14-8-70

G.P.-S.33967—1968-69—1,000. J. 219.

46/70

In the Supreme Court of South Africa.
In die Hooggeregshof van Suid-Afrika.

(Provincial Division.)
(APPELLATE Provinsiale Afdeling.)

Appeal in Civil Case.
Appèl in Siviele Saak.

M. RAUTENBACH *Appellant,*

versus

L. DE BRUYN *Respondent*

Appellant's Attorney Kannemeyer W. & A. *Respondent's Attorney* Symington & K>L
Prokureur vir Appellant *Prokureur vir Respondent*

Appellant's Advocate D.Y. Dube *Respondent's Advocate* H.P Viljoen
Advokaat vir Appellant *Advokaat vir Respondent*

Set down for hearing on 12-11-70
Op die rol geplaas vir verhoor op
13 & 16.11.

Coram: van Blerk A.C.J, Potgieter J.A, de Villiers
Corbett et Muller A.J.J.

(T.P.D.) 9.45 am ——— 11.00 am
11.15 am ——— 12.30 pm
c.a.v.

Muller A.J.A:—

The appeal is allowed with costs, including the costs of appeal to the Court a quo. The Magistrate's order is set aside and judgment is given for the defendant(appellant in this Court) with costs.

REGISTRAR.
4.12.1970

Writ issued
Lasbrief uitgereik

Date and initials
Datum en paraaf

Bills Taxed.—Kosterekenings Getakseer.

Date. Datum.	Amount. Bedrag.	Initials. Paraaf.

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between

M. RAUTENBACH ..... Appellant

and

L. DE BRUIN ..... Respondent

CORAM: VAN BLERK, A.C.J., POTGIETER, J.A., et DE VILLIERS, CORBETT and MULLER, A.JJ.A.

Heard on: 12 November 1970. Judgment on: 4th December, 1970.

J U D G M E N T

MULLER, A.J.A.:

Appellant appeals against an order of the Magistrate's Court of Vereeniging awarding damages against her in an action instituted by the respondent. I shall refer to the parties as they were styled in the Court of first instance.

At approximately one o'clock on the morning of 30 September 1967 a motor-car driven by defendant in

Voortrekker 2/

Voortrekker Street, Vereeniging, collided with another vehicle, the property of and driven by plaintiff. At the time of the collision plaintiff's vehicle was stationary at a robot controlled intersection and was, while in that position, struck from behind by defendant's car. Both vehicles were damaged in the collision, and plaintiff instituted action in the Magistrate's Court for the costs of repairing the damage to his vehicle, alleging that the collision was caused by negligence on the part of defendant. Defendant denied that she was negligent and pleaded that

> "the sole and proximate cause of the collision was the sudden and unexpected failure of the brakes of the motor vehicle being driven by (her) over which (she) had no control and concerning which (she) had no prior warning or knowledge."

It appears from the record that, at the commencement of the trial, the representatives of the parties agreed that the onus was on defendant to establish her defence - presumably this agreement was based on the understanding that the maxim res ipsa loquitur was applicable

to 3/

to the circumstances of the case. Defendant accordingly started in presenting evidence, she being one of the witnesses called.

Defendant's testimony was that on the night in question she, her husband and two friends were travelling in her car. She was driving and her husband occupied the front passenger seat next to her. While approaching a robot controlled intersection in Voortrekker Street, plaintiff's car overtook them and proceeded in front of their vehicle but had to stop at the intersection because the robot lights had changed against them. She was then travelling at a speed of 20 to 30 miles per hour, and, when approximately 20 yards from the robot, she applied her brakes with the object of stopping behind plaintiff's car. The brakes at first reacted but then suddenly failed, and despite her pumping the brake pedal a few times there was no further reaction. She realised that the brakes had failed and, being then approximately 5 to 8 yards behind plaintiff's vehicle, she swung sharply to the left with the object of

avoiding 4/

avoiding a collision with plaintiff's vehicle, but her car collided at an angle with the rear of the said vehicle. Both vehicles were damaged, and she sustained injuries on account of which she was removed to hospital shortly after the collision.

