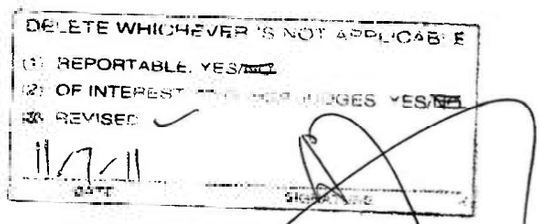
IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)



13/7/2011

CASE NO: A402/2008

In the matter between

JACOBS C. **APPELLANT**

And

THE ROAD ACCIDENT FUND **RESPONDENT**

JUDGMENT

MSIMEKI, J

[1] The Appellant, as Plaintiff, had instituted an action against the Respondent, as Defendant, for damages that he had suffered as a result of bodily injuries he sustained as a motorcyclist in a collision that occurred at approximately 09H45 within the traffic light controlled

intersection of Lynnwood Road and Dyer Street on 23 April 2004. I shall refer to the parties as Plaintiff and Defendant just as they were referred to in the court *a quo*.

[2] The court *a quo* at the end of the trial made the following order:

"1. The Defendant is liable for the Plaintiff's 60 (sic) apportioned proven damages;

2. The defendant to pay the plaintiff's costs on the merits. These costs to include necessary witnesses called on behalf of the plaintiff. Both witnesses who testified on behalf of the plaintiff costs referred to are applicable to them;

3. *The determination of quantum is postponed sine die."*

[3] On 28 February 2008 the Supreme Court of Appeal granted the Plaintiff leave to appeal to the Full Court of this Division against the judgment and order of Legodi J

of 21 September 2006 after the court a *quo* had refused such leave.

[4] The appeal is based on seven grounds, namely:

1. That the Court a *quo* overlooked or did not attribute sufficient importance to certain facts.
2. That the court *a quo* incorrectly held that the Plaintiff was only entitled, under exceptional circumstances, to enter the intersection when the traffic lights turned amber.
3. That the court *a quo* erred in overlooking or in not having had due regard to certain facts and evidence.
4. That the Learned Judge erred in law, and based upon the evidence produced, in reasoning that the insured driver was faced with imminent danger and that she was almost obliged to turn when she did.
5. That the court *a quo* incorrectly held that the Plaintiff should have kept a better look out to guard against motor vehicles that may enter and more specifically turn to the right across the path of

travel of the Plaintiff once the traffic lights turned amber.

6. That the court *a quo,* as a matter of law and fact, erred in not attributing sufficient importance to the fact that the insured driver once the traffic lights turned red executed in a blindly fashion, and without regard to any other road users, a turn to her right across the path of travel of the Plaintiff, as well as the undisputed facts that there was absolutely nothing that could have obscured the insured driver's view towards the direction from which the Plaintiff approached.

7. That the court *a quo* should have held that any negligence on the part of the Plaintiff did not contribute causally to the occurrence of the collision.

[5] As already alluded to, the Plaintiff's cause of action is based on a collision which occurred on 23 April 2004 at the Lynnwood Road and Dyer Street intersection which is

traffic light controlled. The collision occurred between the Plaintiffs motorbike at the time ridden by the Plaintiff and a Volkswagen Golf motor vehicle ('the insured motor vehicle') at the time driven by a certain Ms Jannel Burger ('the insured driver').

[6] The Plaintiff contended that the insured driver had been the sole cause of the collision in that, she, *inter alia,* had failed to keep a proper look out. On the contrary, the Defendant contended that the Plaintiff had caused the collision when he failed to keep a proper look out.

[7] Very briefly the Plaintiff, an executive Chef at a restaurant, testified that he had been from home to his work when the accident occurred. He stopped at Lynnwood Road and Duncan Street intersection where the robots were red and against him. On leaving the intersection the traffic lights of the next intersection, the place of the collision, turned green. The motor vehicles that were in front of him had been at a distance of

