IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**NO**
Of Interest to other Judges:	**NO**
Circulate to Magistrates:	**NO**

Case No.: 1264/2012

In the matter between:

WESRUP BELEGGINGS CC Applicant

and

D KUHN FERRIERS 1st Respondent

GEORGE EBENHAZER GELDENHUYS 2nd Respondent

HEARD ON: 7 & 8 FEBRUARY 2017

JUDGMENT BY: DAFFUE, J

DELIVERED ON: 3 AUGUST 2017

JUDGMENT

I INTRODUCTION

[1] A head-on motor vehicle collision occurred on 10 May 2010, more than seven years ago, on the N1 freeway just a few kilometres south of Kroonstad in the direction of Ventersburg. The two drivers blamed each other and as is usually the case in these situations, two mutually destructive versions were presented to the court. There were no other eyewitnesses that could shed any light on the reasons for the collision. Mr Barry Grobbelaar, a motor vehicle reconstruction expert, testified on behalf of the plaintiff.

II THE PARTIES

[2] The plaintiff is Wesrup Beleggings CC, a close corporation duly registered as such with principal place of business in Vredendal, Western Cape.

[3] First defendant is D Kuhn Ferriers, a firm operating *inter alia* as transporters with principal place of business situated in Kraaifontein, Cape Town.

[4] Second defendant is George Ebenhazer Geldenhuys, an employee of first defendant and the driver of its Toyota Corolla motor vehicle which was involved in the collision.

[5] Adv M Naude presented plaintiff's case before me whilst Adv P Haasbroek appeared for both defendants. It was agreed after the hearing of evidence that the court would be presented with counsel's written heads of arguments, the presentation of oral argument having been waived.

[6] I shall throughout this judgment refer to Wesrup Beleggings CC as the plaintiff, to D Kuhn Ferriers as the defendant and to Mr Geldenhuys as the defendant's driver. Plaintiff's truck was driven by its employee, Mr Zwelinjane Johannes Valashiva, herein later referred to as the truck driver.

III **THE PARTIES' VERSIONS**

[7] I shall deal with the two versions in more detail when I evaluate the evidence, but to put the reader in the picture, the following summary is provided. It is plaintiff's version that the truck driver was travelling from Kroonstad *en route* to Ventersburg, that the defendant's Toyota Corolla motor vehicle moved over the centre line and collided with the right front wheel of the plaintiff's truck, notwithstanding the fact that the truck driver moved to the left and partly across the yellow line in order to avoid a collision. The impact caused the truck's right front tyre to burst, as a result of which the truck driver lost control where after the truck moved into its incorrect side of the road and capsized. After the collision the Toyota Corolla returned to its correct side of the road and came to a standstill on that side. The collision occurred approximately five kilometres outside Kroonstad.

[8] The version of the defendant's driver is that he came across two trucks approaching from Kroonstad and that plaintiff's truck, the second truck, gradually moved over to its incorrect side of the road and collided with the defendant's vehicle where after defendant's driver lost consciousness for a while. Whilst defendant's driver was transported by ambulance to the hospital in Kroonstad, he noticed the 10 kilometre sign post indicating the distance to Kroonstad which made him believe that the collision occurred more than 10 kilometres from Kroonstad. It should immediately be mentioned that defendants admitted the averment in the particulars of claim that the collision occurred approximately 5 kilometres from Kroonstad. The defendant's driver testified that the point of impact was half a meter from the centre line in his correct lane of travel.

IV **ISSUES NOT IN DISPUTE**

[9] *Ex facie* the pleadings the following facts are not in dispute:

9.1 Plaintiff's citation as Wesrup Beleggings CC and defendant's citation as D Kuhn Ferriers;

9.2 The particulars of second defendant and that he was employed by first defendant;

9.3 The following averment as pleaded in paragraph 5 of the particulars of claim: "On or about 10 May 2010 and at or near the N1 approximately 5 km from Kroonstad in the direction of Ventersburg, plaintiff's aforesaid truck and trailers was (sic) involved in a collision with a motor vehicle with registration number [Y...] there and then been driven

by the 2nd defendant, who was there and then acting within the course and scope of his employment with the 1st defendant, alternatively furthering the business and interests of the 1st defendant, further alternatively acting under the 1st defendant's direct control" (emphasis added);