Defendant's car was virtually new at the time of the collision, having by then done approximately 3,700 miles. The car had been serviced about 2 weeks before the collision and, according to defendant, she had not experienced any trouble with the brakes prior to the collision. She remembered that, while her husband was assisting her to get out of the car after the collision, she remarked to him that she could smell brake fluid.

The evidence of defendant's husband was substantially the same. According to him, they were approximately 20 yards from the robot when defendant applied her brakes; the brakes reacted and the car slowed down somewhat, but then he suddenly realised that the brakes were no longer functioning and, despite the fact that defendant

pumped 5/

pumped the brake pedal a few times (he noticed this from the downward movements of her leg) the brakes did not function. When their car was a few feet from plaintiff's vehicle defendant attempted to swing to the left but could not avoid a collision.

According to defendant's husband, he smelled brake fluid while he was helping defendant to get out of the car. He spoke to plaintiff after the collision and told him that he could not say what had happened but that he thought that the brakes had failed. Later, and from the record this would appear to have been after plaintiff and the police had left the scene of the accident, he managed to open the bonnet of their car and noticed a few spots of brake fluid on the road just behind the RIGHT front wheel of the car, and upon investigating further he found a pool of brake fluid, about 6 inches in diameter, on the road near the middle of the car and approximately below the driver's seat. He also testified that prior to the collision he had driven the car - indeed his evidence was that he had done so the very

day 6/

~~very~~ day before the collision - and had found nothing wrong with the brakes. According to this witness the brakes of the car were not functioning after the collision and the car was towed away to a garage where it was inspected by an insurance claims assessor, Mr. Benikos, some 16 days after the collision.

Mr. Benikos was called as a witness by the defendant, and he informed the Court that, after having served a 5-years apprenticeship, he was employed as a motor mechanic for 6 years during which period he was promoted to the position of workshop foreman. Thereafter he joined a firm of assessors and had been assessing damaged motor vehicles for 7 years. He stated that on examining defendant's car he found that it was fitted with ~~a~~ an hydraulic brake system. In this system, as explained by Mr. Benikos and the other expert witnesses, the brake shoes on the wheels of the car are operated by pressure applied on brake fluid in a closed circuit of pipes leading from a master cylinder to the wheels. The master cylinder is operated by the brake pedal which, when

depressed 7/

depressed, exerts pressure on the brake fluid in the circuit. The master cylinder is served by a reservoir or tank containing a supply of brake fluid. The system must be leakproof to function properly, and, if a sudden leak develops in the system, the brakes would fail immediately.

According to Mr. Benikos, he found that, although the reservoir containing brake fluid was ¼ full - a quantity quite sufficient to allow the system to function properly - the brakes were not operating at all. This was due to a leak in a component unit of the system bolted to the chassis of the vehicle near the right front wheel. Due to this leak no pressure could be applied to the brake shoes on any of the wheels because pressure exerted by means of the brake pedal forced the brake fluid to escape at the leak. This leak was traced by the witness to a copper washer used to seal a connection in a junction where three brake pipes meet. When the brake pedal was depressed brake fluid flowed out around the washer. Even depressing the brake pedal repeatedly did not, according to Mr. Benikos,

build 8/

build up any pressure to operate the brakes. From the fact that the unit was relatively clean - free of dust, grit and grime - the witness concluded that the leak was of recent origin, and he was emphatic that the leak could not have been caused by impact of the vehicle with any object as there was no impact damage in the area of the unit.

Having discovered this leak in the brake system, Mr. Benikos called in a certain Mr. James of the firm Sydney Clow, which firm holds the franchise for the particular make of car, Morris Minor, and had sold the car to defendant. Mr. James also tested the brakes, whereafter the unit in which the aforementioned washer is seated, was removed from the car and dismantled. A spanner was used to loosen the component part which holds the washer in place and, in doing so, a certain measure of force had to be applied, indicating that the unit fitted tightly enough. The washer in question, made of copper, was found to be distorted into a saucerlike shape, but this would, it seems, be expected in view of the

