THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

NOT REPORTABLE
CASE NO: 660/2006

In the matter between

LARINA VENTER obo ARNOLD KLAASEN **APPELLANT**

and

ROAD ACCIDENT FUND **RESPONDENT**

CORAM: **MTHIYANE, HEHER, VAN HEERDEN, MLAMBO JJA and KGOMO AJA**

HEARD: **13 NOVEMBER 2007**
DELIVERED: **29 NOVEMBER 2007**

Summary: **Claim for damages arising out of injuries sustained by a pedestrian in a hit and run motor vehicle accident – whether negligence of the driver established by the single eyewitness account and by inferences to be drawn from the facts.**

Neutral Citation: **This judgment may be referred to as *L Venter obo A Klaasen v Road Accident Fund* [2007] SCA 158 (RSA).**

JUDGMENT

MTHIYANE JA

MTHIYANE JA:

[1] What began as an occasion of enjoyment ended in disaster for Mr Arnold Klaasen, who has been deaf and mute since the age of three. On 3 June 1995 Klaasen, some of his friends and his relative, Mr Nigel Bosman, watched a World Cup rugby match on television at a friend's house. A short while after leaving the house he lay injured at the edge of the road, from where he was removed to hospital by paramedics. He had sustained a 'head injury with left frontal contusion and scalp degloving injury.' Prior to sustaining these injuries, Klaasen was in good health and able to retain employment. He now suffers from epilepsy, his mental capacity has been detrimentally affected and he has been rendered unemployable.

[2] Klaasen instituted action in the Cape High Court against the respondent, the Road Accident Fund, claiming damages in the amount of R1 479 570,26 for loss allegedly suffered in consequence of a collision with a hit and run motor vehicle in Steenbras Road, Pineview, Grabouw on 3 June 1995. Prior to the trial, the appellant was appointed as Klaasen's curator ad litem. At the trial before Allie J the parties agreed to proceed with the merits only, the question of *quantum* to stand over for determination at a later stage.

[3] In its plea the respondent disputed that Klaasen had been injured in a motor collision and, in the alternative, alleged that in the event of the collision being proved, the driver of the vehicle concerned had not been causally negligent.

[4] The sole eyewitness to the collision was Bosman. He testified that, on 3 June 1995, after watching the rugby match at the house of a friend (Kobus), he left the house and, together with Mr Randall Brett and others, stood in the front

yard talking for a while. In the meantime Klaasen walked ahead, stepped out of the gate and stood on the pavement. It was about 22.45 and already dark.

[5] Just then Bosman heard a vehicle approaching at speed and as he turned he saw a bakkie mount the kerb onto the pavement. As it veered off back towards the road its left front side caught Klaasen, causing him to fall so that his head or face came into contact with the pavement. Bosman described what he observed as follows:

'die bakkie het baie hard aangekom en toe ons omdraai toe is dit net wat die bakkie op die kerb klim en weer af en hy vang Arnold [Klaasen] en Arnold [Klaasen] val toe met sy gesig op die pavement.'

Later on he amplified what he saw:

'En toe ek omdraai wat ek sien dis `n bakkie en die bakkie klim op die kerb en hy vang vir Arnold en hy is weer in die pad sonder "brake" het hy of iets en hy net aangejaag.'

[6] Brett also gave evidence but this did not take the matter much further. He did not see how the collision occured. He merely heard a bang ('slag') and as he turned he saw the bakkie drive away from the scene. He described the event as follows:

'Arnold [meaning Klaasen] gaan stilstaan daar op die sypaadjie en terwyl ons nog gesels het ek `n slag gehoor.'

[7] After the collision the wife of Kobus, the owner of the house where Bosman, Klaasen and the others had been watching rugby, telephoned the police to report the accident and summon the ambulance.