9.4 That the amount claimed was demanded from defendants.

V ISSUES IN DISPUTE

[10] *Ex facie* the pleadings the following facts were still in dispute when the matter was called:

10.1 Plaintiff's incorporation as a close corporation with principal place of business at 25 Stasie Road, Lutzville, Vredendal – however, this was eventually admitted before the leading of evidence;

10.2 That first defendant was a firm operating *inter alia* as transporters, having its principal place of business at 25 Livingstone Street, Kraaifontein, Cape Town;

10.3 That plaintiff was the registered owner, alternatively *bona fide* possessor of the truck and two trailers bearing the registration numbers as set out in paragraph 4 of the particulars of claim, the risk in respect of the said truck and trailers having passed to the plaintiff. It was also disputed that the trailers were loaded with wooden chipboards and that the risk of loss of the load passed to plaintiff;

10.4 That the sole cause of the collision was due to the negligence of the defendant's driver, who in particular caused his vehicle to veer into the opposite lane in which the plaintiff's vehicle was travelling, causing a collision with the plaintiff's vehicle.

10.5 The plaintiff suffered damages in the amount of R673 587.93.

[11] As pointed out by plaintiff's counsel, defendants denied that plaintiff was either the registered owner or *bona fide* possessor of the truck and trailers as are apparent from paragraph 4 of the particulars of claim read with paragraph 4 of the plea, but in paragraph 5 of the plea in response to paragraph 5 of the particulars of claim defendants admitted plaintiff's entitlement to the truck and trailers. I refer to the portion underlined *supra, i.e.* that plaintiff's truck and trailers were involved in the collision. Although some cross-examination was undertaken in this regard, defendants' counsel did not seriously dispute plaintiff's *locus standi* to sue for damages caused to the truck and trailers as well as the cargo.

VI **SEPARATION OF ISSUES**

[12] Prior to hearing of evidence I made the following orders by agreement:

1. The merits and *quantum* are separated in terms of Rule 33(4) and whilst paragraphs 1, 3, 5, 8 & 9 are now

common cause, the court will have to adjudicate the disputes arising from paragraphs 2, 4 & 6 of the particulars of claim read with the respective paragraphs of the plea;

2. It is recorded that the counterclaim has now been withdrawn;

3. The *quantum* of plaintiff's claim, *i.e.* the allegations in paragraph 7 of the particulars of claim, stands over for later adjudication if required;

4. The costs of the counterclaim shall be argued when the merits are argued.

VII **LEGAL PRINCIPLES**

[13] As mentioned the court is confronted with two mutually destructive and incompatible versions as is generally the case in especially motor vehicle collisions. In order to evaluate the evidence I shall take cognisance of and adopt the reasoning of Nienaber JA in *SFW Group Ltd and Another v Martell Et Cie and Others* 2003 (1) SA 11 (SCA). I quote from paragraphs 5 and 34:

"[5] The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on *(a)* the credibility of the various factual witnesses; *(b)* their reliability; and *(c)* the probabilities. As to *(a)*, the court's finding on the credibility of a particular witness will depend on its impression about the veracity

of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to *(b)*, a witness' reliability will depend, apart from the factors mentioned under *(a)*(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to *(c)*, this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of *(a)*, *(b)* and *(c)* the court will then, as a final step, determine whether the party burdened with the *onus* of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

"[34] In assessing the probabilities, phase by phase as events unfolded, as well as comprehensively and in retrospect, the conclusion seems to me to be inescapable that of the two versions before Court as to what the parties agreed to, SFW's is the more probable. That being so, Seagrams has not succeeded in discharging the *onus* which it assumed for itself in suing for a declaratory order. It further follows that SFW's appeal must succeed."

