck which he was driving, was almost the same in length with the one at page 53, save that his was much higher. At the time of the accident he had an extra 11 code driver's licence which he had been in possession of for 3 years. Presently, he has a code 14 driver's licence which he has been having for 2 years. He knows the intersection very well. At the time, there were only two lanes. He was on the lane for traffic turning right to the Lydenburg road. He had stopped at the intersection as the robot was red. When it turned green he moved and began turning. He waited for the motor vehicles that were from Nelspruit side but turning towards Botanic. He positioned his truck on the imaginary extended lane 4. He moved slowly over to lane 3. He always makes a wide angle turn. When he looked in front, he then saw the roof of the taxi which impacted with his truck. It was a glancing impact on the left corner of his truck. He says that because of its size, when turning in such a big vehicle, he must keep his eyes on the trailer at the back. He drove further forward because he had been standing for long time. The reason why he was looking at the trailer at the back is because he did not want to damage his tyres. He moved the horse close to the island.

He says that the road was busy. He had seen that some people were not going to stop when the robot turned yellow. He moved slowly and stopped at % in lane 4 to allow the other vehicles that were going through caution light. He says that it is a busy intersection. He says that the robots at the intersection turn red for all motor vehicles, to allow a chance to those that are in the intersection to clear it, before turning green. He cannot say for how long these robots remain red for all motor vehicles. He says that at the time, he had been driving heavy duty motor vehicles for the past 18 years and he has now 23 years experience. He says that other motor vehicles must first wait for him to clear the intersection before they can get into it. He had moved into the intersection in such way that he was now looking at the island. He says that two motor vehicles drove through yellow. All four robots were red. Another motor vehicle stopped and he then started moving forward. He could not look towards the direction of Nelspruit because the other motor vehicle had stopped. He had looked at the robot and as well as at the motor vehicle that had stopped, and he immediately moved forward without looking in the direction of Nelspruit. He says that he is aware that people in that region are not obedient to traffic rules and this notwithstanding, he did not look in the direction of Nelspruit. He accepted that because it had stopped, he could move forward. He did not see the motor vehicle on the slow moving lane before, until when it stopped. He says that he only looked at the motor vehicle that had stopped and the robot across as well as at the trailer. He pulled off at 4th gear. He was moving slow, from 5 kmh to 8 kmh. He says that he

did not feel the impact. He says that when he saw the roof top of the taxi he applied his breaks but the taxi collided with the bulbar of his truck. He saw the taxi at the last moment. He says that the taxi must have swerved. He concedes that, in his statement to the police, he had said that if he had seen the taxi earlier then there would have been no accident. When asked why he did not wait at the scene of the accident, he says that although he was not in a hurry, he did not want to take a chance and pull off the yellow lane. He does not agree with the point of impact.

[26] Mrs Carrol Meyer was then called. She says hat she is a sales lady representative of J Gross Safety. In 2000 she was working for SAW Union, doing reconciliation work. She was traveling from the direction of Nelspruit. Just before 13hours, as she was driving, she was approaching a robot that turned yellow. She slowed down to stop. She realized that the vehicle from behind was not going to stop because it was fast. As this motor vehicle, which was a Yogi Sip taxi, was passing her she hooted and put her fingers up and then he saw it collide with a truck. The robot was read when the taxi entered the intersection.

[27] Under cross-examination, she says that when she observed the amber lane, she was on the fast lane and she moved to the left lane. She indicates that she moved at the point where there is an arrow and the island. She says that there were other motor vehicles that were in front of her and went through the robot. She says that she moved over

because the taxi had been at her tale. She was traveling at between 20 and 30 kph as she was approaching the intersection and then stopped. She estimates that the taxi was moving at between 50 and 60 kph. When she showed the taxi driver her fingers, she was not angry with him but was relieved that he got off her back. She did not think that he was going to stop. She says that there was a motor vehicle that was on the left lane, which went through the intersection while the robot was yellow. She says that she did not see the truck before the collision because she was concentrating on the taxi. She says that she was following the taxi and she saw it swerving to the left to avoid the truck and it was only then that she saw the truck. The taxi collided with its portion just in front of the right rear wheel. She says that she would not know when the robot turned red. When it turned amber she was approaching the robot. She says that the collision occurred on lane 2. However, Mrs Meyer, on her own evidence she did not see the truck until when the collision occurred. He evidence is not satisfactory. There is no reason why she could not have seen the truck at all before she stopped. Further, her evidence as to where the taxi was when the robot turned red, cannot be relied upon because when she moved out of lane 3, she did so in order to allow the taxi which was an irritant at her back to overtake her and it did so at that high speed. The probabilities are that immediately after the taxi overtook her, she then saw the robot turning amber at that stage she is responding to this amber robot and she is preparing to stop. The probabilities are that at that moment the taxi is now in front of her, the robot turns to red. She is unable to see

the truck. She cannot assist this Court as to where the truck was at the crucial moment when the taxi enters the intersection.

[28] Ms Norah Dudu Lukhuleni was then called. She confirmed that it is her statement to the police, that appears at page 5 of exhibit C, the typed version of which is on page 7 thereof. She says that she was a passenger in a taxi en route to White River. She was seated in front, next to the driver and there was someone on her left. The taxi was traveling at a high speed. She is the one who warned the taxi driver and asked him whether he could see the truck or the robot. The driver said that he has been driving for long. The robot was red when he entered the intersection. She was referred to the commission stamp on page 6 of her statement. She says she did not take notice of it when she signed the statement. She knows what to take an oath is. She cannot recall having been sworn in when she signed the statement. According to her, she had just finished counting money when she saw that the robot was red.

[29] During cross examination she was referred to her statement to the police. It was pointed out to her that in her statement she did not say that the robot was red when the driver entered the intersection. She says that it is because she was still mixed up and only later when the ambulance arrived did she realize that the robot was red. She conceded that she does not remember very well. She says that when the police arrived at the scene of the accident, the taxi owners were

already there. Other taxi drivers threatened to kill her were she to tell as to what happened. As the result of this threat she did not include anything about the red robot in her statement. She also said that it is only after she had spoken to the police that she remembered about the red robot. She is disclosing this at Court because she had been given assurance that she would be safe. She was not prepared to divulge who gave her this assurance. She later states that she did not tell anyone about the red robot, save a nursing sister after she had made a statement to the police. She later says that she told the nursing sister after she had been discharged at the hospital as the latter had asked her what had happened about the second insured driver's criminal case. She insists that she saw the robot having been red but was afraid to tell about this. In so far as this witness is concerned, her evidence can be safely ignored because she was reluctant answer questions put to her, not only by Counsel for the defence, but even by the Court. She had to be warned by this Court several times to answer questions. This concluded the case for the defence.

- [30] The issue to be determined in casu, is not whether the taxi driver was negligent when he entered the intersection, as he did. The defendant has already conceded that the taxi driver, the second insured driver was negligent. This concession was quite correctly done since the evidence clearly shows that he was traveling very fast under the prevailing circumstances. The issue to be determined is whether Mr. Nel was in any way negligent and whether such negligence contributed

to the collision.

[31] I find it apposite to refer to some authorities. The first is the matter of Bata Shoe Co. Ltd (South Africa) v Moss <sup>1</sup>where the Court said:

"I cannot find that the plaintiff has discharged its onus of proving that the defendant was negligent in failing to give the signal which it was his duty to give.

That, however, does not conclude the matter, because it was not enough that the defendant should have given the signal, as he said he did. When the driver of a motor vehicle wishes to turn across an adjoining carriage way at right angles to his previous line of travel, his proposed action is pregnant with danger. He is about to do something which is inherently hazardous and he is therefore fixed with certain important obligations. The first of those is that he must signal clearly his intention to make the turn, and do so in such a manner as to warn approaching drivers, drivers following him, and the driver of any vehicle who may be seeking to overtake him, of the intended change of direction. It is not sufficient, however to do so, even if the signal is given in good time. His further obligation is to refrain from making the turn until an opportune time, to use the phrase which the Appellate Division has used in that regard. An opportune

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<sup>1</sup> 1977 (4) SA 16 (WLD) at 20H-21C

time in that context is a time when the motorist who wishes to turn can carry out his intention without endangering or even materially impeding the progress of any other person or vehicle lawfully on the road. It is the duty of the driver who wishes to make the turn to satisfy himself by the full and careful personal observation that the time is opportune in the sense which I have indicated."

The court further<sup>2</sup> cited Dowling J in R v Miller 1957 (3) SA 44(T) as saying: "The motorist must make sure that he can execute a right-hand turn without endangering either oncoming or following traffic. Generally speaking he can only do this by properly satisfying himself that such traffic has observed and is responding to his signal or that it is sufficiently far away or slow moving not to be endangered or unless some special circumstances exists it is a manoeuvre inherently dangerous in its nature unless executed with scrupulous care."

[32] In AA Mutual Insurance Associatoin Ltd v Nomeka<sup>3</sup> Viljoen AJA said that:

"In a long line of cases both in the Provincial Divisions as well as in this division, it is clearly stated that to turn across the line of

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<sup>2</sup> 1977 (4) SA 16 (WLD at 22 A-B

<sup>3</sup> 1976 (3) SA 45 at E-G

oncoming or following traffic is an inherently dangerous manoeuvre and that there is a stringent duty upon a driver who intends executing such a manoeuvre to do so by properly satisfying himself that it is safe and choosing the opportune moment to do so. I need in this respect merely refer to the following decisions invoked by the learned Judge in coming to the conclusion that Holdsworth was negligent: R v Miller, 1957 (3) SA 44 (T); Sierborger v South African Railways and Harbours, 1961 (1) SA 498 (AD); Rv Cronhelm, 1932 TPD 86; Johannesburg City Council v Public Utility Transport Corporation Ltd 1963 (3) SA 157 (W)." Driver executing a right hand turn must keep a proper look out; vide Khwerana v SA mutual Fire & General Ins. Co Ltd 1979 (2) SA 947 on preponderance of probability before he started moving forward he should have seen the other motor vehicle coming."

[33] In the matter of Santam Insurance Co Ltd v GOUWS<sup>4</sup> the Appeal Court at 634J-635A said that:

"The duty of a motorist who approaches an intersection and enters it with the green light in his favour is to have regard to the reasonable possibility that traffic which entered the intersection lawfully, may still be in the intersection. He should therefore regulate his speed and his entry into the intersection in such a

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<sup>4</sup> 1985 (2) SA 629 (AD)

manner as not to endanger the safety of such other traffic. The closer the motorist is to the intersection when the traffic light turns green in his favour the more likely it is that the intersection may not be completely clear of traffic. See *Ooorgha and Others v Parity Insurance Co Ltd* 1963 (30 SA 365 (0) at 367F-368; *South British Insurance Co v Barrable* 1952 (3) SA 239 (N) at 242F-G; *Cockram v Durban City Council* 1965 (1) SA 7895 (N) at 802A-B.)

[34] In the matter of *AA Onderlinge Versekkeringsmaatskappy v Mantje* 1980 (1) SA 655 at 661 C-F the Court said that the question to be asked is at what stage would a reasonable man have had the duty to avoid the collision. This question has two phases. The first one is at what stage would the driver have realised that the other driver was already in the intersection or was going to enter the intersection against the red light. The second inquiry is would he at that time have been in a position to avoid the collision.