[8] Bosman gave an account of what had happened to the policeman, Mr Ian Bredell, who attended the scene of the accident. He pointed out various points, in particular the point of impact as being at the edge of the pavement. Bredell drew a plan of the accident indicating amongst other things that he found Klaasen lying at the edge of the pavement. His head was resting on the

pavement and the rest of his body on the road. In his accident report Bredell recorded that the accident happened at 22.45 and the sketch plan was drawn at 23.30 that night.

[9] Although Bosman pointed out to Bredell the various points at the scene and gave a description of the accident, Bredell did not take a statement from him that evening. Bredell said he did not do so because Bosman was under the influence of liquor. Bosman subsequently made a statement to the police on 5 June 1995. Two years later on 20 May 1997 he made a further statement which was lodged with the respondent, together with Klaasen's claim. During cross-examination the statements were put to Bosman by counsel for the respondent in an attempt to show that they were inconsistent with the version he gave in court. The exercise does not appear to have borne much fruit, as I will demonstrate shortly. As to Klaasen's exact position when the vehicle collided with him Bosman said in his first statement:

'Arnold [Klaasen] was reeds naby die rand van die pad gewees. Hy was nog steeds in die sypaadjie gewees.'

In the second statement he said:

'Arnold [Klaasen] het toe gegaan stilstaan. 'n Voertuig het van agter gekom en vir Arnold raakgery waar hy stilgestaan het op die sypaadjie.'

[10] The respondent disputed that Klaasen had been injured in a motor vehicle and suggested that he had been injured in an assault. The assault theory was introduced by Professor J W van der Spuy whom the respondent called as an expert witness, who was described in court as having wide experience in the research of traffic collisions. His expertise was not disputed. He compiled a report to which he spoke and which was handed into court as evidence. In the report the professor asserted that it was improbable that Klaasen's 'injuries resulted from a pedestrian traffic incident . . . '. He refuted any suggestion that

the accident could have happened as described by Bosman and asserted that the 'injury pattern and nature of the lesions favour assault more than pedestrian traffic trauma.' I will return to the professor's evidence later in the judgment. Suffice it to say that the professor did not qualify himself as an expert on how objects react in a collision on impact. His views expressed in this regard are thus no more than the views that would be expressed by a lay person.

[11] At the trial before Allie J, the appellant's claim was dismissed with costs. The learned judge held that the appellant had failed to adduce direct credible evidence that he had been injured in a motor vehicle accident and that he had thus failed to prove on a balance of probabilities that he was injured in a motor vehicle collision. The learned judge refused leave to appeal. However with the leave of this court, Klaasen appealed to the full bench of the Cape High Court. That court took the view that there was sufficient evidence to show that Klaasen had indeed been injured in a motor collision but held that the appellant had failed to prove that the driver of the hit and run vehicle had been causally negligent.

[12] As to whether or not the appellant had been involved in a motor vehicle collision Meer J (with Selikowitz and Motala JJ concurring), said:

'I find it highly improbable that the group that night in their state of inebriation would have had both the presence of mind and ingenuity to fabricate a motor collision and would have recounted this fabrication convincingly to the police in the short time span between the injury being inflicted and the arrival of Bredell. It is moreover highly improbable that had Klaasen been assaulted, an assault charge would not have been brought. There is in any event no evidence to suggest he was in fact assaulted. In the light of all of the above the probabilities suggest to me that Klaasen was hit by a vehicle, fell on the kerb and incurred the injuries on falling.'

I am in agreement with the above finding. During argument counsel for the respondent was constrained to concede that the motor vehicle collision had in

fact occurred, and that Klaasen had been injured in that collision. Counsel thus confined the rest of his argument to the question of negligence. In my view the concession was well made and it therefore renders it unnecessary to subject the evidence of Professor van der Spuy to any analysis on this aspect.

[13] This brings me to the question of negligence, which was dealt with very briefly by the court *a quo*. The court rejected Bosman's version that Klaasen was on the pavement when the collision occurred and that the hit and run vehicle had mounted the pavement. It found Bosman's testimony to be inconsistent and unreliable *inter alia* in that he had, according to the court, wavered under cross-examination when he conceded that Klaasen could have stepped into the road before the collision occurred. Consequently the court dismissed the appeal with costs. On 8 November 2006 - a year to the day on which leave was granted against the decision of the trial court - the appellant was granted special leave to appeal to this court against the judgment of the full bench.

