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

Case No: 542/2020

Reportable: YES/ NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

STEVEN KARL WAIDELICH

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

CORAM: NAIDOO J

**HEARD ON: 9 November 2021; 25,26,28 January 2022; 23 – 25
March 2022**

DELIVERED ON: 26 AUGUST 2022

JUDGMENT

[1] This was a trial, heard in respect of a personal injury claim, arising out of injuries suffered by the plaintiff, Steven Karl Waidelich (the plaintiff) in a motor vehicle accident on 4 December 2016 on the national route (N1) near Parys in the Free State Province. The trial commenced on 9 November 2021. The defendant, the Road Accident Fund (RAF), had agreed at the case management hearing of this matter that the trial could proceed on both the merits and quantum, and the matter was accordingly enrolled for two days for trial. RAF made application at the commencement of the trial for a separation of the merits and quantum in terms of Uniform Rule 33(4). The application was opposed by the plaintiff, as he had come prepared to proceed on both quantum and merits. All his witnesses, including expert witnesses, had been subpoenaed for trial. After hearing arguments, the court granted an order separating the merits and quantum, and the trial proceeded on the merits. Adv J Wessels SC with H Schouten represented the plaintiff and Adv (Ms) J Ferreira represented RAF.

[2] This matter concerned a serious accident between the plaintiff's vehicle, a silver Volkswagen Golf bearing registration number [...](the Golf) and, according to the plaintiff, an oncoming vehicle, which was a blue Mazda vehicle bearing registration number [...](the Mazda). The driver and the two other occupants of the Mazda were tragically killed in the accident. The plaintiff, who was travelling alone, was seriously injured and had to be airlifted to hospital. He has no recollection of the accident, and there were no eye witnesses to the accident. There is consequently no version before this court about how the collision occurred. The issues before this court are, therefore, liability and costs, in respect of which the parties made comprehensive submissions.

[3] The plaintiff called three witnesses and the RAF called two. The plaintiff's first witness was an accident reconstruction specialist, Barry Grobbelaar (Grobbelaar), to give an opinion in respect of how the accident could possibly have occurred. Warrant Officer (W/O) Phele (Phele), the plaintiff's second witness was the police official who attended the scene of the accident, drew a sketch plan and key of the accident scene and also photographed the scene. Karla Waidelich (Mrs Waidelich) is the

plaintiff's wife and was the plaintiff's third witness. She and her father arrived at the accident scene about an hour after the accident and both of them took photographs of the scene, which were referred to extensively during the trial. The plaintiff had also intended to call Warrant Officer Andrew S Oliphant (Oliphant), who was the first police official to attend the scene and who completed, *inter alia*, the Accident Report Form (AR form). The plaintiff, however, decided not to call him and closed its case. He was then called as a witness for RAF. In addition, RAF called W/O Joseph Hunter (Hunter), who was the detective on duty on the day of the accident. He attended the scene of the accident and was also the investigation officer in this matter.

[4] Mr Grobbelaar's Curriculum Vitae (CV) was handed up as an exhibit. He holds a Bachelor's degree, Honours degree and a Master's degree in Mechanical Engineering. His experience spans a period of approximately thirty years, during which time he gained extensive experience, *inter alia*, in vehicle engineering for a large variety of vehicles, mechanical design and accident reconstruction. He has undertaken over 4 400 motor vehicle accident reconstructions in the last twenty eight years, and has testified in this regard in various Divisions of the High Court of South Africa, as well as in the High Court in Windhoek. In this matter, Grobbelaar compiled a detailed report and in doing so, had regard to the AR form, the sketch plan and key together with black and white photographs taken by the police, other black and white photographs of the accident scene, the plaintiff's warning statement made to the police and a copy of Oliphant's statement

[5] Grobbelaar gave lengthy and detailed evidence when the matter resumed on 25 January 2022. On that day, colour photographs of the accident scene, ostensibly from the docket, were made available to Grobbelaar and to RAF. Ms Ferreira's cross examination of Grobbelaar took account of the colour photographs. His evidence was that the colour photographs did not impact on his report, and that the opinion expressed therein remains the same. It was common cause that the colour photographs gave a clearer picture of what the accident scene looked like on the day of the incident. His report indicates that he visited the accident site on 26 February 2016, some two and a half months after the accident. He took the relevant measurements and photographed the site. When he compared the road as he saw it,

with the photographs in his possession, it appeared as if the road had been re-surfaced and repainted, but he was able to do a reconstruction using the photographs and the police report, as well as the photographs taken by Mrs Waidelich and her father, although they were black and white.