form 9/

form of the facings of the male and female components between which the washer is forced into place so as to ~~the~~ seal the connection. From the fact that the component parts holding the washer in place were tightly fitted together, Mr. Benikos concluded that the leakage of brake fluid around the washer was due to the washer not sealing properly. Why this was so, he could not say with certainty, but he did suggest various possibilities. No purpose can, I think, be served in discussing the possibilities suggested by the witness. It will, in my view, suffice to say that, according to the witness, speaking from his experience of hydraulic systems, distortion or displacement of copper washers can occur even though the unit holding the washer is tightly bolted together, resulting in a leak of brake fluid and thus causing a failure of the brake system. Such a failure, and that is what Mr. Benikos concluded, happened in the present case, cannot, he said, be anticipated.

Mr. James was also called as a witness for the defendant. According to him the car, a Morris Minor, had been

sold 10/

sold by the firm Sydney Clow, of which he is the service manager, to defendant only some months before the collision and was still under guarantee. He told the Court that he had been an apprentice motor mechanic for 4½ years, then a tester of motor-cars, and later a workshop manager for 2 years. Having been called in by Mr. Benikos, he was requested to examine the car for a brake failure. He tested the brakes and found that there was no resistance when the brake pedal was depressed. This he established was due to brake fluid leaking - "running down ..... as well as a bit of a squirt" - at the place where the washer fits into the unit, thereby causing a brake failure. Upon executing successive pumping movements on the brake pedal some resistance was built up so as to give a "slight braking effect."

After Mr. James had tested the brakes, the component part housing the washer, was removed from the car and dismantled in his presence, and he examined the washer. Like Mr. Benikos, he concluded that the washer was not sealing properly. Although he stated that that particular make and

model 11/

model of car was "fitted with a very efficient set of "brakes" and that this was the first case that his firm had had of a failure of a brake system "caused by misfitting a seal at Union", his reply when asked what had caused the leak in this case was

> "I can only say the copper washer through its distortion caused the leak."

Also he stated that the leak appeared to be a recent one, and also he was emphatic that the impact of the collision could not have caused the leak in the brake system.

That in brief was the evidence of the witnesses for the defendant. Two witnesses were called to testify on behalf of the plaintiff, namely, the plaintiff in person and an expert witness by the name of Fourie.

According to the plaintiff, he pulled up at the robot controlled intersection when the defendant's car was some distance behind him; he then heard a screeching of brakes coming from behind and immediately thereafter defendant's car collided with his vehicle. After the collision he spoke to

both 12/

both defendant and her husband. Defendant's husband said nothing about the brakes of their car having failed, but, on the contrary, remarked that he did not know whether defendant had, in attempting to apply the brakes, missed the brake pedal. He, plaintiff, did not smell brake ~~brake~~ fluid at the scene of the collision, nor did defendant's husband say anything about brake fluid. According to plaintiff, he noticed brake marks on the road behind defendant's car extending from the rear wheels of the car for some 5 yards back on the road. He did not then consider these marks to be of any importance and made no mention thereof to the police officials who were called out to the scene of the collision.

Mr. Fourie was called by plaintiff to testify as an expert witness on the question of the failure of defendant's brakes. He is a person with considerable experience in the mechanical operation of motor vehicles. He was trained as a mechanic in the Air Force, had then been employed as a motor mechanic for some years and thereafter as a tester of motor vehicles in the traffic department of a municipality for

18 .....13/

18 years.

Mr. Fourie was shown the unit in which the washer in question is fitted and was asked to express an opinion on the efficiency of such a washer. His answer was that the washer in question was a standard washer used for the purpose of sealing a connection and should adequately serve that purpose. The saucerlike shape of the washer was, as he explained, due to pressure exerted on it by the facings of the male and female components between which it is held in place, and the shape of the washer could not be the cause of any leak. In brief, his opinion was that, provided the component parts are properly and tightly screwed together, no leak can occur unless the nut holding the component parts together is disturbed or manually loosened. This he stated in reply to questions repeatedly put to him both in examination in chief, and in cross-examination, of which the following is an example:

Question: "Can a leak develop if a washer is tightly fitted in the unit, and there is no other damage indicated

on 14/

on the whole union?"