[14] In her assessment of the evidence the trial judge rejected Bosman's evidence as to how the collision occurred as untrue. The judge found the following contradictions to be material:

(a) 'In court he said that Plaintiff stood *on the sidewalk* away from the edge of the road. In his statement to the police, two days after the incident, he says that Plaintiff was near the curb but still *on the sidewalk*. (My emphasis.)

(b) In his affidavit dated 20 May 1997, he stated that Plaintiff walked ahead of him and his friends but they were all walking on the sidewalk. In court he said that he and his friends were standing in the front garden of the house and only Plaintiff was on the sidewalk.

(c) He told the police that the point of impact was 2 metres away from where the Plaintiff was found. In court he said that Plaintiff was propelled approximately five metres forward from the point of impact.

(d) In his affidavit and statement shortly after the incident, he did not mention that the vehicle approached Plaintiff from the left side and propelled him to the right but that was his testimony in court.

In addition to the above points the trial judge also mentioned the following discrepancies:

(e) He was unable to explain how the Plaintiff was able to sustain no injuries at the point where the vehicle impacted with his body if the vehicle travelled at 100 to 120 km per hour or at a high speed.

(f) Mr. Nigel Bosman was not reluctant to say when he could not remember an aspect of the incident. For example, he could not remember the make and colour of the vehicle even though his statement two days after the incident refers to a cream coloured Isuzu bakkie. He could easily have stated that he could not remember the issues in which he contradicted himself. It is patently clear that he had a selective recollection in which he could remember aspects which portrayed the unidentified driver as negligent or reckless.'

[15] I deal with the above points *seriatim*. As to the first point (a) it is clear that both in court and in his statement to the police Bosman refers to Klaasen as having been standing *on the sidewalk*. It is also clear from Bosman's evidence that the positions which he pointed out were relative and not cast in stone. His constant reference to more or less ('min of meer') and near or about ('naby' die rand van die pad), attests to this. Furthermore Bosman was describing a moving scene, some ten years after the event – an aspect to which the court *a quo* alluded but to which in my view it accorded little weight. The accident happened on 3 June 1995 and Bosman gave evidence on 13 June 2005. To expect the kind of precision contended for by the respondent would be setting far too rigid a standard. It must also be remembered that the collision occurred unexpectedly at 22.45 in a poorly lit area (as most townships notoriously are) and so exact precision as to the point of impact in those circumstances is an unrealistic expectation. The wavering is understandable given the lapse of time. In my view the proposition put to Bosman under cross-examination and his

‘concession’ that Klaasen might have stepped into the road is neutralised by the fact that on the evidence there would have been no reason for Klaasen to do so. According to Bosman they were all going to walk together to Bosman’s house. On the probabilities Klaasen was standing there waiting for Bosman and the others who were still engaged in a conversation with Kobus, before proceeding to Bosman’s house. There would on the probabilities have been no reason for Klaasen to leave Bosman and the others and begin to walk to Bosman’s house on his own and the evidence does not suggest that that is what he did. On the evidence Klaasen was standing on the sidewalk, and the suggestion that Klaasen might have stepped into the road is, in my view, mere speculation.

[16] I turn to the second point (b). I fail to see how this is material to the question of negligence. In my view nothing turns on this discrepancy.

[17] As to the third point (c), it should be noted how the reference to ‘five metres’ was brought up. During cross-examination counsel for the respondent asked Bosman how far Klaasen landed from the point of impact. Bosman’s response was that he could not say. On further prodding, he replied that it was not far. Not to be outdone counsel pressed on:

‘Moet ons na die toneel toe gaan meneer en kyk waar die meneer tot punt B, sal u sê dis meneer tot by punt B, sal u sê dis maar vyf meter of is dit nog baie nader as vyf meter? . . . Dit kan maar nader wees.’