[6] He testified that according to the AR form, the road at the accident scene was tarred, dry and in good condition at the time of the accident. The road markings were visible, the road was straight and flat and that the speed limit on that road was 120 kilometres per hour. He was able to see this on the photographs and observed much of this when he visited the accident site. With the help of a Google Earth aerial picture of the accident site, and the documentation I mentioned earlier, he was able to determine the probable direction of travel of the Golf and the Mazda and indicated this on the aerial picture. The plaintiff indicated in his warning statement that he remembered leaving home in Randburg, Johannesburg and joining the N1 to Cape Town, but remembers nothing else. His next memory is of him waking up in the hospital. Using this information, the final resting position of the Golf after the accident and the police sketch plan, Grobbelaar determined that the plaintiff drove his Golf motor vehicle from north to south and the Mazda drove in a south to north direction.

[7] Grobbelaar explained in detail, how he used the police photographs and sketch plan to reconstruct certain points reflected on the key to the police sketch plan. He then compared these with the photographs taken by Mrs Waidelich and her father to verify the accuracy of his reconstruction. I pause to mention that Grobbelaar pointed out that the photographs taken by the police and Mrs Waidelich show that there was no yellow line or triple barrier line in the middle of the road, which is what he observed when he visited the site in February 2017. The gouge marks and yaw marks on the road, present in the photographs, were also absent when he visited the site. He therefore relied on the photographs for his reconstruction.

[8] In order to formulate his ultimate opinion Grobbelaar dealt with the damages to the two vehicles, as they appeared from the photographs, in order to ascertain the probable manner in which the collision occurred. With regard to the Golf, he observed that the front of the vehicle was severely damaged and the damage was fairly evenly spread across the front of the vehicle. The bonnet, the top of the bonnet

and the windscreen were also damaged. The Mazda was also very severely damaged, with pieces of the wreckage strewn over a wide area. The photographs indicated that the right rear door, the right front door and the right front fender did not suffer direct impact damage. Similarly, the bonnet showed no direct impact damage, except to the left side thereof. The left side of the roof of the vehicle showed severe impact damage. The engine, wheels and suspensions appeared to have been torn from the vehicle. Grobbelaar opined that it is probable that the left hand side of the Mazda collided with the front of the Golf.

[9] Grobbelaar undertook a detailed analysis of the tyre and gouge marks evident on the road surface from the photographs, and also considered the police sketch plan and key, compiled by Phele. The latter plan indicated a possible point of impact (C), at which the photographs revealed that the largest piece of the Mazda wreckage came to rest. From that position of rest, it appeared that the Mazda ended up in the road on the side on which the Golf was travelling. Grobbelaar considered the tyre marks and observed that the photograph shows three marks curving towards the largest piece of the Mazda wreckage. When considering that the marks are darkest in the lane opposite the Golf and faintest nearer the point of impact, as well as the curved nature of these marks, the implication is that the vehicle that caused these marks was probably in a clockwise yaw as it approached the area where the largest part of the Mazda came to rest.

[10] Grobbelaar explained that a yaw means that as the vehicle moves it starts rotating clockwise on its vertical axis, with the front of the vehicle moving to its right-hand side. The further it rotates, the further away the marks get from each other. The light and dark marks that he noticed on the photographs were continuous, with no breaks or kinks from where they start to where the wreckage was lying. He testified that this is an indication that the Mazda did not collide with anything from where the marks start to where the wreckage lay. If it had collided with anything, there would have been a break or kink in the marks, indicating the application of an external force which interrupted the direction in which it travelled. He further opined that from an observation of the debris around the area, it is most probable that the point of collision would have been approximately where the wreckage lay.