Answer: "Not if it was screwed tight".

He was most emphatic that a leak could only have occurred under one or other of the following circumstances:

(a) if the unit holding the washer had been overtightened - so that the washer was "squeezed flat to such an extent that cracks and crystallisation appear" - which was not the case here;

(b) if the unit had not been tightened properly - "a loose fit" - which, according to the witnesses James and Benikos was not what they found in the present case, because the components were tightly FITTED together;

(c) if the unit had been damaged - "hammered or bent out of proportion" - which was not the position in this case.

With regard to the lastmentioned possibility, Mr. Fourie was asked whether the impact of the collision could have caused the leak and his reply was that it could not unless there was a direct blow on the fitting itself. From the nature of the collision there could have been no direct blow on the

fitting 15/

fitting, and, moreover, the fitting was found not to have been damaged in any way.

On Mr. Fourie's evidence, therefore, there can be no explanation for the leak which, according to the evidence of James and Benikos, was in fact found to exist. Asked about the effect of such a leak in the brake system, Mr. Fourie, answered as follows:

Question: "You are unable to say what severity of leak on Exh. 1 (the washer) was?"

Answer: "Yes I never saw the leak."

Question: "There was evidence that the leak was sufficiently severe for the master cylinder to be empty with each pump."

Answer: "A leak can be so severe."

Question: "If a leak is that severe would it be possible to build up brake pressure by pumping?"

Answer: "If the pedal is used slowly no but if used fast there might still be a slight build up."

After having heard the evidence and argument, the Magistrate found that the collision was caused by negligence

on .....15(a)/

on the part of defendant, and he gave judgment for the plaintiff in a sum agreed upon as the quantum of damages suffered by plaintiff. An appeal against the judgment by defendant to the Transvaal Provincial Division was unsuccessful, hence the further appeal to this Court, leave thereto having been granted by the Court a quo.

The Magistrate's conclusion that defendant was negligent, and that such negligence was the cause of the collision, was expressed as follows at the end of his written reasons for judgment:

> "Taking the evidence as a whole the Court came to the conclusion on the probabilities of the matter, that the Defendant's car did not suffer a complete collapse of the braking system, and even if there was a leak in the system it was not so severe as to have prevented the Defendant from stopping her car timeously.
>
> Had she pumped her brake pedal she would have developed some braking pressure to slow down sufficiently to avoid colliding with the Plaintiff's car; on her own showing she was 15 to 24 feet behind the Plaintiff's car when she according to her, was faced with the dilemma, yet she failed to avoid a collision. Through her negligence the accident occurred and accordingly the Plaintiff succeeds in his claim."

It is difficult to understand how the Magistrate arrived at the above conclusion inasmuch as he failed to make any specific findings of fact on the evidence presented.

He 16/

He did, in his reasons for judgment, in a number of respects express adverse criticism on the evidence of defendant and her witnesses and questioned the reliability of their evidence, but one finds that in so doing the Magistrate erred in many respects either because he did not understand certain aspects of the evidence or misread the evidence or because he based his reasoning on fragments of evidence given by a witness without having regard to the testimony of the witness as a whole. Thus, with regard to the collision itself and as to what happened after the collision, the following reasons are advanced by the Magistrate for his view that the evidence of defendant and that of her husband were contradictory and that they were untruthful witnesses.

Regarding the question as to when defendant first applied her brakes, the following is stated in the reasons for judgment:

> "The Defendant also averred that she first applied her brakes when the Plaintiff's car swerved in front of her and was 5 to 8 paces from her vehicle and that it was travelling. In this regard her husband gave a contrary explanation to the effect

that 17/

that when Plaintiff had stopped Defendant's car was still 15 to 20 paces away."

In this respect there was no contradiction between defendant and her husband. She did not say that plaintiff's car was 5 to 8 paces in front of her vehicle when she first applied her brakes. Her testimony was that she first applied her brakes when she was approximately 20 yards from the robot, and that plaintiff's car was then about to stop at the robot. The reference in her testimony to 5 to 8 yards was the distance estimated by her between her vehicle and plaintiff's car when she realised that the brakes were not functioning, whereupon she swung sharply to the left in an attempt to avoid a collision.