approximately 100 metres. The motor vehicles crossed the Lynnwood Road – Dyer Street intersection. As the front wheel of his motorbike touched the solid white line dividing the intersection, the traffic lights that had been green turned amber or yellow. The insured motor vehicle, at the time, was in the extreme obligatory right turn lane across the Plaintiff's path of travel from the opposite direction. The insured motor vehicle was to turn right once all the motor vehicles coming from the opposite direction, which was the direction from which the Plaintiff was coming, would have driven past. The Plaintiff was driving from West to East in Lynnwood Road while the insured motor vehicle was from East to West. The insured motor vehicle was at a distance of approximately 3 metres when the Plaintiff noticed it. It did not worry him because he did not expect it to turn right before he had cleared the intersection. Testifying under cross examination, he said that he did not pay attention to the insured motor vehicle at the time because, as he put it *'.... I was travelling straight. I was*

not swerving out and really, I was under the impression that she was going to stop.' The insured motor vehicle appeared to the Plaintiff to have been moving slowly in a manner one would expect from someone who was waiting for an opportune moment to cross through an intersection. The insured driver suddenly and without warning turned right in front of the Plaintiff leaving him with no chance to do anything to avoid the accident. He, however, applied his brakes and swerved to the right but the accident could not be avoided. He further explained that the traffic lights would not be green for him and at the same time be green for the insured driver. This is supported by the insured driver who testified that she stopped once the green flashing arrow disappeared. Unfortunately she turned right once the robots were red for traffic moving from West to East and from East to West. This resulted in the collision. The Plaintiff again under cross examination testified that he was approximately 3 metres from the insured motor vehicle when he realised that he was in serious trouble. The

distance was short and nothing at the time could be done to avoid the collision. The Plaintiff testified that he concentrated on traffic that was very close to him and not on traffic that was at a distance of approximately 100 to 200 metres away from him as there was still some distance to cover before one could start worrying about that traffic. Upon being asked by the court the Plaintiff explained how the robots worked. He explained that while the indicator would be green for one to turn right, the robots would be red for him. The right turn would be executed until the green arrow dissappeared. The re-examination of the Plaintiff revealed that the motorbike had been fitted with a performance exhaust pipe that caused the engine to make a loud noise; that the motorbike's headlights had been switched on and that the motorcycle had been of a bright yellow colour. The Plaintiff did not agree that he had been attempting to skip the red robot.

[8] The Plaintiff called Mr Lanie Van der Walt ("Van der Walt for the Plaintiff") to support his case. Mr Van der Walt testified that, he, on the day of the incident, had been approaching Lynnwood Road from Dyer Street, moving from North to South. He had stopped at the robot which had been red and against him. He was to turn right into Lynnwood Road. The robots in Lynnwood Road from East to West and West to East were green. A number of cars passed from his right to his left i.e. from West to East. He then heard the noise of the Plaintiff's motorbike which was at a distance of approximately 100 metres away coming from his right. He identified the motorcycle which is seen on pages 206 – 214 of the paginated bundle of documents (i.e. of Vol 3/3) as the Plaintiff's motorbike. The insured driver approached from his left wanting to turn into Dyer Street. After the motor vehicle that had been in front of the Plaintiff had passed the insured driver then turned right in front of the motorbike. He had seen the insured motor vehicle stationary while the motor vehicles were passing. The collision then occurred as the

insured motor vehicle was turning to the right into Dyer Street. In the main the witness repeated his evidence in chief in his cross examination. He testified that the insured motor vehicle did not have ample time to negotiate the turn to the right after the last motor vehicle had passed because the insured motor vehicle turned immediately. He estimated the speed of the motorbike to have been 60 kilometres per hour but did not know which lane the motorbike used. He did not agree that at the time the motorbike approached the intersection and at the time of the collision the robots in the direction of the Plaintiff had been yellow or amber. According to him the robots had been green during and after the impact. The motorbike, according to him, was at a distance of approximately 8 paces from the insured motor vehicle when the insured motor vehicle entered the intersection after it had stopped. The Plaintiff applied brakes to avoid the collision. He marked with a circle between the two motor vehicles seen on photograph marked "B" appearing on page 200 of the paginated papers as the place where

the accident took place. This concluded the Plaintiff's case. The witness's evidence clearly shows that the insured motor vehicle first stopped to allow the traffic from West to East to pass. It then proceeded slowly allowing traffic to pass to allow it to turn into Dyer Street. The cross examination of the witness revealed that the distance between Lynnwood Road – Duncan Street intersection and Lynnwood Road Dyer Street intersection is approximately 200 metres. There was a distance of approximately 100 metres between the Plaintiff and the motor vehicles that were in front of him. After the collision the witness released his safety belt and unlocked his motor vehicle's doors intending to get out. It, however, did not happen as the traffic lights turned green in his favour causing the motor vehicles behind him to start hooting. He ultimately had to pull out of the Street. His further testimony was that the Plaintiff attempted to brake but the accident was unavoidable.

