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Case No.: I. 54/98

IN THE HIGH COURT OF NAMIBIA

In **the matter between:**

VANESSA CECILIA GRIFFITHS **PLAINTIFF**

and

THE MOTOR VEHICLE ACCIDENT FUND **DEFENDANT**

CORAM: HANNAH, J

Heard on: 13th-26th February 2001

Delivered on: 20th March 2001

JUDGMENT

HANNAH, J: On 22nd September, 1994 Clive Gareth Paul Griffiths (the deceased) was driving a Mercedes Benz 200, Registration Number N36661W, along the Otjiwarongo to Omaruru road in a southerly direction. Whilst entering the township of Kalkfeld the vehicle left the road and collided with a tree. The deceased died as a result of injuries which he sustained. Those facts are common ground between the parties.

As a result of the death of the deceased, the husband and, so it is claimed, the breadwinner of the

plaintiff and her five minor children, the plaintiff instituted this action against the defendant for the payment of damages to her in her personal capacity and in her capacity as mother and natural guardian of the minor children.

The action was instituted against the defendant, a juristic person by virtue of section 2(2) of the Motor Vehicle Accidents Act, No. 30 of 1990, on the strength of an allegation that the death of the deceased was caused by the negligence of the owner of the Mercedes Benz. In the original particulars of claim it was alleged that the vehicle "suddenly tore apart in two pieces and left the road" and it was further alleged that the owner:

> 6.1 .....allowed the vehicle to be driven in a dangerous state of disrepair which the owner knew or ought to have known existed.
>
> **7.** The state of disrepair was a latent nature and not within the knowledge of the Plaintiffs husband."

The particulars of claim were, however, amended and the allegations just referred to were amplified and extended. It is now alleged in paragraph 5 of the amended particulars of claim that the Mercedes Benz:

> (a) tore apart in two pieces and left the road, alternatively
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> (b) commenced and/or developed tearing and/or cracking and/or commenced breaking up and left the road and collided with a tree; alternatively
>
> (c) left the road and collided with a tree.

As for the negligence of the owner, it is now alleged:

"7.1 such owner or employee(s) (both owner or employee(s) hereinafter collectively referred to as "the owner") consented and/or permitted and/or allowed the motor vehicle to leave its custody and/or gave or handed out the motor vehicle to other parties (or allowed the motor vehicle be handed out or to be given to other parties) for the purpose of selling or auctioning off the motor vehicle to third parties generally and/or to plaintiffs husband particularly and/or by allowing the motor vehicle to be driven by plaintiffs husband, whilst the owner knew or ought to have known that the motor vehicle:

(a) contained defects, latent or otherwise;

and/or

(b) was in a dangerous or other state of disrepair which made the motor vehicle unsafe or unfit for use on a public or other road;

and/or

(c) was generally unsafe and/or unfit for use on a public or other road:

Alternatively

7.2 the owner was negligent in that it failed to properly repair and/or maintain and/or inspect the motor vehicle for defects before allowing the vehicle to leave its custody or giving or handing out the motor vehicle (or allowing the motor vehicle to leave its custody or giving or handing out the motor vehicle (or allowing the motor vehicle to be given or handed out) to other parties for the purpose of selling or auctioning off the motor vehicle to third parties generally and/or to plaintiffs husband particularly and/or before allowing the motor vehicle to be driven by plaintiffs husband;

In the alternative to paragraph 7 *supra* (and only in the event of it being found what is set out in the aforesaid paragraphs 7, 7.1 and 7.2 *supra* does not *per se* constitute negligence irrespective of whether the hereinafter mentioned steps were taken or not), plaintiff avers that the owner was negligent in that the owner acted in the manner as set out in paragraph 7.1 *supra* and further because the owner failed to inform or take reasonable steps to

> inform or bring to the knowledge of plaintiff s husband or any other prospective purchaser of the motor vehicle the relevant facts and circumstances regarding the condition of the motor vehicle as set out in paragraphs 7.1(a) to (c) *supra*, the contents hereof are incorporated by reference as if specifically repeated herein;"

On 10"' March, 1998 the parties agreed that if plaintiff could not prove ownership as pleaded in the particulars of claim the defendant could not be held liable and the parties therefore agreed that the trial of the action should be separated into three parts. The question of ownership should be decided first. If this decision was in the plaintiffs favour then the question of liability should be decided and if this decision was also in the plaintiffs favour quantum should then be decided. The separation of the trial in this way was approved by the Court.

And so it came about that from 29th February, 2000 to 2nd March, 2000 Levy, A.J. heard evidence and argument on the question of ownership. On 10th May, 2000 the learned judge delivered his judgment on this aspect of the case and made the following order:

> "(a) Ownership of the Mercedes Benz 200, N36661W driven by Plaintiffs husband on 22 September 1994, when Plaintiffs husband was killed, vested at that time, in First National Bank Ltd., and First National Bank Ltd. was the owner thereof as required by Act No. 30 of 1990.
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> (b) Costs of this hearing to be paid by Defendant."

That disposed of the question of ownership and I am now called upon to adjudicate upon the issue of liability. This involves two issues, namely negligence and causation.

I will begin with a summary of the evidence. The plaintiffs first witness was Andre Kandolf.

He purchased the Mercedes Benz N36661W from a firm called Rolling Wheels in 1993. To enable him to pay for it he obtained a loan from First National Bank (FNB). Kandolf said that he was happy with the vehicle but wanted it to look "nice". He therefore took it to a firm of panel beaters called Asco Motors. Asco informed him that the vehicle was not straight and certain welding joints were pointed out to him. Kandolf then set about returning the vehicle either to Rolling Wheels or to FNB. When he received no response from either of these entities he engaged the services of Behrens & Pfeiffer, a firm of attorneys, and they in turn instructed Harry Riegel, a loss adjuster, to examine the vehicle and compile a report. Riegel examined the vehicle and test drove it and provided Pfeiffer with a report dated 9th August, 1993 and photographs. As this report played a fairly major role at the trial I will set out its contents in some detail.

Riegel measured the depth of the tread on each of the vehicle's tyres. The depths were 0.5 mm, 3.0 mm, 3.0 mm and 2.0 mm. His report describes the condition of the tyres as "good" though when he came to give evidence he said that the depth of the tread of a tyre should be at least 1 mm and, in his opinion, a tyre should be removed when the depth of the tread is 2 mm. The report then goes on to list a number of minor defects and then deals with the doors which are described as having been panel beaten and not opening or closing properly. More defects are then listed and it is stated that two sections from two different vehicles have been welded together to form one vehicle.

The distance between the vehicle's front and rear axle was 2570 mm on the right side and 2596 mm on the left resulting in a difference in distance between the two axles of 26 mm. This shows,

according to the report, that the building together of the two body sections was done without a straightening and measuring system.

The report concludes with the observation that the building together of bodies taken from two vehicles causes the resulting body to lose its stability, that the difference in the axle distances causes the vehicle to run out of its tracks and that the steering geometry is disturbed. In Riegel's opinion the vehicle was not "traffic safe/roadworthy" and, as it could not be repaired, could only be used for spare parts.

