



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

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

Case number: 3008/2012

In the matter between:

VALUE LOGISTICS LTD

Plaintiff

and

MZWANDILE BOOYSEN

Defendant

HEARD ON: 16 & 17 AUGUST 2016
11 & 14 OCTOBER 2016

JUDGMENT BY: DAFFUE, J

DELIVERED ON: 3 NOVEMBER 2016

I INTRODUCTION

[1] This litigation emanates from a motor vehicle collision that occurred on 15 January 2011 at about 01H30 on the N1 highway

approximately 13 kilometres south of Winburg, i.e. in the direction of Bloemfontein. The proverbial merits and *quantum* have been separated in that I ordered that the disputes contained in paragraphs 7 and 8 of the particulars of claim and paragraph 4.2 of the counterclaim together with the relevant paragraphs of the pleas shall stand over for later adjudication if required. Bearing in mind the admissions in the pleadings and concessions made during the trial, the only issue to be considered and adjudicated at this stage is the negligence, and possibly contributory negligence, of the two drivers of the respective motor vehicles.

II THE PARTIES TO THE CLAIM AND COUNTERCLAIM

- [2] Plaintiff is Value Logistics Ltd, the owner of a 2010 model Nissan diesel UD460 horse with registration number [Z...] and trailer with registration number [J...] which truck and trailer were damaged in the collision mentioned in paragraph 1 *supra*. The total amount of damages claimed is R614 122.58.
- [3] In his counterclaim defendant, the owner of motor vehicle with registration number [D...] ('the Mazda') claims payment in the amount of R14 300, being the value of his vehicle which is a total wreck.

III THE DISPUTE TO BE ADJUDICATED

- [4] In their pleadings both parties rely on the so-called usual grounds of negligence in relation to motor vehicle collisions, but over and above that, claim that the other driver caused his vehicle to veer

into the lane of oncoming traffic and therefore into the path of such party's oncoming vehicle. The parties do not rely on contributory negligence in the alternative, but this is obviously an aspect to be considered in the adjudication of the matter.

IV TWO MUTUALLY DESTRUCTIVE AND INCOMPATIBLE VERSIONS

- [5] Plaintiff's heavy motor vehicle, consisting of a horse and two trailers, was on route from Johannesburg to Cape Town on the N1 highway, i.e. in a southern direction. The driver was Mr Cannon Mdamane ("Mdamane"). Defendant and his colleague were travelling in the Mazda from Bloemfontein on route to Welkom via Winburg, i.e. in a northern direction. The two vehicles collided with each other at about 01H30 the particular night. This, and also the area where the collision occurred, approximately 13 kilometres south of Winburg, is common cause. The collision occurred on a section of the road providing for two lanes in the direction of Winburg and one lane in the direction of Bloemfontein with two solid white lines dividing the northerly and southerly bound lanes. So far the common cause facts.

- [6] According to Mdamane he noticed an oncoming vehicle, which later appeared to be the Mazda, approaching across the solid white lines and into his lane of traffic. He tried to avoid a collision by initially putting his truck's headlamps on bright a few times and thereafter reducing speed by changing gears from twelve to six. The Mazda collided with the guardrail (Armco barrier) on his left

hand side twice and spun back into the road. Mdamane moved to the right in order to avoid the Mazda, but all in vain. Prior to the collision he was traveling at approximately 80km/h and according to him he could do nothing further to avoid the collision. After impact he could not control his truck anymore and it crashed through the guardrail on the western side, i.e. his opposite side of the road, and eventually became stationary in the veld. The Mazda was severely damaged and the two occupants were trapped in the vehicle. He noticed that they were seriously injured. He found a sealed Windhoek Lager beer can and a cooler box in the middle of the road next to the Mazda. He contacted his employer to inform them of the collision. Police, personnel of emergency services and ambulances arrived later.