As "another indication that little reliance can be placed on their evidence" the Magistrate compares defendant's evidence that she was 5 to 8 yards away from plaintiff's car when she swung left, with the evidence of defendant's husband that they were only a few feet away from plaintiff's car when defendant swung left. What defendant's husband meant by "slegs n paar voet" is not clear. In any

event 18/

event, one can hardly fault either of them when they ~~are~~ WERE asked nearly a year after the event to estimate individually distances with regard to which their perception must have been limited to a fraction of a second. The fact that they differed in their estimates cannot justify the Magistrate's conclusion that "one or other of them is not truthful as regards the relative positions of the respective cars and what transpired."

After referring to the fact that, as would appear from photographs of plaintiff's car, defendant's vehicle must have struck it at a point between the middle and right-hand side of the rear bumper, the Magistrate states:

> "The Defendant herself stated that she endeavoured to swerve to the left of Plaintiff's car, but if she and her husband were correct then Plaintiff's car would have suffered the damage on the left rear - which is not borne out by their evidence i.e. accepting that the Plaintiff's car was in front of the Defendant's car."

I am unable to understand from the above passage what fault ~~was intended to be found with the evidence~~ of defendant and her husband on this aspect of the case. The defendant's car was damaged on the right front mudguard, and, depending on the

distance 19/

distance between the two vehicles when defendant swerved to the left, the point of impact could have been as shown on the photographs.

Another passage in the reasons for judgment reads as follows:

> "Defendant also stated that when they were about 10-20 paces from the robot the Plaintiff swerved into the left lane and stopped. The Plaintiff on the other hand stated that he passed the Defendant's car shortly after they pulled away from the robot three blocks away from the place of collision. In view of the contradictions, the explanation of the Plaintiff is more tenable."

Defendant did not say that she was about 10 to 20 paces from the robot when plaintiff swerved in front of her car. She gave that distance as 20 to 30 paces. But, in any event, I cannot see on what basis plaintiff's version can be regarded as more tenable than defendant's version.

Referring to the evidence of defendant's husband that he found brake fluid underneath their car after the collision, the Magistrate comments as follows:

> "The presence of the oil was not mentioned to the Plaintiff or the Police. Besides there were apparently no other signs of leaking brakes elsewhere on the road except where the

Defendant's 20/

> Defendant's car was standing after the collision. The Defendant (sic) observed the drops behind the front right wheel, but he stated that after the collision the vehicle travelled forward about a car's length before it came to a stop - so the question arises was the pool of oil in the middle of the car caused by the Defendant's vehicle and when. Was it caused by the impact? Furthermore were the 2 or 3 drops of oil on the road also caused by Defendant's car? The Defendant's husband averred that when he looked under the car he saw the drops of oil behind the front wheel and the liquid was then still dripping, that was ½ hour after the collision. Yet the evidence of the other defence witnesses was that oil escaped only when the brake pedal was depressed. There was no line of oil to be seen."

This passage is pregnant with incorrect statements concerning the evidence and with faulty reasoning. A proper reading of the evidence shows that plaintiff and the police had already left the scene of the accident when defendant's husband managed to open the bonnet of their car and then noticed brake fluid on the road underneath the car. He thereupon investigated and found the pool and spots of brake fluid testified to by him. There is no evidence to support the statement that there "were apparently no other signs of leaking brakes elsewhere on the road." It was in the middle of the night and nobody looked for brake fluid elsewhere on the road. It is correct that defendant's husband stated that their car

moved 21/

moved forward for about a car's length after the collision. That was, however, merely an estimate. On the evidence as a whole and particularly that of the witnesses James and Benikos, there can be no question but that the brake fluid found on the road came from defendant's car, and to pose the question "was it (the brake fluid on the road) caused by the impact?" is to ignore entirely the whole body of expert evidence, including that of plaintiff's own expert witness, Fourie, that the impact of the collision could not have caused the leak in the brake system. It is true that, according to the witnesses James and Benikos, brake fluid flowed out at the leak only when the brake pedal was depressed, but that does not exclude the possibility of some fluid dripping from the component part where the leak was some time after the collision.