[9] The insured driver's testimony is briefly that she was driving along Lynnwood Road with the intention to turn right using the obligatory right turn lane which turns into Dyer Street. The arrow was flashing green as she approached the robots. By the time she was at the robots the arrow was gone. She stopped. She was at the time not in the way of upcoming traffic which was moving from West to East. The lights then turned green for the traffic from West to East. She did not see the motorbike coming as, according to her, the motorbike was not near the intersection at the time she was turning. She saw the Plaintiff in the road once the car stopped spinning. Her testimony was that she had attempted getting out of the intersection and that she had not observed the motorbike which collided with the insured motor vehicle. She testified that the green traffic light along Lynnwood Road turned from green to amber and then red. She turned and that was when her motor vehicle was hit by the motorbike. She alighted and went to the Plaintiff, asked him if he was hurt he, instead, asked her how she could

ask such a question, which, in my view, appeared to imply to her that that had been obvious. She testified, under cross examination, that she had not seen the motorbike approaching and that she would not have made a right turn manoeuvre if she had seen the motorbike. She conceded that the collision would not have taken place if she had not turned in the manner that she did. She was unable to tell why she had not seen the motorbike ending up speculating that the Plaintiff might have been too fast. Her testimony was that she 'thought' that her motor vehicle might not have been an obstruction to the motor vehicles coming from Dyer Street into Lynnwood Road. The traffic lights along Lynnwood Road were red but she did not see any oncoming car. It is clear from the insured driver's testimony that she had waited for the traffic lights to turn amber and red before she turned and that her attention was focused on the change in colour of the traffic lights. Her further evidence was that her motor vehicle had not formed any obstruction to traffic flowing though the

intersection in either direction due to the existence of the obligatory right hand turn lane and the cement island in the centre of Lynnwood Road. Her view of traffic approaching from the direction of the Plaintiff had been unobscured. She, however, could not dispute that the Plaintiff had been travelling at a speed of approximately 60 kilometres per hour. She conceded that she had presumed that the red traffic lights would ensure that no traffic would still be passing through the intersection adding that there had been no vehicles near the intersection when she turned. This of course could not be correct as, in that event, the accident would not have taken place. This much she also conceded. She testified that there had been an opportunity in the flow of traffic for her to make her turn to the right but that she had not taken it as she had been waiting for the lights to be safe. This as we now know did not happen as she thought.

[10] Mr D. G. Van der Walt for the Defendant called by the Defendant testified that he on the day in question, was

sitting in his motor vehicle in an adjacent parking lot at his home overlooking the intersection and to the South thereof when he had a screeching sound caused by the Plaintiff's motorbike. He looked towards the intersection. Employing his photographic memory, which he claimed to have, he told the court that the incident was still so vivid in his mind as though the collision had occurred the day before he testified. He surprised all by coming with a completely new version of how the collision occurred. According to him the motorbike followed more than one motor vehicle. The Plaintiff applied brakes which caused the motorbike to swing. He nearly collided with one of the motor vehicles which had in the mean time stopped in front of him at the robots. He then moved between the cars at the intersection while applying brakes too hard causing the motorbike to tilt over. The witness saw the Plaintiff somersaulting while holding onto the handlebars which he later let go ending up falling to the ground 20 metres away and on the other side of the robots. Apparently his motorbike collided with

the insured vehicle, which had started to execute a turn to its right by entering the intersection. His description of what the Plaintiff was doing while in the air after his motorbike collided with the insured motor vehicle was quite amusing. While the Plaintiff was in the air according to him, the traffic lights from the Plaintiff's direction were red. He could not give the colour of the traffic lights at the time he saw the Plaintiff on the motorbike for the first time. Although he was not concentrating on the flow of traffic in Lynnwood Road, he amazingly testified that it was safe for the insured driver to turn to the right because the two motor vehicles in front of the plaintiff had already stopped. Brilliant as he said he was and with such intellectual ability and photographic memory, he could not give the court the number of motor vehicles that had come before the Plaintiff and which had allegedly come to a standstill at the intersection. He conceded that he had paid attention to the motorbike and not to the insured motor vehicle prior to the collision. He contended that the insured