Armed with Riegel's report and the accompanying photographs Kandolf and his attorney, Pfeiffer, met with officials of FNB in the second quarter of 1994. Pfeiffer showed the report to FNB's credit manager, one Kaufmann, and pointed out Riegel's conclusions. This led to a settlement whereby FNB repaid Kandolf one half of the deposit which he had paid and all instalments and Kandolf returned the vehicle. According to Pfeiffer, who also testified on behalf of the plaintiff, about one month after the settlement was reached he met Kaufmann and Kaufmann told him that he had instructed the personnel in his office to sell the vehicle as spare parts. He added that he had expressly instructed them not to put the vehicle on auction because he would have sleepless nights if someone should die while driving it.

It is convenient at this point to deal with the objection made by Mr Muller, who appeared on behalf of the defendant, to the admissibility of the evidence to which I have just referred. Mr Muller submitted that the evidence falls into the general category of hearsay evidence and is inadmissible as it does not fall within any of the exceptions to the hearsay rule.

In *Union and South West Africa Insurance Co. Ltd* v *Quntana, N.O.* 1977(4(SA 410 (A) the Court was concerned with an action brought in terms of the Motor Vehicle Insurance Act, 29 of 1942, and the point which arose for decision was whether an extra-curial statement or admission made by the driver of the insured vehicle was admissible as against the registered insurance company. Corbett, J. A., delivering the judgment of the Court, pointed out that such evidence falls into the general category of hearsay evidence and is, therefore, inadmissible unless it comes within the ambit of one of the exceptions to the hearsay rule. One such exception considered by the learned judge was the existence of privity or identity of interest. Having considered the position of the driver of the insured vehicle in an action under the 1942 Act, Corbett, J. A. said at 424 A:

> "This being in broad outline the nature of the statutory liability cast upon registered insurers and of the relationship between the registered insurer and an authorised driver of the insured vehicle, I am of the view that in terms of our substantive law there is not as between them the privity or identity of interest or obligation necessary to render the admissions of the driver receivable in evidence against the insurer. Primarily, sole liability is cast upon the registered insurer and it is only exceptionally that the driver may become liable, either directly to the claimant or, by way of the right of recourse, to the insurer. When the driver does become liable directly to the claimant it is as an alternative obligor and his liability is quite disparate from that of the insurer. Whatever the precise meaning of 'privity or identity of interest or obligation' may be, it seems to me that it does not relate to such a situation."

The learned judge concluded at 426 E:

> "For these reasons, therefore, I am of the view that, in general, and certainly in this particular case, the admission of the driver of the insured vehicle is not admissible against the registered insurer, in an action under Act 29 of 1942, on the ground of privity or identity of interest or obligation; and that, in the absence of some other ground of admissibility,

> such as the admission forming part of the *res gestae* or having been authorised by pre-appointment or reference or by subsequent adoption, the admission is not receivable in evidence at all."

Our Motor Vehicle Accidents Act has the same general pattern of liability as was to be found in the South African Motor Vehicle Insurance Act, 29 of 1942, and, in my respectful opinion, this Court should follow the reasoning and conclusion reached in the *Quntana* case *(supra).* Furthermore, although the Court in that case was concerned with an extra-curial statement or admission made by the driver of the insured vehicle I see no reason why the owner or his employees should not be in precisely the same position.

Neither Mr Geier, who appeared for the plaintiff, nor Mr Muller referred the Court to the *Quntana* case *(supra)* but, as I understand it, Mr Geier accepts that the evidence of Pfeiffer of what Kaufmann told him is hearsay evidence. Mr Geier's approach was that the evidence should be admitted as showing Kaufmann's state of mind. What instructions Kaufmann gave his personnel do not show his state of mind but, in my opinion, his statement that he would have sleepless nights if someone should die while driving the Mercedes Benz does. To that limited extent I rule that the evidence under consideration is admissible.

The following admission by the defendant was recorded in the minutes of a pre-trial conference held on 21st February, 2000:

> "The Defendant admits that First National Bank, Wesbank Branch, Windhoek, was the owner of the 1998 Mercedes Benz, from the time it was repossessed from Mr A. Kandolf on or about 25th July 1994 until it

subsequently left the repossession yard of Wesbank."

"Wesbank" is the branch of FNB where Kaufmann was employed and the minutes of a pre-trial conference held on 9th February, 2001 record a further admission by the defendant that:

> ""....Pikkie Louw and J Kaufmann were employees of Wesbank/First National Bank during September 1994 and that they acted at all relevant times within the course and scope of their employment as aforesaid."

At the same pre-trial conference the parties also agreed that the record of the proceedings in front of Levy, A.J. and the judgment of the learned judge should form part of the present proceedings and I now turn to the judgment of Levy, A.J. The learned judge found that Johannes Pretorius, the manager of Motor House CC, used car dealers, had, in or about the middle of 1994, visited Wesbank's repossession yard and seen the Mercedes Benz 200 with which this case is concerned. In his judgment, the learned judge continued:

> "Pretorius says that he asked FNB if he could sell the vehicle 'on their behalf and they agreed. He testified that the vehicle was taken from the yard to the premises of Motor House CC where it was for sale on behalf of FNB. At the time he dealt with one Kaufmann and 'Pikkie' Louw both of whom were employees of FNB, the former being the manager of the second-hand car division of that Bank and Wesbank, and the latter, the manager of the repossession yard of Wesbank. He says the agreement was that he would hold and sell the car 'on consignment' for FNB and he undertook thereby that if he made a profit, that is sold it above the reserve price, such profit was to the credit of Motor House CC.
>
> Pretorius says he was unable to sell the vehicle and it remained on the floor of Motor House CC until it was taken to Gerry's Auction and Car Sales in Independence Avenue to be auctioned for and on behalf of FNB. It was taken there with six or seven other cars one to three weeks before the auction sale was held on 15 September 1994."

The record of the proceedings held before Levy, A.J. also shows that in cross-examination by Mr Muller Pretorius was asked about the condition of the Mercedes Benz when it was on the floor of Motor House CC. Pretorius said that he could tell from the spacing of the rear door to the rear fender that the vehicle had been in an accident. However, the witness denied that he had been informed by either Kaufmann or Louw that the vehicle had been damaged and rebuilt.

Continuing with the judgment of Levy, A.J., the next witness to the chain of events surrounding the Mercedes Benz was Rolf Vogt. In September, 1994 he and the owner of Motor House CC purchased the business known as Gerry's Auction and Car Sales and Gerry's Auction and Car Sales held their first auction on 15th September, 1994. The Mercedes Benz was one of the vehicles auctioned that day and the deceased was the successful bidder. The auctioneer, Rolf Vogt, testified that the deceased asked him if he could take the vehicle because he wanted to show it to his wife and he had an appointment with the Mercedes Benz agent "to service the vehicle 100%". Although payment for the vehicle had not been finalised Vogt allowed the deceased to take it on the understanding that he would immediately return Vogt's garage registration plates. This evidence is admissible in order to show why Vogt's released the vehicle to the deceased but no more.

At this point I should mention the evidence of Johannes Berry who was called as a witness by the defendant. At the material time he was employed as a car salesman by Autocentre in Windhoek. The owner of Autocentre at that time was Vogt and the Mercedes Benz spent some time on the floor of their showroom. Presumably, this was after it left Motor House's premises en route to Gerry's Auction and Car Sales.

