

IN THE HIGH COURT OF LESOTHO

In the matter of :

VRYSTAAT FOKUS (PTY) LTD

Plaintiff

V

E. LEOMA

Defendant

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla  
on the 2nd day of February, 1990.

In this trial the plaintiff instituted an action against the defendant wherein the plaintiff claims:-

- (a) Payment in the sum of M13750.00 in respect of damages to vehicle OB 101658 as a result of a motor collision on 22nd February 1984 near Bethlehem in the Republic of South Africa;
- (b) Interest on the abovementioned amount at the rate of 11% per annum reckoned from date of judgment to date of payment;
- (c) Costs of suit;
- (d) Further and/or alternative relief.

The defendant entered his notice of appearance to defend these proceedings.

In its declaration the plaintiff set out that the collision between the motor vehicles OB 101658 and C 3846 respectively occurred on 22nd February, 1984 on

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the Bethlehem - Kestell Road in the Republic of South Africa.

It further avers that the vehicle bearing registration letter and numbers C - 3846 was at all relevant times driven by one S. Macheli acting as a servant of and within the course and scope of his employment by the defendant in the instant case.

The plaintiff was the Hire Purchaser of the vehicle OB 101658. It is contended by the plaintiff that the collision was caused solely by the negligence of Macheli acting in the capacity referred to above.

Because of the extent of the damage allegedly done to the vehicle OB 101658 the plaintiff maintains it would not be economical to repair this vehicle.

The reduction in market value of this vehicle is presented by the plaintiff as M11075.89. An additional sum of M75.89 was expended by the plaintiff as fees incurred in travelling making a composite sum of M11,151.78 claimed against the defendant. The M75.89 was later claimed under an altered head, namely "towing" instead of "travelling" fees. See para 11 of the further particulars.

Because of the amendment on page 2 of the plaintiff's declaration it appears that the original sum of M13750.00 reflected both in the summons and the original page 2 of the declaration was partly abandoned. Indeed the plaintiff's formal intent to substitute M11075.89 for M13750.00 was effected in terms of paragraph 11<sup>of</sup> further particulars furnished by the plaintiff dated 17th January 1986.

According to the plaintiff's papers the collision occurred approximately seventeen kilometres from Bethlehem; at approximately ten minutes to three o'clock p.m.

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The plaintiff refused to supply any particulars as to the direction the vehicles involved in the collision were travelling in when the collision occurred. The reason supplied was that the defendant was not entitled to any such particulars. I think he was.

The plaintiff refused on papers to furnish particulars requested by the defendant in connection with the points of impact in the bodies of the respective vehicles. The reason supplied was that the defendant was not entitled to any such particulars. I think he was.

One F. Sharp was the driver of OB 101658 at the material time.

In the absence of palpable reasons for refusing to supply further particulars requested regarding the nature of Macheli's employment with the defendant and the duty he was engaged in on the defendant's behalf at the relevant time, in place of the stock reply that the defendant was not entitled to these particulars, I think that because there were as good reasons for refusing to furnish them as for furnishing them, the matter ought to be resolved in favour of the defendant.

The plaintiff in an effort to prove the defendant's negligence indicated that Macheli drove without due care. Further that he drove on the incorrect side of the road; and too fast in the circumstances. Macheli's negligence was attributed to failure to apply his brakes timeously or at all. He is said to have also failed to advise F. Sharp of his intention to turn across the latter's line of travel. Further that he failed to keep the vehicle which he was driving under proper control and that in any event he failed to avoid the collision when by the exercise of reasonable care he could have done so.

It appears that the plaintiff's vehicle OB 101658 is a 1980 Mercedes Benz 250A model whose odometer read 143537 kilometres at the time of the collision. Its pre-collision value as amended is rendered as M11075.39

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while its post-collision value is M2750.00.

The plaintiff in its papers seems not to have addressed itself to the request to state how the amount claimed as the pre-collision value of the vehicle in question was arrived at. It is said however that to repair the plaintiff's vehicle it would cost a sum of money in excess of the amount claimed.