[14] Experts are frequently called in to assist our courts, but courts are not bound by the opinion of an expert. An expert must be called

as a witness on matters calling for specialised knowledge. It is the duty of the expert to furnish the court with the necessary scientific criteria for testing the accuracy of the expert's conclusions so as to enable it to form an independent judgment by the application of these criteria to the facts proved in evidence. See *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft Für Schädlingsbekämpfung MBH* 1976 (3) SA 352 (A) at 370H – 372A. In the evaluation of the evidence of experts it is required to determine whether and to what extent their opinions advanced are founded on logical reasoning. See *Michael and another v Linksfield Park Clinic (Pty) Ltd and Another* 2001 (3) SA 1188 (SCA) at para [36].

[15] In *Mapota v Santam Versekerings Maatskappy Bpk* 1977 (4) SA 515 (AD) at 527H Potgieter JA commented as follows:

> "Dit is egter welbekend … dat direkte geloofbare getuienis dikwels aanvaar kan word al sou daardie getuienis indruis teen waarskynlikhede wat voortspruit uit menslike ervaring of wetenskaplike menings. In die onderhawige geval sou, na my oordeel, die wetenskaplike mediese getuienis slegs die sterk en andersins aanvaarbare en gestaafde getuienis van appellant kan ontsenu indien daardie getuienis onteenseglik getoon het dat die redelike moontlikheid dat die ongeluk kon plaasgevind het soos deur appellant beskryf is, nie bestaan nie."

[16] In *Stacey v Kent supra* the full bench of the Eastern Cape Division considered several *dicta* from a number of judgments dealing with the manner in which expert evidence should be considered and concluded as follows at 350G-I:

"I would point out that the present is not a case where the evidence was of so technical a nature that this Court is obliged to defer to the opinions of the experts who testified. I am further constrained to make the comment that, as will be shown below, the expert testimony adduced in the present matter to an extent verged on the highly theoretical and hypothetical. As pointed out in the authorities cited above, it is the duty of experts to furnish the Court with the necessary criteria for testing the accuracy of their conclusions, so as to enable the Court to form its own independent judgment by the application of those criteria to the facts proved in evidence. The mere pitting of one hypothesis against another does not constitute the discharge of the functions of an expert. The Court should also be on its guard against any tendency on the part of expert witnesses to be biased in favour of the side which calls them and an unwarranted readiness to elevate harmless or neutral facts to confirmation of preconceived theories or to dismiss facts supporting an opposing conclusion."

[17] Bearing in mind the quoted *dicta,* direct and credible evidence of what happened in a motor vehicle collision often carries greater weight than the opinion of an expert who had to reconstruct the event from his experience and scientific training, especially where the expert relies on uncertainties such as estimates of time and distance by witnesses confronted with sudden and unexpected events. It is only where the direct evidence is so improbable that its reliability is impugned that an expert's opinion of what may have occurred should prevail. Having said this, in the final result a decision must be reached on the evidence as a whole.

[18] In motor vehicle collision cases the respective drivers and eyewitness are without exception requested to estimate aspects such as speed, duration and distance. It is obviously necessary to obtain clarification from witnesses, but there can be no doubt that it is notoriously difficult for anyone to make accurate estimates in

the proverbial split second and/or in the agony of the moment. See *Olivier v Rondalia Versekeringsmaatskappy van SA Bpk* 1979 (3) SA 20 (AD) at 26-27 and *Rodrigues v SA Mutual and General Insurance* 1981 (2) SA 274 (AD) at 279 and 280. A strictly mathematical approach, although undoubtedly very useful as a check, can rarely be applied as an absolute test in collision cases since any mathematical calculation depends on exact positions and speeds whereas in truth these are merely estimates almost invariably made under circumstances wholly unfavourable to accuracy. See *Van der Westhuizen v SA Liberal Insurance Co* 1949 (3) SA 160 (C) at 168 quoted with approval in *Diale v Commercial Union Assurance Co of SA Ltd* 1975 (4) SA 572 (AD) at 577A.