Bosman having given what he thought was the answer, counsel pressed on, apparently because he had not received the desired answer.

‘Nee meneer u was daar gewees, sê vir ons. Kyk na die foto, dis mos duidelik . . . Dis nie hoe dinges is, dit was . . .

U volstaan dis vyf meter, is dit u antwoord . . . Ja.’

It is clear from this evidence that Bosman was neither able nor willing to give this distance with any precision at all. It therefore follows that the discrepancy

now relied on by both the trial court and the full bench as one of the bases for rejecting Bosman's evidence is flawed and unfair.

[18] I turn to the fourth point (d). Quite frankly I do not understand this point. It is far from clear what the trial judge was trying to say here.

[19] As to the fifth point (e) concerning Bosman's inability to explain how Klaasen did not sustain injuries at the point where his body impacted with the vehicle which was (according to Bosman's estimate) travelling at 100 to 120 kilometres per hour, it appears that the trial court adopted the opinion of Professor Van der Spuy which was premised on Bosman's estimate of the speed of the vehicle prior to the collision. Van der Spuy conceded under cross-examination that, had the vehicle been travelling at a speed of say 50 kilometres per hour, there would be a greater chance that Klaasen would not have sustained other serious injuries. However, like Professor Van der Spuy the trial court fell into the error of basing its rejection of Bosman's evidence solely on the speed estimate given by Bosman. The evidence of Bosman as to the speed at which the vehicle was travelling should have been approached with caution. In Macintosh and Scoble *Negligence in Delict* 5 ed (1970) p 343 the following is said:

'The evidence of persons estimating the speed at which a vehicle is travelling is not evidence of opinion, but evidence of observation, even though it involves a certain amount of inference from facts. As such it is admissible (*R. v. Van der Westhuizen*, 1929 C.P.D. 484, and *R. v. Frankel*, 1940 T.P.D. 159). But the courts will be careful in accepting such testimony and will only do so after some prior inquiry into the competency and capability of the witness for estimating speeds has been made, and will guard against relying on evidence which, in reality, may be mere guesswork, "for in few things are greater mistakes made than in judging rates of speed". (See *R. v. De Kock*, 1918 E.D.L. 221; *Coetzee v. Van Rensburg*, 1954 (4) S.A. 616 (A.D.)), where Schreiner J.A. said:

"Bearing in mind how difficult it is for even honest witnesses to estimate speeds, distances and relative positions with reasonable accuracy, the courts rightly attach importance to traffic marks and similarly substantially unchallenged evidence."'

As will be observed the remarks of Schreiner JA in *Coetzee v Van Rensburg* (*supra*) are relevant not only on the question of the speed but also in regard to the pointing out of the various positions by Bosman. In my view, the trial court did not approach Bosman's estimation of speed with the required caution.

[20] The validity of the sixth point (f) to the effect that Bosman could not remember the colour of the vehicle is not easy to appreciate in regard to the question of negligence. In my view it belongs to the question whether or not the collision occurred. Even if it was relevant to the question of negligence I do not see how it detracts from Bosman's reliability as a witness. The trial judge described Bosman as having 'a selective recollection'. Nowhere, however, does she appear to consider the fact that Bosman was giving evidence ten years after the event. In my view in those circumstances it is only to be expected that he would not remember some of the details concerning the accident. Indeed, it would have been surprising, if not suspicious, if Bosman had remembered each and every detail relating to the incident.

[21] I think it can be accepted that Bosman was not a particularly good witness in all respects. But given the context in which he was giving evidence, coupled with the lapse of time of more than a decade, and the fact that his honesty could not be impugned, his version does, to my mind, bear scrutiny despite the fact that there were discrepancies here and there. His version as to how the collision occurred is certainly nowhere near as improbable as it is made out to be. If the vehicle mounted the pavement at a much lesser speed than 100 to 120 kilometres per hour, and its left front side caught Klaasen as the driver was correcting himself by bringing the vehicle back onto the road, that would

explain why Klaasen ended up on the edge of the road at the point where he was found by Bredell, as reflected in the police plan. It cannot on the evidence before the court be said that the distance of 2 metres from the point of impact is too short to account for that reasonable probability. No expert evidence was led to suggest that this is so. It follows therefore that the evidence of Bosman in this regard cannot be rejected.