Although it would have been productive to be informed how the amount claimed was arrived at it appears that in the light of the plaintiff's answer that repairs would be more costly than the amount claimed, the request to furnish the particular couched in the question why it would be uneconomical to repair plaintiff's vehicle was rightly refused.

The court was favoured with annexure A in an effort to show the details of the damage to the plaintiff's vehicle. There was also handed in marked "B" a letter of demand dated 30th November 1984.

In his plea the defendant denied that Macheli was negligent in any of the respects that the plaintiff alleged. It stood to reason therefore that the plaintiff had to substantiate its allegations.

The defendant further denied any liability to the plaintiff and accordingly prayed that the plaintiff's claim be dismissed with costs.

Because the defendant has since died it was applied to the court and an order granted substituting Mrs Leoma the heiress to the deceased's estate for the defendant in these proceedings.

The court heard the evidence of P.W.1, Van Wyk for the plaintiff to the effect that he is a sergeant in the South African Police stationed at Bethlehem.

On 22nd February 1984 while in his office P.W.1 received a report concerning an accident whereupon he

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set out for the scene at a spot along the road to Kestell some 17 km outside Bethlehem. This is a tarred road.

P.W.1 arrived at the scene at about 3.20 p.m. and observed that two vehicles were involved in a collision. One bore the registration letter and numbers C-3846 and is marked as vehicle "A" in this witness's sketch handed in the proceedings as annexure E. The other bore registration letters and numbers OB 101658 and was identified as vehicle "B" in the sketch annexure "E".

The witness established that "A" had been driven by Macheli and "B" by Sharp.

P.W.1 testified that these drivers gave him an explanation of how the accident occurred. He then set about taking measurements spanning various points on the road and the position where the two vehicles had come to rest with "B" still stuck in the rear side of "A". Macheli pointed out to him the point of impact which appears as point "X" in annexure "E".

P.W.1 observed that the vehicles were travelling in the same direction from Bethlehem to Kestell.

He observed that on the left hand side as one is facing the direction that these vehicles were taking the road consists of two lanes. Only one lane is provided for vehicles moving in the opposite direction i.e. from Kestell to Bethlehem. He clarified this position for the benefit of the court by concluding that at the area in question the road consists of three lanes - two from Bethlehem to Kestell and one from Kestell to Bethlehem.

Points C to D and E to F appearing in annexure "E" span the brake marks left by left and right wheels of vehicle "B" respectively. It is interesting to observe that a good portion of the area covered by these brake marks occupy an area falling inside the opposite side of the road i.e. the brake marks occupy the area falling across the line dividing the lanes carrying traffic in

/opposite

opposite direction.

Needless to say the sketch though admittedly a rough one makes no reference to the two lanes heading for Kestell. All it shows is a dividing line consisting of a broken line lying side by side with a solid one presumably permitting traffic heading for Kestell from Bethlehem to overtake slow moving traffic while disallowing the other traffic to do so if moving in the opposite direction.

From point "O" to "P" a distance of 14,5 metres are indicated the skid marks of front wheels of vehicle A while J to N measuring 14 metres represents the rear wheel skid marks of this vehicle. These skid marks begin from inside the edge of the opposite lane and end up near point "L" between which and "K" is the farm road measuring 17,9 metres in width.

The farm road abuts on the Bethlehem - Kestell side of the road into a farm on the right. Much argument was raised concerning whether this farm road abuts against the tarred road at right angles or at an oblique angle to the right as one heads for Kestell from Bethlehem. I do not attach much importance to the angle at which the farm road abuts on the tarred road. A point of the first magnitude as far as I am concerned is that in order to enter the farm road while travelling on the Bethlehem - Kestell road one has to turn right and in the process cut across the path of the on-coming traffic travelling in the opposite direction. The farm road is a gravel road.

