G.P.-S.59968—1970-71—2 500 ~~10-8-75~~ 15-11-75

J 219 18/7.5

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

S. A. R. & I. *Appellant,*

versus

SCHUBLE A. *Respondent*

Appellant's Attorney *Respondent's Attorney*
Prokureur vir Appellant W.P.S.A. (Bloem.) *Prokureur vir Respondent* Horn - Vermaak

Appellant's Advocate J.F. Ivor Rensburg *Respondent's Advocate* A. Soloman S.C
Advokaat vir Appelland *Advokaat vir Respondent*

Set down for hearing on 10-3-1976
Op die rol geplaas vir verhoor op

Coram: Wessels, Rabie, Corbett, Hoexter et Wilson AJA

van Rensburg - 9.45 - 11.00, 11.17 - 11.52, 2.20 - 2.27.

(S/E.J.I.D.) Soloman - 11.52 - 12.45, 2.15 - 2.20.

C.A.V.

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:

THE SOUTH AFRICAN RAILWAYS AND

HARBOURS ADMINISTRATION.....Appellant

and

AUBREY SCHEUBLE.....Respondent.

Coram: WESSELS, RABIE, CORBETT, GALGUT, JJ.A., et

VILJOEN, A. JA.

Heard: 10 May 1976.

Delivered: 1 June 1976

J U D G M E N T

RABIE, JA.:

The respondent instituted an action against the appellant in the South-Eastern Cape Local Division in which he claimed R24 438-00 as damages for injuries sustained in a collision which occurred on 21 July 1972

between...../2

between his Chevrolet LDV, while driven by himself, and a motor vehicle owned by appellant and driven by one Spies. Appellant denied liability for the loss suffered by respondent, and counterclaimed for damage done to its vehicle in the collision. It was agreed between the parties before the trial began that appellant's loss was R3 653-00. The trial Court found that the collision was the result of/the negligence of both respondent and Spies. It held that Spies was 80% to blame for the collision, and respondent 20%. Respondent's total loss was found to have been R16 320-00, and judgment in the sum of R13 056-00 (i.e., 80% of R16 320), with costs, was accordingly given in his favour. On appellant's counterclaim judgment was given in its favour for the sum of R730-60 (i.e., 20% of R3 653), with costs. Appellant noted an appeal against the whole of the judgment and order of the Court a quo. The respondent did not cross-appeal.

The...../3

The collision occurred at about 8.30 p.m. on the day in question on the road between Coega and Port Elizabeth. Immediately before the collision occurred respondent was proceeding towards Port Elizabeth (i.e., in a southerly direction), while Spies was travelling in the opposite direction. Spies was driving a mechanical "horse" (weighing about 10 tons), to which there was attached a passenger bus, which Spies described as a "semi-passasiersleunwa". It also weighed about 10 tons. Behind the bus there was a luggage trailer (weighing about 5 tons). The mechanical "horse" was about 8 feet wide. The stretch of road on which the collision occurred was 6,4 metres (about 21 feet) wide. It was level and straight for about 2 kilometres. It was divided by a broken white line. At each end of the straight stretch the road curved: on the northern side the curve was to the east, and on the southern side, to the west. The point where the collision occurred

was...../4

was about midway between the northern and southern ends of the straight stretch. An inspection in loco was held in the course of the trial. Counsel's agreed notes of the inspection, to which fuller reference will be made later in the judgment, read as follows:

"4. Sgt. Meyer also indicated a spot which the driver of the Defendant's vehicle (Spies) had pointed out as the point of impact when Sgt. Meyer had visited the scene shortly after the collision. At this point it was evident that a piece of tarmac had been gouged out; there was an indentation in the tarmac surface of about 18" running from north to south.

5. The point of impact, indicated as aforesaid, was about 1 pace from the centre of the road towards the west, about 2 paces from the western edge of the tarmac.....

6. There were other visible indentations on the tarmac surface as follows:

South of the point of impact:

(a) About 4 paces to the south of the point of impact, a smaller mark, 6" west of the centre line;

(b) About 4 paces to the south of the point of impact, a mark about 18" west of the centre line;

(c)...../5

(c) About 2½ paces south of the point of impact, a mark about 1 yard west of the centre line.

North of the point of impact:

(a) Seven paces north there was a mark about 6 ft. long running from south to north, about 1½ paces from the western edge of the road;

(b) Fourteen paces north of the point of impact and about 6" to 1 ft. from the western edge of the road there was another mark.

.....

10. To the south of the point of impact the road is straight for about 1 kilometre after which there is a curve to the west.

11. To the north of the point of impact the road is also straight for about 1 kilometre, after which there is a curve to the east. About 2 kilometres north of the point of impact the G.M.-Addo road intersects the Old Grahamstown Road and there are stop signs regulating traffic on the latter road.

12. One Abrahams indicated that his vehicle was just north of the bend referred to in para. 10 above when it passed a railway bus."

The respondent's evidence in chief was to the following effect. He was on his way to Port Elizabeth, and was

passed...../6

passed by Suleiman Abrahams, who was also proceeding in a southerly direction, about 100 yards before he reached the G.M.-Addo intersection (referred to in paragraph 11 of the notes of the inspection in loco). Respondent stated that he travelled at a speed of about 40 m.p.h. and that he kept to his side of the road. His lights were on dim. As he travelled along the straight stretch, he saw a vehicle coming towards him. The lights of this vehicle were on bright, and although he "flicked" his own lights in order to warn the approaching motorist that his lights were on bright, there was no reaction. When the approaching vehicle was "very near" to him, respondent said, he saw "a red thing" in front of him. There was nothing he could do, he said, and "we hit each other. I felt that and that was the last thing I remember".