[22] Counsel for the respondent argued that there are two contrasting versions for consideration in this case and urged us to accept the version of the respondent. The version advanced by the respondent during the trial was that Klaasen had not been knocked down by a motor vehicle but had been assaulted. As indicated, this version was abandoned by the respondent before us. This then left only one version to consider – that is the version of Bosman, which of course must be tested by reference to his credibility and upon a consideration of the probabilities. As pointed by Eksteen AJP in *National Employers' General Insurance Co Ltd v Jagers*,[1] the two issues are inextricably bound up. The following remarks by the learned acting Judge-President in that case (at 440I-441A) are apposite:

'It does not seem to me to be desirable for a Court first to consider the question of the credibility of the witnesses as the trial Judge did in the present case, . . . as though the two aspects constitute separate fields of enquiry. In fact, . . . it is only where a consideration of the probabilities fails to indicate where the truth probably lies, that recourse is had to an estimate of relative credibility apart from the probabilities.'

[23] Support for Bosman's evidence is to be found in the evidence of Bredell. He found Klaasen lying at the edge of the road. Klaasen's face was on the pavement and his legs on the road. As to how Klaasen got there, Bosman's evidence is that he was struck at a point also at or near the edge of the road and landed two metres further. The suggestion by the respondent's counsel was that

[1] 1984 (4) SA 437 (E) at 440I-441A.

Klaasen may have stepped into the road and was struck by the vehicle somewhere near the centre of the road is excluded by Bredell, who said he found no indication of any point of impact on the road. There was no broken glass or tyre marks which suggested that Klaasen had been on the road itself at the time of the collision. In my view the point of collision indicated by Bosman must therefore carry the day in the absence of any evidence to the contrary. Any other speculative excercise does not assist in the resolution of the question in issue in this case.

[24] In my view negligence on the part of the driver of the hit and run vehicle was clearly established. On Bosman's version the vehicle mounted the kerb at high speed and collided with Klaasen when he was near the edge of the pavement. I have already referred to the dictum of Schreiner JA in *Coetzee v Van Rensburg supra* who reminded us 'how difficult it is for even honest witnesses to estimate speeds, distances and relative positions with reasonable accuracy.'

[25] The fact of the matter is that Klaasen was found lying with his head on the pavement and the rest of his body in the road. Even if allowance is made for the shortcomings in Bosman's evidence, the court is entitled to draw an inference of negligence from this fact seen in the context of the circumstances of this case as a whole. The stretch of road on which the incident happened is six-metre wide, straight and level. The driver would have had an unimpeded view of the road ahead. The question that must be asked is to how therefore he collided with a pedestrian on the edge of the pavement. In my view he must on the probabilities have mounted the kerb on to the pavement and so collided with Klaasen, as testified by Bosman, as a result of his failure to keep a proper look out or bring his vehicle under proper control. In my view Klaasen is in even a stronger position than the plaintiff in *Motor Vehicle Assurance Fund v*

Dubazane[2] where a pedestrian was found dead near a pedestrian crossing on the side of a busy road. The court in that case found that the facts supported the inference that an unknown driver of the vehicle had been negligent. The majority of the court held that, as a matter of probability, the inference of negligence on the part of the unknown driver had been correctly drawn by the court *a quo*, and that there was no real basis for postulating that the driver was unaware that he collided with a human being and that the reason for his departing from the scene was not a feeling of guilt. In the present matter Klaasen was found lying on the edge of the road, in circumstances that suggest that at the very least the vehicle had left its pathway and come far too close to the pavement before the collision occurred. I consider the evidence of Bosman to provide a sufficient basis for the conclusion that the hit and run driver was negligent. In any event for the factors already mentioned in relation to where Klaasen was found on the road, on authority of *Dubazan*e, an inference of negligence on the part of the hit and run driver was capable of being drawn.