driver's view of Plaintiff's approach was obscured by the vehicles that travelled in front of the motorbike thereby causing her to wrongly execute the right hand turn. This was never the insured driver's version. The witness's photographic mind failed him when he was unable to tell the court whether he had consulted with the Plaintiff's attorneys at their offices – an aspect which was later formally conceded by the Defendant. The witness's version which contradicts the version of the Defendant's own insured driver, was not put to the Plaintiff and his witness in cross examination. Plaintiff's counsel, consequently, objected to the admission of Van der Walt's testimony. Counsel for the defendant explained this failure on the basis that defendant's legal representatives had for the first time consulted with him an hour before. The court a quo indicated that that would be a matter for argument, and allowed the evidence of Van der Walt for the defendant. The Court *a quo* arrived at a finding on the probabilities flowing from the two conflicting versions. We are now confronted with the question as to the value

of the evidence of Van der Walt for the defendant. If his version is accepted, it necessarily implies that the versions of the plaintiff, Van der Walt for plaintiff, as well as the insured driver, which in all material respects compliment each other, should be rejected, and vice versa.

11. **THE LEGAL PRINCIPLES AND AUTHORITIES**

It is important to consider first the legal principles and authorities dealing with two important aspects, namely the driver's duty to keep a proper look out at traffic lights controlled intersections and his or her duty when executing a turn to the right of such intersections. Counsels' heads of argument and their submissions and arguments have been helpful in this regard. I have to thank them for the role that they played in the conduct of this appeal.

The following should be borne in mind:

1. If collisions are to be avoided all road users should keep a proper look-out.

2. The term 'proper look-out' varies from case to case depending on the circumstances.
3. Priority of right of way does not confer an absolute right of way on a driver. ***S v Desi 1969(4) SA 23 T***
4. A driver entering an intersection when the traffic light signal is green in his favour, has to regulate his speed and entry so as not to endanger the safety of traffic which entered the intersection lawfully and which may still be in the intersection. (See in this regard ***Santam Insurance Co. Ltd v Gouws 1985 (2) SA 630 (A) at 634***). The closer a motorist is to an intersection when the traffic lights turn green in his favour the more likely it is that the intersection may not be completely clear of traffic.
5. The noteworthy test that was outlined and applied in ***Von Wezel v Johannesburg City Council 1955 (4) SA 159 (T)*** which should be applied when dealing with the duty of care that rests upon an innocent driver who is faced with a driver who enters an intersection against a forbidding red light is whether a reasonable

driver would have anticipated the possible sudden improper emergence of such traffic against the lights.

6. It is significant to have regard to the fact that a driver who enters a crossing when the traffic lights are green in his favour owes no duty to traffic entering the crossing in disobedience of the red lights beyond a duty that if he sees the traffic he ought to take all reasonable steps to avoid a collision. ***Mr Van Den Berg***, on behalf of the Plantiff referred to an English case of ***Joseph Eva Limited V Reeves [1938]2A11 ER 115*** which appropriately sums the principle up. ***Scott LJ*** in the very matter said:

> *".....nothing again will help more to encourage obedience in the prohibition of the lights than the knowledge that if there is a collision in the crossroads, the trespasser will have no chance of escaping liability on a plea alleging contributory negligence against the car which has the right of way. Finally, nothing will help more to encourage*

compliance with the summons of the green light to go straight on than the knowledge of the driver that the law will not blame him if unfortunately he does have a collision with an unexpected trespasser from the right or the left."

In ***Serfontein v Smith 1941 WLD 195*** and ***S v Desi 1969 (4) SA 23 (T)*** a person inside an intersection crossing against the red light was regarded as a "trespasser". The other innocent driver should use ordinary care after becoming aware of the presence of such a trespasser in attempting to avoid the collision. The innocent driver, however, is not required to look out for traffic, which might possibly enter the intersection unlawfully from either side against a traffic light.

