IN THE HIGH COURT OF SOUTH AFRICA /ES

(TRANSVAAL PROVINCIAL DIVISION)

CASE NO: 10644/05

NOT REPORTABLE DA

IN THE MATTER BETWEEN

PANAYIOTIS ZACHRIOU PLAINTIFF

AND

MINISTER OF DEFENCE DEFENDANT

JUDGMENT

MOKGOATLHENG. AJ

Introduction

[1] On the night of 24 September 2003 at about 23:45 and on the N12 motorway between Xavier and Klipriver Streets a collision occurred between an Audi A4 1.9 TDI motor vehicle driven by the plaintiff the *bona fide* possessor thereof and a Samil military motor vehicle driven by Maharukwa who was employed by the Defendant, acting within the course and scope of his employment as such.

[2] Pursuant to the collision the Audi A4 1.9 TDI motor vehicle was damaged beyond economic repair resulting in the Plaintiff sustaining damages in the amount of R191 162.00.

[3] The Defendant has lodged a counter-claim against the Plaintiff alleging that as a result of the said collision the trailer was damaged beyond economic repair and accordingly has sustained damages in the amount of R43 670,00.

[4] By agreement between the parties, the matter proceeded only on the merits, *quantum* is to be determined at a later stage. An order in terms of rule 33(4) was accordingly made.

[5] The evidence adduced by the parties may be divided into three categories, firstly there was evidence given by the Plaintiff, the Defendant's servants and Rayners a Johannesburg Metro traffic officer who attended the scene relating to observations made by him at the scene, and his opinion regarding the functioning or otherwise of the lights of the Defendant's trailer.

THE EVIDENCE OF THE PLAINTIFF

(6) He testified that at about 23:45 on 24 September 2003 he was driving his motor vehicle. He entered the N12 motorway by engaging the Xavier Street off-ramp.

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(7) The N12 motorway consists of three lanes in which vehicles travel in the same direction. He entered the N12 motorway on the left lane, he noticed a truck in the same lane travelling in front of him in the same direction. He was travelling between 50 to 60kph. He overtook the truck and entered the middle lane. He was at that stage travelling between 60 to 70kph.

(8) When he overtook the truck the road was bending towards his right hand side. When he was virtually about fifty metres from the bend, he started accelerating to 100kph.

(9) The vehicle's headlights were on dim. He remembers going round the bent. It is the last thing he remembers. He did not notice a vehicle in front of him, he did not see any tail-lights, brake lights or chevron. There are no street lights. It is a dark area. There are no shopping centres. The speed-limit is 120kph. He did not see the truck with which he collided. Had he seen any reflective signs or lights he would have been able to take evasive action to the right or left side.

(10) Under cross-examination he stated that he was wearing contact lenses and could see about 150 metres away in front of him. He conceded that the headlights of the truck he initially overtook were on and would have increased and assisted his vision. When the accident occurred in the middle lane the truck he had overtaken had not reached the bent. He stated that at the speed he was travelling at it would

have been possible for him to take evasive action if he had seen the Defendants vehicle.

(11) When it was put to him that photo no 6 shows that the road chevrons indicate that the road was curving to the left, he stated that initially there was a "bent" to the right and later to the left. He conceded that he did not see the Defendant's vehicle at all, although he could see a distance of 150 metres in front of him.

(12) When shown photo no 6 he conceded that he could see the truck reflectors on its left side, and could see the gemsbok sign on the left side, and could also see the yellow number plates on the right side of the trailer.

(13) He denied that the reason he collided with the trailer was because he had failed to keep a proper look-out and stated that "he will not agree at all as he did not see the truck". He stated that if the truck's light reflectors were in good working condition he would have seen it.

(14) He conceded when shown photos no 12 and no 6 that the accident occurred on the straight part of the road. He stated that he did not see the truck even when he had the benefit of the lights of the truck he had overtaken on the left lane. He did not apply brakes. He stated that he would have seen the spray of the beam of the Defendants truck's front headlights if these were proper lights.