[11] In his opinion, Grobbelaar indicated that from this and from the damage to the vehicles, namely the left side of the Mazda and the front of the Golf, it indicates that the Mazda was travelling north and the Golf was travelling south. In response to propositions put to him in cross-examination and to test this, he said that if the Golf were travelling north, its left side would have been facing the Mazda and would have collided with the front of the Mazda. This is incompatible with the damage observed on both vehicles. If the Golf, travelling in a southerly direction, went across the road and collided with the Mazda, the right hand side of the Mazda would be closest to the Golf and would have collided with the Golf. This too is incompatible with the damage sustained by both vehicles.

[12] I pause to mention that the Golf came to rest with its nose facing the grassy verge, which had a slight incline, on the side of the road heading in a southerly direction. In dealing with the gouge mark visible near the wreckage of the Mazda, Grobbelaar testified that the mark was observed close to the wreckage. A break in the tyre marks at this point can also be observed, indicating that an external force was applied to the vehicle, which in turn resulted in the gouge mark. He testified that the gouge mark indicates that the tar was removed and opines that it was most probably caused by the rim of the Mazda's tyre, given that it appeared to have been caused by a circular object. He further asserts that the collision most probably occurred in the left hand lane of the southbound carriageway. From a reconstruction point of view, Grobbelaar asserts, the only conclusion is that the Mazda travelled in a northerly direction and the Golf travelled in a southerly direction. This also accords with the plaintiff's statement to the police that he travelled from Randburg to Cape Town.

[13] Grobbelaar was unable to say what caused the driver of the Mazda to lose control of the vehicle or why it veered onto the opposite side of the road. The only aspects he can give an opinion on are what I have set out above, namely that the Mazda travelled in a northerly direction, it went into a clockwise yaw and collided with the Golf travelling in the slow lane of the south bound carriageway, being the Golf's correct side of the road. He was unable to say what speed each vehicle was travelling at when the collision occurred, but estimates that it was fairly high. The speed limit on that road is 120km per hour, and if both vehicles were travelling at that

speed, they would have been approaching each other at 240km per hour. Taking into account visualisation, perception and reaction time of 1.5 seconds, the driver of the Golf would have been unable to react in order to avoid the collision, as the vehicles would have been less than 100 metres apart from each other. When he visited the accident site, Grobbelaar attempted to estimate the distance between the vehicles before the collision occurred. He did this by counting the dotted/broken middle line, and estimated that the yaw commenced when the vehicles were approximately 30 metres apart, leaving the driver of the Golf no time to react.

[14] Phele merely confirmed that he attended the scene and a Warrant Officer Oliphant (Oliphant) pointed out various aspects of the scene, and based on this and his observations, he compiled the sketch plan and key. He indicated that the sketch plane drawn by Oliphant is not correct and indicated that as a member of the Local Record Criminal Centre (LCRC), he received training in compiling, inter alia, sketch plans and keys thereto. He had attended many accident scenes over the years and had more experience than Oliphant. His sketch plan and key were correct.

[15] Mrs Waidelich confirmed that as they were relocating to Cape Town, the plaintiff drove from Randburg, where they were staying with her parents, to Cape Town to meet the removal truck, when the accident occurred. She also confirmed that she and her father drove to the scene of the accident where they took the photographs of the scene (B60 – B67), which were referred to extensively in the course of the trial. She also indicated that despite her asking the plaintiff on numerous occasions about what had happened, he had no recollection of the accident. That was the case for the plaintiff.

[16] As indicated earlier, RAF led the evidence of Oliphant and Hunter. Oliphant and his colleague were the first police officials to arrive at the accident scene, from where he called the various authorities such as the- detectives who were on standby, ambulance service, fire department, etc. He confirmed that Hunter and a station commander also attended the scene and that Phele took photographs and drew a sketch plan. Oliphant completed the accident report, but it was evident that it was incomplete in many important respects. He conceded that he did not receive proper training with regard to attending accident scenes or how to compile a proper sketch

plan. He was also unable to satisfactorily explain why the details he ought to have completed were not. He also indicated that the sketch plan and key compiled by Phele should be accepted instead of the sketch that he compiled.