Similar and even more glaring errors are to be found in the Magistrate's discussion of the testimony of the expert witnesses. The following will serve as examples.

In dealing with the evidence of the witness

James 22/

James, the Magistrate says:

> "The witness also admitted that a leakage at Exh. 2 (the copper washer) could only occur if the union was loose or cracked. His evidence is that the union was undamaged so that leaves only the possibility that it was loose."

This is an entire misrepresentation of the evidence of this witness, and is based on answers given by the witness to the following questions, viz,

Question: "Would you agree with Mr. Basson if he says leakage at Exh. 2 would only be caused if the union was loose?"

Answer: "No I don't. That is not the only time."

Question: "It could also leak if Exh. 2 was cracked?"

Answer: "Yes."

The witness did not, either in his answers to the above questions or elsewhere in his testimony, say that the leak could ~~only~~ occur only if the union was loose or cracked. Indeed his evidence was that in the present case the leak was due to the washer not sealing properly because it was distorted.

Commenting on the evidence of the witness Benikos that the leak found in the brake system was a serious

one 23/

one, the Magistrate comments as follows:

> "The brake fluid tank at the time of the examination was ¼ full, and according to the witness one depression of the brake pedal would empty the tank, but in this regard it must be remembered that the Defendant pumped the brake several times, the witness James did so as well as the witness Benekos and yet there was fluid left in the tank - a fact which indicates that the leak was not so serious as made out to have been."

This passage evidences a complete misunderstanding on the part of the Magistrate as to the operation of a hydraulic brake system as explained by the expert witnesses. According to the witness Benikos the tank or reservoir feeding the brake system was found to be ¼ full. The evidence was not that one depression of the brake pedal would empty the tank, but that it would empty the master cylinder which is fed by the tank. The master cylinder holds only a very small quantity of brake fluid (according to the witness Fourie 10 - 15 c.c.'s) and only that quantity was ejected with each depression of the brake pedal. The whole reasoning in the above quoted passage to support a finding that the leak was not serious is, therefore, based on a false premise.

The Magistrate also points out that there was

some 24/

some conflict between the witnesses Benikos and James as to the severity of the leak found by them. Benikos' evidence was that the leak was such that, although he repeatedly depressed the brake pedal, no pressure could be exerted on the brakes, whereas James testified that, after he had repeatedly pumped the brake pedal, he found that there was some resistance. In this regard the Magistrate draws attention to the fact that James conceded, in answer to a particular question, that the leak was "not excessive", while Benikos described it as a serious leak. One must, however, have regard to James' evidence as a whole, because in another part of his testimony he explained that by pumping the brake pedal repeatedly only a "slight braking effect" could be obtained. The difference between the evidence of James and Benikos as to the effect of the leak on the braking system can be explained by the fact that they each operated the brake pedal individually and that the pumping movements on the brake pedal executed by the one may not have been as rapid as those executed by the other. But, be that as it may, on their evidence as a whole

the 25/

the leak was such as to cause a collapse of the brakes, although (on James' evidence) some slight braking effect could be obtained if the brake pedal was pumped repeatedly.

Without rejecting the evidence of Benikos and James, which the Magistrate did not do - and indeed there could be no valid ground for rejecting their evidence regarding the leak which they found and the effect thereof on the brake system - there was no justification for the Magistrate's crucial finding that

> "defendant's car did not suffer a complete collapse of the braking system and even if there was a leak in the system it was not so severe as to have prevented the defendant from stopping her car timeously."

The whole basis on which the Magistrate rested his finding of negligence on the part of defendant was, therefore, unsound.

On appeal to the Transvaal Provincial Division the learned Judges (Viljoen and Steyn, JJ.) upheld the Magistrate's finding that the collision was caused by the negligence of defendant, but substituted an entirely different ground of negligence for that upon which the Magistrate had

based 26/

based his decision. The view which the learned Judges took on the record of evidence was that defendant was negligent, not because she failed to stop her car timeously by the application of her brakes, but because she drove her car well knowing that the brakes were defective, without taking precautions to avoid a collision. Their reasoning in arriving at that conclusion was along the following lines:

(a) The circumstances of the collision being such that the maxim res ipsa loquitur applied, defendant had to adduce evidence that the collision was not due to her negligence. Her plea was that there was a sudden and unexpected failure of the brakes of her car; a failure of which she had "no prior warning or knowledge."