(15) He stated that immediately before the collision he would have seen the trailer depending on the speed the truck was proceeding at. He cannot recall at all colliding with the truck. His brother wrote a statement for insurance purposes when he made the allegations that "the army truck had no lights and no big reflectors". He also signed this statement.

THE EVIDENCE OF BREXTON RAYNERS

(16) He was employed by the Johannesburg Metro Police department as an accident investigator and accident reconstructionist. On 24 September 2003, he was called to the accident scene. He arrived at 01:45. The plaintiff was already transported to hospital. He took photographs of the accident scene with a flash light equipped camera.

(17) He ascertained that the lights of plaintiff's vehicle, and the headlights of Defendant's truck were on. The tail-lights of the trailer were not on, after checking same he discovered that all of them were not functioning. The headlights were shining but the rear tail-lights were not functioning.

(18) He asked the driver of the truck about the tail-lights. He told him that they were not working for quite a while but was not sure if a report was actually submitted to that effect. The tail-lights of the trailer were not functioning because it was

disconnected from the truck. There was no reflective material on the rear side of the trailer.

(19) When he took photograph no 6 he was approximately five metres behind the Plaintiff's vehicle. The light of the flash illuminated the chevrons on the right hand side of the road. When shown photo no 6 he stated that he could see the gemsbok sign on the left side of the trailer although the sign did not light up, neither did the orange reflectors.

(20) He did not see any chevron on the back of the trailer. He saw reflectors on the left hand side of the trailer which lit up as shown on photo 13. Except for the number plate, nothing else was reflective. One had to be about three to four metres away before being aware of the reflectors. The reflectors were old and dusty.

(21) To become an accident investigator and reconstructionist he underwent specialised training which consisted of

(a) vehicle dynamics pertaining to tyres, rims, headlights, lamps and other forms of possible causes of vehicle accidents like the braking system of vehicles.

(22) The specialised course consists of theory and a practical element. He has been in the specialised unit for two years and had done about hundred and twenty accident reconstructions.

(23) He investigated the lights of the trailer to ascertain whether they were functioning at the time of the accident. He removed the two lights of the trailer and inspected them. He found two bulbs on each light, one little globe is for the indicator and the other slightly bigger globe is for the brake light and the tail lamp.

(24) If the lights were on at the time of the accident the filament of the globe will be distorted. An electric current causes the filament to heat up and as a result it lights up producing white heat or white light. To determine whether at the time of the accident the light was on and the bulb happened to shatter, oxidation would have occurred and the filament would blacken.

(25) The bulbs of the trailer were not broken or shattered and were not blackened. To determine if the lamps were on, he took into consideration what the damage to the vehicle was and the force to which the trailer was exposed, which resulted in the trailer breaking off from the back section of the truck. Taking these factors into consideration, that kind of force if the trailer lights were lit, would have caused a distortion in the filaments causing them to stretch, warp, or warp considerably and result in the discoloration on the filament itself. If the lights were not on at the

time of the collision the afore-described warping effect cannot occur, one would just get a normal bulb.

(26) After the accident it is irrelevant whether the bulb cools off because the filament would not have recoiled back to its original position, and it will not return to its original colour because, the filament has a tungsten covering, and due to the heat it burns off gradually and does not reform that covering.

(27) If the lights of the trailer had been switched on he would have found a bulb that had been warped and discoloured. His opinion was that the lights of the trailer were not on at the time of the accident, even prior to the accident or thereafter.

(28) Under cross-examination when shown photo no 4 he conceded that he could see the trailer's reflectors and number plate, but stated that they were not well lit. He agreed that he had not studied electrical, chemical, mechanical and structural engineering.

THE EVIDENCE OF ANDRIES EDWARD ISAACS

(29) He was a co-driver of the Defendant's military truck and trailer on 24 September 2003. Before a military cargo vehicle departs from Upington it is standard

procedure to requisition the vehicle a week before departure. A parade vehicle control form is completed which is utilised to check the roadworthiness of the vehicle before it is released for service.