[17] Hunter testified that he was the detective on duty on the day of the collision and responded to a call that there was an accident. When he arrived at the scene, Oliphant and others were there. He did not compile the accident report or the sketch plan and key. He did not take statements from anyone at the scene as the bystanders informed him that they did not see how the accident occurred. He investigated the matter. It also appeared that the plaintiff was charged with culpable homicide, but the prosecuting authority declined to prosecute him. Hunter was not able to assist any further with regard to how the accident occurred.

[18] Very late in the proceedings and after Hunter had testified, the defendant applied for a postponement to call an accident reconstruction specialist as an expert witness, with a view to investigating the exact nature of the roadworks and to report on the possible impact thereof on the collision. The application was opposed and fully argued by both parties. The court delivered a ruling, refusing the application. That ruling is on record and it is unnecessary to repeat the reasons therefor. If necessary, I will refer to the reasons for the ruling, insofar as they may be relevant for this judgment. The parties thereafter presented their closing arguments in the main action.

[19] As indicated earlier, the issues for this court to determine are, therefore, liability and costs. The issues that are common cause or not in dispute, and which were established during the trial, particularly via the evidence of Grobbelaar, are:

19.1 the plaintiff left Randburg, Gauteng at about 4h30 on the morning of 4 December 2016;

19.2 He drove on the N1 to Cape Town, ostensibly on the left hand lane of the south-bound carriageway;

19.3 He drove a silver Golf motor vehicle, bearing registration number [...];

19.4 A Mazda vehicle, bearing registration number [....]travelled in the opposite direction to the plaintiff in the left-hand lane of the north-bound carriageway of N1;

19.5 Approximately 30 metres before the point of impact, the Mazda vehicle went into a right-hand yaw, travelled across its path of travel onto the south bound carriageway on which the plaintiff was travelling, colliding with the Golf motor vehicle, driven by the plaintiff;

19.6 The left hand side of the Mazda collided with the front of the Golf, causing serious damage to both vehicles;

19.7 The three occupants of the Mazda were killed in the accident and the plaintiff was seriously injured. The latter has no memory of the collision, with the result there is no eye witness account of what caused the driver of the Mazda to lose control and veer into the plaintiff's path of travel.

[20] RAF did not put its version to any of the plaintiff's witnesses, but argued that the court should apportion liability equally between the plaintiff and insured driver, as there is no evidence of negligence on the part of the insured driver. It is well established in our law that a cross-examiner bears the responsibility to put his/her case to witnesses and afford such witnesses the opportunity to comment on such a version. The witness should also be informed of what evidence will be led to negate the version proffered by him/her. Where such witness's evidence is not challenged or where no evidence to the contrary is led, the party presenting the evidence of such a witness is entitled to assume that the evidence of his witness has been accepted as correct. RAF did not present any evidence to counter that presented by the plaintiff, but relied on supposition and speculation. I will deal further with his aspect later in this judgment.

[21] The approach to be adopted when dealing with expert evidence was succinctly dealt with by the Supreme Court of Appeal (SCA) in *Michael & Another v Linksfeld Park Clinic (Pty) Ltd & Another* 2001(3) SA 1188 (SCA) in paragraphs 34 - 40 of the judgment. This dictum was applied consistently by the SCA in the years

that followed, the most recent case being *HAL obo MML v MEC For Health, Free State 2022 (3) SA 571 (SCA)* at para 53 and even by the Constitutional Court in *Oppelt v Department of Health, Western Cape 2016 (1) SA 325 (CC)* at para 36. In essence, the court in the Michael case said that the opinions of an expert must be founded on logical reasoning. The expert must have considered comparative risks and benefits (in this case I interpret this to mean all relevant information and circumstances), and reached a defensible conclusion. The expert's opinion must withstand logical analysis and be reasonable

[22] It is without doubt that the plaintiff's case hinges on Grobbelaar's evidence which purports to give insight into what happened on the day in question. As he was led as an expert witness, the court must be satisfied that his testimony is based on objective facts, which are available and clearly discernible. In the case of a forensic expert, such as Grobbelaar, his evidence must further be based on logical reasoning and on scientific principles. I have set out in detail the nature of Grobbelaar's evidence. He prefaced every material aspect of his evidence by reference to objective evidence such as the plaintiff's statement to the police, the sketch plan and key compiled by the police as well as the photographs which were introduced into evidence, without objection from the defendant. He explained in detail how he was able to make the deductions and draw the conclusions he did, based on the photographs, the other documents which he considered as well as his own investigations and photographs, at the accident site. The results of his investigations were documented and presented as part of his report, so that it was evident that he meticulously established the various points reflected on the police sketch plan by reference to the photographs taken by Phele as well as the plaintiff's wife.