[13] **EXECUTING A TURN TO THE RIGHT**

1. Our Provincial Divisions and the Supreme Court of Appeal have held that to turn across the path of oncoming or following traffic is an 'inherent dangerous manoeuvre' and that a driver who intends executing such a manoeuvre bears a stringent duty to do so after satisfying himself that it is, in deed, safe and then choosing the right moment (often called the opportune moment) to do so. (See in this regard ***AA Mutual Insurance Association Ltd v Noneka, 1976 (3) SA 45 (AD) at 52E; R v Cronhelm 1932 TPD 86; Sierborger v SAR & Harbours, 1961 (1) SA 498 (AD)*** and ***Johannesburg City Council v Public Utility Transport Corporation Ltd, 1963 (3) SA 157 (W)***). It is therefore understandable why a driver turning right has a greater duty towards both the traffic following as well as traffic approaching from the opposite direction.

2. A driver turning to the right must signal his intention clearly and avoid turning until an opportune moment presents itself. (See in this regard ***Welf v Christner 1976 (2) SA 170 (N)***).

3. He should only turn to the right once he has satisfied himself that there is room enough between his motor vehicle and the approaching vehicles to allow him to complete the manoeuvre safely. (See ***R v Court, 1945 TPD 133 at 134***).

4. A driver is entitled to assume that those who are travelling in the opposite direction will continue in their course and that they will not suddenly and inopportunely turn across the line of traffic. This assumption may continue until it is shown that there is a clear intention to the contrary. (See ***Van Staden v Stocks, 1936 AD 18*** and ***Rustenburg v Otto, 1974 (2) SA 268 (C)*** and ***Old Mutual Fire and General Insurance Co of Rhodesia (PVT) LTD and Others v Britz and Another 1976 (2) SA 650 (RAD).***

5. Drivers who see a driver signalling his intention to turn right are entitled to assume and accept that that driver will only execute his turn to the right at a safe and opportune moment. This is so because they are not obliged to guard against the unreasonable and negligent actions of a driver who signals his intention to turn to the right. In this regard Van Winsen AJA (as he then was) in the matter of ***Serborger v South African Railways & Harbours (supra) at 504 – 505*** said**:**

"..... the answer seems to be 'none other than keep a look-out'. <u>There was no obligation upon him to stop or even slow down because of having seen a signal.</u> In parenthesis, it need scarcely be remarked, that du Preez's statement in evidence that had he seen appellant's signal he would have stopped, even supposing it to be true, cannot burden him with an obligation not imposed by law." (My emphasis)

In ***Moore v Minister of Posts & Telegraphs 1949 (1) SA 815 at 826, Schreiner JA*** (as he then was) said:

> *"Speaking very generally one expects and is entitled to expect reasonableness rather than unreasonableness, legality rather than illegality, from other users of the highway."*

6. It therefore follows that a driver is only called upon to take precautions against reasonable foreseeable contingencies and not the reckless driving of other motorists. See ***Rondalia Versekerings Korporasie van SA Beperk v De Beer, 1976 (4) SA 707 at 711.***

[13] **THE ISSUES TO BE DETERMINED**

The crisp issue to be determined in this appeal is whether or not the action of the Plaintiff contributed to the cause of the collision. It was contended on his behalf

that his action did not contribute while a different view was held by the Defendant.

[14] **COMMON CAUSE FACTS**

The following facts are common cause between the parties:

1. The Plaintiff's *locus standi.*
2. The Defendant's statutory liability.
3. The identity of the insured driver and the insured motor vehicle.
4. The identity of the Plaintiff's motorbike.
5. That the speed limit in the area is 60 kilometres per hour.
6. The time at which the collision occurred.
7. The number of lanes at the intersection that Lynnwood Road has both in the easterly and westerly direction.
8. The point of impact.

9. That the Plaintiff travelled from West to east while the insured driver travelled from East to West in order to turn into Dyer Street at the intersection.
10. That the insured driver stopped at the intersection before turning right into Dyer Street.
11. That Van Der Walt for the Defendant consulted with the Plaintiff's Attorneys at their offices.
12. That the collision occurred on 23 April 2004 at approximately 09H45.
13. That the collision occurred within the traffic light controlled intersection of Lynnwood Road and Dyer Street.