(30) He checked the lights. The co-driver Maharukwa assisted him to check the lights by operating the switches in the cabin of the vehicle.
The lights of the vehicle were all functioning because the vehicle was driven at night and during the day. He checked the lights at the back of the vehicle. The tail-lights and indicators of the truck and trailer were functioning.

(31) At Kruger National Park he assisted in checking the vehicle. All the lights were functioning. On their way to Upington they never received any indication from other road users that the vehicle's lights were not functioning. On the N12 the Plaintiff crashed his motor vehicle on to the back of the trailer.

(32) A metro policeman showed them globes and told them these were not functioning. He told him no, that is incorrect, the globes were functioning. He never at any stage told the metro policeman that the lights were not working.

(33) Under cross-examination he persisted that all electrical parts of the trailer were working because the trailer was connected to the truck, which is the source of the power.

(34) There was no chevron on the trailer. Before leaving the Kruger National Park they checked all the lights, these were functioning. They did not check the lights at Middelburg because it was already dark.

THE EVIDENCE OF MOSS MICHAEL MAHARUKWA

(35) He was the driver of the Defendants military vehicle on 24 September 2003 when Plaintiff collided with it on the N14 motorway. He confirmed that he completed the first and last parade form before he embarked on the trip from Upington to Skukuza at the Kruger National Park.

(36) He went through all the parts and mechanisms of the vehicle that are necessary to establish its roadworthiness. The lights of the ten ton trailer were in good working condition. Before leaving for the Kruger National Park he did "an inspection before any trip" at 15:00 and then he established through assistance of Isaacs, his co-driver, that all the lights of the vehicle including the trailer were functioning.

(37) On the road back to Upington they received no indication from other road users that the vehicle's lights were not functioning. Reyners asked him whether the lights were working before the accident. He told him yes the lights were working. The lights were working before and during the accident.

(38) Under cross-examination he stated that if the reflectors were not functioning properly he would have reported it although the reflectors were not on the first and last parade form. He was not sure whether the trailer had a chevron.

THE PLEADINGS AND THE APPLICABLE LEGAL PRINCIPLES

(39) In his particulars of claim, the Plaintiff alleges that the sole cause of the collision is attributable to the negligence of the Defendant alternatively Maharukwa in that Defendant and/or Maharukwa

(a) failed to avoid the collision when, by the exercise of reasonable care they could and should have done so;

(b) failed to engage the lights of the vehicle that was driven by Maharukwa, alternatively failed to exhibit proper lights and/or maintain proper lights and/or exhibit a chevron, or reflective material on the vehicle that was being driven by Maharukwa, thus resulting in his vehicle not being reasonably discernible to following traffic.

(40) The defendant denies these allegations and pleads that

(a) at all material times immediately prior to the said collision the lights of the defendant's vehicle and the trailer were engaged;

(b) the defendant's vehicle did exhibit proper lights including proper reflectors; and

(c) the defendant's vehicle did exhibit a chevron.

(41) Adv Boot on behalf of the Plaintiff contends that because the Defendant's trailer did not have any lights, or reflective material discernible, it follows that the Defendant's conduct was negligent, that the Defendant's causal negligence was the sole cause of the collision.

(42) In effect the Plaintiff is submitting the maxim *res ipsa loquitur* is applicable to this matter, namely that the mere fact of a particular occurrence warrants an inference of negligence, where such occurrence is due to a thing or means within the exclusive control of the Defendant.

(43) The maxim *res ipsa loquitur* gives rise to an inference of negligence. A court is not compelled or obliged to draw an inference at the conclusion of the matter, the enquiry is where on the conspectus of evidence the balance of probabilities lies. If it is substantially on the party bearing the *onus* on the pleadings, such party succeeds - if not, such party fails.