Berry said that at the beginning of September, 1994 the deceased came to Autocentre and enquired whether the Mercedes Benz had been sold. At that stage it was at Gerry's and Berry arranged for it to be brought to Autocentre and the deceased asked to be taken on a test drive. Berry agreed and with the deceased as a passenger he drove the Mercedes Benz to a point just outside Okahandja and back. The deceased wanted the vehicle tested at high speed and Berry said that he drove it up to 200 kph. At 150 to 160 kph there was, he said, a little vibration on the steering wheel but at 170 to 180 kph this vibration disappeared. On the return journey the deceased drove for a few kilometres. Berry said that there are bends or curves on the road to Okahandja and the vehicle did not pull to one side nor was there any noticeable defect to the windscreen. Except for the vibration on the steering wheel at a certain speed he experienced no problems with the vehicle.

I now come to the evidence of Isador Titus who was a passenger in the Mercedes Benz at the time of the fatal accident. He was a friend of the deceased and had known him for about five years prior to his death. He said that he had had occasion to drive with the deceased on many occasions and described him as a very good driver.

On the day of the accident the deceased first drove from Windhoek to Ofjiwarongo where he had business to transact and it was then their intention to travel to Swakopmund via Omaruru. A person named Moody was seated in the front passenger seat next to the deceased and he, Titus, sat on the middle of the back seat with the deceased's two young children seated on either side. The following is a summary of what Tims said in examination-in-chief concerning the accident.

As they approached Kalkfeld the Mercedes Benz was not being driven at a very high speed. Titus then felt the vehicle shaking. He looked up and saw that the top of the windscreen had come loose. He sat back and grabbed the two children as he realised that something dangerous was about to happen. He then saw that the part of the vehicle behind the front seats had broken as the mat had torn. The deceased tried to control the vehicle but the front part had broken loose and the witness could see sparks. The front part of the vehicle collided with a tree and at some point in time the witness lost consciousness. He regained consciousness when the police were loading him into their vehicle.

In cross-examination Titus was asked about the journey prior to the accident. One thing which he said he remembered was that the steering wheel was shaking a lot. He could not recall the speed of the vehicle when this occurred but when it happened the deceased applied a tighter grip to the steering wheel. Titus said that the deceased made no comment and would have stopped had it been a problem.

Titus was also asked about what he saw when they entered Kalkfeld and it is apparent from his answers that he saw very little. He did not see any speed limit signs although other evidence established that there were three such signs for southbound traffic and he could not say whether the speed of the Mercedes Benz was fast or slow. This contrasts with his evidence-in-chief that the speed was not very high. He was asked to describe what happened again and said that as they approached the township there was a bend and, although it was difficult to put into words, there was a "pull" on the vehicle. This occurred in the bend itself and was similar to a vehicle going onto a gravel surface. Then he saw the windscreen separate itself from the roof one bit at a time.

Titus was pressed on this part of his evidence and, although according to the witness he could not say exactly, he said that the roof parted from the windscreen by about 15 cm in the middle. Then, he saw that just behind the front passenger seat the vehicle broke. The carpet was torn and he could see tar. The gap in the floor was about 6 cm and ran from the middle of the left seat to the drive shaft tunnel. The back part of the vehicle broke off before the front part hit the tree and lifted itself. As for the sparks he could not say at what stage of the incident he saw these but he could remember them.

Titus was then asked about a statement which he made to the police on 3rd October, 1994 in Windhoek. He agreed with counsel that at that time everything was fresh in his mind and that the object of the exercise was to tell the police everything he could remember happening. The statement reads as follows:

> "1. On Thursday 94.09.22 and at around 12hl5 I was a passenger with Mr. Griffiths and others travelled from Otjiwarongo to Kalkfeld.
> 2. Mr. Griffiths was the driver and I was on the back sit. At around 13h00 and approaching Kalkfeld Mr. Griffiths was driving on a speed approx. 120 km/h when the car left the road and collided against the tree which was on the edge of the road. Before the car hit the tree I felt the backside of the car was shivering and Mr. Griffiths tried to controlled the car, but everytime he turned the car was just shivering, like it was going to broke in two pieces. We were five in the car. The time the accident took place, I don't know how it happened."

The statement was then sworn to.

What is set out in Titus's statement does not accord with the vivid account which he gave to the Court of the roof lifting and the Mercedes Benz actually breaking in two before the front part

struck the tree and he was asked about this. With regard to speed he said it could have been 120 kph which contrasts with his earlier evidence that he could not say whether the speed of the Mercedes Benz was fast or slow. When asked about his statement that he did not know how the accident happened he said that when he made the police statement maybe it was not clear to him. Then when it was put to him that he had decided to add a number of things which had not happened when giving testimony in Court he said that at that stage, referring to when the police statement was taken, he probably could not remember everything. He had told the police everything he could remember. And in re-examination the witness fell back on lack of memory: he could not remember the statement, he could not remember if it was translated, he could not remember if there was an interpreter and he could not remember if he had read it.

The police officer who took Titus' statement was called by the defendant. Sgt. Kairua was a constable at the time and he attended the scene of the accident. On 3rd October, 1994 he went to Windhoek and visited Titus at his house. He said that he asked Titus to explain everything that had happened and what is set out in the statement is an English translation of what Titus told him in Afrikaans. He then read the statement back and asked Titus whether he was satisfied and Titus said that he was. In cross-examination Kairua was asked a few questions about the circumstances in which the statement was recorded but no suggestion was made that it had been recorded inaccurately.

Another witness who saw the accident was Emily Doeses. She was a cleaner at a nearby school hostel. At about 12:30 p.m. on 22nd September, 1994 she and a co-worker, Ludmila Ochurab, were on their way home walking along the Otjiwarongo to Omaruru road in a northerly direction.

At a certain point they saw a vehicle approaching them fast and it left the road on the west side and then crossed back. Both Emily and Ludmila ran and, according to Emily, she heard a sound when the vehicle collided against a tree. Emily said that a gas cylinder struck her on the lower part of her left leg and she fell. Her leg was broken with a bone protruding. With the aid of a photograph she pointed out where she had been when she was struck by the gas cylinder and where Ludmila was when she was struck and injured by part of a car seat. Although Emily was confused as to where she and Ludmila were when they first saw the vehicle it is not disputed that both were struck by flying objects at the places pointed out by Emily.

Sgt. Karugub was another police officer who attended the scene of the accident on 22nd September, 1994. On his arrival he found two parts of a Mercedes Benz. The front part was lying against a tree facing north while the rear part was a few steps away with the open part facing south. Karugub said that he looked for marks on the road and could clearly see four tyre marks on the tar. He marked these on a rough sketch plan which he drew the following day. He saw no scratch or scrape marks on the road nor did he see any broken vehicle parts on the road.

In cross-examination Karugub said that the tyre marks appeared to him to be made by a vehicle broadsiding and, as appears from his sketch plan, they come from the west side of the road and head towards the tree on the east side in a slight curve.