[23] His explanation with regard to the yaw and the mechanism of what happens in a yaw was clear, logical and based on laws of physics and science. This explanation was given with reference to the tyre and gouge marks visible on the various photographs. Similarly, he undertook a detailed analysis of the damage to the two vehicles in order to reach the conclusion that such damage could only have been caused by the Mazda which left its lane of travel and encroached into the plaintiff's path of travel on the opposite side of the road. Several scenarios were canvassed with him by Ms Ferreira during cross-examination as to the possible ways that the

collision occurred, He answered each proposition with reference to the damage to each vehicle, as well as the physical condition of the road, as it appeared in the photographs, to show why those options were not possible. I detailed his responses to those propositions earlier in this judgment.

[24] Ms Ferreira, after receipt of the colour photographs taken by Phele and Mrs Waidelich, took the view that the “heaps” in the distance, which looked like heaps of construction material, may have played a part in the collision. She also noted that the pieces of concrete lying in the grass on the north-bound side of the road may also have had an impact. In addition, the colour photographs showed more clearly a warning sign, on the south-bound side of the road, which was inscribed “Trucks Turning”. Ms Ferreira attempted to suggest that the driver of the Golf may have swerved to avoid a truck that was turning.

[25] Grobbelaar indicated that the “heaps” were at least 200 metres away from the accident site. The driver of the Golf, driving south, would have been approaching the “heaps”, and the Mazda, travelling in a northerly direction, would have long passed the “heaps” when the collision occurred. The concrete pieces lying on the Mazda’s side of the road were clearly off the road and lying in the grassy verge. The yaw/tyre marks starting on the Mazda’s side of the road, begin some distance before the area where the pieces of concrete were lying. Grobbelaar’s estimation of a distance of 200 metres, took account of the dotted middle lines in the road, which are approximately 12 metres apart from each other. He counted those middle lines on the photographs and arrived at the approximate distance of 200 m that the heaps would have been away from the accident site. Similarly, he indicated that the concrete pieces were completely off the road and in his view could not have had any impact in respect of the collision. I am inclined to agree with this view.

[26] Common sense dictates that when a warning sign is placed on a road, it is usually some distance away from the area of danger. The “Trucks Turning” sign was very close to the area of the accident on the side of the road on which the Golf was travelling. It is logical that the Golf would have been approaching the “heaps” which were at least 200 metres away. The sign would have merely warned him of the potential danger ahead so that he could regulate his driving accordingly. It makes no

sense for a truck to have been turning at the area of the collision as there were no roadworks at that point. Hunter confirmed that there was no roadworks in the vicinity of the accident scene. Therefore, that proposition put by Ms Ferreira is mere speculation which is not supported by the objective evidence, and does not explain the presence of the Mazda in the plaintiff's path of travel. Further it is not incumbent on the expert to take account of or consider irrelevant evidence, which would not have impacted on the collision.

[27] Both parties raised the issue of *Res Ipsa Loquitur*, which is accepted to indicate that the thing or event or evidence speaks for itself. This does not of itself create a presumption of negligence and does not relieve a party of the burden of proof that he bears. It merely allows an inference of negligence on the balance of probabilities to be drawn on the proven facts of the probabilities. Ms Ferreira argued, in her Heads of Argument, that the plaintiff has to prove that the Mazda was driving in the opposite direction, that the Mazda moved across the middle lane where it collided with the Golf and that the driver of the Mazda was negligent in that he failed to act as a reasonable man would and take the necessary action to avoid the collision. She further asserts that in the absence of credible and reliable evidence that it was the Mazda and not the Golf that deviated from its correct path of travel, *res ipsa loquitur* will not apply in determining negligence.