- [7] Mdamane was requested to make a sketch of the collision scene which was handed in as exhibit. His rough sketch is a reasonable version of the particular road and road markings as depicted in the photographs placed before me. He was shown certain photographs which he admitted to be from the particular scene. One photograph in particular, depicting skid marks in the lane of traffic leading south in the direction of Bloemfontein (as he was travelling), is contentious. In examination in chief he averred that those marks emanated from the truck driven by him. The astonishment on the face of plaintiff's counsel when confronted with this response spoke volumes. He was asked the question more than once and also in cross-examination, but steadfastly and repeatedly stated that those marks were caused by the truck driven by him. This is clearly an error for the reasons to be

advanced *infra*. However it cannot be said that the driver was a lying witness for making such error.

- [8] Plaintiff called a further witness, Mr Kalis ("Kalis") who not only took photographs of the collision scene a few hours after the collision, but prepared a written report to plaintiff. He was qualified as an expert and testified as an expert witness, although much of his evidence is not based on opinion, but rather what he actually noted at the scene.
- [9] Defendant and his colleague Mr Koko ("Koko") were travelling in the Mazda from Bloemfontein in the direction of Winburg. Close to the point of collision he was still in the right hand lane of the two lanes leading to Winburg. In fact he kept to the right hand lane all the way from Bloemfontein where ever the road consists of two lanes. He was travelling at 120km/h. All of a sudden he noticed an approaching vehicle travelling in his lane of travel which caused him to swerve to the left in order to avoid the collision. Unfortunately he swerved too far to the left and hit the guardrail on the western side - his left hand side - but he managed to steer the vehicle away from the guardrail back onto the road. He became aware that Koko was seriously injured as a result of the impact with the guardrail as he saw blood streaming from his face. He does not have any recollection of what occurred hereafter and his first memory is of lying in the road close to the Mazda and next to his friend, Koko.

- [10] Koko testified as well and corroborated the version of defendant. He, as is the case with defendant, does not know how the collision occurred. I shall deal with improbabilities and inconsistencies in their version when I evaluate the evidence *infra*.

V APPLICABLE LEGAL PRINCIPLES

- [11] In motor vehicle collision cases the respective drivers and eyewitness are without exception requested to estimated aspects such as speed, duration and distance. It is obviously necessary to obtain clarification from witnesses, but there can be no doubt that it is notoriously difficult for anyone to make accurate estimates in the proverbial split second and/or in the agony of the moment. See **Olivier v Rondalia Versekeringsmaatskappy Van SA Bpk** 1979 (3) SA 20 (AD) at 26-27 and **Rodrigues v SA Mutual and General Insurance** 1981 (2) SA 274 (AD) at 279 and 280. A strictly mathematical approach, although undoubtedly very useful as a check, can rarely be applied as an absolute test in collision cases since any mathematical calculation depends on exact positions and speeds whereas in truth these are merely estimates almost invariably made under circumstances wholly unfavourable to accuracy. See **Van der Westhuizen v SA Liberal Insurance Co** 1949 (3) SA 160 (C) at 168 quoted with approval in **Diale v Commercial Union Assurance Co of SA Ltd** 1975 (4) SA 572 (AD) at 577A.

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

:

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

- [13] Reaction time, that is the time that a driver takes to respond to any adversity, differs from person to person and experts make provision for different reaction times when reconstructing collision scenes. Reaction time of the normal person ranges between 1 and 1.5 second. See **Rodrigues** *supra* at 279G where the reaction time was accepted as 1.5 second and **Road Accident Fund v Grobler** 2007 (6) SA 230 (SCA) where the expert allowed

for reaction time of about 1 second. See footnote 1 on page 233 of the judgment.

- [14] As mentioned *supra* I am confronted with two mutually destructive and incompatible versions. In order to adjudicate the matter I shall take cognisance of the *dictum* of Cooper quoted *supra*, but also adopt the reasoning of Nienaber JA and **SFW Group Ltd and Another v Martell Et Cie and Others** 2003 (1) SA 11 (SCA). I quote from paragraphs 5 and 34:

“[5] The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his

recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the *onus* of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.”