[15] Mr. Kekana on behalf of the Defendant referred the court to the case of ***S v Stripe 1972 (2) SA 707 (E) at 709 G – 710 B.*** The citation appears to be wrong. The case that I could find is ***S v Van Stryp 1979 (2) 707 (ECD).*** In this case the court, at 709 H said:

"A motorist approaching a green light should anticipate the possibility that it may change to amber and so control his vehicle's speed that he will be able to stop in a short distance and only in exceptional circumstances will he be forced to cross when the light is amber, for instance when he is very close to the white line with traffic following him. Had the Appellant approached the green light more slowly he would have been able to stop before the intersection, or have entered it at a speed which would have enabled him to stop within the intersection when he became aware of Mrs. Mulder's approach."

On the basis that the intersection was 13 metres wide, the court then said:

"Accordingly, had he proceeded cautiously against the amber light he could and should, in my view, have been able to avoid the collision. His failure to do so constituted negligence on his part."

The Appellant had testified that the light had been green when he approached the intersection. The light turned amber when he was 8 metres from the intersection which then meant that he had had about 15 metres to the point of collision or impact .This clearly distinguished the Van Stryp case from the current matter where the plaintiff's wheel was on the solid white line dividing the intersection when the light changed to amber. The other case that Mr. Kekana referred to is the matter of ***Doorgha and Others v Parity Insurance Co. Ltd 1963(3) SA 365 (D).***The case deals with intersections which are controlled by robots or traffic lights and the responsibilities that rest upon drivers at those intersections. The responsibilities or obligations vary from case to case depending on the circumstances of the case. The test remains the same and that is: what would a reasonable and careful driver do in those circumstances?

In **Walton v Rondalia Assurance Corp. SA LTD 1972 [2] SA 777 (D & C. L. D.) at 779 G –H Fannin J** *said:*

"Generally speaking it is clear, I think, that no motorist is entitled to proceed blindly through an intersection disregarding all possibilities of other traffic, but that does not mean to say, in my opinion, that a person entering an intersection is obliged to anticipate that traffic will move across his path in defiance of a traffic light which is against it, unless some indication is given by such traffic of an apparent intention to do so, more particularly when such traffic is seen to be at a standstill, in obedience to the prohibition of the red light."

[16] **ADMISSIBILITY OF VAN DER WALT FOR THE DEFENDANT'S EVIDENCE**

It will be recalled that the witness had been called by the Defendant without any prior warning. His version was not put to the Plaintiff and his witness. An objection on behalf of the Plaintiff was raised regarding the admissibility of his evidence. The court at the time indicated that that could be left for argument and the new evidence

could be dealt with as may be necessary. The witness surprised all with the evidence that he produced before the court. The evidence was new and even contradicted the evidence of the insured driver and that of the Plaintiff and his witness. Mr Kekana, on behalf of the Defendant, conceded that the admission of the witness's evidence would be unfair to the Plaintiff whose right needed to be protected. This, according to him, would result in unfair trail. He, instead, contended that it was the Defendant who was supposed to have applied for the recalling of the Plaintiff and not the Plaintiff. This, in my view, appears to be correct. Surely it could not be expected of the plaintiff to apply for his witness to be recalled, as he could not cross examine his own witness. If the defendant intended to rely on the new evidence, in order to discredit the plaintiff's evidence, he could have applied for the plaintiff's witnesses to be recalled for the purpose of putting the new version to them. Failing to do so, he could not rely on the new evidence to discredit the

plaintiff's witnesses. This is in line with the SARFU case (infra). The evidence remains untested.

The evidence is also such that it could be difficult relying on it especially if regard is had to its value and quality. As I alluded to earlier on in this judgment, his evidence surprised many in several respects. He could not help the court with the number of motor vehicles that had stopped in front of the motor bike. He could not tell the court what the colour of the traffic lights were along Lynnwood road prior to the collision and at impact. The insured driver did not see the two motor vehicles that were stationary in front of the motor bike that he testified about and above all his evidence was untested. The court *a quo* found that the witness's evidence established negligence on the part of the Plaintiff. The court a quo heavily relied on this witness whose evidence it found not to have been manufactured. I find it very strange that the witness, intelligent as he claimed to be, could not remember that he had consulted with the Plaintiff's attorneys at their offices. The court *a quo* refers to the

witness at paginated pages 241-246. The court *a quo* found that there was only one criticism levelled at the evidence of the witness. This cannot be correct if regard is had to what I have already alluded to above. The court further found that there was no reason good enough to justify the rejection of the witness's evidence, this in my view, is also incorrect.