Apart from the factual evidence just summarised certain plans of the scene of the accident and a number of photographs were admitted in evidence by agreement between the parties. The photographs are of the Mercedes Benz when it was inspected by Riegel in August, 1993, of the

Mercedes Benz after the accident and of the scene of the accident. It was largely with the aid of this material that the expert witnesses called by both parties endeavoured to reconstruct the accident.

It is common ground between the parties that a driver entering the township of Kalkfeld from Otjiwarongo first passes a 90 kph speed limit sign and then two 60 kph signs. He is then confronted with a gentle right hand curve in the road and beyond this curve there is a minor road leading off to the left (east). At the time of the accident there was a tree on the east side of the main road a metre or two from the edge of the road and just short of the junction just referred to. On both sides of this tree there were short poles placed in the ground with double cables threaded through them. The crash caused two of the poles on the northern side of the tree to be dislodged and one on the southern side to be partly dislodged. After the accident the front part of the Mercedes Benz was lying approximately 500 mm from the tree and the rear portion was lying in the mouth of the junction 16,5 metres from the front part. Emily was struck by the gas cylinder on the southern side of the junction 19,7 metres from the rear portion of the Mercedes Benz and Ludmila was struck by the seat also on the southern side of the junction 23,06 metres from the rear portion. One other distance which should be mentioned is the distance of the tyre marks on the road which is given as 31,4 metres.

Coming now to the expert evidence, it is clear that the plaintiff intended to rely on Riegel as her mainstay in this regard. Riegel's evidence can conveniently be divided into two parts. Firstly, there is his evidence arising from his inspection of the Mercedes Benz in July, 1993 and his test drives of the vehicle at that time. Secondly, there is his evidence arising from a report which he

compiled dated 2nd March, 1998. In final submissions Mr Muller was critical of Riegel's qualifications to testify as an expert and although there is some substance to these criticisms when it comes to the 1998 report I remain satisfied that the witness was competent to express opinions arising from the 1993 inspection and test drives.

Riegel first inspected the Mercedes Benz on 19th July, 1993 and he then took it for a test drive. He said that it was unstable, vibrating and pulling very strongly to the right. Surprisingly, Kandolf, who had been driving the vehicle since the beginning of June, 1993, including a fairly long trip from Windhoek to Keetmanshoop and back, said that he noticed only a little pull to the right. It was, he said, soft to drive and that was "nice". It was "very comfortable".

Returning to Riegel's evidence, he took the Court through a series of photographs which he took of the Mercedes Benz in July, 1993 and these, he said, showed various defects on the vehicle arising from the manner in which two body parts had been welded to one another. He was particularly concerned with the fact that the floor panels had been spot welded at intervals of 50 mm and this, in his opinion, should never have been done. According to Riegel, it was done badly and incorrectly and the stability of the whole chassis was affected.

Riegel said that driving the Mercedes Benz over an uneven road would cause movement of the welded sections and the more the vehicle is used the more the welded joints will weaken. At the time, he said, he was of the opinion that if the vehicle was driven further, and depending on the roads, it would break apart. After assessing all the damage/defects he was of the firm opinion that the vehicle was not roadworthy.

In cross-examination Pviegel referred to his second test drive of the Mercedes Benz. He said that he drove it at 100 kph and found it difficult to keep control when negotiating a bend. It is apparent from the evidence of both Kandolf, who drove the vehicle for a total of about 2500 kms, and Berry, who drove the vehicle from Windhoek to Okahandja and back at high speed, that neither of these witnesses experienced the difficulty referred to by Riegel. If the evidence of these two witnesses is correct then either Riegel is mistaken in his recollection of the behaviour of the vehicle or the cause of such behaviour was not inherent, was capable of rectification and had been rectified at least by the time Berry drove it. I will return to this later in this judgment.

In cross-examination Riegel was also asked about other potential causes of vibration and pulling to one side or the other. He agreed that the following can be potential causes: varying tyre pressures, wheel balance, bent wheel rims, incorrect axle adjustment, uneven tyre rotation and, to some extent, poor tyre wear combined with bad shock absorbers. The witness also agreed that all these defects can be rectified.

Riegel was also questioned about the various defects referred to in his 1993 report and how they affected the driveability of the Mercedes Benz. He said that the crux of the matter was that two sections had been welded together. He insisted that this has an influence on stability. Although he admitted to certain mistakes in his evidence-in-chief concerning welding seams on the Mercedes Benz he said that they did not alter the fact that two parts were joined together. That was a theme which was repeated from time to time and it seems that Riegel has a deep-seated objection to vehicles where two parts have been welded together. I will consider whether this has affected his objectivity later in this judgment.

With regard to reconstruction of accidents, at the outset of his evidence the Court raised the question whether it had been established that Riegel was qualified to express opinions on such a subject. Eventually, Mr Geier applied for leave and was granted leave to adduce further evidence and it emerged that in the mid-sixties Riegel had been fairly extensively involved in reconstructing accidents, that in the following years up until 1990 he had been involved in 25 to 30 of such cases and since 1990 had been involved in approximately 15 more. Based on his experience I ruled that he could give evidence reconstructing the accident. However, although he expressed certain opinions in his evidence-in-chief as to the way in which the accident occurred, in cross-examination he said that he had not been asked to do a reconstruction. He said that he had visited the site of the accident in 1998 and taken measurements of points indicated by the plaintiffs attorney but after so many years he could not do a reconstruction. He went further and said that had he not driven the Mercedes Benz in 1993 he would not have been able to give any opinion concerning reconstruction.

In the foregoing circumstances I find it unnecessary to dwell further on the evidence of Riegel save to mention his evidence concerning an indentation on the roof of the Mercedes Benz. This can be seen in three photographs of the vehicle taken while the two parts were kept at Kalkfeld Police Station. The indentation is to the front of the roof on the driver's side and Riegel conceded that if this indentation was caused by the tree it would mean that the vehicle was intact when it hit the tree. Riegel further agreed that another photograph, Exhibit H53, shows that bark had been removed from the tree at a point which coincides approximately with the roof of the Mercedes Benz. Finally, Riegel conceded that the vehicle was probably in one piece when it hit the tree although he continued to insist that the deceased "probably" or "possibly" lost control

because of defects in the vehicle.

Due to the unsatisfactory nature of Riegel's testimony, Mr Geier sought leave to call a further expert and although Rule 36(9) of the High Court Rules had not been properly complied with such leave was granted. And so Jacobus Verster was called to give evidence. He is employed by a local authority in South Africa as an accident investigator and reconstruction expert and, having regard to his qualifications and experience is well-qualified to testify with regard to accident reconstruction.

Verster's evidence ranged over a number of topics and I will bear in mind his evidence as a whole. However, I will summarise only two aspects of his evidence. With regard to the speed of the Mercedes Benz immediately prior to the accident, Verster was prepared to accept that speed was involved but he was not prepared to say that such speed was high speed. He said that it was clear from the road engineer's plan, which was one of the plans placed before Court, that the road at the point where the accident occurred is more straight than curved. This, in the opinion of Mr Verster, was one factor to be taken into account when deciding whether speed played a role. In his view, the curve in question could be taken at approximately 180 kph with ease "give and take maybe a little bit of steering forces". Then, addressing the damage to the Mercedes Benz, as depicted in various photographs, Verster said that you cannot just look at damage and assume from the extent of the damage that the vehicle was travelling at a high speed. He said that a more scientific approach was required using what he described as "crash analysis data". As for the fact that part of a rear seat and a gas cylinder were thrown some distance from the rear part of the Mercedes Benz, Verster maintained that it would be dangerous to conclude

that this indicated high speed without first considering various factors. Was it the whole seat or just a part? If the former, was the seat bolted down? How high was the cylinder projected? Did it bounce or slide along the ground? What was its weight? Without answers to questions such as these Verster said he could not say that high speed was involved.