Although annexure "E" is a rough sketch and not drawn to scale annexure "D" consists of exact measurements. In evidence P.W.1 confirmed the distances he made on the plan. Hence according to annexure "D" the point of impact lies 1,1 metres from M-which is the middle of the road - into the opposite lane.

I have been told that the distance between points C

/and

and D measures 30 metres in length. This distance lies in the general direction of Bethlehem - Kestell road and is inside that road. It would seem therefore that before turning into the farm road lying on the right one has to travel at least 30 metres from the point indicated as the end of the left hand side solid line on the immediate right side of which is a continuous dotted line next to which a continuous solid line on the right stretches side by side with the dotted one a considerable distance past the turn-off to the right into the farm road. Thus it would seem according to the sketch a vehicle would be entitled to overtake another at least 30 metres along the Bethlehem - Kestell road before going past "K" which is the near side of the entrance into the farm road. The far side of this entrance is point "L". These points are 17,9 metres apart.

P.W.1's map describes the paths of vehicles A and B up to the point of impact. The path of vehicle A seems to have been on the extreme left hand lane before curving direct opposite the entrance into the gravel road on the right. The path of vehicle B seems to be on the inside lane parallel that described by vehicle A. P.W.1 said he gathered the story relating to the path of Vehicle A from its driver.

P.W.1 said he took the statements of both drivers. He also took the statement of Macheli's passenger Mosothoane, but did not take the statements of Van Niekerk and Bookless who came upon the scene shortly after the accident and helped disentangle Sharp from the entrapment and the scene of twisted and jammed parts of metal that the front half of his car had become. The front doors could not open. Van Niekerk and Bookless opened the rear doors, shifted the driver's seat back and thus managed to rescue Sharp from the entrapment. Macheli told me that he and his passenger tried but failed to rescue Sharp for they did not have the intelligence or presence of mind to shift the driver's seat back. However help was not long coming.

/Shortly

Shortly afterwards police also came to the scene.

P.W.1 in his evidence-in-chief told me that when he came to the scene he observed that the front of vehicle B was under the trailer of vehicle A. He said vehicle A consisted of a vehicle and a big trailer.

According to him the road around the scene consisted of three lanes. The vehicles using lane 3 cannot overtake. But the ones in lanes 1 and 2 can overtake at the end of the short barrier line.

In conclusion he elaborated as follows:-

"Point X was on the right hand side as shown on the plan. There is a long solid line along a dotted one.

There is towards East a double barrier line with a dotted line in between. Along the dotted line you can overtake, with the barrier one you can't."

Under cross examination P.W.1 said his sketch was not drawn to scale for it could normally be done if somebody had died. He was adamant that this was a normal S.A.P. (South African Police) procedure.

He further said he didn't know why the driver of vehicle A was not charged. He had intimated in his evidence-in-chief that prosecution had been contemplated against Macheli but somehow was not proceeded with.

He did not inquire why the prosecution was dropped. He further said he didn't know that Macheli had been told to go by the S.A.P. because there was nothing for him to answer.

He conceded that the traffic police might have arrived on the scene before him. However when he came there Sharp had already been rescued and taken to hospital in Bethlehem where P.W.1 later took his statement.

Though he did not deny that he was already a police sergeant at the time P.W.1 said he did not reflect in

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his report that the traffic police were there or what they did. This conclusion is derived from the following questions and answers:-

"I can't understand you as a S.A.P. sergeant compiling a report and not knowing that the traffic police were there before you - ?

I can't remember whether they were already there.

It does not appear in your report that they did a b c etc -?

It is not in my report."

P.W.1 stated that he wrote what he had been told in his plan when asked how he came to describe in it the relative paths followed by A and B prior to the accident.

He was told that Macheli the driver of A would state that P.W.1's observations of the road were wrong because at that spot the road consists of two lanes either direction. His answer was that

"On the day of the accident there were two lanes on the left and one lane in the direction from Bethlehem. It may have changed now."

"Your sketch is not useful. If you found that two lanes head for Kestell and one for Bethlehem why didn't you indicate that. For here only one lane is shown either way - ?

This is only a rough sketch.