[17] A conspectus of the facts of this matter reveals that:

1. The insured driver stopped and waited for traffic, along and in Lynnwood Road to pass.
2. The robots along an in Lynnwood Road were green at the intersection with Dyer Street in favour of traffic travelling west to east and east to west.
3. She waited for the traffic light to turn amber and then red. This happened.
4. She then turned right, and
5. There was a collision.
6. The collision on her own version would not have occurred had she not turned right as she did.

7. The collision would not have occurred had she waited for the green arrow to reappear after it, as she put it, had disappeared.

8. The insured driver posed no obstruction to the traffic along Dyer Street that would have turned left or right into Lynnwood Road. She also conceded that she had an unobscured view of traffic approaching her from the direction in which the Plaintiff had been coming.

9. The insured driver was in the obligatory right turn lane apparently waiting for traffic to clear the intersection prior to the collision.

10. A concrete traffic island separated traffic making it almost impossible for a vehicle from the opposite direction to encroach upon the direction in which the Plaintiff was travelling.

    This emphasises the fact that, there indeed, was no obligation upon him to look out for vehicles that might have done so.

11. The insured driver gave no indication that she would or could not stop or wait for the Plaintiff to safely clear the intersection.
12. The approach and presence of the Plaintiff on a noisy bright yellow motor bike with its headlights on must have been clearly visible to the insured driver.
13. The insured driver admitted that she had paid attention only to the change of the traffic lights and that she had not seen the Plaintiff
14. The insured driver entered the intersection when it was inopportune and dangerous to do so and when it was impossible for the Plaintiff to reasonably avoid the collision.
15. The Plaintiff took all reasonable measures at his disposal and available to avoid the collision.
16. The traffic lights turned green at the intersection in Lynnwood Road and Dyer Street the moment the Plaintiff took off from the Lynnwood Road and Duncan Street intersection.

17. No evidence was tendered that the Plaintiff knew that the traffic lights at the intersection of Lynnwood Road and Dyer Street would turn to amber before he safely passed through the intersection.

18. The Plaintiff travelled at approximately between 55 and 60km/h.

19. The motor cycle's front wheel touched the solid white line demarcating the zebra crossing and intersection when the traffic light turned to amber.

20. There was no evidence to despute that it would have been impossible for the Plaintiff to stop behind the solid white line.

21. It was impossible for the Plaintiff to avoid the collision given the distances indicated by the different witnesses.

22. No evidence was produced to show that the insured driver was faced with imminent danger and that she was almost obliged to turn when she did and as she did.

23. Had the insured driver waited for the flashy green arrow to be displayed, it indeed, would have been safe and opportune for her to turn to the right and thereby avoiding any danger to the other road users or the collision.

24. The evidence of Van Der Walt for the Defendant should not have been relied upon.

[18] Applying the principles dealt with and referred to above to the facts of this matter the following become noteworthy.

1. There was no reason for the Plaintiff to expect that the insured driver would execute the right hand turn before he had cleared the intersection and thereby not allowing him the safe travel through the intersection before she turned right.

2. The insured driver gave no indication that she would or could not stop or wait for the Plaintiff to safely clear the intersection.

3. A greater duty of care rested upon the insured driver than the Plaintiff, given the circumstances of the case, to keep a proper look out and to take all reasonable measures to avoid the collision.
4. The Plaintiff took all reasonable steps available to avoid the collision.
5. The Plaintiff was entitled to proceed through the intersection in the manner that he did.
6. He was entitled to assume that the insured driver would obey the traffic lights and turn when it was safe and opportune for her to do so. In the absence of an indication to the contrary there was no reason for him to not assume that she would act reasonably and legally. In the circumstances of the Plaintiff's case there was, indeed, justification for him to proceed as he did regardless of whether those circumstances were exceptional or not.
7. There was no obligation or duty in the circumstances of the Plaintiff's case for him to have kept a better look-out to guard against motor

vehicles that might enter the intersection and turn to the right across his path of travel once the traffic lights turned amber. No such duty of care rested upon him unless the actions or the omissions of the insured driver made it reasonably clear to him that she would not heed the traffic lights signals. There would also have been no reason for him to act differently even if he had earlier noticed the insured driver stationary or waiting in the intersection. The law is clear in this regard.

