IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, PORT ELIZABETH

Case No.: 2224/2019

Date Heard: 9-11 March 2021

Date Delivered: 30 March 2021

In the matter between:

NIVEN DAINE GOLIATH Plaintiff

and

ROAD ACCIDENT FUND Defendant

JUDGMENT

POTGIETER AJ:

[1] On 11 November 2015 at approximately 22h30 a mini bus taxi with registration number HJ[…] apparently owned by Mr Mark Such and being driven by the plaintiff at the time collided with a green Isuzu KB light delivery vehicle (commonly known as a bakkie) with registration number FH[…] ("the insured vehicle") that was stationary in the fast lane of Stanford Road, Helenvale in Port Elizabeth. The plaintiff sustained bodily injuries in the collision and is claiming damages from the defendant, the Road Accident Fund ("the RAF"), as a result.

[2] The merits and quantum of the claim have been separated in terms of Rule 33(4) and the trial proceeded in respect of the merits only. The particulars of claim were amended during the trial to identify the owner of the insured vehicle as Mr Nordien and to reflect the correct registration number of the insured vehicle as FH[….] instead of THZ[…] (the significance thereof will appear later in the judgment). The driver of the insured vehicle was unknown. The plea was also amended during the trial to incorporate averments that the plaintiff was the sole, alternatively, a contributory cause of the collision and specifying various grounds of negligence in this regard claiming apportionment of damages should contributory negligence be established.

[3] The plaintiff pleaded that the sole cause of the collision was the negligence of the insured driver who failed to keep a proper look out; parked his vehicle in an unlit and unmarked area in the fast lane of Stanford Road at a time when it was dangerous and inopportune to do so; he parked his vehicle without due regard to other motor vehicles, to wit, the plaintiff's motor vehicle, without giving any or adequate warning of his stationary vehicle and without switching on any lights on his stationary vehicle; he failed to avoid a collision when by exercising reasonable care and skill he could and should have done so; he failed to give the plaintiff's vehicle a sufficiently wide berth; he failed to activate his emergency lights; he failed to put a warning triangle behind the insured vehicle to warn other vehicles of his stationary vehicle; he failed to take any measures and/or steps to warn following vehicles of his broken down vehicle and/or parked

stationary vehicle in the fast lane and in a busy area which is unlit; and he left the insured vehicle unmanned.

[4] The defendant pleaded in the amended plea that the plaintiff was the sole cause of the collision and was negligent in one or more of the following respects: he failed to keep a proper look out; he drove his vehicle at an excessive speed in the circumstances; he drove his vehicle without due regard to other road users; he failed to keep his motor vehicle under proper control; and he failed to prevent a collision when he was, with the exercise of reasonable care, in a position to do so. The defendant furthermore pleaded that in the event of the court finding that the insured vehicle was negligent there was contributory negligence on the part of the plaintiff and that his claim should be apportioned. Pursuant to an earlier amendment of the plea, the defendant pleaded that the plaintiff failed to comply with Regulation 2(1)(a) of the Regulations in terms of the Road Accident Fund Act, 56 of 1996 as published under Government Notice R770 in Government Gazette 31249 of 21 July 2019 in that his claim was lodged more than two years after the cause of action arose and that the claim accordingly prescribed in terms of Regulation 2(1)(b).

[5] The issues for my determination are accordingly whether the claim prescribed, whether the sole cause of the collision was the insured driver or plaintiff, or whether the plaintiff and/or the insured driver were causally negligent and in the latter event whether the plaintiff was contributorily negligent and an apportionment of damages should be applied.

[6] The plaintiff was the only witness that testified about the circumstances of the collision. The remaining two witnesses for the plaintiff were Mr Siraj Nordien the owner of the insured vehicle and plaintiff's attorney Mr Armoed who dealt with ancillary issues.

[7] The plaintiff indicated that he resides at 40 4th Avenue, Algoa Park, Port Elizabeth and that he was born on 23 November 1984. He confirmed his identity number as set out in the Particulars of Claim. He also confirmed that he was involved in a collision on 11 November 2015 at approximately 22h30 in Stanford Road, Helenvale which is one of the suburbs of Port Elizabeth. Stanford Road is a major thoroughfare with a raised island which separates the traffic moving towards and from the city. He confirmed the layout of the road as reflected on the photographs which form part of the bundle of documents. This reflects that there are two lanes conveying traffic in each direction. There is a third lane immediately next to the island on both sides of the road reserved for the rapid transport bus service. The fast lane is immediately next to the bus lane. The fast lane is separated from the bus lane by objects akin to small blocks which are embedded in the road surface and have been painted in a bright yellow colour. On the far side of the road from where the plaintiff was travelling there is a steep embankment immediately next to the road. In the vicinity of the collision, Stanford Road runs straight with a slight incline in the direction in which the plaintiff was travelling.

[8] Plaintiff was driving a mini bus taxi Sakukan BAW model owned by Mr Mark Such. He was alone in the vehicle and was travelling on Stanford Road in the direction of the city in the fast lane. He travelled at a speed of approximately 70km per hour which was also the speed limit for the particular section of the road. There were streetlights along Stanford Road but the lights were off in the particular section of the road where the collision occurred. There was a kombi travelling ahead of him in the same lane at the time and there were a few cars in the lane to his left which was the slow lane. The roof of the kombi was slightly higher than the roof of his vehicle which obstructed his view. As he was approaching the kombi it gave way for him and moved into the left hand lane. After the kombi had moved into the left hand lane his vehicle collided with the stationary Isuzu bakkie in the fast lane. The bakkie's lights were not on. Its emergency lights were not operating nor were there any triangles placed in the road near the bakkie. The bakkie was green or blue in colour. He could not swerve to the left because the kombi had moved into the left hand lane and he had no opportunity to swerve to the right into the bus lane. He thinks that the purpose of the yellow blocks which separate the fast lane from the bus lane is to keep ordinary vehicles out of the bus lane. At the speed at which he was travelling it was impossible to drive over the blocks. There was nothing he could do to avoid the collision. The front of his vehicle collided with the back of the bakkie. He had no recollection of what had happened after the collision. He only regained consciousness in hospital. He sustained serious injuries in the collision. He did not report the accident to the police and was in hospital when the accident was reported to the police. He denied that he was negligent in any of the respects pleaded by the defendant.

[9] Under cross-examination he indicated that he did not know what the registration number of the bakkie was. He was discharged from hospital on 17 or 20th December 2015. He made no effort to identify the driver or the owner of the bakkie. He had been using Stanford Road for a long time. In his view it depended on the speed one is travelling at whether it is possible to move across the blocks separating the bus lane. At the speed at which he was travelling it was physically impossible to drive over the blocks. It was possible to do so at a lesser speed. He got his driver's licence in 2010 and knows that a driver must be vigilant and keep a proper look out and maintain a safe following distance. He confirmed that the kombi which was traveling in front of his vehicle moved into the left lane and never collided with the stationary vehicle. At the time of the collision there were no vehicles travelling in the bus lane nor were there any vehicles approaching from the front. He did not see any vehicles travelling in front of the kombi. He confirmed that there was no curve in Stanford Road in the vicinity of the collision but that there was a slight slope in the road. He confirms that this was not a blind rise. His reason for not swerving to the left was that the kombi had moved into the left hand lane and he continued straight. He estimated that he was approximately 10-15 metres away from the kombi ahead of him when he saw it for the first time. He pointed the distance out inside the court room that he was away from the kombi when it moved into the left hand lane. It was paced out by defendant's counsel as 7½ metres which was accepted by the parties as being equal to 7½ metres. He estimated that the stationary vehicle was approximately 3 ½ metres from his vehicle when he saw it for the first time after the kombi had moved into the left hand lane. He only saw the stationary

vehicle when he was about to collide with it. He only saw a slight reflection of the number plate of the stationary vehicle but was too close to be able to swerve out. He was driving with his vehicle's headlights on dim. The dim lights illuminated the road for approximately 10 metres ahead of him. He confirmed that he would have seen the stationary bakkie at a distance of approximately 10 metres ahead in the dimmed headlights of the vehicle if he looked ahead. He did not apply his brakes and struck the bakkie at the same speed he was travelling at. He drove straight into the back of the bakkie. The headlights of his vehicle were on but he just could not see the bakkie because it had no lights or hazard lights that were flashing or a triangle that was placed on the road. He confirmed that there was nothing wrong with his eyesight and that he only started wearing spectacles after the collision. He was unable to say how far the kombi was from the bakkie when the kombi moved into the left hand lane. He could not see in front of the kombi and cannot say that the kombi gave way to avoid the stationary bakkie but it could have been the reason why it moved into the left hand lane. He confirmed that he made no manoeuvre to avoid the collision.