A very rough sketch - ?

No. Just a rough sketch not a very rough sketch.

Did you observe how long the broken line was before the turn off to the farm on the right -?

I did not observe how long it is.

Since you did not observe how long it was despite you being a policeman, the driver of A says that only 12 paces constitute a broken line between the turn off and the start of a solid line which continues towards Kestell till falling out of view - ?

It is possible."

/P.W.1

P.W.1 admitted that between the turn-off and a point of clear view from Bethlehem is at least 250 paces in length. He did not record this fact despite his interest in recording facts which are relevant to the case. He did not even measure the distance between these two points.

P.W.1 stated that contrary to the impression created by reading from his map that A and B drew level for some distance before B could overtake A,

"the driver of A didn't say the vehicles were travelling side by side as shown (in the map)."

P.W.1 did not ask B's driver about where the point of impact was. This is rather strange because the driver of B was absent when the driver of A allegedly showed P.W.1 where the point of impact was. In any case before Court Macheli the driver of A was adamant that the point of impact was not in the opposite lane as shown in the map where it is reflected as lying 1,1 metres deep in that lane from the point of impact.

Macheli in his turn showed that the point of impact lay around a point marked "C" which is inside the right-hand side lane of the road leading from Bethlehem to Kestell. The point C is close to the dotted line lying on the middle of the road marked "M". It is important to note that even though Macheli is the type of witness who could be described as dull and at most times appearing to be completely mystified by court procedures he nonetheless tapped the limited resources of his intelligence to bear on his testimony that the lanes at this particular spot are four i.e. two lead from Bethlehem to Kestell while the other two lead from Kestell to Bethlehem.

Of significance regarding this controversial aspect of the scene is P.W.1's failure to indicate on his map that the lanes leading to Kestell from Bethlehem as deposed to in his oral testimony are two instead of one. Reading from his map it looks as if there is one lane either way.

/P.W.1

P.W.1 conceded that for a vehicle as light as B to have become a wreck on impact against A it must have been moving at a speed far in excess of a mere 50 km per hour. He however stated that he couldn't answer the question that B could have been moving at between 120 and 140 km per hour. He conceded that the effect of locking the wheels of B by applying its brakes such that it left 30 metres of brake marks on the tarmac before reaching the point of impact reduced the speed of that car considerably.

Another baffling feature with regard to the drawing of the map is the fact that the skid marks left by the truck A start some considerable distance from the end of B's brake marks. This is a strange feature regard being had to the fact that the car had to be pulled away from the back of the truck where it had stuck under it. One would have expected the skid marks of A to start immediately after the point of impact.

Asked whether as a man of standing in the S.A.P. seeing the point of impact to lie across the divide of the road, and the collision occur despite 30 metres of hard braking by B taken along with the fact that the view ahead of both vehicles was open P.W.1 did not get the impression that B's driver was reckless he said he did not know who was responsible for the accident.

The question was repeated whereupon P.W.1 said

"It seemed A's driver was responsible for he did not indicate."

Asked by court if A's driver told him that, P.W.1 said

"He said his indicator was on when he turned.

Confronted with defence counsel's question that

"You have just said he didn't indicate - ?

P.W.1 was clearly in a cleft stick and consequently was at a loss for words. This in my view betrayed positive inclination by P.W.1 to implicate A's driver. It is of some significance though that the traffic officers did not

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lay a charge against A's driver.

The drawing showing the manner in which the two vehicles were observed after the impact shows that B's front portion went a considerable distance at the back as well as under "A"'s back under carriage leaving projections of "A"'s rear side on either side of B's front mudguards.

But despite P.W.1's evidence to this effect in his evidence-in-chief and the clear indications of the position he found the vehicles in per his sketch when questioned under cross-examination on the issue the following emerged:-

"The back of a vehicle is not the same as the side of the vehicle - ?

Yes.

A's driver says B got stuck into the back of the trailer, you mentioned not side - ?

I can't remember if it touched the side.