38. The insured driver, on her own version, made herself a trespasser in the intersection. The Plaintiff in turn used the ordinary care after becoming aware of her presence and did everything possible to avoid the collision. He was therefore entitled to assume that the insured driver would not suddenly and inopportunely turn across his line of travel and across the line of traffic. Without a clear intention to the contrary, the Plaintiff was perfectly within his right to proceed as he did. The Plaintiff, and

depending on the circumstances of the case, was called upon to take precautions against reasonable and foreseeable contingencies only, and not against the possibility of reckless driving of other motorists. (see **Rondalia Versekering korporasie van SA beperk v De Beer *supra***).

9. There is no evidence to show that the collision could have been avoided had the Plaintiff reduced the speed. The Plaintiff, in any case, did not have to. Mr Kekana also correctly conceded.

10. Applying the above principles to the facts of the case and having regard to the circumstances of the case one clearly finds that there is no room for any contributory negligence on the part of the Plaintiff.

[19] Cross examination is such an important tool in the conduct of a case. Indeed, as Mr Van Den Berg, on behalf of the Plaintiff correctly submitted, it reveals the truth by exposing a witness who deliberately lies or is mistaken in one or more of the points in his evidence, or is biased,

unworthy or has omitted to tender full and adequate evidence on a material aspect. The Bill of Rights in our Constitution protects the right to challenge the evidence subjects only to the limitations provided for in section 36. The institution of cross examination constitutes constitutional rights and imposes obligations. (See in this regard **President of the Republic of South Africa v South African Rugby Football Union 2011 (1) SA (CC)**). It must be borne in mind that evidence in respect of a point in dispute which is left unchallenged is accepted as correct (**The President of the RSA v SA Rugby Football Union (*supra*)**). Significant and important as cross examination is, the version of Van Der Walt for the Defendant was never put to the Plaintiff and his witness. As already and correctly conceded by Mr Kekana, in my view, the Defendant was the right party to have recalled the Plaintiff to enable it to properly deal with the version of Van Der Walt for the Defendant. Indeed, again as correctly conceded by Mr Kekana, relying on the witness's evidence resulted in an unfair trial on the part

of the Plaintiff. This concession aside, I still have difficulty with having to rely on this untested evidence the truth of which, in my view, is so questionable. This evidence, it will be recalled, surprised all who heard it.

[20] This then takes me to the question whether without this piece of evidence, as the court a quo found, the Plaintiff's negligence remains proved. The court *a quo* at page 247 of the paginated papers said: ***"His evidence, that is Mr Van der Walt for the defendant in my view, establishes negligence on the part of the Plaintiff."*** Having regard to the principles I alluded to earlier on, Mr Kekana's concessions as well as the circumstances of this case, the value to be attached to the witness's evidence, in my view, is nil. No negligence contributory or otherwise was proved on the part of the Plaintiff. A greater duty of care rested upon the insured driver than upon the Plaintiff given the prevailing circumstances to keep a proper look out and to take all reasonable steps to avoid the collision. The Plaintiff, in my view, did

everything reasonably possible in the circumstances to avoid the collision. The collision, in my view, was unavoidable.

[21] The available evidence as well as the principles referred to above point in one direction which is that the insured driver was, indeed, the sole cause of the collision on the day in question and that she should therefore be held liable for 100% of the Plaintiff's proven or agreed damages.

[22] I, in the result, make the following order.

1. The appeal succeeds with costs.
2. Paragraph one of the court a quo's order which reads:

"The Defendant is liable for the Plaintiff's 60 (sic) apportioned proven damages" is altered to read:

"The Defendant is liable for 100% of the Plaintiff's proven or agreed damages".

3. Paragraphs 2 and 3 of the order remain unaltered.

M. W. MSIMEKI

JUDGE OF THE HIGH COURT

I Agree.

L. M. MOLOPA-SETHOSA

JUDGE OF THE HIGH COURT

I Agree.

A. F. ARNOLDI

ACTING JUDGE OF THE HIGH COURT

And it is so ordered.

Heard on: 20 April 2011
For the Appellant: Adv. Mr. van den Berg
Instructed by: Adams & Adams
For the Respondent: Adv. Kekana
Instructed by: Maponya Inc.
Judgment delivered on: