

CASE NO.: I 1717/2003

**IN THE HIGH COURT OF COURT OF NAMIBIA**

In the matter between:

**MARIA MAGDALENA SWART**

**PLAINTIFF**

and

**THE MOTOR VEHICLE ACCIDENTS FUND**  
**DEFENDANT**

and

**HAREN**  
**THIRDPARTY**

**SWARTZ**

**CORAM:** VAN NIEKERK, J

Heard: 22 - 25 June 2004; 2-4 August 2004; 25 - 27 October  
2004; 1 - 5 November 2004; 2-3 December 2004

Delivered: 10 March 2006

**JUDGMENT**

**VAN NIEKERK, J:** The plaintiff instituted action against the defendant by way of combined summons. She claims damages against the defendant as a

result of injuries sustained in a collision on 26 December 1998 between a vehicle in which she was a passenger, driven by her husband, the third party, and another vehicle, driven by Mr Ben Serogwe. It is common cause that the plaintiff and the third party are married in community of property and that plaintiff is a quadriplegic as a result of the injuries sustained. The quantum of plaintiff's claim has been settled at N\$4 713 232 - 00. It remains for this Court to determine the issue of negligence.

The plaintiff alleges in her particulars of claim that the sole cause of the collision was the negligent driving by Serogwe. Defendant admitted that collision occurred, but denied that Serogwe was the sole cause of the collision. Defendant pleaded that the sole cause of the collision was the negligence of Swartz, the third party. In addition it was pleaded that the said Harenz Swartz is a person contemplated by section 6(2)(b)(ii) of the Motor Vehicle Accidents Act, 1990 (Act 30 of 1990). Alternatively, the defendant pleaded that if the Court should find that Serogwe was negligent, his negligence did not cause the collision or the damages sustained by the Plaintiff, or contributed thereto. In the further alternative the defendant pleaded that if the Court should find that Serogwe was negligent and that his negligence contributed to or caused the collision, the negligence of Swartz contributed to the collision and the plaintiff's damages. As such the defendant claims an apportionment of damages in terms of the Apportionment of Damages Act, 1956 (Act 34 of 1956).

The defendant also issued and served upon Harenz Swartz a third party

notice in terms of Rule 13 of the High Court Rules, (which notice was amended several times) as well as a notice in terms of section 2(2)(b) of Act 34 of 1956. It is common cause that the third party never intervened in the action between the plaintiff and defendant, and that, should this Court find that the third party was negligent and contributed to the plaintiffs damages, this Court may only make a declaratory order in respect of the third party. (*Shield Insurance Co. Ltd v Zervoudakis* 1967 (4) SA 735 (ECD); *Hart and Another v Santam Insurance Co. Ltd* 1975 (4) SA 275 (ECD); *Ranbond Investments (Pty) Ltd v FPS (Northern Region (Pty) Ltd* 1992 (2) SA 608 (W)).

The collision occurred at a robot controlled intersection shortly after midnight in the early hours of the Day of Goodwill, 26 December 1998. The street in which the plaintiffs vehicle traveled, Abraham Mashego Street, runs through the intersection. Before the intersection along the path that plaintiff traveled, Abraham Mashego Street runs in a downward direction, goes through the intersection and then leads across a bridge which is positioned over a riverbed. Should one continue with this road over the bridge, a residential area on the immediate right is known as Grysblok. Further along Abraham Mashego Street one would be traveling in the general direction of Otjomuise, another residential area, approximately 5 kilometres away. It is in this residential area that the plaintiff and the third party lived.

On the left side (as the plaintiffs vehicle was traveling) of Abraham

Mashego Street there are houses and on the right are the CCN offices. The road entering the intersection from the left is Mungunda Street and runs parallel to the riverbed. It continues through the intersection, but the street on the opposite side of the intersection is called Caesar Street and also runs generally parallel to the riverbed in a northern direction. The intersection is not a perfect cross. A motorist entering the intersection from Mungunda Street must veer slightly towards the right when crossing over to Caesar Street. The roads were tarred and lit by electric street lights.

Before the intersection is reached, the view for a driver traveling from the direction in which plaintiffs vehicle was traveling, towards the left to Mungunda Street is obscured, partly by the incline, partly by shrubs and trees and a signboard on the corner of Abraham Mashego Street and Mungunda Streets. Similarly the view of Abraham Mashego Street to the right for a person traveling in Mungunda Street towards the intersection is obscured by the shrubs, trees and sign board.

Mungunda Street lies lower than the approach of Abraham Mashego Street towards the intersection. Before Mungunda Street enters the intersection there is a slight dip in the street, where after it goes up at a slight incline towards Caesar Street.

In summary the plaintiffs case regarding the collision itself amounts to the following:

On 26 December 1998 shortly after midnight the plaintiff was a passenger in a Volkswagen Caddy bakkie. She was sitting behind in the bakkie, which had a canopy, with a female relative, Alexia and the latter's small child. Plaintiff's husband, the third party, drove the Caddy. Next to him, in front was the witness Clemens Gaseb. They proceeded along Abraham Mashego Street in the general direction of Otjomuise. Near the CCN offices they entered the robot controlled intersection, which I described earlier. Mr Swartz entered the intersection at about 50 kph while the robot was green for him. Shortly after he had entered the intersection he collided with the vehicle of Mr Serogwe, which entered the intersection from Mungunda Street when the robot was red for him. He was traveling very fast. As a result of the collision the plaintiff was injured.

In contrast, the defendant's case essentially is that Mr Serogwe entered the intersection from Mungunda Street while the robot was green for him and that Mr Swartz was negligent by entering the intersection while the robot was red for him. The defendant further alleged that Mr Swartz was under the influence of alcohol at the time. In the further particulars provided by the defendant the grounds of negligence relied upon were set out as follows:

"1.1 The said Harenz Swartz entered into the intersection when it was not safe and/or opportune to do so; and/or

1.2 The said Harenz Swartz entered into the intersection against the red traffic light; and/or

1.3 The said Harenz Swartz entered into the intersection when he did not

have the right of way; and/or

1.4 The said Harenz Swartz did not heed the right of way which the vehicle with registration number N99449W, driven by Mr Ben Serogwe had; and/or

1.5 The said Harenz Swartz did not apply brakes timeously and/or at all;

1.6 The said Harenz Swartz did not avoid the collision by exercising reasonable care and while in a position to do so; and/or

1.7 The said Harenz Swartz was under the influence of liquor."

Counsel agreed in oral argument at the end of the evidence presented, and it is indeed clear that two opposing or contradictory versions of the accident and what occurred thereafter were put before the Court. In such a case it has been said that:

"Where there are two stories mutually destructive, before the onus is discharged, the court must be satisfied upon adequate grounds that the story of the litigant upon whom the onus rests is true and the other is false." (*National Employers' General Insurance Association v Gany* 1931 AD 187 at 199).

However, in *African Eagle Life Assurance Co Ltd v Cainer* 1980 (2) SA 234 (W) it was held (at 237F-238) with regard to the approach as stated in *Gany* that -

".....this approach to problems of proof in this type of case *only applies in cases where there are no probabilities one way or the other*. Where there are probabilities, inherent or otherwise, there is no room for this approach. On the other hand, where there are no probabilities - where, for instance, the *factum probandum* was whether a particular thing was white or black, with

not the slightest evidence as to the preponderance of white or black things in that particular community, there are clearly no probabilities of any sort. And, when the testimony of witnesses is in conflict, the one merely saying the thing was white and the other black, it does not matter logically what the measure of proof is, whether it is on a balance of probabilities or beyond a reasonable doubt. The position is simply that there is no proof, by any criterion, unless one is satisfied that one witness' evidence is true and that of the other is false. It is frequently said that the *dictum* in the *Gany* case does not apply to civil cases because of the omission of the learned Judge to have regard to the measure of proof in civil cases being on a balance of probabilities. But this criticism is invalid because, unless suitably qualified, it confuses proof with the measure of proof. Where there is no probability there is simply no proof of anything (regardless of the measure by which you measure it) unless you believe one person and disbelieve the other. Until then the chances of it being black or white remain exactly evenly balanced. This is simple logic."

This approach has been approved and applied in numerous cases and I shall bear it in mind in my evaluation of the evidence. I further take into consideration the following passage in *National Employers' General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (E) where the Court said (at 440E-G):

"It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiffs allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of

the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false."

The plaintiff did not testify in person. The witnesses who testified in her case were Det/Sergeant Nunuheb, who investigated the matter; Mr Phillip Haradoeb, the first person who was at the scene of the collision; Mr Clemens Gaseb, the passenger in front with Mr Swartz; Mr Swartz, the driver; and Mr Jeremy Engelbrecht.

For the defendant the following witnesses testified: Mr Serogwe, the other driver; Oubaas Makies, an alleged passenger; police officers Haraseb, Nowaseb and Harold Gaseb; the ambulance driver, Mr Strydom; and two women, Oscarine Tenzin and Ella Bakhela. The trial was tenaciously conducted by all the parties against a backdrop of suggestions and innuendo, on the one hand, that the defendant was dragging its feet because *inter alia* it was unable to pay the settled amount, and, on the other hand, that the plaintiff, the third party and sympathetic witnesses had motive to colour or adapt the evidence in order for the plaintiff and the third party to benefit from the huge settled amount, especially in the light of her plight. Evidence was presented by both sides that there were attempts or apparent attempts to influence witnesses in various ways. The evidence presented did not just cover the collision itself but also event before and especially after the collision. Cast in simple terms, the main factual issues in respect of which

there is a dispute have boiled down to the following questions:

- 1 Which driver went through the intersection against the red light?
- 2 Were Swartz and Gaseb under the influence of alcohol?
- 3 Did Swartz leave the scene to look for help or because he was under the influence of alcohol?
- 4 Did Serogwe have passengers in his vehicle?

Mr Swartz testified that on Christmas Day, 25 December 1998 he walked over from his house to that of the witness Clemens Gaseb between 17:00 and 18:00. He found Gaseb barbecuing some meat. They ate the meat and shared a six pack of Tafel Lager beer, each having three beers. After the braai they went to Swartz' house where they watched a video. They consumed no alcohol there as the plaintiff does not drink or want others to drink there.

At about 23:00 they traveled seated as I described before, to different houses in various residential areas to see relatives. No alcohol was consumed. Shortly after 24:00 they approached the intersection in Abraham Mashego Street. He was driving at plus minus 50 kph when he entered the intersection. The robot was green. He saw a vehicle suddenly driving in front of him from the direction of Mungunda Street towards Caesar Street. In cross-examination he explained that he saw Serogwe's vehicle just before or at the time of the collision, that there was very little time to react and that everything happened in a split second. He said that his view was obstructed to the left into Mungunda Street, because of the trees and sign board, but that he did look in that direction before he entered the intersection. He said

any person would look to see if there are vehicles approaching when approaching a robot intersection. In reexamination he said that he saw Serogwe's vehicle when he entered the robot crossing, that is why he could still swerve and apply his brakes.

The other vehicle was driving very fast. Swartz applied his brakes and swung his vehicle toward the right in the direction of Caesar Street to avoid the accident. However, the two vehicles collided and came to a standstill. Mr Swartz stopped in the left-hand lane of Caesar Street facing into Caesar Street, pushed into that direction by Serogwe's vehicle. Serogwe's vehicle came to a standstill on the ground next to Caesar Street, facing the river bed.

Swartz immediately got off his vehicle and walked towards the other driver, accompanied by Gaseb. Serogwe was getting out of his vehicle. Swartz immediately asked him why he was driving like that. In response Serogwe just held his head and said that he is sorry. By this Swartz understood Serogwe to indicate that he is guilty. Serogwe was alone.

Thereafter Swartz returned to inspect his vehicle and to see whether any of his passengers were hurt. The plaintiff was screaming for help. She was lying down at the back of the Caddy. Alexia and her child were standing outside next to the Caddy. Swartz wanted to get into the back to help the plaintiff, but somebody told him from behind that she should not be touched, it may be serious. Someone arrived with a cell phone and he was asked to telephone the police and ambulance. They waited for a long time,

but neither the police nor the ambulance arrived. The plaintiff kept screaming for help. Swartz said he was feeling very sorry for the plaintiff and desperately wanted to help her. He therefore told Gaseb to stay at the scene and that he would run off to his brother's house. It is common cause that Swartz has a brother, Peter Karon who lived in Grysblok, a residential area on the other side of the riverbed. He passed through the riverbed and the veld and then proceeded to Karon's house, from which he wanted to telephone. At the stage he left the scene there were no police officers yet. He later added that the man with the cell phone also left the scene.