[28] The court must be able to infer from the facts, she asserts, that the only reasonable and legitimate inference is that the collision occurred on the correct lane of the Golf and incorrect lane of the Mazda. From these assertions it appears that Ms Ferreira is insinuating that Grobbelaar's evidence is neither credible nor reliable. She has asked the court to reject the evidence of the two police officials that she called as witnesses, so that would leave only the evidence of Grobbelaar. She did not challenge the correctness of Phele's sketch plan and key, so I accept that her request does not include Phele when she refers to police officials. She has not dealt meaningfully with Grobbelaar's evidence or the basis of his opinion, other than to raise speculative arguments about the roadworks, cement pieces, the truck turning sign and of course various possibilities of how the collision could have occurred, in support of her contention (in her Heads) that he did not take account of all relevant information and circumstances

[29] The plaintiff, via its witnesses, especially Grobbelaar, has shown on a balance of probabilities that the plaintiff was travelling on the southbound carriageway of the N1, towards Cape Town. The evidence of the plaintiff's wife, viewed together with the plaintiff's statement to the police about where he was going, as well as the position in which the Golf came to rest after the collision, are support for that assertion. I have dealt with Grobbelaar's evidence and his opinion with regard to how the collision occurred. There is no evidence before this court to contradict or challenge that evidence. It seems that Ms Ferreira now belatedly raises a challenge as to whether the Mazda travelled in the opposite direction to the Golf and left its path of travel and encroached into the path of travel of the Golf. The tenor of her cross-examination was that anything could have caused the Mazda to leave its correct side of the road and move to the opposite side of the road. The assertions in her Heads of Argument that the plaintiff must prove that the Mazda travelled in the opposite direction to the Golf and moved across the middle lane where it collided with the Golf are misplaced.

[30] The evidence of Grobbelaar has in my view, met the requirements as set out in *Michael & Another v Linksfield Park Clinic (Pty) Ltd*. The defendant, despite having ample opportunity to do so, failed to lead any evidence to the contrary. The defendant had Grobbelaar's report since September 2020 and ought to have realised that in the absence of eye witnesses, an accident reconstruction expert would be needed to counter the evidence of the plaintiff, if indeed it held that view at all. It chose to engage in a protracted trial without presenting a version and offering no reason why the court should reject Grobbelaar's evidence. The court accepts his opinions, especially with regard to the direction of travel of both vehicles, and the area where the collision occurred. There is furthermore no explanation for why the Mazda left its path of travel and collided with the Golf on the latter's correct side of the road.

[31] It would appear to me that dictum of the Appellate Court in *Arthur v Bezuidenhout and Mieny 1962(2) SA 566 (A) at 573 B-F* finds application in this matter. This dictum has been applied and cited with approval by courts in numerous matters, including the SCA in *Goliath v MEC for Health, Eastern Cape 2015 (2) SA 97 (SCA)* at para [10].

The dictum in *Arthur v Bezuidenhout* reads as follows:

“It is, of course, trite that, in a case such as the present, a plaintiff must prove that the damage he has sustained has been caused by the defendant's negligence. It is equally trite to say that the *onus* thus resting upon a plaintiff never shifts. While the maxim *res ipsa loquitur* has no general application to highway collisions, no sufficient reason appears to me to exist why the maxim should not, in a restricted class of case, sometimes apply. Without in any way attempting to define the limits of such application - and see on the question generally, *Hamilton v MacKinnon*, 1935 AD 114 at pp. 125 *et seq*: and pp. 360 *et seq*: - I am of opinion that on the facts of the present case the maxim may rightly be applied. For, when plaintiffs proved that defendant's truck for no apparent reason suddenly swerved on to its incorrect side there to collide with their truck, plaintiffs proved facts from which an inference of negligence against defendant may, in the absence of any explanation, be drawn - *res ipsa loquitur*.