The other part of Verster's evidence which I intend summarising is his evidence regarding separation of the Mercedes Benz or part thereof prior to the collision with the tree. Verster's opinion was that the roof of the Mercedes Benz, at least at the A pillars, was probably separated from those pillars just prior to the vehicle colliding with the tree. The A pillars are the metal struts which run from the front comers of the roof to the wing of the vehicle. Verster echoed Riegel's evidence that it can be seen from the photographs that there is an indentation on the right side of the front part of the roof which, according to the witness, indicates force being applied to the roof at that point in the direction of the rear of the roof. In other words, that part of the roof had been forced towards the rear. However, when one looks at the right side of the roof, i.e. the part of the roof running from the right A pillar to the rear, there is no damage. If the roof was attached to the right A pillar at the point of impact one would expect damage in that area. The witness' conclusion was that as there was no damage in that area but damage was caused to the front of the roof then the roof had to be lifted up at the point of impact.

Verster said that this conclusion was further supported by what can be seen in photograph H46 of the right A pillar. It can be seen, he said, that the A pillar has been pushed towards the centre of the Mercedes Benz. If the roof had been attached to the A pillar when the A pillar was pushed into that position it would have dragged the roof with it. The roof would not have jumped away

and sustained no damage on the right side. Verster considered that Titus' description of the roof lifting made a lot of sense. Verster's reconstruction of the accident was that the roof jumped open, the driver probably got a fright and jerked the steering wheel or braked and as a consequence lost control. From the tyre marks on the road the Mercedes Benz was at some stage on it's wrong side of the road and then yawed back to its correct side and collided with the tree.

In cross-examination Verster was constrained to agree that he had made a mistake when identifying the A pillar in photograph H46. He agreed that what he had identified as the A pillar pushed towards the centre of the Mercedes Benz was in fact the cover of the A pillar. He agreed that the right A pillar is depicted in photograph H47 and it has a substantial kink in the middle. He further agreed that if the A pillar had been attached to the roof when the impact occurred one would see it in the condition shown in photograph H47.

Mr Muller then put to Verster that the kink on the A pillar proves that the roof was still attached to the A pillar at the point of impact. Verster did not disagree with this suggestion contenting himself with saying why did the roof not sustain damage to the right? Mr Muller then put it to the witness that on the probabilities the roof was still attached at the time of impact and Verster said that he had to agree with that probability. He also agreed that the roof would have sagged a little as a result of the A pillar bending and when it was put to him that this would explain the indentation on the front of the roof he said that under such circumstances the possibility did exist. Pursuing this, Mr Muller suggested that because of the force of penetration and the angle involved the tree would have caused the indentation as seen on photograph H46 and Verster agreed. However, he continued to insist that the absence of damage on the right side of the roof was significant.

Verster was then questioned about his thought processes when formulating his opinion on how the accident occurred. He agreed that step one was Titus' account. Step two was Riegel's evidence. And step three was confirmation by the photographic evidence. He said that if Titus' account had been simply that the Mercedes Benz shuddered, that the deceased lost control and then tried to regain control then he would not have come to the conclusion he did.

The defendant called two experts, Johannes Strydom and Martin Slabber. Strydom is a consultant in investigation, cause analysis and reconstruction of motor accidents and his qualifications and experience are similar to, though rather more extensive than, those of Verster. The same information was made available to him as was provided to Verster and he had the added advantage of visiting the scene of the accident albeit almost four years after it had occurred.

Strydom's conclusion concerning the accident under consideration is set out in the summary of his evidence which he confirmed in the witness box. His conclusion reads:

> "I am of the opinion that this collision occurred as a result of the driver of the Mercedes Benz vehicle who entered the said curve in the left lane at a high speed, lost control, swerved sharply to the right to try to gain control over the vehicle, left the road on the western side of it, and at this stage the vehicle started spinning anti-clockwise and skidded side-ways across both lanes and hit the tree on the drivers side of the vehicle.
>
> At impact with the tree the vehicle broke into two parts and came to the final resting positions as indicated on the police plan."

Strydom said that in reaching his conclusion he took into account the final resting positions of the two parts of the Mercedes Benz, the yaw marks on the road, the damage marks on the tree,

the damage to the vehicle, the positions of the two injured pedestrians and the layout of the road including the curve.

With regard to speed the witness said that there was not enough physical evidence to calculate the speed of the Mercedes Benz correctly but he adhered to the view that the speed must have been high. This view was based on the matters just mentioned and his twenty nine years experience dealing with motor accidents.

Unlike Verster, Strydom did not have regard to Titus' evidence when reaching his conclusion and so far as the question of the roof lifting that, he said, was not in his field. In cross-examination he agreed with counsel that, generally speaking, one would not expect a driver to lose control when negotiating the curve in the road with which this case is concerned. He said that normally that curve could comfortably be negotiated at 140 kph.

Slabber's qualifications and experience differ from the other experts who testified. He graduated from Stellenbosch University, South Africa in 1955 with a degree in mechanical engineering. He then did practical training in the United Kingdom and from 1960 lectured in the engineering faculty of mechanical engineering at Stellenbosch until 1973. From 1973 he worked for various companies involved in the production and design of motor vehicles. The same information made available to Verster and Strydom was made available to him and, like Strydom, he visited the scene of the accident.

Based on the information made available to him and his visit to the scene of the accident Slabber

reconstructed the accident as follows:

> "That the driver of the Mercedes Benz lost control of the vehicle when he tried to negotiate the right-hand turn on the approach to Kalkfeld from Otjiwarongo. He was travelling at a high speed and landed on the right-hand verge.
>
> To regain control, the driver tried to cross back to the left-hand side of the road. Regrettably his corrective action was to swerve resulting in a broadside back across the tarred section of the road. The back of the vehicle started rotating in an anti-clockwise direction, with right-hand rear tyre making a distinct broadside rubber mark on the road.
>
> At this stage the driver was still trying to correct the situation by turning the steering to the right. The result of this action was that the front tyres left no distinct mark on the road.
>
> The Mercedes Benz crossed the particular section of the road at an angle increasing from parallel to about 24 degrees at the left-hand verge of the tarred section (Eastern side). The vehicle itself had rotated through approximately 57 degrees.
>
> With the rear wheels still on the tarred section, the left front comer of the vehicle collided with the steel cables strung from the short supporting poles.
>
> As the vehicle penetrated the cables the left-hand vertical section of the chromed grill assembly and the left-hand headlight assembly made contact with the upper steel cable as depicted in photograph 48 on page 27. The cable penetrated the front end of the left-hand front fender, folding it backwards and causing the buckle on the upper edge.
>
> As the vehicle further penetrated the cable barrier, three of the support poles collapsed, two ahead of the tree and one beyond the tree. The vehicle was partly constrained by the cables, until they snapped. This resulted in a further rotation of the vehicle to a total rotation angle of approximately 106 degrees. The further penetration of the cables during this phase, also caused the engine hood (bonnet) to buckle.
>
> The vehicle struck the tree at an angle of about 106 degrees on the right-hand front door. This impact position is slightly ahead of the vehicle's centre of gravity, which will cause the vehicle to rotate further in an anti-clockwise direction. Penetration of the tree will continue to a maximum point.