(44) If the Plaintiff proves the occurrence giving rise to the inference of negligence against the Defendant, the latter is obliged to adduce probative evidence in rebuttal of the inference of negligence.

(45) In law the maxim *res ipsa loquitur* has no bearing on the incidence of proof on the pleadings and does not alter the incidence of *onus.* See *Madyosi and Another v SA Eagle Insurance Co Ltd* 1990 3 SA 442 (A) at 445.

(46) There is only one enquiry, namely, has the plaintiff, having regard to the totality of the evidence adduced, discharged on a balance of probabilities the *onus* of proving the negligence he has alleged in the pleadings against the defendant.

(47) In the final analysis the court does not adopt a piecemeal approach of:

(a) first drawing the inference of negligence from the occurrence itself, and regarding this as a *prima facie* case, and then

(b) deciding whether this has been rebutted by the defendant's explanation.

See *Sardi and Others v Standard and General Insurance Co Ltd* 1977 3 SA 776 at 680D-E and G-H and also *Arthur v Bezuidenhout and Mieny* 1962 2 SA 566 at 574B.

EVALUATION OF EVIDENCE

(48) I propose to deal first with the evidence of Rayners. When questioned by the court, he testified that he regarded himself as an expert four times over in the field of accident investigation and reconstruction. When pertinently asked by the court in what field he was an expert. He never stated that he was an expert in the electrical engineering with specific reference to the analysis and exposition of the

effect of the impetus of force on the structure of filament configuration, warping and discoloration as a result of motor vehicular collisions.

(49) Rayners never testified that he is the author of exhibit *"C",* neither did he testify as to who the author of the document comprising of pages 22, 23, 28 and 31, is. He did not testify as to from which scientific journal, manual, manuscript, text book or source these papers comprising exhibit *"C"* were derived from, neither did he testify as to the qualifications of the author of the said pages.

(50) When led by Mr Boot regarding his expert qualifications, Rayners testified that on 24 September 2003 he was employed by the Johannesburg Metro Police as an accident investigator and reconstructionist in its specialised unit.

(51) He stated that he underwent specialised training with regard to accident reconstruction, that the training he underwent was vehicle dynamics pertaining to tyres, rims, headlights, lamps and other forms of possible causes to vehicle accidents like the braking system of a vehicle. He stated that the course material consisted of a theoretical and practical element, the latter consisting of simulation. He said he was in the specialised unit for two years.

(52) Under cross-examination he conceded that he has no qualifications in mechanical, electricity chemical, structural and physical engineering. He also stated that he has not attended any tertiary institution in relation to these disciplines.

(53) The Plaintiff's attorneys issued a rule 36(9)(a) notice alleging that Rayners is to give expert evidence, citing his curriculum vitae. In terms of rule 36(9)(b) a summary of his opinion and reasons was given.

(54) According to Rayners' curriculum vitae

(a) he attended and completed an accident vehicle dynamics course starting on 17 to 27 June 2003;

(b) he attended and completed an accident investigators course starting from 2 to 13 June 2003;

(c) he attended and completed an accident drafting and photography course starting from 5 to 23 May 2003

(55) It is noteworthy that these training and certificates by the Johannesburg Metropolitan Police do not enumerate the subjects constituting the course like the South African Police Service certificate awarded to Rayners on 16 January 2003.

(56) Isaacs and Maharukwa both testified that the trailer's lights were functioning and were on at the time of the collision. They vehemently denied that they informed Rayners that the trailer lights were not functioning for a considerable time or at all.

(57) In terms of the subpoena issued by the Plaintiff's attorney, Rayners was required to bring and produce to court the "bulbs and/or filaments removed from a military trailer with registration letters and numbers BDP 667M at the scene of the collision on 24/25 September 2003 on the N12 highway between Klipriver and Xavier Gauteng". Rayners did not produce these bulbs, no explanation was tendered by Rayners or the Plaintiff why the bulbs were not produced, or what happened to them.

(58) It was put to Rayners that Isaacs and Maharukwa would deny that the trailer lights were not working, or that they had informed Rayners that the trailer lights were not working. In fact it was never put to Isaacs under cross-examination that he told Rayners that the lights were not working.

(59) It is trite that he who alleges must prove. The Plaintiff's or Rayners' failure to produce the light bulbs in my view corroborates the denial of Isaacs and Maharukwa that the lights on the trailer were working. In any event Isaacs and Maharukwa evidence is that they both checked the lights before their departure from Skukuza, this evidence is not controverted.

(60) Rayners despite claiming to be an accident reconstructionist expert did not even attempt to reconstruct the accident. Rayners conceded under cross-examination that he is not an electrical or mechanical engineer, that he could not establish the

speed of the two vehicles before the collision, neither could he establish the effect of impact generated by the collision.

(61) Rayners stated regarding the fact that the impact of the vehicles could have caused the globes to break, that this assumption was "not speculative at all because in the test that we done while studying accident investigation all of it was basically in house, with everything set up with the globe all lit up".

(62) *Wigmore in his treatise on Evidence vol* 2 *para 665(b) points out that the data of every science are enormous in scope and variety. No one professional man can know from personal observations more than a minute fraction of the data which he must everyday treat as working truths. Hence a reliance on the reported data of fellow scientists learned by perusing their reports in books and journals. The law must and does accept this kind of knowledge from scientific men. On the one hand a mere layman who comes to court and alleges a fact which he has learned by reading a medical or mathematical book cannot be heard. But on the other hand to reject a professional physician or mathematician because the fact or some of the facts on which he testifies are known to him only upon the authority of others, would be to ignore the accepted methods of professional work and to impose impossible standards.*

(63) *Wigmore further details the requirements for an expert witness as*

(a) the professional experience of the witnesses;

(b) the extent of his personal observation in the general subject enabling him to estimate the general plausibility or probability of the soundness of the views expressed and the impossibility of obtaining information on particular technical data except through reputed data in part or entirely.

(64) W.E Cooper in his work Delictual Liability in Motor Law Revised edition of.... Principles of Liability published-1996 expressed himself of this on page 469, regarding an expert witness, "the opinion of a witness in respect of a subject on which he is an expert is admissible for this opinion to be admissible the witness must qualify as an expert and adduce the facts upon which his opinion is founded.

(a) Qualification

Before receiving his opinion the court must be satisfied that the witness is an expert in this field concerned.

A witness is an expert by the virtue of his training, special skill or experience. General expertise in a field does not necessarily qualify a witness as an expert on a particular aspect in that field.

However eminent an expert may be in the general field, he does not constitute an expert in a particular sphere unless by special study of experience he is qualified to express an opinion on that topic. The dangers of holding otherwise - of being overawed by a recital of degrees and diplomas-are obvious, the court has then no way of being satisfied that it is not being blinded by pure "theory" untested by knowledge or practice. The expert himself must either himself have

knowledge or experience in the special field on which he testifies (whatever general knowledge he may also have in pure theory) or he must rely on the knowledge or experience of others who themselves are shown to be acceptable expert in that field.

Where a witness does not have the necessary qualifications any inference he draws has no probative value and is inadmissible".

In page 470, the Learned author states this,

Value of an expert opinion evidence.

The court is not bound by the opinion of an expert. If it were, the expert would unsung the function of the court. At the same time there are various dangers inherent in expert evidence, eg the inability of the court to verify the expert's conclusions and the tendency of experts to be partisan and overready to find and multiply confirmations of their theories from the harmless facts

the court, while exercising caution, must be guided by the views of an expert when it is satisfied, of his qualifications to speak with authority and with the reasons given for his opinion. It is not surprising that when confronted with a conflict between the opinion of an expert and the direct evidence of a credible eye witness the court may prefer the evidence of the latter"

(65) SELKE, J in *Govan v Skidmore* 1952 1 SA 732 (N) at 734C-D stated that:

The minimum degree of proof required in a civil case, for, in finding facts or making inferences in a civil case, it seems to me that one may, as Wigmore conveys in his work on *Evidence* (3rd ed, para 32), by balancing probabilities select a conclusion which seems to be more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one".