[26] In the present matter the appellant has in my view, succeeded in establishing that the driver of the hit and run vehicle was negligent.

[27] For the above reasons the appeal must succeed. As to costs, counsel for the respondent conceded that the case merits the costs of two counsel.

[28] Accordingly the following order is made:

1. The appeal is allowed with costs, including the costs of two counsel.
2. The order of the court *a quo* is set aside and replaced with an order in the following terms:

[2] 1984 (1) SA 700 (A). It will be noticed that I have written the plaintiff's name as 'Dubazane'. The plaintiff's name was misspelt. There is no such name as 'Dubuzane' in the African language. In my view it would be undesirable to perpetuate the error by continuing to refer to the case as 'Dubuzane' as it appears in the reported judgment.

‘(a) The appeal is upheld with costs.

(b) The order of the trial court is set aside and replaced with the following order.

“The defendant is liable for such damages as the plaintiff is able to prove arising out of the collision with a hit and run motor vehicle on 3 June 1995.”’

KK MTHIYANE
JUDGE OF APPEAL

CONCUR:

VAN HEERDEN JA
MLAMBO JA
KGOMO AJA

HEHER JA:

[29] The plaintiff suffered a terrible injury. Any court would assist him if it could. However, despite diligent and repeated reconsideration of the evidence, I cannot agree that his appeal should succeed.

[30] The Full Bench of the Cape High Court (*per* Meer J, Selikowitz J and Motala J concurring) delivered a careful and well-reasoned judgment. I agree with it in all material respects save one, *viz* that the plaintiff probably sustained the depressed fracture of the left frontal region of the head and accompanying degloving of the scalp when he fell on the kerb after the collision. Allie J said in

her trial judgment, ‘This would only have happened if there were protrusions on the surface on to which the plaintiff fell. No evidence of such protrusions was presented to the court’. She might have added that, as the photographs of the scene show, the so-called ‘kerb’ is virtually non-existent at the place where he came to rest. In any event, his head was not on the kerb. Furthermore the finding of the court *a quo* requires one to accept that the plaintiff sustained no bodily injuries in the course of contact with a vehicle travelling at a substantial speed, which is in itself improbable.

[31] I proceed to set out shortly my reasons for concluding that the plaintiff did not discharge the onus of proving that the insured driver was negligent.

[32] The plaintiff’s case depended on the reliability of a single eyewitness, Bosman. His evidence was not corroborated in any material respect. The circumstances for accurate observation were, to say the least, unpropitious: the light was poor, the events were unexpected and passed in a flash. Bosman had been drinking over several hours, to the extent that sgt Bredell who arrived at the scene shortly after the accident (the pedestrian was still bleeding freely) made a note in his diary that the witness was under the influence of liquor – for that reason he deemed it inappropriate to take a statement from him. Allie J, who saw the witness, did not believe him. She said, ‘It is patently clear that he had a selective recollection in which he could remember aspects which portrayed the unidentified driver as negligent or reckless’. Reference to his evidence bears her out.

[33] One cannot demand or expect pinpoint accuracy from an eye-witness. The important issues for determination in this case were:

a) the point of impact;

b) the spatial relation between the plaintiff and the vehicle in the moments preceding and at the point of impact.

But the witness either contradicted himself materially in evidence on these matters or departed from statements made by him to the police shortly after the event.

[34] Bosman testified that at the time of the collision he and his friends (other than the plaintiff) were talking inside the yard of a house near the gate. He was standing with his back to the road. However, in a statement made under oath on 20 May 1997 and submitted to the defendant he said:

'3. Op 3 Junie 1995 was ek, my broer Gideon Bosman, Randall Brett en Arnold Klaasen oppad na my huis. Ons het op die sypaadjie te Steenbrasweg geloop.