[10] He confirmed that he was certain that there were streetlights in the vicinity of the section of Stanford Road where the collision occurred, but that the lights were not on. He was referred to the affidavit that he submitted to the Road Accident Fund in terms of section 19(f) of the Road Accident Fund Act. In this affidavit he stated that there were no street lamps in Stanford Road, which lamps were only installed recently. The affidavit was deposed to on 27 August 2018. He, furthermore, stated in the affidavit that he applied his brakes and attempted to swerve to the right but did not have enough time

to do so. He was not really able to explain these inconsistencies between his testimony and his affidavit when it was raised with him in cross-examination.

[11] He confirmed that his claim was lodged with the Road Accident Fund on 27 August 2018 approximately two years and nine months after the accident. In response to questions about the accident report that was part of the documents that were lodged with his RAF1 claim form, he indicated that he was not aware if the owner of the taxi, Mr Mark Such, reported the accident or provided the information in the accident report. He conceded that the indication on the accident report that the streetlights were on in the vicinity of the scene of the collision, was inconsistent with is testimony that the lights were off.

[12] The plaintiff accepted that if the road is dark, the driver of a vehicle has an extra responsibility to control the vehicle in order to deal with any emergency situation and the driver must be more careful and on the look out as there may, for example, be pedestrians on the road. He accepted that if he drove at a speed less than 70km/h, he would have been able to drive over the blocks into the bus lane. He accepted that he was not compelled to drive at the designated speed limit of 70km/h.

[13] He denied that he did not keep a proper look out to see what was ahead in the road or that after the kombi had moved into the left hand lane there was sufficient opportunity for him to take avoiding action and not collide with the stationary bakkie. In

response to a proposition that a reasonable driver in the circumstances would have been able to avoid the accident he responded that there was not enough time to avoid the accident or to swerve to the right. He furthermore denied that if he had applied his brakes he could have avoided the collision. He had no comment when it was put to him that he would have been able to avoid the collision if he had not driven at an excessive speed and that he had contributed to the collision.

[14] He confirmed that he did not know the owner or the driver of the bakkie that he collided with and that he made no effort to determine the identity of either of them. He was unable to comment on the proposition that because the owner or driver of the bakkie was unknown, his claim should have been lodged within two years of the date of the accident while his claim was only lodged approximately two years and nine months after the accident.

[15] In re-examination, the plaintiff confirmed again that he lost consciousness after the collision and he did not know who reported the accident to the police. Prior to the collision he was looking in front of him at the road ahead.

[16] In response to questions from the court the plaintiff confirmed that he maintained his speed of 70km/h until he collided with the stationary bakkie. After the collision his vehicle veered across the bus lane, the raised island in the middle of the road and the oncoming lanes and ended up against the embankment on the far side of the road.

[17] The next witness for the plaintiff was his attorney, Mr Irvine Fergus Armoed. Mr Armoed's evidence was led on a number of peripheral issues which do not warrant any specific comment. More pertinently, he testified that the plaintiff's claim was lodged as an identified claim on 27 August 2018 within three years from the date of the collision. The registration number of the insured vehicle was incorrectly reflected in the RAF1 claim form as THZ[…] instead of FHZ[…]. When they commenced with preparations for the trial he conducted a search on 1 February 2021 in respect of registration number THZ[…] and found that the registration number was non-existent. The registration number of the insured vehicle was reflected as FHZ[…] in the section 19(f) statutory affidavit that accompanied the claim that was lodged on 27 August 2018. He also undertook a search in respect of registration number FHZ[…] and ascertained that the owner of the vehicle was Mr Nordien. He only discovered in the course of the trial that the registration number of the insured vehicle was incorrectly reflected as THZ[…] in paragraph 3 of the Particulars of Claim. The Particulars of Claim were then amended, without any objection from the defendant, to reflect the correct registration number of the insured vehicle as FHZ[…] and to add that the insured vehicle was owned by Mr Nordien. He also served and filed an amended RAF1 claim form during the trial reflecting the correct registration number of the insured vehicle, for the sake of completeness. He accepted in cross-examination that the amended RAF1 claim form served no real purpose given the fact that the claim form must be lodged prior to institution of legal proceedings.