[32] The SCA in *Goliath* said at para [10]:

“Broadly stated, *res ipsa loquitur* (the thing speaks for itself) is a convenient Latin phrase used to describe the proof of facts which are sufficient to support an inference that a defendant was negligent and thereby to establish a *prima facie* case against him. The maxim is no magic formula (*Arthur v Bezuidenhout and Mieny* 1962 (2) SA 566 (A) at 573E). It is not a presumption of law, but merely a permissible inference which the court may employ if upon all the facts it appears to be justified (Zeffertt & Paizes *The South African Law of Evidence* 2 ed at 219). It is usually invoked in circumstances when the only known facts, relating to negligence, consist of the occurrence itself (see *Groenewald v Conradie*; *Groenewald en Andere v Auto Protection Insurance Co Ltd* 1965 (1) SA 184 (A) at 187F) — where the occurrence may be of such a nature as to warrant an inference of negligence. The maxim alters neither the incidence of the *onus* nor the rules of pleading (*Madyosi v SA Eagle Insurance Co Ltd* 1990 (3) SA 442 (A) at 445F) — it being trite that the *onus* resting upon a plaintiff never shifts

(*Arthur v Bezuidenhout and Mieny* at 573C). Nothing about its invocation or application, I dare say, is intended to displace common sense”.

[33] It is well established in our law that where a collision occurs on the incorrect side of the road, there is a *prima facie* inference of negligence on the part of the driver found to be on the incorrect side of the road. Where the plaintiff establishes that the collision occurred on his side of the road, the defendant is required to explain his presence on his incorrect side of the road. If the explanation by the defendant is insufficient, or if the defendant fails to lead evidence to dispel the inference of negligence, the defendant will be held to be negligent. The explanation by the defendant must be based on proven facts and not on speculation or hypothetical suggestions. [See *Ntsala v Mutual and Federal Insurance Co Ltd* 1996(2) SA 184 (T); *Macleod v Rens* 1997(3) SA 1039 (EC)].

[34] From the objective evidence placed before this court, together with Grobbelaar’s evidence, it is my view that the plaintiff has established on a balance of probabilities, that the collision in this matter occurred on the plaintiff’s correct side of the road, creating an inference of negligence on the part of the driver of the Mazda. RAF led no evidence to rebut or dispel this inference. In my view there is no basis upon which I can find that the plaintiff contributed in any way to the collision.

[35] Allied to this is the issue of whether the plaintiff has proven that he suffered damage as a result of the defendant’s negligence. It is trite that a motorist is required to avoid an accident where he observes that another motorist fails to observe the rules of the road and normal driving conventions. He is entitled to assume that a vehicle travelling in the opposite direction will continue on its path of travel and not suddenly appear in or encroach upon his path of travel. The question that arises is at which moment did the motorist, in this case the plaintiff, observe or become aware of the impending collision. Grobbelaar explained that, based on the assumption that the Golf and the Mazda were travelling at the speed of 120km per hour, being the speed limit on that road, the driver of the Golf would have had no time to react before the collision occurred. This evidence stands unchallenged and must be accepted. On this score, I am satisfied that the plaintiff has established that the collision was

caused by the negligence of the insured driver, which negligence caused him to suffer damages.

[36] An aspect that I should perhaps mention is the issue of the plaintiff's expired driver's licence. Ms Ferreira raised that with the police officials, presumably to indicate negligence on the part of the plaintiff. She however, did not pursue this aspect and did not deal with it in her Heads of Argument. In her oral address in court she indicated that this issue does not impact on the matter. I am, consequently, of the view that this issue requires no further attention.

[37] I turn now to the question of costs. Both Counsel advanced extensive arguments on the various costs incurred in the course of the matter. The plaintiff's argument, in essence, is that the costs must follow the result. Mr Wessels submitted that costs is a fourfold consideration. Prior to the commencement of the trial, the matter was case-managed, and the parties agreed that the issues of merits and quantum would be heard together, resulting in the trial being set down for two days. The trial commenced on 9 November 2021, on which date the plaintiff came prepared to deal with both merits and quantum, To this end all the relevant witnesses for the proof of merits and quantum were subpoenaed. RAF applied for a separation of merits and quantum, which was opposed. After hearing arguments, the court granted separation of issues in terms of Uniform Rule 33(4).