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

[15] Experts are frequently called in to assist our courts, but courts are not bound by the opinion of an expert. An expert must be called as a witness on matters calling for specialised knowledge. It is the duty of the expert to furnish the court with the necessary scientific criteria for testing the accuracy of the expert's conclusions so as to enable it to form an independent judgment by the application of these criteria to the facts proved in evidence. See **Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft Für Schädlingsbekämpfung MBH** 1976 (3) SA 352 (A) at 370H – 372A. In the evaluation of the evidence of experts it is required to determine whether and to what extent their opinions advanced

are founded on logical reasoning. See **Michael and another v Linksfeld Park Clinic (Pty) Ltd and Another** 2001 (3) SA 1188 (SCA) at para [36].

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

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

In **Stacey v Kent** 1995 (3) SA 344 (ECD), the full bench of the Eastern Cape Division considered several *dicta* from a number of judgments dealing with the manner in which expert evidence should be considered and concluded as follows at 350G-I:

“I would point out that the present is not a case where the evidence was of so technical a nature that this Court is obliged to defer to the opinions of the experts who testified. I am further constrained to make the comment that, as will be shown below, the expert testimony adduced in the present matter to an extent verged on the highly theoretical and hypothetical. As pointed out in the authorities cited above, it is the duty of experts to furnish the Court with the necessary criteria for testing the accuracy of their conclusions, so as

to enable the Court to form its own independent judgment by the application of those criteria to the facts proved in evidence. The mere pitting of one hypothesis against another does not constitute the discharge of the functions of an expert. The Court should also be on its guard against any tendency on the part of expert witnesses to be biased in favour of the side which calls them and an unwarranted readiness to elevate harmless or neutral facts to confirmation of preconceived theories or to dismiss facts supporting an opposing conclusion.”

Bearing in mind the quoted *dicta*, direct and credible evidence of what happened in a motor vehicle collision often carry greater weight than the opinion of an expert who had to reconstruct the event from his experience and scientific training. It is only where the direct evidence is so improbable that its reliability is impugned that an expert’s opinion of what may have occurred should prevail. Having said this, in the final result a decision must be reached on the evidence as a whole.

VI EVALUATION OF THE EVIDENCE

- [17] As indicated *supra* the court is confronted with two mutually destructive and irreconcilable versions. I mentioned that Mdamane made an obvious error pertaining to the skid marks found in his lane of travel. Having considered the evidence of Kalis and following my own observations of the marks depicted in the photographs as will be elaborated *infra*, his version should be regarded as an honest mistake and I make such a finding.

Plaintiff's counsel, having been caught by surprise as was obvious from her reaction, did not know how to remedy the situation. She was not entitled to cross-examine her own witness. It also appears from Mdamane's evidence as if it was not possible to notice the oncoming Mazda from a much greater distance as the distance he mentioned in his testimony, but the evidence in this regard and reasons provided are not acceptable. It must be accepted that the collision occurred nearly six years earlier. Mdamane's description as to how the vehicles collided with each other sounded somewhat strange, bearing in mind the milliseconds within which the vehicles made contact with each other. It is not necessary to reject his version as improbable for merely incorrectly describing the movement of the vehicles immediately before impact and thereafter. If I do that I would be guilty of an armchair approach.

- [18] Defendant and his witness gave a version that appears to be entirely improbable. I accept that the evidence was led nearly six years after the collision and that it would be difficult to remember minor details. There was no cross-examination in this regard, but I found it strange that the answers provided by defendant on questions by the court just before lunch on the first day of the resumed hearing were largely echoed by Koko when he testified after lunch. I have reason to believe that they discussed defendant's evidence during the luncheon adjournment. I accept that it is impossible to estimate duration of events, time and distance with accuracy as stated above, but I find it improbable that the two gentlemen could leave Rocklands in Bloemfontein at

22H00, only to arrive at the scene of the collision 80 kilometres north of Bloemfontein at 01H30. In order to explain the trip of three and a half hours, they mentioned that they stopped at a garage in Bloemfontein to fill-up petrol and to enjoy a burger. Furthermore and along the road they stopped between three and five times for either of them or Koko in particular to urinate. A trip of eighty kilometres on the quiet N1 at a speed of 120 kph will take forty minutes only. When this was put to defendant he had to find excuses, *inter alia* that he did not travel at that speed all the time and that he stopped regularly as indicated. I also find it improbable that defendant would drive all the way from Bloemfontein to the scene of the collision with his lights on dim as he testified. His reasoning for doing so is improbable and far-fetched, bearing in mind that they were driving during the middle of the night and with few vehicles approaching. It was defendant's case that they preferred to undertake the trip that time of the night in order to avoid heavy traffic. I am not convinced that defendant and his witness played open cards with the court in this regard, but I shall for purposes of evaluation of the evidence be careful not to over-emphasise my conclusion that they were not speaking the truth.