I put it to you it hit four-square at rear of trailer - ?

On the rear but on right hand side.

Even in the translated statement you made you said it was on the right rear not on the side of the trailer. A's driver says the car bashed into the rear -?

I said on right of the rear.

According to your sketch and what you claim you were told by A's driver A and B moved side by side. If it is so, and if the truck lurched to the right wouldn't the car have touched or scraped either the side of the truck or of the trailer before getting under either of those -?

That's right.

In other words the movement of the vehicles before point of impact is wrong according to the sketch - ?

That's right.

For they would not have collided as shown in the sketch. A's driver will say he never showed you the point of impact. He will deny that the vehicles were going side by side before the collision for he didn't see the car He showed me."

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Under re-examination P.W.1 said it was not necessary for B to have moved to the other side in order to overtake A for A was moving on extreme left handside lane leaving the inner lane on the right free. He further stated that the speed limit on this open road was 120 km. per hour and therefore vehicle B could have legitimately been moving at 120 km per hour on that road. He said further that B was under A, but he couldn't remember if there were any damages on the trailer.

P.W.1 was asked to look at the skid marks with regard to the question put to him by counsel for the defence that the accident could not have occurred as shown on the sketch and P.W.1 said

"I would have expected it to be from behind."  
But in the same breath he shifted from the above statement and later said

"From side towards the rear".

The sketch shows that B slammed into the full rear of A. In his evidence P.W.1 seeks to persuade this Court that the sketch does not represent the true picture of how the vehicles remained after the collision. Macheli says the sketch shows the exact position. Little is it to be wondered then that the plaintiff failed to furnish the further particulars which were required of him by the defendant to indicate the portion in vehicle A which came into contact with B on collision. The prominence of that request during pleadings cannot be overlooked especially when the evidence relied on by the plaintiff envelopes this point in incredible mystery instead of clarifying it.

P.W.1's sketch, evidence in chief and credible parts of his evidence under cross examination negate the new version that he attests to in re-examination that the point of contact with A is on broadside but towards the rear end of that vehicle. It seems to me to be an after thought geared at justifying the unsubstantiated version that the relative paths of A and B were

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in lanes 1 and 2 respectively. Significantly P.W.1 is the only witness who says A was a lorry pulling a trailer. All others say it is a big truck. P.W.1 therefore cannot be credited with making accurate observations despite his rank in the police force.

P.W.2 Sharp testified that as he was travelling along the Bethlehem - Kestell road he observed vehicle A ahead of him.

He said that he believed the speed limit was 120 km per hour. As he approached A from behind it moved into the left lane just beyond the dip below. At that point the road becomes a dual road on the left hand side because it is up hill. The truck moved over into the left lane. This according to P.W.2 was a normal manoeuvre by the slow-moving truck geared at giving him way to pass on the right and fast lane.

P.W.2 flipped B's indicator to show that he was going to overtake on the right lane when there and then and without any indication by A it made a turn to the right immediately in front of B.

P.W.2's car was so close to A when the latter turned right to get into the farm road that P.W.2 slammed into the right back corner of A. P.W.2 tried to avoid the truck by trying to turn along with the truck describing a more or less parallel path to that described by the truck. At the same time P.W.2 was applying his brakes very hard.

However the accident occurred. The accident started in the lane where P.W.2 was travelling for as he remembers he slammed into A while B was in the process of travelling in the right handside lane leading for Kestell.

Then the next thing P.W.2 re-called was that the flat bed truck and his car had come to a stand-still. His seat-belt had held him to the back rest of his seat. He was bleeding profusely.

Then a passer-by a man later known as Bookless

/stuck

stuck his head through the broken windscreen and asked P.W.2 if he was still alive.

Then Macheli looked back where P.W.2 was leaning his head against the head-rest and scrambled into the truck and switched on the indicator of the truck to the right.

P.W.2 maintains he or Bookless must have said something to the effect that A's driver had only then turned the indicator of the truck on.