> The tree had two stems of which one was partially torn off as depicted in photograph 53, page 29. The upper section of the tree branch contacted the leading edge of the roof above the driver's head at a point where the windscreen starts. Refer to photographs 44, 45, 63 and 64.
>
> The construction of the vehicle is such that the section from the front seats forward can be considered as one part with its own centre of gravity, as well as the same for rear section. Impact on the driver's door will then cause a sideways bending action of the vehicle structure. If the induced bending moment due to the impact is high enough, vehicle will start pulling apart from the left-hand side and will totally part due to the momentum of the rear section.
>
> After parting, the rear section will still have sufficient momentum to propel it to the final position as indicated in the police plan.
>
> The fact that the rear seat of the car as well as a gas bottle in the car were flung from the rear part of the car and collided with two persons quite a distance further is an indication that the vehicle travelled at a high speed on impact with the tree."

Slabber elaborated on his reconstruction while in the witness box. He dealt with the reaction time of a driver confronted with the bend in question, a bend which Slabber described as slight. He said that once the vehicle was on the dirt or gravel section on the western side of the road the driver would obviously try to get it back on the road. If he had gone back gradually he should have had no problem but if he turned too sharply he would have induced a sideways or yaw movement. The vehicle then started to rotate and Slabber illustrated the movement of the vehicle as it crossed the road on a plan which he had prepared and with the aid of a model car. Slabber then explained why he was of the opinion that the Mercedes Benz first struck the cables strung from poles, an opinion with which Verster disagreed. The vehicle continued to rotate and struck the tree on the right hand door. Due to the centre of gravity of a vehicle being more or less where the gear lever would be the Mercedes Benz would then have rotated further. Slabber went on to explain that the effect would have been that one side of the vehicle would want to open and the

other side close-in. Put another way, one part would be under tension and the other under compression and if the tension is high enough there will be a tearing or breaking apart. Having broken off the rear section spun around and ended with the open section facing south.

Dealing with the speed of the Mercedes Benz, Slabber started his considerations by taking the speed of the vehicle when it entered the bend as 120 kph. This speed was given to him and presumably comes from Titus' statement to the police. He then considered the damage to the vehicle with a view to ascertaining its speed when it struck the tree. He said that the damage did not enable him to come to any precise conclusion regarding speed but it must have been considerable. He also took account of the possibility that the deceased braked once he realised there was a problem and continued to brake once the vehicle left the tarred road. When the vehicle returned to the tarred road it started to yaw or broadside as is evidenced by the tyre marks on the road and this would have resulted in further retardation of its speed. Then there was the fact that two pedestrians were struck by objects propelled from the vehicle. Slabber was of the firm opinion that the gas cylinder and rear seat cushion left the rear part of the vehicle when it spun after colliding with the tree and both objects were thrown a considerable distance. This, he said, indicates that there was a high spin on the rear section after the collision plus longitudinal speed. Slabber was of the opinion that the speed of the Mercedes Benz when it collided with the tree was somewhere in the region of 70 kph, maybe more. And although he took a speed of 120 kph as his starting point he was of the opinion that the speed of the Mercedes Benz when it entered the bend was probably higher.

Slabber was also asked to comment on the evidence of Titus, Riegel and Verster regarding the

lifting of the roof of the Mercedes Benz. He said that it was not possible for the roof to have lifted for 15 cm in the middle as described by Titus. For the roof to have lifted it would have had to have parted from both A pillars and could not just have lifted in the middle. And if it had lifted from both A pillars but remained connected to the two B pillars which are situated between the front and rear doors there would have been a distinct kink in the roof; but no such damage is depicted in any of the photographs. Further, if, after lifting 15 cm, it was no longer connected to either A pillars or B pillars there would have been some indication at the back end of the roof that it had moved up 15 cms. There was no such indication. As for the evidence of Titus that part of the Mercedes Benz broke and there was a gap in the floor of about 6 cms which ran from the middle of the left seat to the drive shaft tunnel, Slabber was of the opinion that there was no way in which that could have happened. Although there was only stitch or spot welding along the floor panels the two sills on either side and the tunnel in the centre were continuously welded as accepted by Riegel in cross-examination. Accordingly, there was no reason for there to be an opening in the floor panels which are positioned between each sill and the tunnel.

Dealing with the evidence of Riegel and Verster regarding the lifting of the roof, Slabber said it is clear from the photographs that the tree penetrated the driver's door and right A pillar. This, he said, is established by the severe kink on that A pillar. At some stage in the penetration process the kink in the A pillar became so severe that it tore the A pillar from the top. The witness then referred to photograph H46 which, he said, clearly depicts a definite tear at the top of the A pillar. He disagreed entirely with Verster's evidence that it was a clean break at the welding seam. He placed a ring around the top of the A pillar where the tear occurred.

Slabber also gave an explanation for the indentation on the front leading edge of the roof on the driver's side, the indentation relied on by Pdegel and Verster as suggesting that the roof had lifted prior to the impact with the tree. He said that this was caused when the tree had penetrated the A pillar. He illustrated this part of his evidence in a sketch (Exhibit V). The witness said that the tear marks at the top of the A pillar together with the kink in the A pillar which caused the tearing plus the deformation of the door frame all lead to the fact that the A pillar on the right side was still attached to the roof at the time of impact.

As for Verster's opinion that damage to the right edge of the roof was to be expected if the roof was still attached at the time of impact, Slabber said that that would be expected if the impact was further back but not when the impact occurred against the A pillar with the vehicle rotating.

Slabber also commented on Riegel's 1993 report. Some of the points dealt with were the following. Poor tyre treads would not have had any effect on the driveability of the vehicle when driven in dry conditions. The difference in distance between the two axles of 26 mm meant that one axle sat across the vehicle at an angle. Taking the distance from the middle of one wheel as 1500 mm and applying basic mathematical principles the angle involved was 0,99°. Slabber said that such a small angle would not have an influence on the driveability of the vehicle although it would crab. However, with the angle as low as 1° a driver would not easily notice it. It makes steering to one side easier than to the other and it could have an effect on the wear of the front tyres.

With regard to Riegel's evidence that the joining together of two vehicle sections has an

influence on stability, Slabber said that the wrong terminology had been used. The body does not give stability to a vehicle. The correct word is "stiffness". Slabber explained that the bodies of different types of vehicles vary in stiffness. They are not absolutely rigid. If the weld on the sills and the drive shaft tunnel were properly welded then the fact that the floor panels are stitch or spot welded would contribute little to the stiffness of the body.