- [19] Much of the evidence of Kalis who was called to give expert evidence, is not expert evidence at all. He visited the scene of the collision during daylight and some nine hours thereafter. At that stage he was employed by plaintiff and at present he still has a business relationship with plaintiff. He does much work for plaintiff pertaining to the investigation of collisions involving motor

vehicles of the plaintiff. I shall take extra care in evaluating his evidence as he cannot be regarded as independent, a factor usually required from an expert. Most of what he has observed and testified to and depicted on the photographs could have been observed by any lay person visiting the scene and/or studying the photographs. If the court could have conducted an inspection *in loco* that same morning, the same observations could have been made. I refer *infra* to those aspects of Kalis' evidence which can be regarded as opinions.

- [20] Defendant's attorney cross-examined Kalis and made submissions in argument pertaining to his lack of objectivity, the failure of providing the court with all the photographs that he had taken at the scene and finally the alleged contradiction in his version pertaining to when photographs were taken. I am particularly mindful of the fact that Kalis has a close link with plaintiff and will keep that in mind at all times. The mere fact that more photos were taken than those attached to his written report provided to the company two days after the collision, which report forms part of the evidential material before me, is in my view insignificant, although I would have expected Kalis to provide a photograph of the damaged guardrail caused by the plaintiff's truck when it left the road. Fact of the matter is that it was never in dispute that plaintiff's truck crashed over the guardrail on the western side of the road and ended up in the veld. There is nothing peculiar pertaining to the evidence as to when the photographs were taken. It is clear that Kalis could not take all photographs at the same time, but as explained, he took

photographs during his investigation and as he walked about the scene of collision, following the skid marks, until he arrived at the area of collision.

[21] The photos of the two vehicles clearly establish severe impact on the right front side of the truck including the right front wheel thereof whilst the Mazda was a total wreck insofar as the engine was completely ripped off. Photo 59A of Exhibit A which is also duplicated in the annexure to Kalis' summary provided in terms of Rule 36(9)(b) and photo 63A are not only compatible and serve as corroboration of Mdamane's version about the movement of the Mazda prior to impact, but cannot be explained in any other way. The skid marks depicted are those of a light motor vehicle whose wheels became locked. They start at the right hand lane of the two lanes leading to Winburg, cross the double white lines and proceed into the lane of vehicles travelling to Bloemfontein, carrying-on in the direction of the guardrail and going back from there in the direction of the solid white lines in the middle of the road where the patch of oil and water spillage was found, which area is also depicted on the photographs. The indentations in the guardrail are evident on photo 59A. This, which has been explained by Kalis, serves as corroboration for the version of Mdamane.

[22] If it is accepted that plaintiff's vehicle was driven at 80 kph and defendant's vehicle at 120 kph immediately prior to the collision, the cumulative speed was 200 kph. A simple calculation shows

that the two vehicles would travel a combined distance of hundred metres in a time of 1.8 second. If the normal reaction time of a person is accepted as between 1 and 1.5 second, it would mean that neither of the drivers would be in a position to take any evasive action if an unusual occurrence in respect of the other vehicle would be taking place less than approximately fifty metres in front of either of them. Therefore no reliance can be placed on the estimates of any of the witnesses pertaining to duration of events and distances. Their estimates, varying from seven or eight metres to fifty metres, being the distance between the two vehicles when the one crossed over the solid white lines, are rejected as wrong without making any negative deduction against anyone. I don't find their estimates strange or unusual. The drivers were driving at night time; they were in moving vehicles; their vehicles' headlamps were on and they testified nearly six years after the event. It would not be possible to give exact distances. Their estimates were poor and off target, but that in itself does not mean that their respective versions should be rejected.