[35] In casu, inspector Martlock, is an independent witness for the plaintiff. He places the point of impact on lane 2, but slightly left of the divide line of lane 2 and lane 3. He does so on the basis of the concentration of the debris on that lane. He was not so much attacked or discredited by the defence. On the other hand, Mr Shabangu has placed the point of impact on point S, which is on lane 3. It must be accepted that Mr. Shabangu basis the point of impact on share memory. The collision

happened almost 6 years ago. It is very probable that he is making a mistake in regard to the point of impact. I therefore accept that the point of impact was slightly left of the divide line of lane 2 and lane 3, as determined by inspector Martlock.

- [36] Mrs. Nokuthula Mathonsi Maziya, whose evidence I have referred to herein above, has stated that the incident has occurred some time ago and some of the things she does not remember. Notwithstanding the grueling cross-examination she was subjected to, I found her to be an impressive witness because she readily conceded that some of the things she could not remember because the accident occurred long time ago. She is however adamant that their taxi was traveling fast. When they were approaching the robot, the robot was green and it turned to amber. This tallies with the evidence of Mrs. Meyer who says that the taxi was traveling fast and it was on her back. When the robot turned amber, Mrs. Meyer moved to the left lane preparing to stop. When she stopped the robot turned red and she realized that the taxi would not make it as it was passing her. It must be accepted that, since the taxi was traveling much faster than Mrs. Meyer's vehicle at the time, in a matter of seconds it would have covered some considerable meters and would have entered the intersection within few seconds from the time when Mrs. Meyer saw the robot turning red. Mrs. Maziya further says that she was unable to see the truck until their vehicle was inside the intersection. The reason for this is due to the fact that there were other passengers before her. Mr. Shabangu says that when they

crossed the stop line the robot changed to amber. I am of the view that he must be wrong in this respect when one has regard to the evidence of both Mrs. Maziya and Mrs. Meyer. I do accept that the robot turned amber much earlier. Since the taxi was traveling faster than that of Mrs. Meyer, it can be safely accepted that it must have covered considerable distance within a matter of few seconds. It can be accepted that it entered the intersection, while the robot was red. But it cannot be determined as to how far from the intersection it was when the robot turned red, nor where precisely was the truck at that moment.

[37] From the evidence of the plaintiff and that of her co-passengers, it is clear that when they saw the truck they raised their concern with the taxi driver. Some of them only saw the truck when it was already on top of the taxi. At that time. I accept their evidence that just before the collision, the taxi was traveling on lane 3 and the taxi swerved to its left to avoid the collision. From their evidence, the negligence of the truck driver cannot be determined. The reason for this is because they only saw the truck when it was almost on top of the taxi. But from the authorities referred to herein above that is not the end of the case for the plaintiff. I need to look at the version of the truck driver as well<sup>5</sup>.

[38] Mr. Nel says that as he was in the intersection, he looked at the motor vehicle that had just stopped at the intersection along lane 2. That would be the motor vehicle of Mrs. Meyer. He also looked at the robot

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<sup>5</sup> Vide Bata Shoe Co. Ltd (South Africa) v Moss (supra).

across him, which was red at the time and he decided to move forward. At the time when he was moving forward, he says that he did not look towards the direction of Nelspruit. At that moment, he was looking at the back, watching the trailer because he was concerned with it not going over the pavement, since this had happened before, that the rear wheels of his truck went over the pavement as he was turning. Since, Mr. Nel was executing an inherently dangerous maneuver, he was duty bound to "satisfy himself by the full and careful personal observation that the time is opportune" for him to execute the right turn. It was not enough for him to merely look at Mrs. Meyer's, motor vehicle that stopped on lane 2. He should also have satisfied himself that there was no other vehicle that was traveling on lane 3, coming from the direction of Nelspruit, and whether such motor vehicle was going to stop or not.