4. Ek, Gideon en Randall het met iemand langs die pad gesels, terwyl Arnold 'n entjie vooruit geloop het. Arnold het toe gaan stilstaan. 'n Voertuig het van agter gekom en vir Arnold raakgery waar hy stilgestaan het op die sypaadjie.'

In evidence he conceded that paragraphs 3 and 4 were wrong. He also said that, hearing a vehicle approach at a speed 'toe ons omdraai is dit net wat die bakkie op die kerb klim en weer af en hy vang vir Arnold [the plaintiff].'

[35] He told the trial court that the plaintiff was at a point about a metre from the edge of the road at the time he was struck and definitely not standing at or near the edge. But Bredell's evidence (reflected on his contemporaneous sketch) that Bosman identified the edge as the point of impact is obviously more reliable. Bosman twice conceded in cross-examination that the plaintiff could indeed have walked into the road. He did not deny pointing out to Bredell a point of impact on the edge of the road, but he denied that that was in fact the correct point.

[36] A licensed driver himself, he estimated the speed of the vehicle at between 100 and 120 kilometres per hour although it was beyond doubt that he had insufficient opportunity to make such an observation.

[37] His account in evidence of the movements of the vehicle, seen from the side at a distance of between 10 and 15 metres (to judge from the photographs), could only have been an imaginative reconstruction. He said

'. . . hy het op die pavement gekom, amper soos 'n – en hy kom weer pad toe, hy is amper soos een wat verloor beheer het oor die voertuig en toe met inkom, wat hy weer pad se kant toe kom, dis wat hy toe vir Arnold tref.'

[38] He first testified that the plaintiff was standing with his back to the oncoming vehicle and was struck in the back. At another time he said that the plaintiff turned his head and looked toward the vehicle. He was asked (concerning the plaintiff): 'Ten tye van die botsing, was sy rugkant na die pad gewees of hoe?' to which he replied, 'Nee, my rugkant was na die pad toe.'

[39] One further example of his unreliability, Bosman said - 'Ons het uitgehardloop om te kyk of ons nie die registrasienommer kan lees nie, maar daai bakkie is te vinnig daar weg.' But in his statement to the Fund he said that they could not read the number because the vehicle had no rear lights.

[40] The inherent probabilities (as borne out to some extent by the evidence of the defendant's expert witness, Dr van der Spuy) are against the version proffered by Bosman. If the front of the vehicle had struck the plaintiff at any substantial speed he must inevitably have been thrown or carried further than a few metres from the point of impact. Also, the injuries suffered by the plaintiff both as to location and extent, were inconsistent with a collision like that described by Bosman. The place at which the plaintiff came to rest and the

position of his body suggest, as the most plausible inference, that he was struck at some point on the tarred surface and deflected by the impact towards the left. Van der Spuy's comment that it was contrary to the laws of physics for him to have been projected into the air by a single blow on the side of the head, is simple common sense. By contrast, if Bosman's account were to be accepted, the only possible course of events is that the vehicle ran over the plaintiff after it struck him (which did not happen). On that version too the plaintiff could not have come to rest with his head on the pavement and his torso and feet on the tarred surface at right angles to the road edge.

[41] The probability is that the collision occurred on the left side of the vehicle and that the injury was caused by a protuberance such as a wing mirror or a projecting load. In such event the plaintiff would have been propelled towards the kerb away from the path of the vehicle. Since he came to rest with all of his body and legs stretched out into the road the actual point of impact must have been at least a metre on to the surface. As the single lane was only 3,1 metres wide, the likelihood is that the vehicle was then in a position on or near the middle of the road. That necessarily leads to the inference that the plaintiff had moved across the road toward its path of travel. One does not know at what speed or in what manner he was proceeding. Clearly he did not see the vehicle, if at all, until it was too late. The fact that his sole injury was to the left front of his head can only be explained on the supposition that he turned his head towards the vehicle or looked back at his friends. One cannot determine as a matter of likelihood whether he was closer to the front or the rear of the vehicle when the impact took place. He certainly never entered its line of travel.