[18] He indicated that on the previous trial date in February 2021 the defendant requested a copy of the relevant entry in the police occurrence book. His office immediately obtained a copy of the relevant extract from the occurrence book and provided it to the defendant's legal representatives. The matter was then postponed, *inter alia,* to allow the defendant an opportunity to consider the new documentation that was provided including the occurrence book. The latter reflected the registration number of the insured vehicle correctly as FHZ[…].

[19] He furthermore indicated that the RAF is allowed a period of 120 days after lodgement of the claim, to enable it to conduct the necessary investigations. Summons cannot be issued until this period had elapsed, unless the claim is repudiated within the period. In this instance no correspondence or queries were received from the RAF resulting in the summons having been issued after the 120-day period had elapsed.

[20] The final witness for the plaintiff was Mr Nordien who confirmed that he was the owner of the KB Isuzu light delivery vehicle that was involved in a collision in Stanford Road, Helenvale on 11 November 2015. He confirmed that the vehicle was green in colour and that its registration number was FHZ[…]. Apart from having been aware that the collision occurred at night, he had no knowledge of the circumstances surrounding the collision as he was not the driver of the vehicle at the time.

[21] The defendant closed its case without calling any witnesses.

[22] Mr Frost, who appeared on behalf of the plaintiff, submitted that although the incorrect registration number of the insured vehicle was given on the claim form, the RAF never objected to the claim form within the 60 days that the Road Accident Fund Act allows for this purpose. The issue was raised for the first time by the defendant during the trial. The registration number reflected in the claim form was a clear error and the correct registration number was reflected in the section 19(f) affidavit that accompanied the lodgement of the claim form. The registration number is also reflected in the police occurrence book which was provided to the defendant at the previous trial date. He submitted that it was of note that the submission of the section 19(f) affidavit was a peremptory requirement and it was deposed to under oath. Furthermore, the RAF1 claim form does not require the details of the owner or driver of the insured vehicle to be provided. It only requires details of the insured vehicle itself. In the circumstances the claim was lodged as an identified claim and not as a hit-and-run case. The plaintiff cannot therefore be non-suited on the basis that the claim had become prescribed pursuant to the provisions of Regulation of 2(1)(b) because the claim was not lodged within two years of the date of the collision.

[23] He submitted that there is no basis for finding that the plaintiff's negligence contributed to the collision. He emphasised that the collision happened at night while the insured vehicle was stationary in the fast lane of Stanford Road. It can be accepted as a proven fact that the vehicle had no lights on or emergency lights flashing and that there were no triangles or other warning signals indicating the presence of the insured vehicle on the roadway. The insured vehicle was dark in colour and the particular

section of the road where the collision occurred was dark due to the fact that the streetlights were not on. He submitted that the onus rested on the defendant to establish contributory negligence on the part of the plaintiff on a balance of probabilities. This has not been done. Insofar as prescription is concerned, this had to be raised by means of a special plea which has not happened and the court cannot in the circumstances have regard to the plea of prescription. He also submitted that the costs should follow the event but that the costs in respect of 17 February 2021 that were reserved, should remain reserved for later determination. He also submitted that the costs order should make specific provision for the photographs of the area in question in Stanford Road that were produced by the plaintiff as well as an inspection *in loco* attended by counsel.