[38] The trial commenced but Ms Ferreira objected to the contents of the police docket being introduced into evidence without the relevant police officials being called to testify. Another argument ensued in this regard and the matter was then postponed to 25, 26 and 28th January 2022 for the plaintiff to subpoena the police officials. Costs stood over. The trial proceeded in January 2022, and the defendant indicated that it wished to call further witnesses. The matter was postponed to 23, 24 and 25 March 2022 to enable the defendant to do so, with certain directives issued by the court for the defendant to advise the plaintiff timeously of the witnesses it would be calling. As I indicated earlier, the defendant applied for a postponement on 23 March 2022 to call an expert witness which was refused. The closing arguments were then presented, both parties also having filed written Heads of Argument. The plaintiff sought the costs of two counsel, due to the matter being large and important,

the documents being voluminous, the vigorous opposition by the defendant and the substantial money judgment being sought.

[39] The defendant does not deal with the issue of the wasted costs incurred as a result of the separation of issues on 9 November 2021, but requests costs of that day to be awarded to the defendant, as the plaintiff's failure to call the police witnesses occasioned the postponement. Such witnesses ought to have been called as there was no version regarding the cause of the collision. The defendant tendered the wasted costs of 23 March 2022, and indicated that an order to this effect be made. The rest of the costs were left in the discretion of the court. With regard to the costs of two counsel sought by the plaintiff, Ms Ferreira objected on the basis that Mr Schouten is not an advocate but an attorney, and should not be allowed costs of counsel, as costs of two attorneys would then be paid.

[40] The award of costs is in the discretion of the court, which discretion must be exercised judiciously, taking into account all the relevant factors and circumstances. The practice is that costs would usually follow the result, unless there is good reason to depart from that norm. The trial in this matter was protracted and long drawn out. In two instances it was attributable to the defendant. The issue of the separation of merits and quantum was also due to the defendant moving the application in terms of Rule 33 on the morning that the trial commenced. The plaintiff would have incurred the wasted costs of securing the attendance, especially of the medical witnesses. The defendant's insistence that the police witnesses be called to enable them to be cross-examined with regard to the photographs, sketch plan, etc resulted in the postponement on 9 November 2021.

[41] I point out that ultimately there was no cross-examination or challenge in respect of the sketch plan and key compiled by Phele. Ms Ferreira requested the court to disregard the evidence of Oliphant and Hunter as it was of no assistance. The police docket was made available to the defendant in June 2021, giving it ample time to consider the contents and determine the various problems with, for example, the accident report and sketch compiled by Oliphant, and to realise that Hunter himself would not be of much assistance with regard to the collision. No indication was given by the defendant that it would not accept the documents. That said, it is

incumbent on a party intending to introduce documents in evidence without calling the authors, to canvass with his opposition whether they would have any objection thereto. The plaintiff did not do so. The costs of 9 November 2021, therefore would have to be split in respect of the wasted costs relating to the quantum trial, to be borne by the defendant and the costs of the postponement for the purposes of calling the police witnesses, to be borne by the plaintiff. All other costs should follow the result. With regard to the issue of costs of two counsel, there is insufficient information before me to justify the awarding of costs to an attorney who assisted senior counsel in the capacity of junior counsel. It is also not clear whether Mr Schouten is from the firm of attorneys representing the plaintiff. If he is, then it may well be impermissible to award costs to two attorneys in the same matter. Without more, I am of the view that costs of only one counsel should be allowed.

[42] Consequently the following order is made:

42.1 The insured driver was solely responsible for collision, which occurred on 4 December 2016, between the VW Golf motor vehicle, bearing registration number [...], driven by the plaintiff and the Mazda vehicle bearing registration number [...], driven by the insured driver.

42.2. The costs of 9 November 2021 are to be paid as follows:

42.2.1 The defendant is directed to pay the plaintiff's wasted costs of preparing for trial on quantum;

42.2.2 The costs of postponement of the matter are to be paid by the plaintiff;

42.3 The defendant is directed to pay to the plaintiff all other costs, such costs to include costs of one counsel.

On behalf of Plaintiff	:	Adv J Wessels SC, with Mr H Schouten
Instructed by :		Munro, Flowers and Vermaak Attorneys Rosebank c/o Webbers Attorneys 96 Charles Street Bloemfontein (Ref: M Koller/kc/MUN7/0001)
On behalf of Defendant		Adv J Ferreira
Instructed by		The Road Accident Fund 41 Charlotte Maxeke Street Bloemfontein Claim No. 502/12650049/99/0 (Ms C Bornman).