Then P.W.2 was helped out of the wreckage by Bookless. An ambulance conveyed him to hospital. P.W.2 swore that at the speed he was travelling there was nothing that A's driver did to make him think it was not safe to pass. Instead he did the natural thing, namely moved to the left such that P.W.2 thought he could pass safely. P.W.2 maintains that if A's driver looked into his rear-view mirror nothing could have obscured his vision.

P.W.2 recalls that he made his statement to P.W.1 on the same day at hospital in Bethlehem. P.W.2 denied P.W.1's version that the statement was taken some days later because according to P.W.1 P.W.2 was laid-up.

P.W.2 finds P.W.1's version even more strange because P.W.1 was not in that vicinity any days later.

Though P.W.2 is adamant that he told P.W.1 in his statement that Macheli went to switch on the indicator of A to the right nothing of the sort appeared in that statement. Confronted with the question why such an important act of dishonesty by Macheli did not appear in the statement made to P.W.1, P.W.2 decided not to accuse P.W.1 of negligence but stated that he remembered telling Bookless about the incident. Needless to say in his statement to the police P.W.2 did not allude to the fact that he effected a manoeuvre that made his car move parallel to A when he suddenly realised that he was

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being confronted by A's broadside as the latter suddenly turned right cutting across B's intended path.

P.W.2 says his car hit the right rear end of the truck. It seems strange to me that the car did not at that stage go into a spin but instead got stuck headlong into the back of the truck.

His testimony is in response to the questions asked, namely:-

"Why didn't you hit A broad on. Why is it that it seems you followed it into the farm road-?"

I didn't hit it full at the back but I hit at the right end; further to the end of the truck."

Yet the following question seems to elicit a somewhat contrary answer to the one immediately above, namely:-

"But you didn't hit the side - ?

No."

The reply to the next question put is amazing

"If you saw the truck on the left lane moving slowly and your car moving at that speed you couldn't have hit A at the back - ?

I have no intention of saying I followed the truck into the farm road.

Also (do you agree) that for that car to have had that extensive damage the collision must have occurred at high speed - ?

I was travelling at 120 to 130 km per hour. That is high speed."

P.W.2 said he was aware of the place in the road where P.W.1 said the accident took place.

Then the following came to surface in the evidence:-

"According to you you hit the truck on the right rear corner - ?

Yes.

Seeing that you hit it on wrong side for you and in the lane for on-coming traffic I would take it that

/the



the two lanes on the left were unoccupied - ?

Possibly, Yes.

Then when you saw that the truck turned to the right why didn't you avoid the accident by taking either of the two vacant lanes - ?

It was too late. I was moving at 33 metres per second.

I put it to you you didn't see the truck turning; you probably saw it on impact - ?

I maintain I saw it turning."

P.W.2 having earlier said he did not notice that according to P.W.1's sketch B was represented as having stuck directly behind A said he later noticed that in fact B is represented as stuck headlong behind A.

Then came the following

"You realise he represents it as stuck - ?

It shows it as underneath. I don't see it as stuck.

I put it to you he (P.W.1) testified that he found it stuck headlong under the truck. Do you want the court to accept this as representative of the position the two vehicles were in - ?

I don't know."

It is clear to me that at this stage P.W.2 was prevaricating or seeking to engage the court in an idle play on words.

I cannot see what difference it makes whether B was underneath the rear of A or stuck in the rear of A if in either case B suffered such extensive damage that the cost of repairing B would far exceed the M11,000.00 being the pre-accident value of B. See paragraph 12 of the further particulars supplied by the plaintiff. Still more surprising that P.W.2 should respond as he did to the pertinent questions put to him under cross-examination account being taken of the fact that P.W.1 stated and the

/defence

defence accepted that B was stuck so fast into the rear of A that extra means had to be resorted to of separating them.

P.W.3 Bookless testified that he gave his statement to Bloemfontein Police 3 to 4 weeks after the accident because he didn't relish waiting by the roadside on the day in question for he was eager to get to Harrismith.