- [23] I am satisfied that I may accept the version of Kalis who attended the scene nine hours after the collision in broad daylight. He had sufficient time to do an investigation, make observations and take photos. I accept that he observed the fresh skid marks of a light motor vehicle which started in the right hand lane of traffic going to Winburg, crossed the solid white lines and proceeded in the direction of the guardrail on the eastern side of the road, i.e. the incorrect side of the Mazda travelling to Winburg. He explained

that the marks were still fresh insofar as he detected small rubber particles along the marks. This is a reasonable deduction and he cannot be criticised for arriving at such conclusion. In fact, this was not put in contention. I also accept that Kalis found indentations in the guardrail in the vicinity where the skid marks ended and started again and that these were caused by the Mazda. Kalis explained that he found the wooden poles to which the guardrail was fastened to have been pushed back in the direction of Winburg and furthermore, the nature of the indentations was such that force from the direction of Bloemfontein was applied. This finding was also not attacked. Further skid marks from the guardrail started, leading towards the area where he found oil and water spillage in the middle of the road which he regarded as the area of collision. The photographs confirm his *viva voce* evidence. I also accept that the skid marks were not made by plaintiff's truck which is a heavy double axel vehicle as dual skid marks would have been found in such instance and the marks would also be much wider than those depicted in the photographs.

- [24] Kalis referred to the area of collision as a dark patch on the road surface across all lanes, but essentially across the double solid white lines and the right lane of vehicles travelling to Winburg. The skid marks ended in the vicinity of this dark patch. He observed that this dark patch was caused by oil and water spillage and concluded that this had been deposited there at the time of the collision. He determined that the area of impact was in the lane of vehicles travelling towards Bloemfontein. The area

of collision indicated is based on his opinion. If it is tested, it appears that the opinion cannot be rejected. The photographs and the *viva voce* evidence are evident. Anyone studying the photographs will be able to notice the skid marks of a light motor vehicle, the indentations in the guardrail and the dark patch in the middle of the road just beyond the skidmarks. Kalis, who was at the scene, confirmed what he photographed and why. He presented a logical version which is corroborated by the photographs and Mdamane's version pertaining to the movement of the two vehicles immediately before impact.

[25] A further opinion advanced by Kalis is that generally speaking a light motor vehicle such as a Mazda would not burst through a guardrail, but will merely damage it and bounce off the guardrail after having collided with it, whilst a 60 ton heavy vehicle such as plaintiff's truck and trailers would go right through the guardrail, pushing it flat as happened in this case.

[26] It should be mentioned that Kalis' opinions were at no stage attacked. It was never submitted that his conclusions were incorrect. It is true that upon questions put to him in cross-examination, he admitted that he had not inspected the guardrail on the western side of the road, save where the truck crashed through, and could not deny or admit whether there was any damage caused by the Mazda. He did not interview either of the two drivers although he later received a copy of Mdamane's statement. I am satisfied that bearing in mind the objective facts,

the photographs and those facts which are common cause, Kalis' opinions should be accepted.

[27] In conclusion pertaining to the evaluation of the evidence in totality, I have to consider the credibility of the various witnesses, their reliability and the probabilities in line with the **SFW** judgment *supra*. I accept that Mdamane was a credible witness. He made mistakes pertaining to the skid marks and the distance between the vehicles when the Mazda crossed into his path of travel. His explanation as to how the collision actually occurred might be doubted. However he made a good impression on me as a witness and his version is also supported by the photographs, Kalis' testimony and the probabilities. I'm not impressed with the evidence of defendant and Koko. Koko's attitude in the witness box and his demeanour in general gave me the impression that he did not respect the court and/or court proceedings. I even detected an arrogance which is seldom found amongst witnesses. I made remarks pertaining to their credibility *supra*. Notwithstanding this I am firmly of the view that if their version is considered with the probabilities, the objective evidence and common cause facts, they cannot be believed.

[28] When reliability is considered, I'm satisfied with the evidence of Mdamane, save for the aspects referred to, but which does not detract from the inherent reliability of his version. Although he gave the impression that it was not possible to observe vehicles over a relatively long distance coming from Bloemfontein, his

version in respect of the events during and after the collision should be accepted as reliable. His version is also corroborated by the probabilities and objective facts referred to *supra*. According to him both occupants in the Mazda were trapped inside the vehicle and were unconscious. When the damaged Mazda is considered, this version appears to be reliable and probable.