[24] Mr Mgidlana, who appeared on behalf of the defendant submitted that the purpose of the claim form was to enable the RAF to consider whether the plaintiff's claim was valid. It was therefore incumbent on the plaintiff to ensure that the documents were consistent in all material respects. The registration number THZ[…] does not exist and no owner could have been identified in respect of such non-existent registration number. Neither the owner nor the driver of the insured vehicle was identified when the claim was lodged which would have rendered the claim as an unidentified claim regulated by Regulations 2(1)(a) and (b). The claim was not lodged within two years of the date of the collision and had accordingly become prescribed.

[25] Mr Mgidlana furthermore submitted that the plaintiff was not open and frank in his testimony and was not a credible witness. His testimony that there were streetlamps in the particular section of Stanford Road but that the lights were off is directly contradicted in his section 19(f) affidavit that indicated that there no street lamps in the particular area. On his own version, he struck the bakkie directly at its rear and did nothing to prevent the collision. He never reduced his speed and never applied his brakes. He never made an attempt to swerve into the bus lane to avoid the collision. It would not have been physically impossible for him to have moved into the bus lane as his vehicle had veered across the bus lane as well as the opposite lanes after the collision and had ended up on the embankment on the far side of the road. The only reasonable conclusion in the circumstances is that he failed to keep a proper look out. He could not comment when this proposition was put to him in cross-examination. He, furthermore, drove at an excessive speed and did not maintain a safe following distance behind the kombi that was travelling in the same lane. It is significant that the kombi could move into the left hand lane and never collided with the stationary bakkie. There were no curves or a blind rise in the road and the plaintiff was accordingly not confronted with a sudden emergency. The plaintiff accepted that he had to be more vigilant as he was entering a dark section of road at night time. The kombi managed to avoid the collision and there was no reason why the plaintiff could not have done likewise even at 70km/h given the distances that he had indicated between himself and the kombi when the latter had moved into the left hand lane. If he had kept a proper look out he had sufficient opportunity to take evasive action and to avoid the collision. There was also no reason why the plaintiff could not see the road ahead of the kombi if he kept a proper

look out. Mr Mgidlana submitted that on his own version the plaintiff was entirely to blame for the collision, alternatively, his negligence was the main cause of the collision and the court should as a result attribute 90 percent of the liability for the collision to the plaintiff and 10 percent to the insured driver.

[26] He further submitted that the issue of prescription arises from Regulations 2(1)(a) and (b). There was no need for the defendant to raise a special plea before the issue of prescription could be adjudicated. It was sufficient to raise the issue as part of the plea as was done by the defendant.

[27] Insofar as the issue of costs is concerned, Mr Mgidlana submitted that it was readily apparent from subsequent events that the matter was not trial ready on the previous trial date in February 2021. The plaintiff himself did not have his house in order. For example, he previously indicated that he would only call one witness just to land up calling three witnesses. The reason for the matter not proceeding on the previous trial date, cannot be attributed to the defendant. The matter was rolled over and the file eventually retrieved from the trial judge and the matter was then raised with the Deputy Judge President who had allocated a new trial date for the matter. He further submitted that the general approach with regard to taxation is that the courts are reluctant to prescribe to the taxing master. The issue as to what reasonable fees and disbursements can be justifiably recovered by a party should be left to the discretion of the taxing master. The court should not accede to the plaintiff's request that specific items should be identified in the costs order which should be allowed by the taxing

master. It should also be borne in mind that there have been considerable delays during the trial occasioned by the plaintiff. He submitted in conclusion that the plaintiff's claim should be dismissed with costs alternatively a 90% / 10% apportionment should be ordered against the plaintiff.

[28] Mr Frost indicated at the conclusion of the address of Mr Mgidlana, that he was not in a position to reply immediately. He was afforded an opportunity to submit a written reply which was received after a slight delay due to health problems experienced by Mr Frost.

[29] In reply to paragraph 17 of the plea which concerned prescription of the claim, Mr Frost submitted that the plaintiff substantially complied with section 24 of the Road Accident Fund Act, 56 of 1996. Section 24(5) of the RAF Act provides that unless the RAF objects within 60 days of transmission or delivery of a claim to the validity thereof, it shall be deemed to be valid in law in all respects. He further submitted that while an incorrect registration number of the insured vehicle was given in the claim form, the correct registration number was disclosed in the plaintiff's section 19(f) affidavit lodged with the claim. He referred to the decision of *Mlatsheni v Road Accident Fund* 2009 (2) SA 401 (ECD) paras [13]-[17] and submitted that the RAF was obliged to investigate the plaintiff's claim and that the information furnished reasonably afforded the RAF a proper opportunity to consider its position and investigate the claim which was lodged as an "*identified claim"* within 3 years of the date of the collision and accordingly did not prescribe.