In cross-examination respondent said that the lights of the vehicle remained on bright throughout, but that they did not shine into his eyes, and that they did not

cause...../7

cause him any concern. He did, however, reduce his speed to about 20 or 25 m.p.h. as the vehicle came near him. The vehicle, he said, travelled in a straight line; he never saw it going from one side of the road to the other. However, when the vehicle was "very near" to him, he "realised" that it was "partly over the white line". When questioned as to what he could recollect of the collision itself, respondent said that he could remember feeling the impact as the two vehicles collided. The following is an extract from the evidence he gave on this point:

> "Yes, you could feel the impact? --- Yes.
>
> You remember the impact, the accident? --- That is all I know.
>
> But do you remember that there was an impact? --- Yes.
>
> .....
>
> Did you feel the bang? --- The bang, Yes.
>
> Did you hear the bang? --- Yes.
>
> When you woke up in hospital, or when you

regained...../8

regained your consciousness, which was a couple of weeks after the accident, were you able to remember this, were you able to remember where you were? --- I remember about the accident.

Do you remember, as you have told us now? ---- Yes.

So, if at any stage after you had regained consciousness, I had said to you do you remember the accident, if anybody had asked you whether you remembered the accident, you would have said yes, I remember the accident, is that right? --- Yes, I remember the accident.

.....

You wouldn't have said to them, no, I cannot remember the accident, I only know what happened before the accident, you wouldn't have said that? --- No, I wouldn't say that, my Lord.

.....

You remember the collision took place, the bang and the sound and the noise and everything else? --- No, I don't say the noise and all that.

But you remember the bang of the collision? --- I only know that when the collision was all over I knew nothing after that.

Yes...../9

Yes, but you remember the actual collision, the impact between the vehicles, that you remember? --- Yes, only that I remember".

It was put to respondent that he had on 16 November 1973 told Mr. Kessler, a neuro-surgeon practising in Port Elizabeth, that he could remember only what had happened before the accident, but not the accident itself, and, also, that he could remember seeing the oncoming headlights of a motor vehicle, but "then nothing more". Respondent denied that he made such statements to Mr. Kessler. "That is false", he said, "I said I remember everything that happened before the accident, but after the accident, I remember nothing, because I was unconscious". Respondent also denied that Mr. Kessler made notes of what he said to him.

Abrahams, referred to above, gave evidence on behalf of respondent. As stated before, he travelled on the same road as respondent on the night in question. A cousin of respondent's, William Scheuble, was a passenger

in...../10

in his car. Abrahams said in his evidence in chief that he travelled at a speed of about 55 to 60 m.p.h., and that he passed respondent about 100 yards (the same distance as that mentioned by respondent) on the northern side of the G.M.-Addo intersection. As he approached the southern end of the straight stretch of road, he saw the lights of an approaching vehicle. Its headlights were on bright. He "flicked" his own lights a few times, he said, but "there was no response from the driver of the bus and it was travelling on my side of the road". His evidence in chief on this point continues as follows:

> "And what did you do then, as he came towards you? --- Well, he was travelling partly on my side of the road, I noticed it immediately.
>
> Yes, so what did you do? --- I had no alternative, I had to swerve off the road.
>
> Did you actually swerve off the road? --- I was completely off the road.
>
> And this bus, when it passed you, was it

still...../11

still partly on its incorrect side? --- Yes, it was keeping a straight route all the time, because I looked back at it.

You looked back at it after it passed you? --- Yes.

What did you see then? --- It was keeping a straight route all the time.

Course? --- That is correct.

Partly on the wrong side of the road? --- On the wrong side of the road.

What did you do then, Mr. Abrahams? --- I pulled off and headed back to Port Elizabeth.

You went on? --- Yes."

Abrahams also said, in his evidence in chief, that the bus which forced him off the road was the first bus which passed him on the night in question. After this bus had passed him, he said, he passed about four or five other buses.

In his evidence given in cross-examination, Abrahams said that the bus proceeded on a course "about three feet over the barrier line", and that he got the impression

that...../12

that the driver used the broken white line "as some sort of guideline, because it passed directly under his steering more or less". Abrahams could not give a description of the vehicle that passed him, but he thought that it was a passenger bus. He could not recollect seeing a mechanical "horse" or a luggage trailer. As to the speed of the bus, he first said that "it must have been doing" about 60 m.p.h., but later he twice said that he thought that its speed was about 40 m.p.h. At the end of his evidence, however, when asked whether the bus could have been travelling at about 40 m.p.h., he replied "I wouldn't say so", and he then proceeded to say that its speed was "about 60, about 50,55,60". Abrahams estimated the speed at which respondent travelled at about 40 m.p.h. (which agrees with respondent's own estimate). With regard to his own speed, Abrahams said that he travelled at about 55-60 m.p.h., but that he slowed down as he neared the bus, and that he finally went off the road and

came...../13

came to a stop. The point where the bus passed him, he said, was about 100 yards from the curve at the southern end of the straight stretch of road.

Cross-examining counsel put it to Abrahams that if the collision occurred at a point about half-way between the northern and southern ends of the straight stretch of road, and if he travelled at 55 to 60 m.p.h. while respondent's speed was about 40 m.p.h., then he (Abrahams) could not have been so far ahead of respondent's vehicle as his evidence would suggest that he was, and that he could not have reached the curve when he said that he did. Abrahams would not agree with the suggestion put to him. The relevant questions and the witness's answers thereto appear from the following extract from his evidence:

> "So you have a straight road of about two kilometres and ..... the point of impact was about midway between the two curves? —— Yes.

So...../14

So if ..... you were almost at the end of the straight on the P.E. side of the straight, and I assume that Mr. Scheuble's vehicle at that stage, at the time you first saw the bus, if he was still travelling at 40 miles an hour, he must have been very far behind? --- That is right.

In fact, Mr. Scheuble, at that stage, if the bus and Mr. Scheuble were travelling at let us say more or less the same speed, Mr. Scheuble must have entered the straight at the other end, not so, for the two of them to meet in the middle? --- It could be.

Well, what I am putting to you is that at that stage you were about two kilometres ahead of Mr. Scheuble. ---- I wasn't travelling 60 miles an hour all the way.

No, what, were you travelling more than that? --- I wasn't travelling all the same speed, I was travelling slightly slower at the time.

Slower at the time. Well, can you explain how it comes about that, if this is how the accident happened, that you must have - that you were two kilometres ahead of Mr. Scheuble at that stage.

BY THE COURT: The witness hasn't said that it was.

MR...../15

MR. MELUNSKY: Well, my Lord, I am going to ask your Lordship ..... (Court intervenes)

BY THE COURT: .....what Mr. Scheuble did.

MR. MELUNSKY: No but..... very well, if Your Lordship pleases. What I am putting to you is that, if Mr. Scheuble was travelling at 40 miles an hour as he says he was, Mr. Scheuble, by the time that he reached the bend where you - by the time you came closer to the bend around which the bus came, and if Mr. Scheuble was coming up and if the two vehicles collided more or less in the middle, I want to suggest to you that Mr. Scheuble must have been about two kilometres behind you? --- Well, I wouldn't say so.

You wouldn't say so. Well, perhaps I can put it this way, that if the Court finds that that is where Mr. Scheuble's vehicle must have been, then you must have been travelling very much faster than 60 miles an hour. --- I wasn't travelling fast. I was not familiar with the road. I passed Mr. Scheuble. At the time I passed him I was doing 60, but I wasn't continuing on 60 all the time. It is a very narrow road that, and I didn't know the road

well..../16

well.

So, in fact, there were times when you were doing less than 60? — Much less, much less than 60.

Well, I want to suggest to you that ....., on your evidence and Mr. Scheuble's evidence, you couldn't have been at the curve when you say you were at the curve. — Well, was Mr. Scheuble travelling at the same speed all the time?

Well, I want to suggest to you that it is impossible that you could heve reached that curve so far ahead of Mr. Scheuble. — I don't find it impossible".

The second witness called by respondent was a Mr. Barnard, the owner of a breakdown service. He went to the scene of the collision on the night in question in order to fetch respondent's damaged vehicle. He found both vehicles off the road: respondent's on the eastern side of the road, and Spies's on the western side. The front - particularly the right front portion - of respondent's vehicle had been extensively damaged, and

the...../17

the whole front carriage of the mechanical "horse" had been torn off. Barnard also testified that he saw a number of marks on the road. His evidence in chief on this point reads as follows:

> "Were there a number of marks on the road? ---- That is correct.
>
> From where to where approximately did these marks run? --- It is very difficult to say exactly - look, I am not at the scene of the accident at this stage, but it is very close to the white line on the centre of the road, bearing sharp left, I wouldn't say exactly sharp left.
>
> Bearing towards the left? --- Towards the left".

His evidence in cross-examination on the point reads as follows:

> "All of the marks that you saw were on the one side of the white line, is that correct? --- 99%, Your Lordship.
>
> In all probability, all of the marks you saw were on the west of the line? --- That was

in...../18

in all probability right.

And these appeared to you to be fresh marks? --- That is correct.

BY THE COURT: Did I understand you to say earlier that these marks started approximately on the centre line? --- That is correct.

MR. MELUNSKY: I am sorry, my Lord. I thought you said, Mr. Barnard, that they started close to the centre line? --- That is correct. That is the same statement, I cannot give it within centimetres, put it that way.....".

I turn now to the evidence given on behalf of appellant. I shall begin with Spies. He testified that he dimmed his headlights as he saw the vehicle with which he subsequently collided, and that he than kept them on dim. His speed was about 40 m.p.h., and he drove on his correct side of the road. His vehicle was about 12 or 18 inches from the centre line, and the collision occurred on his side of the road. The other car, he said, also travelled on its correct side of the road as it approached him, but when it was about 10 or 15 yards away from him

it...../19

it suddenly swerved to its right and collided with his vehicle. He could offer no explanation as to why the other car suddenly swerved in the manner described by him. Some time after the collision a member of the S.A. Police, Sgt. Meyer, arrived on the scene. Spies stated that he pointed out "die punt van botsing" to Meyer. He fixed the point of impact, he said, by reference to mud and glass which he saw on the road. He said in his evidence in cross-examination: "..... my merk wat ek uitgewys het waar die botsing was, dit is net volgens daardie modder, daardie droë modder en glas wat daar op die pad gelê het". He also saw marks ("skraapmerke") on the road. These, he said, commenced at the point of impact. His explanation of how the marks were caused, appears from the following extract from his evidence in chief:

"Waarvandaan het die skraapmerke gekom? --- Van die punt van botsing.

Ja...../20

Ja, maar wat het dit veroorsaak? Die skraapmerke? --- Ek sou sê dit is die voorstel wat op die teerpad ..... daar was geen wiele om te rol nie, die voorstel het daardie strepe op die grond getrek, op die teer getrek (en) in die gruis.

En die tenks, het hulle enige.....? --- Die tenk wat op die regterkant onder die semi (i.e., the passenger bus) gesit het, jy kon hom gesien het, hy het nie reg onder gesit nie, hy het aan die kant gesit, hy het ook op die teer geskuur".

The tanks referred to were diesel tanks. As to these Spies said: "Die twee diesel tenks was af. Die een het in die veld gelê aan die linker kant van die pad. Die een was onder die semi-leunwa waar die passasiers in is, hy was onder die semi het hy vasgesit". Spies could not remember how far the mud and glass he saw were from the centre line, but according to the evidence of Meyer the distance was 1 metre (say 39 inches). Spies could not remember seeing marks to the south of the point of im-

pact...../21

pact indicated by him, but he said that he would not deny that there were such marks. Such marks were seen at the inspection in loco, but, although Spies was present at the inspection, his attention was not drawn to those marks, and when he gave evidence he was not asked to explain how they could have been made.

With regard to the evidence given by Abrahams, Spies stated that no vehicle passed him on the straight stretch of road before he encountered respondent's vehicle. He also said that his vehicle was not the first of the railway buses which travelled over that road on the night of the collision. Another bus, he said, left Swartkops on its way to Grahamstown before he did. He thought that it might have left about 5 minutes before he did, but he was not certain about the time. The distance between Swartkops and the stretch of the road in question does not appear from the record.

Sgt. Meyer, referred to above, went to the scene of

the...../22

the collision on the night in question. He took certain measurements and made notes thereof. The next day he prepared a plan of the scene. He testified that Spies pointed out the "punt van botsing" to him, and that he saw "droë modder en glasstukke" at that point. Answering questions put to him by the Court, Meyer said that the mud and pieces of glass were scattered ("versprei"), but that the heaviest concentration thereof was at the point indicated by Spies, which he marked X on his plan. This point(X) was 1 metre west of the centre line. Meyer could not recall seeing marks on the road, but he conceded that there might have been marks.

I come now to the evidence of Mr. Kessler, to whom reference was made above. He examined respondent at the request of his attorneys on 16 November 1973, and thereafter furnished them with a report concerning respondent's injuries. The witness testified that he made notes

of...../23

of what respondent told him, and that he did so in respondent's presence. His notes relating to what respondent said about the collision read as follows:

> "Driving a L.D.V. when involved in crash with Railway bus—head-on collision. Remember only what happened before the accident, not the accident. On road from Colchester to P.E. at night. Remembers seeing oncoming lights and then nothing more. Recovered consciousness in the Livingstone hospital about three weeks later".

(The word not is underlined in the witness's original notes). Kessler said that he put questions to respondent because he wanted to find out whether he could remember the impact itself, and in order to establish the period of pre-traumatic amnesia.

Kessler's evidence that he made notes of his conversation with respondent and that the notes correctly recorded what respondent said, was not challenged in cross-examination. When respondent gave evidence, it will be

remembered...../24

remembered, he stated that Kessler did not make notes and that he (respondent) did not make the statements recorded in the notes. What counsel put to Kessler in cross-examination, was that his notes were an "ambiguous record" in that they recorded respondent as having said, on the one hand, that he was involved in a head-on collision, and, on the other hand, that he could not remember the accident. Kessler's answer was that when respondent stated that he was involved in a head-on collision, he was either reconstructing, or else saying something which someone else had told him. Kessler said, furthermore, that he asked respondent what the last thing was that he could remember, and that respondent's reply was that he saw lights. He also said that he specifically asked respondent what he could remember after seeing the lights, and that respondent said that he could remember nothing more. Counsel also put it to Kessler that "that he did not make it specific" to respondent that he

was...../25

was "interested in the yard by yard approach to the accident". The suggestion was, as I understand it, that Kessler did not try to establish what the very last moment was which respondent could remember. The witness's answer was: "I asked him what he actually remembered and he remembered seeing lights. This is specific, he remembered seeing lights and then he remembered nothing more until he woke up in hospital some time thereafter. That is what he told me".

The trial Court, while finding that respondent "did not create an unfavourable impression in the witness-box", rejected his evidence that he could remember everything that happened right up to and including the impact. The Court, accepting Kessler's evidence, found that respondent's statement that he told Kessler that he could remember the impact, was untruthful; that his untruthfulness related to "an important aspect of the case", and that consequently his "credibility as a whole" was

affected...../26

affected. Although the Court did not accept respondent's evidence, as aforesaid, it expressed the view that it was unlikely that he would have swerved across the road in the manner alleged by Spies. The Court held that Spies was untruthful with regard to the pointing out of the point of collision, and it rejected his version of how the collision occurred. Abrahams's evidence was accepted.

In this Court respondent's counsel (who also appeared in the Court below) argued that the trial Court attached too much weight to Kessler's evidence. Kessler's notes of what respondent told him, counsel submitted, were "inconclusive", because they did not show precisely how long before the impact respondent's amnesia commenced. Consequently, so it was argued, one could not exclude the possibility that, even if respondent could not remember the impact itself, he could remember everything that preceded it. (Cf. the suggestions which counsel

put...../27

put to Kessler in the course of his cross-examination). In view of this possibility, it was argued, one would not be justified in holding that respondent's evidence as to what preceded the collision was unreliable. I do not think that counsel's submission can in any way affect the trial Court's finding as to respondent's credibility and, consequently, the reliability of his evidence. The point is that the Court held that respondent was untruthful when he denied that he told Kessler that he did not remember the impact. It cannot be said that the Court erred in making this finding, and in the circumstances it was, with respect, fully justified in holding that respondent's untruthfulness on this point affected his credibility as a whole. Respondent also testified, it will be recalled, that Kessler did not make notes of what he told him. This evidence, too, was untruthful. Counsel also submitted that it should be borne in mind that

respondent's..../28

respondent's statement to Kessler that he could not remember the impact was not made "in the contex of this case" (these were counsel's words). By this counsel meant, if I understood him correctly, that respondent might not have appreciated that it could be important to be wholly accurate in what he told Kessler. I do not think that this submission , if I understood it correctly, has any merit, and it cannot validly be advanced in the face of Kessler's evidence. He said, it will be remembered, That he asked respondent what the last thing was that he could remember, and that respondent's reply was that he saw lights; and, also, that he specifically asked respondent what he could remember after seeing the lights, and that respondent said that he could remember nothing more. In the circumstances I consider that counsel's submission concerning the trial Court's finding as to respondent's credibility are unsound. The appeal must therefore be dealt with on the basis that the finding was correctly made.

In...../29

I now proceed to consider appellant's contention that the trial Court erred in rejecting the evidence of Spies as being untrue. The further question as to whether the trial Court should have accepted Spies's evidence, will be considered later in the judgment when I deal with the appeal against the Court's order on the counterclaim.

The trial Court held that, although Spies was not an impressive witness, it could not reject his evidence on the ground of demeanour alone. It found that he was untruthful "concerning the point of impact", as appears from the following passage in its judgment:

> "I find, however, that he was untruthful concerning the point of impact - such point not only being out of keeping with his own evidence, but in conflict with the marks observed on the road by Barnard, whose evidence I accept".

In finding that Spies drove on his incorrect side of the road, the trial Court also placed reliance on the evidence

of...../30

of Abrahams. This point will be dealt with after I have considered what is stated in the passage just quoted.

Ad the finding that the point of impact indicated by Spies was out of keeping with his own evidence:

It is not stated in the judgment in what respect(s) the point of impact pointed out by Spies was out of keeping with his evidence, but it was assumed by counsel that the learned Judge probably had in mind the fact that Spies indicated a point 1 metre (about 39 inches) west of the centre line as having been the point of impact, whereas he testified that he travelled on a straight course about 12 to 18 inches west of the line. The question whether the point indicated by Spies could, or could not, have been the point of impact, would depend, primarily, on how far respondent's vehicle had encroached onto Spies's half of the road, and at what angle it was to Spies's vehicle when the collision occurred. These questions were not investigated, and I

agree...../31

agree with the submission of appellant's counsel that one cannot hold, on Spies's evidence, that the impact could not have occurred at a point 39 inches from the centre line if Spies was, at the time, travelling from about 12 to 18 inches from the centre line. It is true that Spies said that respondent's vehicle collided with the right front portion ("regter voorkant") of his vehicle, but one cannot infer from this that the actual point of impact between the two vehicles could not have been 39 inches from the centre line: Spies's vehicle was 8 feet wide, and even if it was 12-18 inches from the centre line, it could have been struck on what one may, I think, validly describe as its "regter voorkant". In the circumstances I do not think it can be said that the fact that Spies indicated a spot 39 inches from the centre line was out of keeping with his evidence. In any event, the real question in issue is whether it can be found -

as...../32

as the trial Court did - that Spies was untruthful concerning the pointing out. It seems to me that, in order to make such a finding, one would have to be satisfied that Spies did not honestly think, or could not honestly have thought, that the spot indicated by him was the point of impact. In my view such a finding cannot be made. Spies testified that he indicated a spot where he saw dry mud and pieces of glass lying on the road, and, if it is true that he saw such mud and glass, he would not have acted unreasonably, I think, in pointing to that spot as having been the point of impact. It should be remembered that Spies's evidence was that he did not observe marks on the road to the south of that point on the night in question. It does not appear from the judgment of the Court a quo whether the learned Judge accepted Spies's evidence that he saw mud and glass on the road and that he fixed the point indicated by him with reference thereto, but one gets the impression that

he...../33

he did not. I say this because the learned Judge, when dealing with counsel's submission that Spies's evidence was corroborated by that of Meyer, said: "Defendant sought to find confirmation of Spies's evidence in that of Sergeant Meyer who testified to having observed scattered glass and mud in the vicinity of the point of impact pointed out by Spies. This evidence of Sergeant Meyer was based solely on memory, no note having been made by him of his observations. Not only, therefore, is his evidence somewhat suspect, but it is in any event of doubtful value in attempting to fix the point of impact". The learned Judge erred in stating that Meyer made no notes of his observations and that he relied purely on his memory. Meyer said that he made notes of what he observed on the night in question, and that he drew up his plan the next day. Furthermore, Meyer said that he could recollect seeing mud and glass on the road, and that evidence was not challenged in cross-

examination..../34

examination. In the circumstances it seems to me that the trial Court should have held that Spies's evidence as to the presence of mud and glass on the road was indeed supported by that of Meyer.

Finally, on this point, counsel for appellant submitted that an impact in a case like the present is "not confined to a pinpoint", and that the trial Court attached too much significance to the fact that Spies pointed to a spot 39 inches from the centre line while he testified that he travelled about 12-18 inches from the line. I agree with this submission.

In view of the aforegoing, I am of the view that the trial Court erred in holding that Spies was untruthful concerning the point of impact on the ground that that point was out of keeping with his evidence.

Ad the finding that the point indicated by Spies was in conflict with the marks observed by Barnard:

This finding refers to the fact that Spies pointed

out...../35

out a spot 39 inches from the centre line, whereas, according to Barnard, there were marks much closer to the centre line. Barnard, as will appear from the summary of his evidence above, was somewhat uncertain as to where he saw marks, but this is immaterial, for the inspection in loco revealed where the marks were. As appears from the notes of the inspection, there were marks close to the centre line, and also marks to the south of the point indicated by Spies. The trial Court held that these marks were inconsistent with the point indicated by Spies, and that he was, therefore, untruthful about the point of impact. I do not think that the Court was justified in making such a finding. Spies testified to having seen marks which commenced at the point indicated by him, and he said that he did not observe other marks. He conceded, however, that there might have been other marks, including marks to the south of the point indicated by him. The presence of such other marks cannot, by

itself...../36

itself, show that Spies was dishonest when he did his pointing-out, for he said that he did not observe such marks on the night in question. In order to find that Spies was untruthful, one would have to say that he knew that there were other marks which had to be taken into account when attempting to fix the point of impact, but that he ignored them, or that he lied in Court when he said that he did not observe such marks on the night of the collision. Spies was cross-examined as to where he saw marks on the night in question, but it was never suggested to him that he was untruthful when he said that he did not see marks other than those mentioned by him. The question arises whether one can infer from the position in which the various marks were found that Spies could not have believed that the impact occurred at the point indicated by him. In my view the answer to this question is "no". There is no evidence on which it could be found that the marks could not have been

made...../37

made in the positions in which they were found if the impact occurred at the point indicated by Spies. The evidence shows that the whole front carriage of Spies's vehicle was torn off in the collision, and there is no way of establishing what parts of his vehicle came into contact with the road surface. Spies, it will be recalled, stated that a diesel tank fitted underneath the right hand side of the bus was dragged over the road. ("Dit het ook op die teer geskuur"). Some of the marks, as I have said, were to the south of the point indicated by Spies, but could they not have been made by the rear part of Spies's vehicle when it was jolted in the collision? A further point to be mentioned is that the learned Judge, after stating that "there were marks extending from just to the west of the centre line in a northwesterly direction.....", proceeded to find that they were "probably caused by one or other of the vehicles involved in the collision". (My underlinging).

It...../38

It seems to me that, if one assumes that some of the marks could have been caused by respondent's vehicle, it becomes even more difficult to say that the marks which were caused by Spies's vehicle justify the conclusion that his pointing-out of the point of impact was dishonest.

Finally, as to the marks, it is to be noted that they were all to the west of the centre line. The learned Judge says, in a passage in his judgment to which I have not yet referred, that the marks are "inconsistent with the point of impact pointed out by Spies, and probably also with the evidence given by him, but consistent with Plaintiff's version of the collision". Since the marks were all on Spies's side of the road, I find it difficult to understand how it can be said that they are more consistent with respondent's version of the collision than with that of Spies. If one can, in the absence of expert evidence, draw any inference from the location of the marks, I would say that they are more consistent

with...../39

with the view that the collision took place on Spies's side of the road than that it occurred on respondent's side.

I now proceed to discuss the trial Court's reliance on the evidence of Abrahams. Abrahams was considered to be an independent and reliable witness. He made a favourable impression on the learned Judge, and was found not to have been shaken in cross-examination. As to the question whether it was Spies's vehicle which Abrahams passed near the southern bend in the road, the learned Judge said: "An analysis of the evidence satisfies me, on a balance of probabilities, that the vehicle referred to by Abrahams in his evidence was that driven by Spies". The learned Judge found, furthermore, accepting the evidence of Abrahams, that Spies's vehicle passed Abrahams at a point approximately 900 metres from the point of impact; that Spies was driving partially on his incorrect side of the road at the time; that Spies's headlights

were...../40

were on bright throughout, and that, when Spies's vehicle was last observed by Abrahams, it was about 800 metres from the point of impact, still travelling partially on the incorrect side of the road. In addition, on the evidence of Abrahams, taken "in conjunction with that of Plaintiff" (respondent) and the evidence of Spies that he did not deviate from the course which he followed, the trial Court found that Spies was still partially on his incorrect side of the road when the collision occurred. The Court held that it was conceivable that Spies "mis-assessed his position on the road, despite his denial to the contrary".

I fully appreciate that the trial Court had the advantage of seeing Abrahams in the witness-box, but I am nevertheless satisfied, on reading his evidence, that the trial Court erred in its assessment thereof. It can easily be demonstrated, I think, that he could not possibly have passed Spies's vehicle at a point about

900...../41

900 metres south of the point of impact. (As pointed out above, appellant's counsel cross-examined Abrahams — with a view to showing that his evidence could not be correct. The question is, however, not discussed in the trial Court's judgment).