[19] I wish to quote the following from Cooper, *Delictual Liability in Motor Law*, 1996 ed, vol 2 at 471, relying *inter alia* on *President Insurance v Tshabalala* 1981 (1) SA 1016 (A), *Kapp v Protea Ass* 1981 (3) SA 168 (A) and *Marine & Trade Ins v Van der Schyff* 1972 (1) SA 26 (A):

> "In a civil case a court is obliged to determine all issues on a balance of probabilities. If on the totality of the facts, and after making due allowance for the risk of error, the court is satisfied on a balance of probabilities of the reliability of the estimates, there is no reason why it should not adopt a 'mathematical' approach, not merely as a 'useful check' but to determine the negligence issue. The many reported judgments in collision cases reflect the important role this line of reasoning plays in the determination of the negligence issue."

VIII **EVALUATION OF THE EVIDENCE AND SUBMISSIONS ON BEHALF OF THE PARTIES**

[20] Although the defendant finally admitted plaintiff's incorporation as a close corporation as pleaded in paragraph 1 of the particulars of claim, it was not prepared to admit plaintiff's *locus standi* to sue for damages caused to the truck, trailers and cargo. However, Mr Haasbroek conceded in his heads of argument that plaintiff bore the risk of damage to, or loss of the cargo on the trailers at the time of the collision. Plaintiff called Mr Rupping, a co-member of plaintiff who testified with reference to the official registration certificates that the truck and trailers were registered in the name of the plaintiff at the time of the collision, that ABSA Vehicle Finance ("Absa") was the title holder of the truck and trailers and that the right of ownership therein vested in ABSA. After the collision Absa provided plaintiff with a written settlement quotation dated 15 June 2015 in respect of the truck, emphasising that the right of ownership shall vest in the bank until the settlement amount is received. Plaintiff filed an insurance claim with its insurers, was duly paid out and Absa's claim was settled. Plaintiff was therefore duly indemnified.

[21] Mr Rupping was not in a position to provide the court with the written credit agreement entered between ABSA and plaintiff notwithstanding attempts made to obtain same, but in my view the documentation provided and uncontested evidence of Mr Rupping serve as *prima facie* proof that plaintiff was the debtor in terms of the credit agreement entered into with ABSA pertaining to the truck and trailers and that plaintiff carried the risk in respect of loss of the

truck, trailers as well as the cargo. It is not in dispute that Mr Rupping presented not only oral evidence, but also documentary proof in respect of the risk of loss in respect of the cargo, and as mentioned, Mr Haasbroek conceded this aspect. I accept that Mr Rupping presented hearsay evidence and that the failure to present the credit agreement might have been fatal. Mr Haasbroek merely submitted in his heads of argument that plaintiff failed to prove that it bore the risk of damage to or loss of the truck and trailers without taking the issue any further. He did not in cross-examination attack the veracity of the registration documents of the truck and trailers or the Absa settlement quotation or Mr Rupping's version of plaintiff and Absa's relationship, although Mr Rupping was warned that he would argue that plaintiff failed to prove the nature of the relationship with Absa. I am of the view that judicial notice may be taken that credit providers such as Absa will not be prepared to accept risks of damage to or loss of vehicles which are the subjects of credit agreements. They or their personnel have no control over the manner in which such vehicles are being used. Motor vehicle collisions and car and truck hi-jacking occur frequently and no credit provider would be prepared to accept the risk of loss in such instances. I therefore find that plaintiff bore the risk of damage to or loss of the truck and trailers.

[22] As mentioned *supra,* two eyewitnesses testified pertaining to the collision, to wit the truck driver, Mr Valashiva and defendant's driver, Mr Geldenhuys. I accept that their versions should not be unnecessarily scrutinised pertaining to detail, bearing in mind the authorities quoted, as well as the time lapse of seven years. I considered the versions of the two witnesses and I am satisfied