At Karon's house the gate was locked. He jumped over the fence and someone (the witness Engelbrecht) came out, who told him that Karon had gone to a farm. Engelbrecht was looking after the house and told him that the phone was locked. They then woke up someone in the neighbour's house, which had a phone, but they could not phone from there. Swartz waited a short while as Engelbrecht had told him that Karon would be back at anytime. After a while Swartz went to look for a taxi, found one and returned to the scene of the accident, but there was nothing. Everyone had left, and the vehicles were gone. He then went by taxi to visit his wife in hospital, but was not allowed to see the plaintiff. He went home as the children were alone.

The next day he went to Ben Swartz, another brother in Otjomuise and borrowed his vehicle to go to the police to report the case. On his way to Clemens Gaseb's house he met Clemens by chance and took him along to

Wanaheda Police Station. Clemens told him who the investigating officer was. They asked the police on duty to contact Nunuheb, but he did not turn up. From there they visited the plaintiff in hospital. Then they went home.

On 27 December they again went to the police where they met Nunuheb. Swartz was interviewed first. Nunuheb asked him why he ran off from the scene of the accident. Swartz told him that he went to look for help. Nunuheb informed him that he had gone to Karon's house with Clemens to look for Swartz in order to arrest him for not being at the scene. Apparently Clemens had told Nunuheb that Swartz had gone there to look for help. Swartz then made a warning statement.

Swartz is in all material respects corroborated by Jeremy Engelbrecht. Peter Karon was his uncle and he looked after Karon's house on Christmas evening 1998. Karon and family had gone to the farm for the day and they were expected back that same night. He went to bed between 22:30 and 23:00. Swartz woke him up by knocking at the door and told him that he had been in an accident. He was looking for Karon. Swartz was very shocked and he kept referring to the fact that his wife was hurt seriously. Swartz wanted to use the phone, but it was locked. They tried the neighbour's at Erf 344 but were unsuccessful. Swartz waited a few minutes for his brother but then returned to the scene. He felt sorry for Swartz and when asked "Could you evaluate whether he was under the influence of liquor or not?", his answer was "No.". Engelbrecht went to bed and woke up the next day at 10:00 to find that Karon had returned in the meantime.

In cross examination he made it clear that it was not possible that Swartz was drunk because he did not smell of alcohol. He was able to observe well as they were standing close to each other and talking. He said his head was clear and that he himself had not been drinking. He noticed that Swartz was wearing a pair of spectacles with one lens missing. He did not know at what time Swartz came to wake him up.

Clemens Gaseb corroborated Swartz in all material respects regarding the events on Christmas Day and how the collision occurred. Although he did not look at the speedometer he estimated Swartz to have driven between 40 and 50 kph. In cross examination he said Swartz drove not more than 50 kph. He said Swartz could not have moved faster, only slower. He based his estimation thereon that "someone who usually gets into a car he would know at approximately what speed the car would be traveling." By this I understood him to say that from having been a frequent passenger he has acquired some experience of the speed at which a vehicle is traveling. He did admit that he did not have a driver's licence, but only about two months before he entered the witness box obtained a driver's licence. In his handwritten statement (G1) prepared a day or two after the collision he put the speed at 50 kph. Later in cross examination he said that Swartz was driving at a reasonable speed which he estimated to be 50 kph.

I am willing to accept that Gaseb's estimation is not too far off. It fits in with that of Swartz. In any event, the speed at which Swartz was traveling is not one of the grounds of negligence relied on by the defendant. Furthermore,

although Serogwe denies this, Det/Segt Nunuheb said that Serogwe pointed out the collision point to him. In Court all the parties pointed out the same point. The sketch plan he drew up and measurements he made were never disputed and must be accepted as correct (except that points C and D must switch around). According to this information the point of impact was very close to the point where Swartz must have seen Serogwe's vehicle for the first time. It is just in the lane next to the one in which he was traveling before one leaves the intersection on the bridge's side. What is more, Swartz' vehicle stopped just about two steps away from the point of impact.

I agree with Mr Muller, who appeared for the plaintiff and the third party, that the evidence tends to show that Swartz did not move fast and probably used his brakes as testified. The points on the scene therefore also tend to corroborate Gaseb in his estimation.

Gaseb further confirms Swartz' evidence that they immediately went to Serogwe's vehicle after the collision, that Serogwe held his head and said "God, I'm sorry" and that he was alone. They returned to the Caddy and heard plaintiff calling for help. He also heard that plaintiff said she could not move. He confirms that Swartz tried to help her but that he was stopped. He saw that Swartz was in shock. Swartz then said that he would go look for help at this brother. There was some uncertainty on the evidence whether Swartz mentioned that he intended going to the brother in Grysblok, as he also has a brother in Otjomuise, but in my view nothing turns on this. There is evidence on record that Otjomuise is about 5 kilometres away from the

scene and it is unlikely that Swartz would have gone so far or intended to go there, as Karon was just around the corner in Grysblok. Besides, Gaseb knew where Karon lived as he had been there before. In fact he took Nunuheb to that house later that evening to look for Swartz. The ambulance arrived about 5 to 10 minutes after Swartz had left. The plaintiff was placed in the ambulance, which also took Alexia and the child and they all left.

At the scene Nunuheb, whom he knew from before, asked him where Swartz is and he told Nunuheb that Swartz went to his brother's house for help. He accompanied Nunuheb to the house, found the brother, but not Swartz. They drove back to the scene hoping that Swartz would be there, but he was not. The vehicles were towed away and Gaseb was taken home.

Both Swartz and Gaseb are corroborated by the witness Phillip Haradoeb in all material respects. He was the first person on the scene immediately after the accident occurred. He confirms the incident relating to what Serogwe said and stated that to him it appeared that they argued about the manner in which Serogwe had driven. He stated that his wife is a nurse and she cautioned Swartz not to move the plaintiff in her condition. He said that Swartz initially was in shock, but calm. Later he was "confused" after he saw the plaintiffs condition and moved towards the riverside. He was not asked to explain his description of the plaintiff as being confused. He saw him walking down into the river and towards Grysblok. He noticed Serogwe talking on his radio and a person with a cell phone called the police and ambulance. The ambulance and police arrived only after a very long time

and removed the plaintiff. He instructed Gaseb to remain at their vehicle to keep it safe. He did not notice the police searching for Swartz in the river. He did not see that either of the drivers was under the influence of alcohol. The witness made a good impression in the witness box.