Slabber was also asked about Riegel's conclusion that the Mercedes Benz was unroadworthy and he said that he did not share that conclusion. Such defects as there were could be adjusted. Although it was to some extent skew, if he had to use the vehicle he would live with that. Any vibration which was experienced had nothing to do with poor welding.

Slabber's evidence-in-chief was probed at some depth in cross-examination but the general picture that he had painted was not materially altered. He accepted that the result of butt welding is that the joint which has been welded would be weaker but only a little bit weaker. He considered that the welded material would be more or less 80% of its original strength but this would fall within the necessary safety margin. Slabber was also questioned about the likely result of bad welding and he conceded that if cracks appear where bad welding has been done you will get progressive worsening eventually leading to the vehicle breaking up. However, he reiterated that you would not have movement in one area such as the floor panels. The whole would move together. He considered it unlikely that both welded sills and the welded tunnel would break simultaneously and if one sill were to break the driver would be aware of it.

As I indicated earlier in this judgment the question of liability involves two issues, namely

negligence and causation. The test for determining negligence was authoritatively stated by Holmes, J.A. in *Krttger v Coetzee* 1966(2) SA 428 (A) at 430 E-F:

> "For the purposes of liability *culpa* arises if-
>
> a) a *cliligens paterfamilias* in the position of the defendant -
>
> (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
>
> (ii) would take reasonable steps to guard against such occurrence; and
>
> b) the defendant failed to take such steps."

The plaintiffs case, on the question of negligence, is that Riegel's 1993 report, (Exhibit J) correctly reflects the condition of the Mercedes Benz at that time. The Mercedes Benz, according to the report, was not "traffic safe / roadworthy" and, as it could not be repaired, could only be used for spare parts. The report was shown to Kaufmann, FNB's credit manager, in the second quarter of 1994 and Riegel's conclusions were pointed out. Kaufmann was therefore aware of the fact that the Mercedes Benz was not "traffic safe/roadworthy" and was fit only for spares. Despite this, FNB permitted Pretorius, of Motor House CC, to remove the Mercedes Benz from its repossession yard for the purpose of selling it and ultimately it was knocked down to the deceased at an auction. The deceased was permitted to drive the vehicle away and one week later, because of its condition, the deceased was killed.

Mr Geier submitted that a reasonable person in the same circumstances as Kaufmann would have foreseen the reasonable possibility of harm to **the** deceased, would have taken reasonable steps to guard against that possibility but failed to take such steps. Counsel submitted that the three parts of the test for **negligence have been satisfied and that** FNB **should** be **adjudged negligent.**

VVhen making his submissions Mr Geier relied in part on a certain passage in the judgment of Levy, A.J. The learned judge set out the evidence of one Angela Dreyer, an employee of FNB and Kaufmann's junior. Her evidence concerned the deceased's application for finance for the purchase of the Mercedes Benz. The judgment continues:

> "It was formally admitted by Mr Geier on behalf of Plaintiff that the deceased had completed the form and applied for finance on 13th September 1994 and that Mr Kaufmann approved thereof."

1 do not see how the plaintiff can use an admission made on her behalf to prove a fact against the defendant. But, in any event, there is no evidence that Kaufmann realised or should have realised that the deceased's application for finance was in respect of the Mercedes Benz to which Riegel's report referred.

Although not expressly concluded in such terms, Riegel's report can, in my view, be interpreted as concluding that the Mercedes Benz was in a dangerous condition. Not only does it conclude that the vehicle was not "traffic safe/roadworthy" but it states that it is only fit for spare parts. That Kaufmann saw it in this light is, I think, made clear by Pfeiffer's evidence, which I accept, that Kaufmann told him that he would have sleepless nights if someone should die while driving the Mercedes Benz.

If Riegel's report was correct in its conclusion and the Mercedes Benz was indeed in a dangerous condition then, in my judgment, Kaufmann should have taken steps to ensure either that the vehicle was not disposed of for use on the road or that anyone acquiring it or, for that matter, using it, was made aware of its dangerous condition.

Pretorius asked FNB if he could sell the Mercedes Benz on their behalf and FNB agreed. He was permitted to remove the vehicle from FNB's repossession yard for the purpose of selling it. One of the employees of FNB with whom Pretorius dealt was Kaufmann and Pretorius denied that he had been told by Kaufmann or the other employer with whom he dealt that the vehicle had been damaged and rebuilt. It must, in my view, follow from this that he was also not told that the vehicle was in a dangerous condition.

As Kaufmann was not called to testify by the defendant the evidence of Pretorius to which I have just referred remains uncontradicted and, in my view, must be accepted. I therefore find that Kaufmann not only failed to take any steps to ensure that the Mercedes Benz was not disposed of for use on the road and failed to pass on information concerning the vehicle's dangerous condition but he was actually instrumental in having the vehicle put up for sale. In my judgment, if the evidence establishes that the Mercedes Benz was indeed in a dangerous condition then Kaufmann was negligent.

The minutes of a pre-trial conference held on 9th February, 2001 record that:

> "Defendant admits that Pikkie Louw and J Kaufmann were employees of Wesbank / FNB during September 1994 and that they acted at all relevant times within the course and scope of their employment as aforesaid."

If Kaufmann was negligent FNB, as his employer, must be held vicariously liable for his negligence.

The question of negligence is entwined with the question of causation because in each the state

or condition of the Mercedes Benz in September, 1994 has to be considered. In this connection, Mr Geier relied heavily in final submissions on the direct evidence of Titus. If the Court were to accept the evidence of that witness as to how the accident occurred then clearly the death of the deceased was caused by the dangerous condition of the vehicle. However, I have to consider to what extent, if at all, Titus is a credible and trustworthy witness. I agree with counsel that, when seen in isolation, Titus' description in examination-in-chief of what occurred appeared plausible enough particularly when seen against the backdrop - undisputed - that the vehicle separated into two parts. But Titus' description in examination-in-chief of what occurred cannot be considered in isolation. It must be considered and weighed against several factors which emerge from the rest of the evidence, not least being his statement to the police made on 3rd October, 1994 less than a fortnight after the accident.

I have already set out the contents of Titus' statement and I do not intend to repeat them. It is perfectly plain that what he told the police bore little resemblance to what he told this Court some six years later. Indeed, the only common denominator in his police statement and his testimony is his reference in the police statement to the Mercedes Benz shivering "like it was going to broke in two pieces" but there can be no real doubt that by 3rd October, 1994 Titus was well aware that that was what ultimately happened. He said in cross-examination that he had even been interviewed at some stage by NBC reporters.

Titus did not deny making the police statement and, in any event, there was adequate proof that he did make it both from his own lips when he identified his signature and from the evidence of Sgt. Kairua. When questioned on how he could give a graphic description in February, 2001 of

hovv the accident happened whereas in October, 1994 he told the police that he did not know how it happened all the witness could resort to were unconvincing answers such as maybe it was not clear to him in 1994 or probably he could not remember everything at that stage.