that the truck driver made a more favourable impression on me in the witness box than defendant's driver. I shall elaborate. I could not find any material contradictions in the truck driver's version, either internal contradictions or external contradictions. The same cannot be said of the defendant's driver. Notwithstanding the admission on behalf of the defendants that the collision occurred approximately five kilometres from Kroonstad, and that it was never put in contention when the truck driver testified that, according to defendants, the collision occurred at a totally different spot on the road towards Ventersburg, the defendant's driver testified that the collision occurred further than ten kilometres from Kroonstad and therefore denied that it occurred at the spot testified to by the truck driver and indicated on the photographs taken by Mr Grobbelaar, the expert witness to whose evidence I shall refer later. However, defendant's driver who frequently made use of the road even after the collision could not find the spot afterwards, but insisted that evidence was led in respect of the wrong scene. In cross-examination he insisted that he informed defendant's counsel prior to the hearing that he did not agree with plaintiff's version, but counsel – a senior legal representative – failed to either arrange for the withdrawal of the admission in the pleadings or to seek leave to make appropriate statements about the incorrectness of plaintiff's version. Defendant's driver was either mistaken about the 10 kilometre road sign due to his medical status at the time, or deliberately wanted to discredit the truck driver's version. Fact of the matter is that on his own version there was an incline in the road in the direction of Kroonstad at the spot where the collision occurred and two lanes leading to Kroonstad and one to

Ventersburg. This appears vividly from the photographs presented in evidence by plaintiff.

[23] The defendant's driver travelled the particular road frequently at the time prior to the collision, and also thereafter, but could not identify the area of collision afterwards. The truck driver on the other hand, identified the spot by attaching a plastic bottle to the fence next to the scene and was able to point it out to Mr Grobbelaar approximately two and a half years after the collision. Both drivers prepared a rough sketch a few days after the collision, indicating that the road consisted of two lanes, one in each direction. However, it is apparent from the photographs handed in as exhibits as well as the evidence of both drivers that at the area of collision a single lane leads towards Ventersburg whilst two lanes lead in a northern direction towards Kroonstad. I do not think that the witnesses shall be taken to task about their failure to draft proper plans. They are lay persons who merely wanted to indicate that the point of impact was on their correct side of the road. Both drivers testified that the defendant's driver was driving the Toyota Corolla in the right hand lane leading towards Kroonstad (or the inner lane) immediately prior to the collision. Both are therefore *ad idem* in respect of the general lay-out of the area where the collision occurred although defendant's driver disagreed with the truck driver about the particular spot on the road.

[24] On the truck driver's version the truck's right front tyre burst as a result of the impact and that the Toyota Corolla carried on its movement during impact to also damage the fuel tank which is located just behind the cab of the truck before it dislocated from the

truck and slid across the road back into its correct lane of travel. Prior to the collision and as the Toyota Corolla was moving across the centre line, the truck driver flashed his lights twice (from dim to bright and back), took his foot off the accelerator and moved towards his left. At the time of impact, the truck's wheels straddled the yellow line to the left of the lane leading to Ventersburg. He was severely cross-examined about the truck's precise position prior to and at impact. In examination in chief he mentioned that "ek ry effentjies in die geel lyn." During cross-examination he mentioned that the collision occurred just as he was about to cross the yellow line. Later he said that the yellow line was between the left and right wheels of the truck and that he did not completely cross the yellow line. I do not agree with Mr Haasbroek's statement to him that he changed his version. The truck driver acted in the proverbial split second at night time and it would be unfair to expect that he could possibly give a more appropriate answer. He moved to the left to avoid the Toyota Corolla and on his version he was "effentjies in die geel lyn" or then slightly or partially across the yellow line. Mr Haasbroek put it to the witness that his sketch plan does not indicate the position of the vehicle across the yellow line. I indicated *supra* that it could really not be expected of any of the drivers to draft detailed plans.

[25] I am satisfied that on the probabilities, and considering the two drivers' version in isolation, the Toyota Corolla would have caused damage to the fuel tank of the truck as described by the truck driver. In my view it would be highly improbable for the Toyota Corolla to come into contact with the fuel tank of the truck if the truck moved to its right and veered across the centre line into the

lane of the Toyota Corolla just before impact as described by defendant's driver. In such a case the fuel tank situated on the right hand side of the truck would in all probabilities not come into contact with the Toyota Corolla.