In aspect of the case that took up much of the Court's time was the allegation by the defendant that Swartz was under the influence of alcohol at the time of the collision. The allegation is coupled with another, namely that Swartz decided to skip the red robot as it was late at night and usually quiet on Christmas evening. The implication of the allegation appears to be that he did so because he was under the influence of alcohol, although this was not actually stated. This is also the true reason, defendant says why Swartz ran from the scene. I prefer to deal with this issue earlier in the judgment as the analysis of the evidence surrounding this aspect will facilitate the weighing up of the probabilities concerning the cause of the collision itself.

Swartz and Clemens Gaseb both admit that they had three Tafel Lager beers each with meat between 17:00 and 18:00 the previous day.

Thereafter they ate more meat at Swartz' home. Swartz drove around from 23:00 until the collision shortly after 24:00 without any problems. Both he and Gaseb denied that either of them was under the influence of alcohol. It is important to note that not one witness testified that he actually saw Swartz under the influence of alcohol.

Serogwe, who knew and recognized Swartz shortly after the collision, did

not describe him as being under the influence of alcohol. According to Serogwe they were told to go near the police vehicle for a breath alcohol test. At the time Nunuheb and Swartz were approaching each other. He heard Nunuheb say to Swartz in Damara or Nama (which he understand) "You see yourself that you are drunk" and "run" and shortly thereafter heard the policeman say "there he's running, there he's running" referring to Swartz.

In a written statement (exhibit "B7") Serogwe made on 11 May 2004 during the trial, but before he testified, he stated for the first time that Nunuheb said to Swartz "You must run away, you know you are under the influence of liquor". Later in the written statement he expressly confirms this. When cross-examined on this statement he persisted that Nunuheb did this. There is overwhelming evidence that Nunuheb arrived at the scene only after Swartz had left the scene. No one else mentioned that any breath tests were done.

In the warning statement by Serogwe dated 27 December 1998 he mentioned at the end that Swartz was drunk, that he observed Swartz and that Swartz ran away from the scene but makes no mention that he did so on Nunuheb's instruction. When confronted with this statement, Serogwe testified that he never made this statement, but was asked to sign a blank form or warning statement, which he did. This startling fact he mentioned for the first time in his evidence after he was pressed in cross examination about its contents. He also admitted that he never mentioned it to the defendant's legal practitioners during any of the preparations for the case.

This explains why it was not put to Nunuheb during cross-examination. Serogwe was a police officer in the past and was at the time of the collision a security officer at Transnamib who at times investigated crimes at times together with the police. I find it highly improbable that he would sign a blank warning statement. Even if he did so, one would expect of him to have reported or mentioned it as soon as he found out that it contains a statement purportedly made by him, especially if it is wrong. He mentioned several instances in which the statement was incorrect during cross-examination. I further find it highly improbable that Nunuheb who was investigating the collision would have instructed a drunken driver to run from the scene in the presence of the other driver and other police officers and onlookers. If he did this, one would expect that Serogwe would immediately have protested or reported the instruction. Instead he only mentioned it 5Vfe years later. I have no hesitation in rejecting Serogwe's evidence on these aspects as false.

It is also in this statement ("B7) that Serogwe for the first time mentioned that Nunuheb removed a crate of beers and a bottle of Richelieu brandy from Swartz' vehicle. In his testimony before this court he however said that it was one of the policemen dressed in camouflage uniform who took these items from the Caddy and put them in the police vehicle.

Both in during and during cross-examination Nunuheb denied that any liquor was found on or removed from the vehicles or the scene of the accident. No one else saw the alleged crate of beer or bottle of brandy. Both

Swartz and Gaseb denied that there were such things in the Caddy.

Nowaseb who was called by defendant and who was a detective sergeant in the Namibian Police appears to have been one of the first police officers on the scene. He testified that he inspected the vehicles of both drivers and he did not see a crate or bottle of brandy. He left the scene before Nunuheb arrived. He never saw any other police officer at the scene or anyone in uniform. The alleged crate of beer and Richelieu seem to have disappeared into thin air. In exhibit "B7" Serogwe mentioned that he asked Nunuheb about this alcohol when he went to see Nunuheb the next morning at the police station and that Nunuheb "just told that it is his job he knows what he must do". He says further than when he and instructing counsel, Mr Murorua asked Nunuheb whether "he still having the evidences of liquor", Nunuheb said "that he is still having the evidences there". This was never put to Nunuheb in cross-examination and there was no attempt reflected in the evidence to produce such exhibits in Court. In my view the weight of evidence strongly favours the probability that there was no crate of beers or bottle of brandy found in the Caddy.

I next turn to a consideration of the remainder of the evidence of Nowaseb. He says he was the first policeman on the scene and that he was off duty and in plain clothes. He passed by the scene on the way home. He reported the collision by cell phone to the police and called for an ambulance. It took a long time for them to respond. Eventually he left the scene to report the matter in person at Wanaheda Police Station. Swartz also mentioned a man

with a cell phone who telephoned the police and ambulance, but who left before their arrival. He appears to have thought this was a civilian. It seems to me that this person may very well have been Nowaseb, although Nowaseb testified that he only spoke to Serogwe and Gaseb. When he looked for Swartz they could not locate him or observe him. He said that Swartz may have been amongst the persons on the scene. He testified that Gaseb spoke to him at the scene. Gaseb told him that he was a passenger in the Caddy and that Swartz was the driver. Gaseb also told him that "they" drove "over " a red robot and bumped into an oncoming vehicle. At the time Nowaseb was right next to Gaseb and he clearly observed Gaseb to be "reasonably drunk". His tongue was slurring, his breath smelled of alcohol and he was unsteady on his feet.

Nowaseb then inspected the vehicles. I understood his evidence to be that he did this because it is normal procedure for a police official who comes onto a scene of a collision to inspect the inside and immediate vicinity of the vehicles involved. He peeped in the front of the Caddy and saw beer bottles there as well as beer bottles next to the vehicle when he moved around to the back. He saw nothing when he inspected Serogwe's vehicle.

In cross-examination he said that he could not remember if he inspected the vehicles alone. What is clear is that he did not make any point to take anyone with him. He acknowledged that normally the driver would be taken along lest the driver later denies the fact that something relevant was found. When pressed on why he did not do it in this case, he said it is not a written

policy or rule, but that it is done out of habit. When pressed further on this point he said that he actually does not normally work with collision cases, but with fraud cases. He further explained that he saw beer bottles inside the Caddy where the passenger's feet would be. He could not say how many, but it was more than one. At first he said they were empty, then he corrected himself and said that he could not actually say whether there were sealed bottles. He did not take them out of the vehicle. On the left side at the back of the Caddy he found more than one empty beer bottle on the ground. Again he could not say how many.