(b) She was, therefore, called upon to adduce evidence not only that there was a sudden failure of the brakes, but also that the failure was unexpected, i.e. that she could not reasonably have forseen or anticipated a failure of the brakes.

(c) She succeeded in establishing that the brake failure was sudden, but not that it was unexpected, because on the evidence as a whole the probabilities were that there

was 27/

was a slow leak in the brake system prior to the collision and that defendant must have been aware thereof.

The decision of the learned Judges was, therefore, that the leak in the brake system was not one which developed at the time when defendant attempted to apply her brakes just before the collision, but that the leak had manifested itself some time prior to the collision and that defendant must have been aware of the unreliability of her brakes and should have taken precautions to avoid a collision. And this finding was based on the learned Judges' reading of the expert evidence of the witnesses James, Benikos and Fourie. Thus, with regard to the evidence of the witness James, the learned Judges draw attention to that part of his evidence in which he conceded that the leak was "not excessive." As I have already indicated above, one cannot look at only one part of his evidence because he later explained that the leak was so severe that, only after repeatedly pumping the brake pedal, a "slight braking effect" could be obtained. Regarding the evidence of Benikos the learned Judges comment as follows:

Benikos' 28/

> was a slow leak in the brake system prior to the collision and that defendant must have been aware thereof.

The decision of the learned Judges was, therefore, that the leak in the brake system was not one which developed at the time that defendant attempted to apply her brakes just before the collision, but that the leak had manifested itself some time prior to the collision and that defendant must have been aware of the unreliability of her brakes and should have taken precautions to avoid a collision. And this finding was based on the learned Judges' reading of the expert evidence of the witnesses James, Senikos and Burke. Thus, with regard to the evidence of the witness James, the learned Judges draw attention to that part of his evidence in which he concedes that the leak was "not excessive." As I have already indicated above, one cannot look at only one part of his evidence because he later explained that the leak was so severe that, only after repeatedly pumping the brake pedal, a "sufficient braking effect" could be obtained. Regarding the evidence of Senikos the learned Judges comment as follows:

Senikos' ....28.

> "Benikos' evidence is to the effect that there was no resistance at all notwithstanding the fact that he repeatedly depressed the pedal. But the evidence is that the reservoir was not empty and on the evidence of James and Fourie who said that ¼ capacity of the master cylinder was enough to cause resistance, the probabilities seem to be that the system did not completely collapse, as the defendant and her husband said."

This passage shows that the learned Judges were, like the Magistrate, confused with regard to the conclusions to be drawn from the fact that the tank or reservoir was ¼ full. None of the witnesses said that ¼ capacity of the master cylinder was enough to cause resistance. Indeed the evidence of Benikos was that there was no resistance at all; James said that by pumping the brakes rapidly "a slight braking effect" could be obtained, and Fourie, upon the severity of the leak having been described to him in cross-examination, stated that with a rapid pumping of the brake pedal "there might still be a slight build up" of pressure.

Dealing with the evidence of the witness Fourie, the learned Judges say:

> "From his evidence the inference is to be drawn that there might have been a leak due to improper tightening of the union, but that that was a very slight leak which would not have caused a sudden collapse. That there was not a very serious

leak 29/

leak seems to be consistent with James' evidence."

With due respect, it is wrong to say that it can be inferred from Fourie's evidence that there might have been a leak due to improper tightening of the union but that "that <u>was a very slight leak which would not have caused a sudden collapse</u>."

The learned Judges, no doubt, drew this inference from the following passage in his evidence:

> <u>Question:</u> "The evidence is that the unit functioned properly and the nuts were securely screwed down."
>
> <u>Answer:</u> "If the two unions with the copper washer in between was tight it is physically impossible for that unit to develop such a leak that you would drain the master cylinder with one depression of the pedal."