[26] The defendant's driver made a poor impression on me. He was not only vague on many occasions, but also contradicted his initial version as well as his version in court. He recorded in writing a few days after the collision that the Toyota Corolla was the third vehicle of a convoy moving in the direction of Kroonstad, but in court, seven years after the collision, he presented a totally different version. There were no vehicles directly in front of him. He did not refer in his initial description of the collision that two trucks approached him, four to five truck lengths apart, and that the second vehicle veered over to its right in the face of the oncoming Toyota Corolla. He tried to explain that he did not think at the time that the other truck was relevant. Surely, one's first reaction in such circumstances would be to think that the one truck tried to overtake the other when it was unsafe to do so. Therefore it could be expected that he would refer to such manoeuvre, instead of referring to a convoy of vehicles which was not a convoy at the time. Although defendant's driver was accustomed to the specific road, it was impossible for him to identify the area where the collision occurred afterwards.

[27] Defendant's driver was at pains, contrary to what Mr Haasbroek thought he would testify, to explain that the truck gradually (in Afrikaans – geleidelik -) moved over the centreline prior to impact. His counsel desperately tried to solve the problem in re-

examination, but to no avail. He insisted that the truck "(h)et geleidelik oorgekom na my kant toe. Geleidelik. Nie vinning, maar stadig oorgekom." I find it strange that he testified that the point of collision was half a metre to the left of the centre line on his correct side, but was unable to say which parts of the vehicles collided with each other. If the truck gradually moved across the centre line as he wanted me to believe, he would have more than sufficient time to steer the small Toyota Corolla to his left to avoid a collision. He had the luxury of an extra lane to his left. His version of how the collision occurred is much less probable than that of the truck driver and it is not supported by the general probabilities. He came all the way from Port Elizabeth that day – a distance of nearly nine hundred kilometres – and it is possible that he lost concentration and veered to his right as described by the truck driver and consequently caused the collision.

[28] Mr Grobbelaar did not have an opportunity to inspect the damaged vehicles and had to rely on the version of the truck driver, evidence on the scene, quotations pertaining to the damage caused to the truck and trailers and photographs of the damaged Toyota Corolla only. Photographs of the damaged Toyota Corolla were handed in as exhibits. He readily conceded that circumstances were not ideal to come to his ultimate findings. I do not agree with Mr Haasbroek's submission that plaintiff's failure to produce photographs depicting the damaged truck calls for a negative inference. It cannot be accepted, as Mr Haasbroek submitted, that plaintiff did not want the court to see the photographs. I considered the quotations that form part of the documentation before the court also referred to by Mr Grobbelaar as well as the summary prepared on behalf of Mr

Grobbelaar in terms of Rule 36(9)(b) and his *viva voce* evidence. No doubt, extensive damage was caused to the truck and trailers, bearing in mind that the truck capsized after the collision which obviously would have caused further damage.

[29] Mr Grobbelaar referred to gouge marks at the scene of collision as pointed out by the truck driver of which he also took photographs. He concluded that at and after impact on the truck's correct side of the road (the truck travelling astride the yellow lane of its emergency lane) a series of gouge and chop marks were deposited from the area of collision to the place where the truck capsized. He found two short parallel gouge marks in the Toyota Corolla's correct lane between the area of impact and the position where the Toyota Corolla came to a standstill and accepted that these were caused by the Toyota Corolla when it was forced at an angle back to that lane after impact with the much heavier truck. There were no gouge marks found in the northbound lanes which could have been associated with the collision, save for the two short parallel marks. Several photographs were taken of the collision scene as well as the gouge and chop marks and he also prepared a plan, drafted on scale, showing what is depicted on the photographs. These substantiate Mr Grobbelaar's reasons and opinion.

[30] Mr Grobbelaar testified that it is likely that the vehicles collided with an offset frontal impact with the right front corners of the vehicles overlapping at impact although it could not be established with accuracy if the centre lines of the vehicle were parallel on impact or if there was an angle between them due to the lack of photographs of the damaged truck and the fact that he could not

inspect the damaged vehicles physically. However it appears from the Toyota Corolla's damage that if there had been an angle between the centre lines of the vehicles on impact then such angle would probably have been small. He testified that the gouge marks found at the scene of the collision as pointed out by the truck driver were consistent with the approximate area of the collision and the resting positions of the vehicles afterwards. The first marks at point "D" on the scale plan as well as depicted on the photographs indicate the swerving of the truck to the right after impact due to weight transfer occurring on to the left wheels and the tyres and rims thereof then causing those marks.