Nowaseb said that he showed his appointment certificate to Gaseb and that he wanted to know who the drivers were. Although he acknowledged that it was important to know who and where the driver and passengers of each vehicle were, he did not actually ask Serogwe about any passengers or see any. To explain this he said that it is actually the responsibility of the person who is coming to investigate the case. He acknowledged that a passenger or liquor could disappear from the scene if he did not report their existence to the investigator.

There is evidence that Nowaseb's report was noted in the occurrence book at Wanaheda with particulars of where he could be traced. He noted that an accident took place and that there were serious injuries. It seems he did not report the evidence of alcohol in the vehicle or the drunken passenger.

The fact that Gaseb was allegedly under the influence was not put to Nunuheb or Haradoeb during cross-examination. However, it may be that

the evidence of Nowaseb was not available at the time these witnesses testified. I have the impression that the defendant's list of witnesses grew as the case progressed. Nevertheless, it seems clear that Haradoeb had occasion to observe Gaseb's condition and actually spoke to him. He did not mention the signs which, according to Nowaseb were noticeable to anyone. In my view it is unlikely that Haradoeb would have left a drunken person in charge of Swartz' vehicle.

Nunuheb had a lot of contact with Gaseb that evening. Gaseb did not tell him the story that Swartz had driven through the intersection while the light was red. If he told Nowaseb this freely, why does he not tell Nunuheb, the investigator? Nunuheb also drove with him to Karon's house and back to the scene to leave Gaseb in charge of the vehicles until they are towed away. Nunuheb must have noticed Gaseb's condition and if he were indeed intoxicated it is unlikely that Nunuheb would not have made something of it or mentioned it in his own statement, especially as he was keen to trace the driver and even formulated charges against him for leaving the scene. If Gaseb was intoxicated and bottles were found in the Caddy it seems obvious that the next logical question would be whether the driver may not have been intoxicated. Nowaseb suggested that perhaps Nunuheb did not do his duty in this regard, but I find it improbable bearing in mind that he actually went to look for Swartz and brought Gaseb back to the scene to remain there until they are towed away. He also asked Serogwe (and it seems Gaseb) to report to the police station the next morning at 8:00 for statements. Although he may be criticized on his subsequent handling of the matter and

the content of the statements and accident report, I am unable to find on the evidence that he was in dereliction of his duty on the night of the collision, unlike Nowaseb.

I find Nowaseb's evidence regarding the beer bottles vague and unsatisfactory. He says he went specifically to inspect the vehicle as it is customary to do. Having seen that the passenger of one vehicle is drunk and having heard that he admitted to their vehicle infringing the red traffic light and finding empty bottles, but no driver, it is probable that any police officer in his position would have specifically counted the bottles, or have made a point to see if they were empty or full or made notes of his observations or not have left the scene until the investigator or other police arrived to whom he could hand over the scene. According to him he was the only police officer there. There was no need to drive to Wanaheda to report the matter in person. He could have made another urgent telephone call. As a detective with the rank of sergeant normally handling fraud case I think it is reasonable to expect of him to anticipate that the driver might have consumed some of the beer and may remove the evidence or disappear from the scene. Yet he leaves the scene without any handing over to another police officer. According to him he also did not report his finding of the beer bottles or the drunken passenger to anyone. He did not report the passenger's explanation that they crossed the intersection against the traffic light and caused the collision. He also did not mention this in the occurrence book to alert anyone to the circumstances which he found at the scene. His explanation is that was the duty of the investigator to deal with all this, but

clearly the investigator may not have found the scene in the state Nowaseb left it. Furthermore, the drunken passenger might not repeat the story to the investigator or might even leave the scene. To conclude, I find his evidence improbable and unsatisfactory on these aspects.

Oscarine Tenzin and Ella Bakhela went to the scene some time after the accident. The ambulance arrived while they were there. Tenzin saw a male person sitting in the passenger seat of Swartz' vehicle. On the dash board were two empty drinking glasses. She is the only person that saw this. In my view this evidence is neither here nor there. Ella Bakhela saw an empty glass and empty beer bottles in the back of Swartz' vehicle where the plaintiff was lying and crying. She was also the only one who saw this. The persons who made specific inspections, namely Nowaseb and Nunuheb did not see this. It seems that Ella was approached to testify at a very late stage. I find it doubtful and improbable that she would remember seeing such details as the glass and empty beer bottles after a period of approximately 5<sup>1</sup>/<sub>2</sub> years. I prefer not to rely on her evidence on this aspect in the face of the evidence by Nowaseb and Nunuheb.

The only other witness who gave evidence on the alcohol aspect is Harold Gaseb, the uncle of Clemens Gaseb. At the time he testified he was a constable in the Namibian Police with eleven years service. He had previously done duty as a court orderly at the magistrate's court and as a traffic officer. At the time of the collision he was living in Port Louis Street about 500 - 600 metres from Clemens. He stated that they had a good

relationship and that Clemens used to come to him with his problems, one of which was alcohol abuse. Allegedly Clemens respected Harold and also borrowed money from him on paydays.

On 26 December 1998 between 7:00 and 8:00 Clemens came to see Harold and told him that he had been involved in a vehicle accident. He said that Swartz was the driver of the vehicle and that the other vehicle was a Transnamib pick-up. Clemens also told him that they had had a party and drank at a certain house in Katutura and just before midnight Swartz and he got into the front of the vehicle with three ladies in the back. They were on their way back to Swartz' house in Otjomuise. As it is normally quiet during Christmas nights, Swartz speeded through the intersection while the traffic light was red. (I pause to point out that this intersection appeared to be quite busy that night. Not only were Swartz and Serogwe there, Haradoeb, Nowaseb and Haraseb passed there by chance shortly after the collision. The evidence was that there were several other vehicles and onlookers who stopped at the scene. It appears that not all passed there because of the accident.)

The light was green for the Transnamib vehicle and they collided. Clemens said that if Swartz had obeyed the traffic light, the accident would not have occurred. Clemens also told him that he was feeling bad, that if Swartz had not gone through the red light, the accident would not have happened and Mrs Swartz would not have been hurt. He told Gaseb that she had sustained a neck injury. Gaseb stated that Clemens was not happy about being a

passenger involved in the accident and said, referring to Swartz that the "bastard" nearly caused his death.