[30] In respect of the merits Mr Frost submitted that the defendant's plea of having no knowledge of the collision was contradictory to its plea of contributory negligence on the part of the plaintiff. The short answer is that the plea of contributory negligence was clearly in the alternative which was not irregular.

[31] He submitted that the onus was on the defendant to prove contributory negligence on a balance of probabilities. The defendant elected to present no evidence but instead attempted to rely on hearsay evidence such as the affidavit of Mr Mark Such and the accident report. It is not sufficient to rely on inferences drawn from inadmissible evidence and submissions from the Bar. Duly proven evidence is required. He furthermore referred to the matter of *Paterson NO v RAF* case no. 3852/2017 (Eastern Cape Local Division, Port Elizabeth) paras 9 & 16-17 that dealt with a collision involving a stationary vehicle on the road surface without hazard lights or some other form of warning in a dark area where the streetlights were not working. The court found in that case that the claimant cannot be held to be negligent when he was unable timeously to observe and react to an obstacle on a dark road. In the present case the defendant presented no evidence why the insured vehicle could not have been moved into the bus lane. There was only the version of the plaintiff that he was unable timeously to observe or react to the insured vehicle. Mr Frost submitted in conclusion that no contributory negligence has been established on the part of the plaintiff and that the defendant should be declared 100% liable for the plaintiff's damages.

[32] Having considered the matter and the arguments advanced on behalf of the parties, I am not persuaded that there is any basis for the plea of prescription. The claim was clearly lodged as an identified claim within the period of three years of the date of the collision. Considered holistically the information which was provided to the RAF upon lodgement of the claim would have been sufficient for it to investigate the claim. Although the incorrect registration number of the insured vehicle was provided in the RAF1 claim form, the correct registration number was reflected in the section 19(f) affidavit. It would have been a relatively easy matter to ascertain that the registration number in the claim form was non-existent and that Mr Nordien was the owner of the vehicle identified in the section 19(f) affidavit. It would have been equally easy to established from Mr Nordien that his vehicle was indeed involved in the collision and he would also have been in a position to provide the details of the insured driver. All of this was eventually done by both parties albeit on the eve or during the trial. It is trite that while the submission of the RAF1 claim form is peremptory, the information that is to be provided in the form is directory and that only substantial compliance is required in this regard. It is clear in the circumstances that the incorrect first letter of the registration number of the insured vehicle in the claim form is an error or oversight. The rest of the digits in the registration number are correct and coincide with the actual registration number of the insured vehicle as reflected in the section 19(f) affidavit. I am satisfied in the circumstances that the claim as lodged, complied with the statutory requirements and sufficiently served the purpose of enabling the RAF to investigate the claim (cf *SA Eagle Assurance Co Ltd v Pretorius* [1998] 1 All SA 131 (A); *Pithey v Road Accident Fund* 2014 (4) SA 112 (SCA)). I accordingly find that Regulations 2(1)(a) and/or (b) find

no application in this matter. The claim of the plaintiff has accordingly not become prescribed.

[33] Insofar as the issue of liability is concerned, I agree with the submission of Mr Mgidlana that the plaintiff's negligence was the main cause of the collision. On his own version, he had sufficient opportunity to avoid the collision but did not do so mainly because he failed to keep a proper look out. It is significant in this regard that the kombi travelling in front of him in the same lane was able to pass the stationary bakkie safely by moving into the left hand lane. At that stage the plaintiff was approximately 7½ metres from the kombi. He should have been able to see the bakkie in the road at the stage that the kombi moved into the left hand lane which would have allowed him sufficient opportunity to take evasive action. On his own version the range of his dim headlights was approximately 10 metres. The headlights would have illuminated the bakkie immediately when the kombi moved into the left hand lane approximately 7½ metres ahead of him. This would be so even if the bakkie's lights were off or in the absence of a warning triangle on the road.