(66) In *Holtzhausen v Roodt* 1997 4 SA 766 (WLD) SATCHWELL J formulated the following principles applicable to the admissibility of expert opinion evidence

(1) matters on which expert is to testify must call for specialised skill or knowledge;

(2) sight must not be lost of court's responsibilities in drawing inferences;

(3) witness must be a qualified expert;

(4) facts on which expert opinion based must be proved by admissible evidence;

(5) guidance offered by expert must be sufficiently relevant to matter in issue; and

(6) opinion evidence not to usurp functions of court in deciding questions court has to decide.

(67) Rayners stated that he has not attended and studied the laws of physics and dynamics, chemical, physical, electrical or mechanical engineering at tertiary level. Rayners did not testify as to his experience regarding filaments, tungsten and bulbs in actual accidents in which he reconstructed and testified to in a court of law. Rayners says he is an expert four times over. This he did not prove.

(68) Rayners claims to be an expert on the investigation and reconstruction of motor vehicle collisions yet he did not investigate the circumstances of the accident. He did not interview the Plaintiff to ascertain the speed he was travelling at immediately before the collision, whether the Plaintiff was able to see part of the trailer before the accident, whether the Plaintiff saw if the trailer's reflectors and lights and the gemsbok insignia and number plate were visible to him before the collision, whether the Plaintiff saw the trailer at all before the collision, and at what stage, the reason why the Plaintiff did not take evasive action to avoid the collision and the reason why the Plaintiff did not apply his brakes.

(69) He did not make any informed assumptions regarding the visibility of the trailer from the plaintiff. He did not investigate the beam spread or field angle of the Plaintiff's headlights and the distance the Plaintiff's headlights can illuminate and did not explore the basis, and the distance the ten ton trailer would have become

visible to the Plaintiff at the estimated speed he was travelling before the collision. He did not provide a conservative estimate of the Plaintiff's total human reaction time before the collision. He did not establish the speed at which the Defendant's trailer was proceeding immediately before the collision.

(70) In my view Rayners is not an expert witness on either electrical, chemical, mechanical or physical engineering and it follows that his evidence is rejected as not credible because it is not of assistance to the court.

THE EVALUATION OF PLANTIFF'S EVIDENCE

(71) The Plaintiff does not know how the collision occurred, he only remembers traversing the off-ramp on Xavier Street and engaging the N12 highway on the left lane and seeing a truck travelling in front of him in the same lane about 100-150 metres in front. He says he overtook this truck and engaged the middle lane travelling at 60-70kph. He thereafter remembers nothing.

(72) The collision happened in the straight section of the N12 between Xavier and Klipriver. The Plaintiff is incorrect when he says the last thing he remembers is going round the bent to his left. Fact of the matter is the collision happened before the bent.

(73) The Plaintiff says he did not notice the defendant's vehicle in front of him in the middle lane. The Samil military truck is a huge truck drawing a ten ton huge trailer. In my view I accept the evidence of Isaacs and Maharukwa that the trailer lights were functioning, that the reflectors were functioning. Further in my view the yellow and white gemsbok sign on the left of the trailer was visible and reflected light as shown in photograph no 4. The number plate on the right of the trailer is also visible and reflected light as shown on the said photo, as do the two middle orange reflectors.

(74) The Plaintiff conceded that he could see a distance of 150 metres in front the beam of his Audi lights. He further admitted that the truck he overtook on the left lane had its headlights on. In my view because the collision occurred in the straight section of the N12, the Plaintiff when overtaking the truck on the left lane ought to have seen the Defendant's huge ten ton trailer because his vision was assisted by the lights of the truck he had just overtaken on the left lane. If plaintiff kept a proper look-out, and jf he overtook when it safe and appropriate to do so, and was travelling at a reasonable speed and not an excessive speed he could and should have taken evasive action and avoided crashing his motor vehicle into the back of the Defendant's trailer.