P.W.3 was travelling with Van Niekerk who has since past away. They came to the scene. They helped P.W.2 out of the car that was stuck behind the truck.

P.W.3 then saw the driver of the truck go back into the cab of his truck and switch on his indicator to the right. P.W.3 made a remark to A's driver that it was too late to try to put the indicator on for it had not been on when P.W.3 and Van Niekerk came on the scene. He testified that this was a solid truck without a trailer. He further said B was more to right of A's back.

Questions were put to P.W.3 as follows regarding the incident where Macheli is said to have manipulated A's indicator on:-

"P.W.2 said the two of you talked about something apart from asking how he was - ?

I can't remember talking about or discussing anything with Mr Sharp.

As you say according to you when you saw A's driver do this stupid thing of waiting until witnesses had come and only then go and switch the indicator on, you challenged him saying it was too late for him to do that -?

Yes.

But P.W.2 said the question of the indicator was confined to the discussion between you and him, one drawing the attention of the other to what was happening. Macheli was not challenged. So which of you is telling us the correct thing on the point -?

I can't remember discussing matter with Mr Sharp.

/Assuming

Assuming you saw the indicators being put on, is it your story that you told the police 3 to 4 weeks later that you saw A's driver switch on the indicator. Did you tell police that -?

Yes."

Significantly in his statement to the police P.W.3 had said .....

"... while we were waiting for the police to arrive, I saw that the black man who was the driver of the heavy vehicle had put on his indicator which was not on at the time when we had arrived there."

Yet when questioned on the point the following surfaced

"A story told before you gave evidence is that before going into the cab the driver had walked away from the truck. Did he do such a thing -?

Not that I can remember.

But you would have seen him go back to the cab had he done such a thing. Yet your statement as translated says you didn't see him switch the indicator on. It says when you arrived you didn't see the indicator on; but somewhere along the line you saw it on -?

I saw him switch it on.

Why didn't you tell the policeman that you saw the man come into the cab and switch on the indicator - ?

I didn't write the statement. It was police who did.

(The question was repeated) - ?

I have no idea.

You don't know why you didn't tell the policeman that -?

No. I don't know.

That's because you didn't see any driver standing next to the cab and going into the cab to switch the indicator on - ?

Moolman P.W.4 gave evidence which I need not elaborate on.

/Thereafter

Thereafter Macheli gave evidence for the defence. As stated earlier he was very inarticulate and uninspiring in the manner in which he gave evidence.

However he said when approaching the farm and making ready to turn to the right he was already indicating where he was going to enter. Then when he was about opposite the gate he felt something hit his truck so hard that his truck was pushed out of the road. He stopped and saw that B had slammed into the rear of A up to the diff.

D.W.1 showed a white woman what had happened. The latter effected a U-turn presumably to report to the police or get some help. Two white men arrived and tried to help B's driver out of the wreckage.

A black policeman asked D.W.1 what had happened. Then D.W.1 was asked to report the following day. But later D.W.1 was told to drive home after he had been asked again to explain what had happened.

D.W.1 said when it got hit at the back his truck was moving at about 20 km per hour. He maintains it was B's driver who caused the accident for he was travelling at too high a speed.

D.W.1 said under cross-examination that he went as far as Std. 1 at school. He said he could not read a map; for his eyes don't see well due to the effect of paraffin heaters.

It was when he was shown the skid marks J.N. and O.P. on the map that he focused his attention on the graphic representation of the road and objected that the lanes were four in all as against two only shown in the sketch. It was also then that he pointed out that "X" is not correctly placed on the sketch. He pointed out that it should have been near where point "C" is lying inside the inner lane heading for Kestell.

/He

He stated that the accident occurred around 10 am or 11 am. He said he didn't remember the exact time as this happened a long time ago.

True to his level of education he proceeded as follows to questions put:-

"There are two lanes in the road you were following and two in the opposite direction -?"

Yes.

What traffic travels on the left hand lane and what traffic travels on the right hand lane as you head for Kestell from Bethlehem -?