The collision occurred about midway between the northern and southern ends of the straight stretch of road, which was about 2 kilometres long. The G.M.-Addo crossing was about 1 kilometre to the north of the northern end of the straight stretch of road. All this was observed at the inspection in loco, and was common cause between the parties. Respondent's evidence was that he travelled at a speed of about 40 m.p.h., while Abrahams said that his speed was 55-60 m.p.h. (at least until he neared the southern bend, when he slowed down and finally stopped.) Spies's evidence, which was not challenged in cross-examination, was that he travelled at a speed of 40 m.p.h. The trial Court, accepting

Abrahams's...../42

Abrahams's evidence, found that he passed Spies at a point about 900 metres south of the point of impact. If Spies and respondent travelled at the same speed (i.e., about 40 m.p.h.), it follows that respondent must, at the moment when Spies passed Abrahams at a point about 900 metres from the point of impact, also have been about 900 metres away from the point of impact - i.e., 900 metres to the north of the point of impact -, otherwise the two vehicles could not have met at the point of impact. Now, if this is so, it would mean that Abrahams travelled about 2 800 metres from the G.M.-Addo intersection, i.e., 2 900 metres less the 100 metres he was ahead of respondent at the intersection, in the same time that it took respondent to travel 1 100 metres, i.e., the distance between the intersection and a point 900 metres north of the point of impact. A simple calculation shows that this could only have happened if Abrahams travelled at a speed of about 102 m.p.h. over the whole distance of 2 900 metres.

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This could obviously not have happened. Abrahams's version can also be tested in the following way. If respondent's speed was 40 m.p.h. and that of Abrahams 60 m.p.h., respondent would have travelled about 1933 metres in the time that it took Abrahams to cover 2 900 metres. Allowing for the fact that Abrahams was about 100 metres ahead of respondent at the intersection, it would mean that respondent was about 1833 metres south of the intersection (which is about 167 metres north of the point of impact) when Abrahams reached a point about 900 metres south of the point of impact. On Abrahams's evidence this could not have happened, for respondent - like Spies - must at that moment have been about 900 metres from the point of impact. Similar calculations show the following: If one assumes that Abrahams's average speed was 55 m.p.h., respondent would have been 2 010 metres from the intersection when Abrahams reached a point 900 metres south of the point of impact, i.e., respondent would then have been at the point where the collision took place; if one assumes that Abrahams's average

speed...../44

speed was 50 m.p.h. and that of respondent 40 m.p.h., respondent would have been 240 metres beyond (i.e., to the south of) the point of impact when Abrahams reached a point 900 metres to the south of it. I appreciate that one is dealing with estimated distances and speeds, but it seems to be clear that, even if one makes the most liberal allowances for this fact, one cannot escape the conclusion that Abrahams's version was an impossible one. As to the question of estimates, it should also be noted, however, that certain relevant points were observed, and agreed to, at an inspection in loco; as to the question of speed, more particularly, it will be observed from the aforegoing that the lower Abrahams's speed is assumed to have been (he said that he did not travel at 55 or 60 m.p.h. all the way), the less credible his evidence is shown to be.

In view of all the aforegoing I consider that the trial Court erred in finding it proved that Abrahams

passed...../45

passed Spies at a point about 900 metres from the point of impact, and that Abrahams saw Spies travelling partially on the incorrect side of the road at a point 900 metres - or 800 metres, for that matter - from the point of impact. It follows from this that in my view the trial Court also erred in holding that it could rely on Abrahams's evidence in considering the question whether Spies was on his incorrect side of the road when the collision occurred. The Court found, as said before, that the vehicle to which Abrahams referred was that driven by Spies, and in this regard counsel for respondent referred us to Abrahams's evidence that the bus which forced him off the road was the first bus which passed him that night. In view of what I have already said about Abrahams's evidence, - and I shall refer to two other unsatisfactory points about his evidence presently -, I regard all of his evidence about the bus, or buses, which passed him on the night in question as suspect and unreliable, and

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in the circumstances I do not think that one is entitled to find that it was Spies's vehicle to which Abrahams referred. I would also point out in this regard that Spies's evidence was that another bus left Swartkops before he did. His evidence was, of course, rejected by the trial Court, but the Court did so on grounds which, as I have said, I consider to be unjustified, viz., because it held that Abrahams was a reliable witness, and because it found that Spies was untruthful with regard to his pointing out of the point of impact.

I said above there are two other unsatisfactory points about Abrahams's evidence. Both relate to his evidence about the vehicle that forced him off the road. The first is that he was unable to give any sort of description of the vehicle concerned. He referred to it as a "bus", but when he was asked in cross-examination whether it was an ordinary passenger bus, he said that it was - which it was not, if it was Spies's vehicle to which

he...../47

he referred. It is true that he said that he was blinded by the approaching vehicle's lights, but this can hardly be a satisfactory explanation of why he was unable to see what sort of a vehicle it was after he had pulled off the road. He was not even able to say whether the vehicle consisted of a single unit or not. He could not recollect seeing the "horse", and although he said that he looked at the vehicle as it went away from him over a distance of about 100 yards, he was unable to say whether he saw a luggage trailer or not.

The second point relates to Abrahams's evidence about a conversation he had with William Scheuble. He testified that he met William Scheuble about two weeks after the collision and that Scheuble then told him that respondent had been involved in a collision with a railway bus. This was the first he had heard about it, he said. He was asked in cross-examination: "And didn't you say to him, do you remember that bus that we saw on

the...../48

the bend, or near the bend, on the wrong side of the road?" His reply was, "I only mentioned to him that it must have been those buses, because it was on the same night that it happened", and then he proceeded to say, in answer to further questions by counsel, that he had only a "small discussion" with Scheuble, and that he never spoke to respondent about the matter - "I didn't know the plaintiff", he said - until about two weeks before the trial. I find this evidence very unconvincing. It seems to me that if Abrahams had indeed had such a disconcerting experience with a railway bus on the night in question as testified to by him, he would immediately have associated the collision with that vehicle, and would not merely have made a general sort of reference to "those buses". Scheuble had, after all, been his passenger on the night in question, and would also have known about the alleged incident. The reason given by Abrahams for not having spoken to respondent about the matter until about two

weeks...../49

weeks before the trial, viz., that he did not know him, is also unsatisfactory, for, even if he did not know him personally, he could have got into touch with him through William Scheuble if he wanted to do so.