[31] Mr Grobbelaar made concessions where it was needed, such as that the truck would have ended up at the same spot after the collision no matter which version is to be accepted and that the position where the Toyota Corolla ended up, is equally plausible in respect of both versions. He also conceded that the damage visible on the photographs of the Toyota Corolla is equally plausible in respect of both versions.

[32] Mr Haasbroek accused Mr Grobbelaar of being partisan, attempting to assert the plaintiff's case. He pointed out that Mr Grobbelaar did not deem it necessary to respond to the truck driver's version put to him to the effect that the Toyota Corolla slid across the road after impact, whilst Mr Grobbelaar testified that the Toyota Corolla either spun across the road or may have been airborne whilst moving as such. These contradictions and Mr Grobbelaar's inability to say anything further are regarded by Mr

Haasbroek as the low water mark of his evidence. I am not prepared to accept this criticism. As pointed out by the authorities quoted *supra* it is virtually impossible for eyewitness to describe in minute detail exactly what has happened within seconds or even a split second either before, during or after impact in motor vehicle collisions. The truck was clearly out of control after impact and went off the road. The further movement of the Toyota Corolla occurred behind the truck driver. I am not prepared to accept that the truck driver could have been fully aware of the exact movements of the Toyota Corolla after impact and his version of the spinning of the Toyota Corolla across the road cannot be used to discredit Mr Grobbelaar.

IX **CONCLUSIONS**

[33] I am satisfied that the truck driver was a credible witness, that he did not contradict himself on material aspects and that he provided a plausible version of the events which should be accepted as more probable than the version of the defendant's driver who was a rather poor witness. The truck driver's version was much more coherent and it should be accepted bearing in mind the totality of the evidence provided to court and the general probabilities.

[34] Although Mr Grobbelaar was at a disadvantage for the reasons stated *supra*, I am prepared to accept his opinion and the reasons advanced. His reasoning cannot be faulted. It is in line with the probabilities. I am satisfied that he was an objective witness who made several concessions when called for.

[35] The truck driver explained that when the Toyota Corolla moved over the centre line, he tried to avoid the collision by flashing his lights, reducing speed by taking his foot off the accelerator and moving to his left to the extent shown *supra*, but notwithstanding this a collision still occurred. He could do nothing further to avoid a collision. On his version, which I prefer for the reasons stated herein, no negligence can be ascribed to him. It must be recognised that he was driving a truck which pulled two fully laden trailers at the time. The possibility of successfully taking evasive action in such instances is severely limited. Therefore plaintiff has succeeded in proving that the negligence of the defendant's driver was the sole cause of the collision. There is no reason why costs should not follow the event.

[36] The counterclaim was withdrawn at the start of the proceedings and the parties agreed that costs thereof would be argued at the end of the case. I have not been persuaded that first defendant shall not be held liable for plaintiff's costs pertaining to the withdrawn counterclaim and such an order shall be made.

X **ORDERS**

[37] Therefore the following orders are issued:

[1] First and second defendants are held liable, jointly and severally, for 100% (one hundred percent) of plaintiff's damages to be proven or agreed upon.

[2] First and second defendants are liable, jointly and severally, for the plaintiff's party and party costs in respect of the costs thus far, such costs to include the fees and expenses of plaintiff's counsel and the two sets of attorneys, the fees of the expert witness, Mr Barry Grobbelaar pertaining to his attendance of the trial on 7 and 8 February 2017, including consultations, drafting of his report and preparation for trial, as well as his expenses pertaining to travelling and accommodation, and also the travelling and accommodation costs of plaintiff's two witnesses, Mr Rupping and Mr Valashiva.

[3] First defendant shall pay plaintiff's costs of opposition of the counterclaim.

[4] The matter is postponed *sine die* for determination of the *quantum* of plaintiff's claim.

_____

J.P. DAFFUE, J

On behalf of plaintiffs:	Adv M Naude
Instructed by:	Horn & Van Rensburg Attorneys Bloemfontein
On behalf of defendant:	Adv P Haasbroek
Instructed by:	Phatshoane Henney Attorneys Bloemfontein