When seen in the light of his statement to the police I regard the account given by Titus to this Court as highly suspect but that is not all. Slabber, who, to my mind, was the epitome of an expert witness, dismissed Titus' account of a 6 cms gap appearing in the floor of the Mercedes Benz from the middle of the left seat to the drive shaft tunnel out of hand. I find his reasons for doing so convincing. In making this finding I take account of Riegel's evidence which was not in agreement with that of Slabber but I regard the latter's evidence as vastly superior. Not only is he far better qualified to express opinions on matters which fall within the domain of mechanical engineering but he provided convincing reasons for his opinions whereas Riegel fell back on generalisations such as that it is never allowed by the manufacturer to cut the body of a motor vehicle into pieces and weld them together.

Further, there is the question of the roof parting from the windscreen by about 15 cms in the middle as described by Titus in his evidence. Slabber said that that was not possible and even Riegel said that he could not imagine that happening.

Mr Geier submitted that corroboration for Titus' evidence concerning the roof can be found in the testimony of Verster that the roof of the Mercedes Benz had to be lifted up at the point of impact with the tree. This conclusion was based on the presence of the indentation on the right side of the front part of the roof and the absence of any damage on the right side of the roof.

However, in cross-examination Verster agreed that he had made a mistake when identifying the right A pillar in the photographic evidence. The position of the A pillar, as identified by the witness, formed part of his reasoning for the conclusion that the roof had lifted prior to the impact and when the A pillar was correctly identified Verster did not disagree with the proposition that the kink on it proves that the roof was still attached at the point of impact. He was then constrained to fall back on the absence of damage on the right side of the roof.

The absence of damage on the right side of the roof of the Mercedes Benz was, in my view, satisfactorily explained by Slabber. The impact with the tree occurred while the vehicle was rotating. The tree penetrated the driver's door and the right A pillar. The right A pillar slopes from the wing of the vehicle to the roof and when the tree penetrated it would not have made contact with the right side of the roof. In my judgment, that is the probable explanation for the absence of damage on the right side of the roof.

Verster and Riegel also sought to support their respective opinions that the roof had lifted prior to the impact by reference to the indentation on the right side of the front of the roof. Slabber also dealt with this. It was caused, he said, when the tree penetrated the A pillar. In cross-examination Verster agreed that this was a possibility but I would go further. If one has regard to photograph H46 it can be seen that there is a tear at the top of the A pillar as testified to by Slabber. This is not consistent with the welding seam breaking on its own. It is, however, consistent with force being applied to the A pillar causing it to bend or kink and dragging the roof down to a point where it tore away from the A pillar. In the process the tree could well have caused the indentation on the front of the roof and I accept Slabber's evidence, at least on a

balance of probabilities, that this was what happened. I accept that at the time of the impact the A pillar on the right side was still attached to the roof.

Mr Geier submitted that Titus had no motive to misrepresent the events surrounding the accident but it is not necessary for the defendant to establish a motive. Whatever his reasons for doing so, I am satisfied that Titus has placed before the Court a fictitious account of what occurred. I reject his testimony.

That, of course, does not dispose of the matter completely. There remains the evidence of Riegel concerning the condition of the Mercedes Benz in July, 1993, the fact that the curve in the road being negotiated by the deceased when he left the road was gentle or slight and the evidence of Riegel that in his opinion the deceased lost control because of defects in the vehicle.

Riegel's evidence must first be compared with that of Kandolf and Berry. Riegel was highly critical of the condition of the Mercedes Benz. When he test drove it in July, 1993 it was, he said, unstable, vibrating and pulling very strongly to the right. He found it difficult to keep control when negotiating a bend at 100 kph. However, Kandolf, who drove the vehicle for a total of about 2500 kms, and Berry, who drove the vehicle from Windhoek to Okahandja and back at high speed, did not experience these difficulties. Kandolf said that he only noticed a little pull to the right and, apart from that the Mercedes Benz was "nice" and "very comfortable". And Berry said that all he noticed was a little vibration on the steering wheel at a speed of between 150 and 160 kph. To that can be added the fact that the deceased, who also test drove the Mercedes Benz, subsequently saw fit to bid for it at auction and to use it to convey his children

and friends. There are therefore two completely different pictures of the behaviour or performance of the Mercedes Benz.

What emerged clearly from Riegel's evidence was his deep seated dislike for vehicles where two parts have been welded together and I think it likely that this, coupled with the fact that the Mercedes Benz ultimately broke in two, has coloured his mind and probably, to some extent, affected his recollection. It must be borne in mind that Riegel was only called upon to report on the accident in January, 1998, more than three years after it had occurred and more than four years after he had inspected the Mercedes Benz. And in his 1998 report he felt free to condemn the welding joint which held the two parts of the vehicle together as "extremely unprofessional" and to state, as a "finding" that the weld joints had come undone as the vehicle was travelling through Kalkfeld resulting in the two parts of the vehicle separating. Yet in evidence he admitted that the welding of the two sills and the tunnel was continuous welding and abandoned his "finding" that the vehicle broke in two prior to colliding with the tree. In my view, Riegel's evidence as to the condition or behaviour of the Mercedes Benz in July, 1993 must be approached with a great deal of circumspection.

On the other hand, the evidence of Berry was simple and straightforward. He test drove the vehicle at the beginning of September, 1994 and, after the accident which took place a couple of weeks later, saw pictures of the deceased in the newspapers. He therefore had good reason to recall what had happened. In my judgment, Berry's evidence can safely be relied upon and either Riegel is mistaken in his recollection of the behaviour of the Mercedes Benz or, as was said by Slabber, adjustments must have been made to it during the period from Riegel's test drives to the

time it was driven by Berry.

To succeed in this action the plaintiff has to prove that the Mercedes Benz was in a dangerous condition and that as a result thereof it

> "commenced and/or developed tearing and/or cracking and/or commenced breaking up and left the road and collided with a tree."

In my judgment, the plaintiff has failed to prove either of these allegations. Looking at the probabilities as a whole, the accident and the death of the deceased were caused by the deceased losing control of the Mercedes Benz for some reason not connected with its condition. In these circumstances the action must be dismissed.

As for costs, counsel are agreed that the costs of this part of the trial must follow the event. Also, that the agreement in respect of costs prior to 29th February, 2000 be made an order of Court. However, I was not asked to make any order for payment of the qualifying expenses of the defendant's two expert witnesses.

In the result, the following orders are made:

1. The action is dismissed;

2. The plaintiff is to pay the defendant's costs of this part of the trial;

3. The agreement in respect of costs prior to 29th February, 2000 is made an order of Court.

For the Plaintiff: Advocate H. Geier

Instructed by Messrs Oliver Law Office

For the Defendant: Advocate L. C Muller, S.C

Instructed by: Government Attorney

(P) A 121/01

U M STRITTER vs AFRICAN GAME (PTY) LTD & OTHER

HOFF, J

HEARD ON: 2001/05/03
DELIVERED ON: 2001/05/07

PRACTICE

URGENT APPLICATION:
SUMMARY JUDGMENT - Reason why urgent relief was sought inter alia - absence of applicant.

No reason advanced for absence and no reason advanced why urgent application had not been instituted as soon as cause thereof has arisen. Reason for absence important consideration in order to establish whether court should exercise its discretion in favour of applicant. Court not to be kept in the dark regarding cause of absence. No case made out to be a application as matter of urgency. Application struck from roll.