They are vehicles. We use two lanes which are in the middle of the road. When I had to turn to the direction where I went I used the one on the right.

You went over hill and descended towards the right when you reached the dip -?

Yes

When you descended did you use the left hand side lane -?

Yes. But the one which is on the right.

You see the arrows A and B - ?

Yes.

These arrows show your vehicle was using the extreme left hand lane -?

This map is not the same as the road which had four lanes.

(Question repeated) - ?

I swerved to the inside lane to give way to whatever traffic would come.

When did you swerve -?

Before swerving I indicated first.

How far were you from the turn-off when you swerved to the inside lane -?

About 40 paces.

Before you indicated that you were going to swerve to

/swerve

the right did you look back -?

I looked into the mirror.

What did you see -?

When I started swerving to the inside lane there had not yet been any vehicle emerging from behind me.

Did you at any time see a vehicle coming from behind you -?

I looked into the mirror first. When I was a little ahead I looked into the mirror. I saw vehicle emerge at great speed. When I thought it was passing on the other side I felt it hit my vehicle. It hit mine and pushed it outside the road."

The agony I felt while trying to follow D.W.1's testimony was appreciably relieved when a more experienced interpreter put across to him proper translations of English questions put by Mr Molyneaux into proper Sesotho text.

I formed a clear impression that D.W.1 was not, in all his infectious agony that swung between nervousness and outward form of uncertainty, attempting to mislead the court.

In S vs Kelly 1980(3) SA 301 at 302 Diemont J.A.'s remarks are summarised as follows:-

"There can be little profit in comparing the demeanour of one witness with that of another in seeking the truth. There is no doubt that demeanour -

'that vague and indefinable factor in estimating a witness's credibility'

.... can be most misleading. The hallmark of a truthful witness is not always a confident and courteous manner or an appearance of frankness and candour. As was stated by Wessels J.A. in Estate Kaluza vs Braeuer 1926 AD 243 at 266:

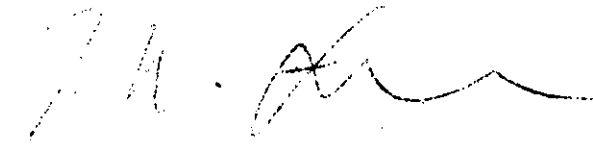
'A crafty witness may simulate an honest demeanour and the Judge had often but little before him to enable him to penetrate the armour of a witness who tells a plausible story.'

On the other hand an honest witness may be shy or nervous by nature, and in the witness-box show such hesitation and discomfort as to lead the court into concluding, wrongly, that he is not a truthful witness. Nonetheless, while demeanour can never serve as a substitute for evidence, it can, and often does, 'reflect on and enhance the credibility of oral testimony.' The experienced trial officer is well aware of this fact ..."

The plaintiff's version of how the accident occurred beggars description. It indeed escapes my perception of physical reality in moving vehicles how B moving on the extreme lane and curving suddenly to the right can, instead of hitting A's broadside, come four square into A's rear and remain stuck under it.

I reject the plaintiff's contention that A's driver was negligent. I find no merit in the argument that A's driver could wait all the while before he showed a white lady what had happened and all the while after she left and only when Bookless and Van Niekerk arrived did he switch the indicator on. Needless to say this episode appears nowhere in Sharp's statement to the police. The portion that appears in Bookless's statement taken between 3 and 4 weeks after the incident does not show that he challenged D.W.1 about the uselessness of his endeavour to concoct the evidence in his favour. In any case if P.W.3 challenged D.W.1 P.W.1 could have heard. But strangely he said nothing about the challenge in this court. If such a thing could have happened regard being had to its enormous evidential value to the plaintiff's case, could it have been left out? I think not. It is my considered view that the collision occurred because P.W.2 was moving too fast and with less caution than was warranted in the circumstances.

The plaintiff's claim is dismissed with costs.



J U D G E.

2nd February, 1990.

For Plaintiff : Mr Molyneaux  
For Defendant : Mr Seotsanyana.