[42] It becomes obvious that while the probabilities in an overall conspectus fall heavily against the plaintiff, a precise determination of the mechanics of the collision and the subsequent movements of the plaintiff are not possible. In the

circumstances there are too many imponderables in the case of the plaintiff. I find it impossible to infer as a probability that the driver was negligent in not taking any or sufficient action to avoid the plaintiff. I would dismiss the appeal.

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J A HEHER
JUDGE OF APPEAL

VAN HEERDEN JA:

[43] I have had the benefit of reading the judgments of my colleagues, Mthiyane JA and Heher JA. I agree with the reasoning and conclusion of Mthiyane JA. As regards the judgment of my colleague, Heher JA, I am constrained to make a few comments so as to dispel any possible misconceptions.

[44] In paragraph 6 of his judgment, Heher JA compares the testimony of the eyewitness, Mr Bosman, with the content of a statement made by him on 20 May 1997 (viz nearly two years after the collision had taken place on 3 June 1995). Heher JA regards the discrepancy between Bosman's testimony and this statement – in regard to the positions of the various people in the group of friends immediately prior to the collision – as an example of Bosman's 'unreliability' as a witness. As was the case with the trial judge, Allie J, my colleague does not give sufficient weight to the fact that Bosman was giving evidence ten years after the events of the fateful night. Moreover, my colleague

does not refer to the earlier statement made by Bosman on 5 June 1995, viz only two days after the collision. In that statement, Bosman said the following:

'Op Saterdag 1995/06/03 om ongeveer 22.45 het ek en Arnold Claasen [sic Klaasen] by 'n vriend se hek – Steenbrasweg uitgestap. Ek [onleesbaar] nog by die hek gewees. Arnold was reeds naby die rand van die pad gewees. Hy was nog steeds in die sypaadjie gewees.'

As regards Bosman's position relative to that of Klaasen immediately prior to the collision, this earlier statement is the same as his testimony during the trial. My colleague Mthiyane JA deals with this aspect in some detail in paragraph 15 of his judgment and I agree with his reasoning in this regard.

[45] As a further example of Bosman's unreliability, Heher JA relies on his evidence during the trial to the effect that Klaasen was standing at a point about a metre from the edge of the road and not standing at or near the edge. He contrasts this with sgt Bredell's evidence, as reflected on his sketch plan drawn up on the night in question, that Bosman had indicated to him that the point of impact was at the edge of the road. My colleague regards this pointing out as 'obviously more reliable' than Bosman's testimony in court. But, at the same time, Heher JA expresses misgivings about the reliability of Bosman's evidence concerning what happened on that night inter alia on the ground that Bosman had been drinking and that sgt Bredell did not take a statement from him then as he (Bosman) was under the influence of liquor. Here too, Heher JA does not have regard to Bosman's statement dated 5 June 1995, in which he says that Klaasen, although 'near' the edge of the road, was still on the pavement at the time of the collision. The judgment of my colleague Mthiyane, in paragraph 15, also deals with this aspect in greater detail, pointing out correctly that Bosman's evidence as to Klaasen's position just prior to the collision was not at all categoric and was clearly based on a rough estimate. Furthermore, Bosman's so-called 'concessions' during cross-examination on which Heher JA relies were not at all clear, and were in fact interspersed with denials of the possibility that

Klaasen stepped or could have stepped out into the road before the collision occurred.

[46] Finally, Heher JA's reconstruction of how the accident probably occurred amounts to pure speculation. There was no evidence whatsoever of protuberances such as a wing mirror or projecting load on the bakkie that collided with Klaasen. Prof van der Spuy was not qualified to testify as an accident reconstruction expert and and the respondent did not attempt to place any other such evidence before the trial court.

BJ VAN HEERDEN
JUDGE OF APPEAL

CONCUR:

MTHIYANE JA
MLAMBO JA
KGOMO AJA