Clemens further said that he forgot to take along some of the liquor that was in the vehicle for his hangover the next day. He mentioned that there were beers, Richelieu brandy and a half jack of Mellow Wood brandy. Clemens also said that Swartz got out of the vehicle and said to Clemens that he is going to run, that he could not stay there, as he was drunk. Swartz said that if he stayed there the police would lock him up for drunken driving. According to Harold, Clemens came to him for advice, because, as Swartz had run away from the scene, Clemens was worried that Swartz might turn around and say that it was Clemens who had been the driver. Gaseb advised him that as he had been just a passenger in the vehicle, why should he be afraid? He told Clemens just to tell the truth.

According to Gaseb, Clemens said that he was not feeling well and had a hangover. Gaseb could also observe that he was hung over, as he smelled strongly of alcohol and his eyes looked as if he had gone to sleep late. Gaseb sent his daughter to go and buy a beer at a shebeen nearby and when she returned, Clemens took the beer and left.

A short while thereafter Clemens and Swartz came walking to Gaseb's house and Swartz asked Gaseb for transport to take him to the place where the accident had taken place to look for his spectacles. Gaseb obliged. He parked his vehicle in Caesar Street and went with a footpath down into the

river bed with Clemens and Swartz to look for the spectacles. In the witness box he could not remember if they found the spectacles or not. He also could not remember if Swartz wore spectacles that day. From there he took Clemens and Swartz home.

This witness also told the Court that on 3 August 2004 during the time that Swartz was giving evidence in this Court Swartz had approached the witness to come and say, if he is called, that he had found Swartz and Clemens on 26 December 1998 at the river looking for the spectacles, because this is what Swartz had testified. Swartz also told him that he had denied in evidence that he went to the scene with Harold Gaseb. Swartz was giving him a tip-off, as he described it. Swartz allegedly wanted Gaseb to help him with this piece of evidence.

Gaseb also told the court that the next day he met with Swartz in Port Louis Street near his home, because the latter left him a message at home. Swartz then showed Gaseb a document which had been handed in at Court. It was a statement about the events of the collision on 26 December 1998. (There was indeed handed in as exhibit "J" a statement conforming to the description). Swartz then said that Mr Erasmus, his instructing counsel, had said that Gaseb should go thoroughly through the statement and when he testifies his testimony must go along the same lines as that of Swartz in the statement. Mr Erasmus had also allegedly said, in the words of Gaseb, that "they are only short of one percent, then they walk away with 5 million" an apparent reference to the fact that the plaintiff needed only to prove 1%

negligence on the part of Serogwe to succeed in her claim (something which had been mentioned by counsel for both parties in Court during an earlier application for postponement of the trial and in the opening statement on behalf of plaintiff at the start of the trial.).

Swartz was recalled to be cross-examined on these allegations and he denied them. Swartz earlier testified that he borrowed his brother Ben Swartz' vehicle on the morning of 26 December and later went with Clemens to look for the lens of his spectacles which he lost in the river bed the previous evening. While there, Harold Gaseb happened to come by. When Clemens was cross-examined, he also denied the conversation which Harold alleged took place and his allegations relating to the spectacles.

There are several aspects about Harold Gaseb's evidence which are to my mind quite improbable. If Gaseb was upset and felt bad about Swartz "going through" the red robot, it is likely that he would he have told Nunuheb the same story. Even if one accepts that he may have been afraid that Swartz would pin the driving onto him, why would he then tell Nunuheb that Swartz had gone to his bother in Grysblok to seek assistance? One would expect that he would have told Nunuheb that Swartz was drunk and ran away not to be arrested. If he really told the story about the beers, the Richelieu and Mellow Wood, it is improbable that both Nowaseb and Nunuheb did not see all these items, although they inspected the vehicle. The alleged fear that Swartz would pin the driving on him is unreasonable as at least Alexia and Haradoeb saw that Swartz was the driver. There were also other relatives who saw that

Swartz drove the vehicle the previous evening before the collision. Clemens did not have a driver's licence - it is improbable that he would have driven Swartz' vehicle, especially if he, Clemens, was drunk. It seems to me that Harold needed some aspect on which to "advise" Clemens.

I find it improbable that Clemens would shortly afterwards bring the very Swartz, who nearly killed him the previous evening, ran away and who is suspected of perhaps wanting to pin the driving on him, to Harold to ask for transport to look for his spectacles. It is further improbable that Harold would comply and that the two Gasebs would assist Swartz in these circumstances to look for the spectacles. I find Harold's explanation on this score vague and improbable. I bear in mind that at the time Harold was a police officer. I think it highly improbable that he did not confront Swartz about committing several offences the previous evening, especially as there was a prospect in the mind of his nephew Clemens that Swartz would blame Clemens.

He did not even ask Swartz anything about the previous evening's events. Further, he goes so far as to assist the very offender at the scene of the crimes to retrieve his property which was lost while fleeing from justice while knowing that an innocent person was seriously injured. If he truly did all this he is patently dishonest and not to be trusted. This of course does not necessarily mean that he is lying, but in the absence of other satisfactory evidence supporting him, I take a dim view of his evidence on these aspects.

It is also opportune to deal at this stage with the impression made on me by

Clemens Gaseb. He was not an easy witness to deal with. He sometimes did not answer questions and had to be pressed, sometimes by the Court. However, I did not have the impression that it was because he wanted to hide anything or because he could not explain. I agree with Mr Muller's submission that he wanted to be clever. He also seemed to be obstinate at times. His failure to attend the proceedings after an adjournment while he was under cross-examination seemed to be related to financial constraints and a dispute with plaintiffs legal practitioners about his costs and not because he wanted to avoid being questioned. He testified by means of an interpreter and at times appeared to have difficulty with understanding the questions in translation. These sometimes related to questions relating to his view about the importance of reasonableness of certain matters and not about facts of narrative material.

One aspect which caused him difficulty was the fact that he obviously missed a day in his recollection of events, namely the day light hours of 26 December 1998. At times he appeared to think that the accident occurred on 27 December after midnight. He was adamant that he made his warning statement the very next morning after the accident. Swartz said that they went to the police station twice - once on the 26<sup>th</sup> and once on the 27<sup>th</sup> of December. On 26 December they tried to get hold of Nunuheb, but he did not turn up, so they returned the next day. In this respect he is supported by Serogwe who initially gave the same evidence. I have considered whether this difficulty of Clemens had anything to do with the story told by Harold Gaseb. However, in the light of the fact that the weight of probability is

against Harold's version, I have come to the conclusion that it is probably a problem with his memory or a mistake.