[29] Defendant and his witness did not witness the collision. Koko was on his cell phone and there must be doubt as to the reliability of his observations. Defendant does not remember what transpired after he steered the Mazda away from the guardrail. I am not impressed with the explanation that he could not remember anything that happened thereafter. I got the impression that he did not want to be confronted with reality. In any event, the only version before me as to exactly what happened immediately before impact is that of Mdamane who noticed defendant's vehicle in his lane at a relatively late stage for the first time. It is not required of me to speculate, but if defendant and Koko are to be believed, it is quite possible that the Mazda first hit the guardrail to the left, became out of control and skidded across the road before hitting the guardrail on the other side and thereafter collided with plaintiff's truck. However I do not find this as a fact.

[30] Defendant and his witness gave the impression that they were ejected during impact and were lying on the tarmac next to the Mazda and close to each other. This cannot reasonably possibly

be true and is found to be improbable. Firstly, they were unconscious after impact and could not tell what happened to them as a result of impact. Secondly and if they were ejected as a result of the collision, they would have been propelled in different directions. It is more probable that the medical personnel who arrived at the scene lifted them out of the wreck with the help of emergency personnel, causing them to be positioned close to each other before being taken away by the ambulance personnel.

[31] Mdamane testified about the cooler bag containing Windhoek Lager beer and the one sealed Windhoek Lager can found in the middle of the road after the collision. His version is corroborated insofar as Koko testified that he was on the verge of opening another can of Windhoek Lager when the collision occurred. He also testified that there were other cans of Windhoek Lager behind the driver's seat and it is probable that these would have been kept in a container like a cooler bag. Defendant's version that the beer was kept in the boot of his car and that it was necessary to stop for Koko to take out beer prior to the collision is contradicted by Koko.

[32] Koko was speaking on his cell phone at the stage when the collision occurred and he was also on the verge of opening another can of Windhoek Lager which he had just picked up from behind the driver's seat. The reliability of his version pertaining to the collision and what occurred just prior thereto is doubtful to say

the least. I am also not prepared to accept defendant's version to be reliable pertaining to the occurrences immediately prior to and during the collision. On his version the plaintiff's truck was approaching in his lane, to wit the right hand lane as he was travelling to Winburg. There was no indication that the truck was moving in any other direction than in the specific right hand lane. It did not cross lanes. If defendant had sufficient time to move to the left as he alleged, he would clearly be in a position to move to the left hand lane and pass the truck without causing a collision. Bearing in mind reaction time and even if he struck the guardrail to his left as alleged, the probabilities do not favour a head-on collision. I would have expected him either to miss the plaintiff's truck completely or collide with the side thereof or the side of either of the two trailers.

- [33] I've already referred to probabilities, but wish to emphasise that I am satisfied that the probabilities favour plaintiff's version. Having considered the probabilities and assessed them phase by phase as events unfolded as well as comprehensively and in retrospect as indicated by Nienaber JA in SFW *supra*, I have arrived at the inescapable conclusion that plaintiff's version is more plausible and probable than that of defendant. Therefor I find that plaintiff has proven its case on a balance of probabilities. An order should be made in terms whereof defendant be held 100% liable for such damages that plaintiff may eventually prove or to be agreed upon. Simultaneously defendant has failed to prove its case pertaining to the counterclaim and therefore it should be dismissed with costs.

VII ORDERS

[34] Consequently the following orders are made:

Main claim

1. Defendant's negligence was the sole cause of the collision that occurred on 15 January 2011.
2. Defendant is liable for payment of 100% of plaintiff's damages to be proven or agreed upon.
3. Defendant shall pay plaintiff's costs of the action to date hereof.

Counterclaim

4. Defendant's counterclaim is dismissed with costs.

JP DAFFUE, J

On behalf of the plaintiff:	Adv Boonzaaier
Instructed by:	Christo Dippenaar Attorneys Bloemfontein

On behalf of the defendant:	Mr Seobe
Instructed by:	SMO Seobe Inc. Bloemfontein

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