[34] The plaintiff could also have moved into the left hand lane because he never indicated that there was other traffic in the left hand lane which was moving alongside his vehicle which prevented him from moving into the left hand lane. The kombi was ahead of him and did not prevent him from doing so despite his unconvincing claims to the contrary in his evidence. He could also have moved into the bus lane which was empty and would have been able to avoid the collision in that fashion. I do not accept

the plaintiff's evidence that the yellow blocks separating the fast lane from the bus lane made it physically impossible for him to move into the bus lane. It is readily apparent from the photographs of the scene that the yellow blocks in question serve as a warning signal and a demarcation between the fast lane and bus lane rather than a physical barrier between the fast lane and bus lane. He maintained that at the speed of 70km/h at which he was travelling it was physically impossible to move over the yellow blocks. This was not at all convincing. He did proceed right across the road after the collision and ended up against the embankment on the far side of the road. His vehicle was not stopped by the blocks. In any event he conceded that he could have driven over the blocks at a lesser speed. He furthermore conceded that he never reduced speed or applied his brakes. He had ample opportunity in the circumstances to have done so. He never gave a convincing reason why he did not do so. His conduct in simply proceeding at the same speed and driving straight into the rear of the stationary bakkie without even attempting to take evasive action significantly deviated in the circumstances from the standard of the *bonus paterfamilias*. While he confirmed having been aware that it was necessary to be extra vigilant as he was entering the dark section of the road, he never adjusted his conduct accordingly. The negligence of the insured driver was clearly also a significant contributing cause of the collision but it was less so than the negligence of the plaintiff. This should be reflected in the apportionment of liability.

[35] For the reasons set out above, I do not agree with the submission of Mr Frost in reply that the plaintiff was unable timeously to observe or react to the insured vehicle.

On the probabilities, the kombi ahead of him moved into the left hand lane to avoid a collision with the insured vehicle, which it successfully managed to do. The plaintiff who was some distance behind the kombi when it did so, was in a similar if not better position to also have done so. It is trite that each case must be decided on its own facts and circumstances. No useful purpose is served to transpose the conclusion in other cases to the matter at hand. I accordingly do no find that the matter of *Paterson NO* referred to by Mr Frost precludes me from coming to the conclusion that I have reached in this matter concerning the plaintiff's contributory negligence. It is furthermore incorrect that the defendant relied upon inferences drawn from inadmissible evidence or submissions from the Bar for its argument in respect of the plaintiff's contributory negligence. It is clear that the defendant relied in this regard on the version of the plaintiff himself which it was fully entitled to do even in the absence of any witnesses of its own.

[36] In the circumstances, I conclude that the negligence of the plaintiff was the principal cause of the collision and that 60 percent of the blame for the collision should be apportioned to the plaintiff and 40 percent to the insured driver.

[37] There is no adequate reason in the circumstances of this case why costs should not follow the result or why the plaintiff should be deprived of any portion of his costs. He was compelled to approach the court to recover his loss, albeit with only partial success. I am constrained to remark *en passant* that there might very well be cases where, in the exercise of the court's discretion in respect of costs, a plaintiff could justifiably be deprived of a portion of its costs proportionate to an apportionment even in

cases where there is not a partially successful claim and counterclaim but only a claim in convention as in the present matter. A possible example that springs to mind is where the contributory negligence on the part of the defendant is but slight. However, this is not such a case.

[38] In the result, I make the following order:

(a) The defendant is liable for 40 percent of the plaintiff's proven or agreed damages resulting from the injuries he sustained in the motor vehicle accident that occurred on 11 November 2015.

(b) The defendant is ordered to pay the plaintiff's costs occasioned by the trial on the merits;

(c) The costs in respect of 17 February 2021 shall remain reserved for later determination.

D O POTGIETER

ACTING JUDGE OF THE HIGH COURT

Appearances:

For Plaintiff: Adv Frost instructed by Boqwana Burns Inc, Port Elizabeth

For Defendant: Adv Mgidlana instructed Mohulatsi Attorneys Inc c/o BLC Attorneys, Port Elizabeth