Another aspect to be dealt with is that Clemens did reluctantly admit after long cross-examination that he discussed the incident of the collision with Swartz the next day. Swartz, rather improbably, denied this. I must point out that this is a common feature of the testimony of witnesses in Court who are often reluctant to deny that they have discussed any aspect of a case, no matter how startling, shocking or life changing the event may have been, even with their lawyers. One knows that they naturally did discuss it and any lie or reluctance that they have not does not tend to weigh heavily in the mind of the Court.

Returning to Harold Gaseb's evidence regarding the events of 3 August, it seems to me unlikely that Swartz would tip Harold off regarding a relatively unimportant piece of evidence, namely that Harold found

Swartz at the scene looking for his spectacle lens. Swartz must have known that Harold would probably be called by the defendant and that any attempt to influence him would probably be revealed, especially if he was asking Harold to tell a deliberate lie.

The same can be said about the evidence regarding the statement on the events of 26 December 1998. In any event, there can be no reason for Mr Erasmus to send a message to Harold to tailor his evidence along the lines of Swartz' statement at it is concerned with the collision itself, and not with

any matter on which Harold could or would be a witness. Swartz also did not strike me as being so unintelligent or uninformed that he would think that it would serve any purpose to ask Harold to do this. In fact, Swartz' evidence amounts thereto that it would have served no purpose. In my view Harold's evidence on this aspect cannot be accepted.

I now turn to the issue of why Swartz left the scene. He says it was to seek assistance from his brother. He is supported in this version by Clemens that this was the reason he advanced and which was conveyed to Nunuheb, who further confirms this. He says that he was desperate to help the plaintiff and that the ambulance took long to arrive. In this he is supported by the evidence of defendant's witness, Mr Strydom, who said that the ambulance only left for the scene at 24:59. This is slightly less than an hour after the collision approximately took place. There is evidence by both Swartz and Haradoeb that the plaintiff was not to be moved. That this was said, is highly likely on the probabilities. According to Swartz the man with the cell phone had left. As I said before, this appears to be Nowaseb who confirmed that the ambulance took long to arrive and that he then left to personally report the matter.

It may be that one can raise valid criticism as to why Swartz did not seek help from Haradoeb, from any of the onlookers, or at one of the nearby houses. At least Haradoeb had a vehicle there and could possibly have taken Swartz to seek for assistance. Swartz explained that he did not know Haradoeb that well and did not know anyone else there, except his brother.

He took what he thought was the quickest route through the river bed and walked, ran and jogged to Karon's house where he jumped over the fence. There was some light and he could see, although he did acknowledge that the route he took was not easy and without obstacles. It may be that a person who was thinking clearly and calmly might rather have chosen to take the route along the road and over the bridge, but I bear in mind the evidence that Swartz was shocked, confused and concerned about his wife, which is reasonable and probable in the circumstances. It seems natural that a person in Swartz' position would prefer to seek help from a relative close by. He is supported, as I already pointed out, by Engelbrecht about what occurred at Karon's house. This lends support to his story that he left to seek assistance. It does seem strange that Swartz missed the return of his brother, as well as Nunuheb's visit to Karon's house and that he returned to the scene after everyone had left. He explains this by saying that he went to look for a taxi, which he found nearby at the corner of the street at a big house. During cross-examination Mr Geier for defendant confirmed that there is indeed such a place which is also a business place at the corner of the street in which Karon lives. Swartz said that he also had to wait for the taxi driver to fetch a bag in the house and close the gates. This took time. They then drove back to the scene.

It appears to me that Swartz was just unfortunate in that he missed his brother and Nunuheb. He says he did not see them. It is not unlikely that Karon returned soon after Swartz had left, as he was expected home any

minute. In fact, Nunuheb found him there shortly afterwards. Furthermore, from exhibit "K", a street map handed in it is clear that there is more than one route that a vehicle could take from the scene to Karon's house. It is not improbable that Karon and Nunuheb had taken a different route to that taken by Swartz. It seems to me that were it not for the allegation that Swartz was under the influence no-one would have thought it strange that he left the scene to look for assistance or that he missed his brother or Nunuheb on the way back. In the absence of any credible evidence that he was indeed under the influence, the probabilities favour Swartz' version that he left the scene for an innocent purpose.

In coming to this conclusion I must also mention that Swartz made a good impression on me when he testified. In addition I do not think that the fact that these aspects were not fully dealt with in his warning statement is of great import, as there is clear evidence that the reason for his absence was already conveyed to Nunuheb on the night of the collision. As far as Nunuheb is concerned it is clear that he must be mistaken that Haraseb had told him that Swartz was warned not to leave the scene. None of the police officers have given such evidence. It seems to me that it is not improbable that the general impression arose at the scene that Swartz had fled, perhaps also because he was at least some of the time jogging or running. He only told Clemens that his purpose in leaving was innocent. To others observing him it probably looked as if he was fleeing or even hiding in the river bed. It is not improbable that this impression could have led to a suspicion that he was under the influence and had to make a getaway.

I now turn to the evidence by the defendant's witnesses in more detail and will then deal with the first and last two factual questions posed above. The evidence by the witness Serogwe in essence amounted to the following. He had two passengers with him in the front of the Transnamib pick-up. The two were Oubaas Makkies and Don. He picked them up at Ella Bakhela's house about 500-600 metres away from the intersection in Mungunda Street. Her house is at Erf 9533. Ella testified that the intersection can be seen from outside her house. Serogwe was in a hurry as he was busy investigating a matter of stolen property which was kept at a certain house. He needed Don to point out the house to him. Why Makkies went along is not quite clear. Serogwe said that he drove about 80 kph. He first said that when he got onto Mungunda Street at Ella's house the robot was already green for him. He drove towards the intersection and before the crossing he heard a bang or a knock. He then said "the time that I just reached the crossing that's when I heard a knock or a hit on my right hand side." He pointed out a point on photo D(12) which coincides with the place which Nunuheb indicated on the sketch plan as the point of impact. It is clear that Serogwe did not see plaintiffs vehicle at all before or during the collision, but only after he had come to a standstill and he got out of his own vehicle. When he heard the knock he swerved right and came to a standstill off the road down in the riverbed. (His description is misleading. From the point pointed out it is clear that it was not actually in the riverbed, but higher up on the banks of the incline towards the river.)