- [39] In my view, a reasonable driver, will not only start moving forward merely on seeing the motor vehicle of Mrs. Meyer coming to a stop, he would also satisfy himself that there were no other vehicles approaching the intersection on the other lane. On his own admission Mr. Nel did not do so. He was at that critical moment, looking at the back, at the trailer of his truck, and also moving forward. He only saw the roof top of the taxi when it was already in front of him. One must have regard to the fact that the damages on the taxi were on the right hand side of the taxi, particularly on the right rear wheel side, as reflected on photograph 10 , and as per the testimony of Mr. Shabangu and Mrs. Meyer and Mr. Nel. From the location of this damage, it is

clear that the collision was a glazing blow collision, in other words the taxi shaved over or glanced over the bulbar of the truck. I have accepted that the point of impact was slightly on the left side of the divide line of lane 2 and lane 3. This point of impact is about 5 meters from the edge of the triangular island, more towards the right of the greater part of lane 2. It is also slightly more than the 2,2 meters' distance from the stop lane. From these facts, an inference can be drawn that the taxi had already completely swerved out of lane 3 when the collision occurred. From this evidence is it clear that the taxi had almost cleared the path of the truck. In my view, having regard to the fact that Mr. Nel failed to satisfy himself as to whether there were other motor vehicles still traveling on the 3rd lane, before he encroached into this 3rd lane, and having regard to the point of impact which is on lane 2, and having regard to the glancing blow by the taxi on the bulbar, an inference is irresistible to make, that had Mr. Nel kept a proper look out, he would have observed the speeding taxi in time so as to enable him to apply his brakes in time. Had he done this, then the taxi would have managed to clear the intersection without the collision occurring. I find that, on his own version, he has failed to look towards the side of Nelspruit and to satisfy himself that lane 3 did not have any other motor vehicle approaching the intersection at that moment. I further find that, he did not keep a proper look out. I further find that as the result of this failure to keep a proper look out, he moved forward at an inopportune moment, and that he failed to apply the brakes of his motor vehicle timeously. If he had kept a proper look out, as he should have done, he


would have seen the taxi well in time, and he would have applied the brakes of his truck in time and stopped it just before he entered lane 3 or even at the time when his truck was at the middle of lane 3. This would have allowed the taxi a safe passage. I further find that as the result of this failure, he was negligent and that such negligence was causally contributory to the collision. His negligence, as compared to that of the taxi driver, in my view, was at least 20% and I consequently apportion negligence at 80% against the second insured driver and 20% against Mr. Nel, as the first insured driver.

[40] In casu, the plaintiff needs only prove 1 % negligence to succeed in her claim. Since I have found that Mr. Nel was contributory negligent to the extent of 20%, it stands to reason that the defendant must be held liable for the damages suffered by the plaintiff, without any apportionment. She is also entitled to her costs including the reservation costs of her expert. With regard to costs of senior counsel. it needs to be pointed out that, although this is an ordinary collision case, the circumstances of this case are not as simple as it might appear. However, in my view, any senior junior counsel could have competently dealt with the matter.

[41] In the premises I make the following order:

1. That the insured driver was negligent;

2. That the negligence of the insured driver was 20% contributory to the cause of the collision of the 25 October 2000;
3. That the defendant is 100% liable to the plaintiff's proven or agreed upon damages.
4. That the defendant is liable to the plaintiff's cost, which costs shall include the costs of counsel, computed at the scale of a senior junior counsel and the reservation costs of expert witnesses

  
N.M. MAVUNDLA  
JUDGE OF THE HIGH COURT  
 N M MAVUNDLA  
 JUDGE OF THE HIGH COURT

<u>HEARD ON THE:</u>	22/05/07
<u>DATE OF JUDGMENT:</u>	07/08/2007
<u>PLAINTIFFS ATT:</u>	MR HOUGH [Ref: N2/0 1 (N 18/18)]
<u>PLAINTIFFS ADV:</u>	MR. J.P.J. DU PLESSIS SC
<u>DEFENDANT'S ATT:</u>	MR. KRUGER [Ref:01301470]
<u>DEFENDANT'S ADV:</u>	Mr. M J BOTHA