(75) In *South African Railways* v *Symington* 1935 AD at 45, WESSELS, CJ stated the following:

> 'Where men have to make up their minds how to act or in a fraction of a second, one may think this course is better whilst another may prefer that.

It is undoubtedly the duty of every person to avoid an accident, but if he acts reasonably, even if by a justifiable error of judgment he does not choose the very best course to avoid the accident as events afterwards show, then he is not on that account to be held liable for *culpa."*

(76) *Wrongfulness, negligence and causation are the three requirements for delictual liability. In Ngubane* v *South African Transport Services* 1991 *1 SA* 756 *(A) at 776D-E and I-J the principles of negligence were restated as follows:*

"Liability based on negligence is proved if:

(a) a diligens paterfamilias in the position of the defendant's servant,

(i) would foresee the reasonable possibility of his conduct injuring another person in his person or property and causing him patrimonial loss; and

(ii) would take reasonable steps to guard against such occurrence, and

(b) the defendant failed to take such steps.

This has been constantly stated by this court for some .fifty years. Requirement (a)(ii) is sometimes overlooked. Whether a diligens pater familias in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend upon the particular circumstances of each case. No hard and fast

basis can be laid down. Hence the futility, in general, of … guidance from the facts and results of other cases."

Regarding the requirement in paragraph (a)(ii) it is acknowledged that reasonable steps are not necessarily those which would ensure that foreseeable harm of any kind does not in any circumstance eventuate. The critical question is whether "once" it is established that a reasonable man would have foreseen the possibility of harm the question arises whether he would have taken measures to prevent the occurrence of the foreseeable harm.

See *Kruger v Coetzee* 1966 (2) SA 428 at 430E-G.

(77) The judgment in the case of *Valkyrie International Trading (Pty) Ltd v W P Laidlaw and Others* case no 32443/02 to which I was referred by Mr Boot, is distinguishable on the facts from this matter in that Mr Van Heerden the plaintiff was travelling on a slope of about 1,5 kilometres; he overtook a bakkie on the crown of the slope on Silkaatsnek, and says he saw brake lights at a distance of five to six metres; but did not see any lights or reflectors on the trailer; and thinks he applied brakes instinctively to avoid the collision. Rothman, the driver of the bakkie Van Heerden overtook, testified to the effect that he did not see lights or reflectors on the trailer. The driver of the truck and trailer conceded that there was a possibility that the terrain his motor vehicle had earlier traveled on was dusty, that he drove on dusty roads, that dust may have gathered on the trailer. In

my view the probabilities existing in that case are not applicable to this present matter. It is trite that every case is decided on its own facts.

(78) In my view the Plaintiff was travelling at an excessive speed under the circumstances before the collision. This is shown by the fact that his motor vehicle telescoped into the back of the Defendant's trailer resulting in it sustaining a "concertina effect" damage on its front.

HEARD ON:
FOR THE PLAINTIFF:
INSTRUCTED BY:
FOR THE DEFENDANT:
INSTRUCTED BY:

iff overtook the truck on the left and engaged the middle
g himself that it was safe to do so, and when it was not safe
ılt the Plaintiff failed as a reasonable driver to foresee that there could possibly be a vehicle in the middle lane, and failed to prevent the collision by not having regulated his speed in accordance with the range of his vision. Accordingly the Plaintiff's conduct was grossly negligent.

(80) In the premises the plaintiff was the author of his own misfortune in that he is the sole cause of the collision and is also liable to the Defendant's damages. The Plaintiff's summons is dismissed with the costs. The Defendant's counterclaim is upheld and is granted with costs.

The order

(1) The summons is dismissed with costs.

(2) The Plaintiff is ordered to pay the quantified damages of the Defendant.