As the driver's door had already been damaged before and could not open, both he and his two passengers got out on the passenger side. He then

moved around his vehicle and saw Swartz' vehicle next to his. (Again Serogwe's description is not accurate, as Swartz' vehicle was at point A on exhibit A1, about 18 paces away from Serogwe's vehicle.)

Contrary to what everyone else said, Serogwe testified that the police were there within seconds and that the drivers were instructed not to move. Much later he said that they arrived 30 - 40 minutes later. Later they were called to give a breath specimen for alcohol, which evidence is likewise not supported by any other witness. That is when Nunuheb allegedly told Swartz to run away, which evidence I have already rejected. Swartz then ran and the police were searching for him. Nunuheb then said that he could report at the police station at 8:00. This he did, but Nunuheb was not there. He returned on 27 December when the warning statement was taken. Later he stated that he actually met Nunuheb on 26 December and signed a blank warning statement.

According to Serogwe, Oubaas Makkies disappeared from the scene, that is why no statement was eventually taken from him. The obvious place to have looked for him was at Ella Bakhela's house where he found Makkies. There is no evidence that this was done. It is clear though that he never mentioned to the police or in any of his statements that

Makkies was the one passenger. He only mentioned a person by the name of Deon, who he later said was Don. Nunuheb confirms that Serogwe had mentioned that there was a passenger by the name Deon. Much time was spent on the issue of whether Serogwe tried to bring Deon and Nunuheb

together for a statement to be taken and whether Nunuheb failed to do his duty in this regard. The initial stance taken in plaintiffs case was that Serogwe was alone in the vehicle, but later it was conceded after Oscarine and Ella testified that Don and Makkies may have been in the vehicle at the time of the collision.

There are however, aspects of Makkies' evidence that concern me. He first, like Serogwe said that the light was green when they drove off from Ella's House, but then he changed his evidence and said that he saw the light turning green about 16 paces before they entered the intersection. Serogwe also changed his evidence in cross-examination to say the light turned green when they were about 50 metres away from the intersection. Makkies just heard the sound of the collision and did not see Swartz' vehicle. Immediately after the accident he saw Swartz get out of his car and run away. Makkies said that he stayed at the scene for about 30 minutes and then went to Ella's home and told her and Oscarine that they had been involved in an accident. Strangely, he did not tell them what happened and on their own testimony, they did not ask him what happened. They were only concerned about Don, who was, according to Makkies, unharmed. Makkies also testified that the police searched for the other driver and even fired shots in the process. There was no such evidence by anyone else. This must be a clear fabrication. The witness Haraseb who arrived by chance at the scene testified that he was dressed in a blue uniform and accompanied by a driver in a camouflage uniform. They looked for Swartz in the river bed, but did not state that they fired shots.

Although Makkies appeared truthful in the witness box about his criminal record and the general impression he conveyed was one of honesty, it was clear that he is not youthful anymore. He was slow to respond to questions and in his manner of speaking. I did not get the impression that he was quick in his reactions or particularly responsive. Bearing in mind in his favour that the accident occurred a considerable time before his testimony, I must nevertheless say that I would not be surprised if he were not particularly observant. His testimony that Swartz ran away immediately tends to confirm this impression. What is more, he did not even tell the women at home what had occurred, as one would have expected, namely that another vehicle disobeyed the red light. This must surely have been something noteworthy to say in the circumstances. According to him he also did not speak to Serogwe at the scene, which also seems strange. I have my doubts that he even discussed the matter with Serogwe later, as he was never mentioned as a witness who could testify that Serogwe was in the right and Swartz in the wrong. It was only after Don died that his name came to the fore. If he did discuss it, it would rather seem that he probably could not assist Serogwe. If he could assist, I find it very improbable that he just left the scene without making himself available as a witness. For the reasons already mentioned, I am not inclined to rely on his evidence as to the colour of the traffic light.

Serogwe's evidence was most unsatisfactory. Counsel for the defendant conceded mildly that he was not the best witness and that his evidence should be treated with caution. I do not propose to deal with the countless

instances where he clearly contradicted himself, adjusted his evidence to cast himself in a better light, blamed others for his mistakes, gave spurious answers and even fabricated evidence. I have already referred to some aspects in regard to exhibit B7 and the warning statement. At times he seemed not to know the difference between lies and the truth. Apart from this he was distinctly hostile, arrogant and rude in the witness box while being cross-examined. The Court repeatedly had to warn him to listen to the questions and to answer them. What is clear is that his evidence on material issues cannot be relied upon in the absence of corroboration. In the light of my findings on the evidence given by Makkies I am driven to the conclusion that there is no support for Serogwe's version that the traffic lights were green for him. I am fortified in this conclusion by the evidence of Swartz, Clemens and Haradoeb that Swartz and Clemens immediately after the collision went to Serogwe and confronted him about his driving. Swartz says he was angry about the manner in which Serogwe drove. Haradoeb had the impression that there was an argument. This reaction by Swartz would be a natural reaction by an innocent driver towards the offending driver. In addition Serogwe held his head and apologized.

Apart from this Serogwe on his own version drove at 80 kph at night in an area where the speed limit is 60 kph. He did not keep a proper look out or enter the intersection with the necessary care expected from a reasonable driver in the circumstances. In the intersection he did not even see plaintiffs vehicle until after the collision and they had come to a stop. He only swerved to the left after his vehicle had been hit. It is clear that Serogwe

was negligent and caused the accident. In the result the plaintiff has proved her claim against the defendant.

As far as the driving by Harenz Swartz is concerned, I can find no basis upon which it can be said that he was negligent on any of the grounds alleged by the defendant and point out that the general description of the damage to his vehicle supports his version that he swerved to the right. The claim against him as third party must fail.

In the result I make the following order:

1. In respect of plaintiffs claim against the defendant judgment is granted for the plaintiff for:

1.1 Payment of the amount of N\$4, 713, 232-00.

1.2 Interest on the aforesaid amount at the rate of 20% per annum calculated from 14 days after the date of judgment to date of payment.

1.3 Costs of suit.

2. In respect of defendant's claim against the third party the claim for declaratory relief is dismissed with costs.

**APPEARANCE FOR PARTIES:**

**PLAINTIFF AND THIRD PARTY:** Adv L C MULLER SC

Instructed by: Van der Merwe-Greeff Inc

**DEFENDANT:**  
**Geier**

**ADV. H**

Instructed by Murorua & Associates