There is one further point to consider with regard to the question whether it was proved that Spies was negligent, viz., the view of the trial Court that it seemed unlikely that respondent "would have swerved in the manner and circumstances described by Spies, there being no apparent reason for his doing so". I respectfully agree with this view, but the point cannot, by itself, justify a finding that the collision must have been caused by Spies's travelling on the incorrect side of the road - and the trial Court, I should add, did not make such a finding.

In view of all the aforegoing I am of the view that the trial Court should not have held it proved that Spies was negligent, and that it should not have given the

judgment...../50

judgment it did on respondent's claim. In my view an order of absolution from the instance should now be made on that claim.

I now come to appellant's appeal against the trial Court's order on its counterclaim. Counsel for the appellant argued that it should be held that respondent was wholly to blame for the collision, and that the trial Court's order should be altered to one granting judgment in appellant's favour for the full amount of its agreed loss. I do not agree. Although I am of the view, as stated above, that the trial Court erred in relying on the evidence of Abrahams and in holding that Spies was untruthful in the respects found by it, I am nevertheless not satisfied that appellant, on whom the onus lay to prove negligence on respondent's part as far as its couterclaim was concerned, established that the collision occurred in the manner described by Spies. I hold this view primarily because of a point that has already been

mentioned...../51

mentioned, viz., the unlikelihood that respondent would have swerved across the road in the manner alleged by Spies. Spies himself, as I have said before, could think of no reason why respondent should have acted in that way. In my view an order of absolution from the instance should have been made on respondent's counterclaim. It follows that appellant's appeal against the trial Court's order granting judgment in its favour for only R730,60 cannot succeed.

In the course of his argument appellant's counsel submitted inter alia that if this Court held that neither appellant's nor respondent's version as to how the collision occurred should have been accepted by the trial Court, it should make an order granting absolution from the instance on both the claim and the counterclaim. Respondent, as stated above, did not note a cross-appeal, and after the conclusion of argument counsel for the parties were asked to submit written argument

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on the question whether this Court could, in the absence of a cross-appeal by respondent, make an order granting absolution from the instance on appellant's counter-claim. Counsel submitted argument as requested. The order made by the trial Court on appellant's counterclaim is, clearly, a "judgment or order" within the meaning of those words in sec. 20(1)(b) of the Supreme Court Act, no. 59 of 1959, and Rule 5(3) of the Rules of this Court. The respondent, as said before, did not cross- appeal against the order concerned, and he cannot now take the benefit, so to speak, of appellant's appeal against it. The order cannot be varied against appellant, i.e., to his prejudice, in the absence of the necessary cross-appeal by respondent. See Bay Passenger Transport Ltd v. Franzen 1975(1) S.A. 269(A) at p. 278 A-B; Standard Bank of South Africa Ltd. v. Stama (Pty) ltd. 1975(1) S.A. 730(A.) at p. 745 D-E, and Shatz Investments (Pty)

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Ltd. v. Kalovyrnas 1976(2) S.A. 545 (A.) at p. 560G-H.

The result is an unfortunate one for respondent, for the trial Court's order orders him to pay R730,60 to appellant, whereas I have come to the conclusion that the Court should have granted an order of absolution from the instance instead of the order it made. The result is, however, unavoidable, and is a consequence of respondent's not having cross-appealed. It follows that paragraphs 5 and 6 of the trial Court's order cannot be disturbed.

There remains the question of costs. Appellant has been wholly successful in its appeal against the order made on respondent's claim, but I do not think that it should be awarded all of its costs relating to that appeal. Appellant noted an appeal against the whole of the trial Court's order and judgment on 6 June 1975, and in its written heads of argument, dated 22 April 1976, it intimated for the first time that it would not contend that the trial Court erred in its assessment of the total

loss..../54

loss suffered by respondent. In the meantime tho whole of the record of the proceedings in the Court a quo had been prepared and lodged with this Court. Much of the evidence of the Court below was concerned only with the question of respondent's injuries and the quantum of his damages, and a substantial part of the record in its present form - I should say somewhat more than one-third of its 380 pages in all - could, and should, have been omitted. In all the circumstances I think that appellant ought not to be awarded more than 60% of its costs of the appeal against the order on respondent's claim. (Cf. Rondalia Versekeringskorporasie van Suid-Afrika Bpk. v. Pretorius 1967(2) S.A. 469(A.) at p. 658 D-E, and A.A. Mutual Insurance Association Limited v. Nomeka (a judgment of this Court, delivered on 30 March 1976).

It is ordered as follows:

1. Appellant's appeal against the trial Court's order on respondent's claim in convention is upheld. Respondent is to pay 60% of appellant's costs of this appeal.

2. Appellant's appeal against the trial Court's order on its claim in reconvention is dismissed with costs.

3. No order is made as to the costs of the written arguments which were submitted at the request of this Court.

4. Paragraphs 1,2,3,4 and 7 of the trial Court's order are set aside, and the following order is substituted therefor, viz.:

> "Absolution from the instance, with costs, is ordered on Plaintiff's claim in convention".

P.J. Rabie

P.J. RABIE

Judge of Appeal.

WESSELS, JA.)
CORBETT, JA.)
GALGUT, JA.)
VILJOEN, A,JA.)

Concur.