This part of his evidence must, however, not be read out of context so as to gather the impression that with a loose fitting ~~then~~ there would, on his evidence, only be a slight leak. The severity of the leak would depend on how loose the fitting is. In any event, on the evidence of the witnesses James and Benikos, the fitting was tight enough; indeed force had

to 30/

to be used to loosen it. And, as I have shown earlier in this judgment, Fourie's evidence on the whole was that if the fitting was tight, there could be no leak at all, unless the component unit was damaged or the washer itself was cracked, which was not the position in this case.

With regard to the evidence of defendant's husband, the learned Judges make the same mistake as the Magistrate in faulting defendant's husband for not directing the attention of the police to the brake fluid which he had found underneath defendant's car after the collision. As I have already explained, the police had already left the scene of the accident when defendant's husband discovered the brake fluid on the road.

Dealing further with the evidence of defendant's husband, the learned Judges, like the Magistrate, seem to find it strange that brake fluid was found underneath defendant's car where it came to rest after the collision while there is no evidence of brake fluid further back on the road at the point where defendant attempted to apply her brakes. This is a matter which I have already dealt with in discussing the Magistrate's reasons for judgment.

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In general the learned Judges drew the following conclusions on the evidence, namely:

> "The weight of the expert evidence seems to be that the flexible pipe end - the metal end where the washer was seated - was not tightened well enough to the brass unit."
>
> and
>
> "Having come to the conclusion, on the probabilities that there was a leak caused by the improper tightening of the fitting, a further conclusion is inevitable and that is that the leak did not develop all of a sudden."

With all due respect, I must say, that both the above conclusions are not in line with the expert evidence. Indeed both conclusions are in conflict with evidence of the expert witnesses James and Benikos, which was to the effect that the fitting was tight enough and that, in their opinions, the leak was due to the washer itself not sealing properly, which caused a sudden collapse of the brakes. It was only Fourie who expressed the opinion that, unless the washer itself was cracked or the unit holding the washer was damaged (neither of which was the case), brake fluid could have escaped only if the fitting

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was loose. And against that opinion there is the evidence that in fact the fitting was not loose but so tight that a certain measure of force had to be applied to loosen it with a spanner.

In the circumstances it seems to me that the whole basis on which the Court a quo rested its finding that there was a slow leak in the brake system of which defendant must have been aware for some time prior to the collision, is not supported by the evidence.

The position, as I see it, is that defendant adduced evidence which served to establish her defence. Both she and her husband testified that the brakes of her car had not previously given any trouble at all, and that at the crucial moment before the collision the brakes suddenly failed. Although some criticism can justly be levelled against certain aspects of their evidence, there is nothing which disproves their testimony that the brakes of the car functioned properly before the collision, and, indeed, the evidence of both James and Benikos supports their testimony that there was a sudden

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and serious collapse of the brakes immediately prior to the collision.

The defendant, having produced such evidence, the enquiry is

> "where, on the evidence, the balance of probabilities lies. If it is substantially in favour of the party bearing the onus on the pleadings, he succeeds; if not, he fails." (Klaassen vs. Benjamin 1941 T.P.D. 80 at p. 87 and Arthur vs. Bezuidenhout and Mieny 1962(2) S.A. 566 (A.D.) at p. 574).

On the evidence as a whole, plaintiff has, in my view, not discharged the onus of proving, on a balance of probabilities, that defendant was negligent and that her negligence caused the collision; and, that being so, the appeal must succeed.

The appeal is allowed with costs, including the costs of appeal to the Court a quo. The Magistrate's order is set aside and judgment is given for the defendant (appellant in this Court) with costs.

My brother Potgieter became indisposed during the course of argument on appeal, as a result of which the

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hearing of the appeal proceeded before the remaining members of the Court. The judgment of such remaining members is therefore, in terms of Section 12 (3) of the Supreme Court Act, No. 59 of 1959, the judgment of the Court.

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M U L L E R, A.J.A.

VAN BLERK, A.C.J.)

DE VILLIERS, A.J.A.) Concurred.

CORBETT, A.J.A.)