

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU NATAL DIVISION, PIETERMARITZBURG**

Case No: 350/10

In the matter between:

CEMISHA TRANSPORT CC

PLAINTIFF

and

NI-DA TRANSPORT (PTY) LTD
D R DUBE

FIRST DEFENDANT
SECOND DEFENDANT

Coram : Poyo Dlwati J
Heard : 24 April 2015
Delivered : 27 September 2016

ORDER

The plaintiff's claim against the first and second defendants is dismissed with costs. The first defendant's counterclaim against the plaintiff succeeds with costs.

JUDGMENT

POYO DLWATI J

[1] This matter concerns a motor vehicle collision which occurred on 30 October 2009 at about 21H30 at/or near the R102 road in Stanger. At the commencement of the trial it was agreed by the parties that there be a separation of issues and that the trial would deal with the merits only, with the quantum being dealt with at a later stage, which I so ordered.

[2] The evidence has established that the plaintiff, a close corporation that does trade store deliveries, had acquired the second hand 8 ton box bodied truck a year and a half prior to the accident. On the evening of 30 October 2009 the plaintiff's truck, referred to as the Cemisha during the trial, was travelling in the left hand lane of the R102 near Stanger. The R102 is a dual carriage way that has traffic flowing in both directions of the road. There are no street lights at the point where the first defendant's truck turned or where the collision occurred.

[3] The first defendant's truck, a horse and trailer, referred to as the Ni-da during the trial, was carrying a load of steel reinforcing bars on the evening in question. At the point where the collision occurred, the Ni-da had executed a left-hand turn onto a gravel cane road. A portion of the Ni-da's trailer was in the left hand lane of the R102 in the path of the Cemisha. The Cemisha collided with the left rear of the Ni-da's trailer. Shortly after the accident, Mr Sewraj, a member of the plaintiff, received a telephone call that the truck had been involved in an accident.

[4] On arrival at the scene, Mr Sewraj found members from both the South African Police Services and the Fire Department present, as well as paramedics. The two truck drivers were also at the scene of the accident. The paramedics and members of the fire brigade were using the Jaws of Life equipment to rescue the Cemisha's truck assistant who was stuck in the truck. The truck driver of the Cemisha was taken to hospital as he had sustained injuries. According to Mr Sewraj, the Ni-da's trailer was fully across the left-hand lane of the road whilst the rest of the truck was on the cane field road. The Cemisha was in the left lane of the R102. The front end of the Cemisha was against the left rear side of the Ni-da's trailer. Mr Sewraj took several photographs of the scene. The photographs, amongst other things, showed how the vehicles were positioned after the collision. He left the scene at about 03H00 or 04H00 on 1 November 2009.

[5] Later that morning, at about 08H00, Mr Sewraj returned to the scene and took photographs of the road. The photographs showed the skid marks made by the Cemisha on the evening of the collision and a possible point of impact at the time of the collision. He was able to see these as there were still some remnants of the collision at the scene. There were also radiator leaks on the road which left several stain marks. He also viewed the damage on the Nida's trailer and took photographs of same.

[6] The plaintiff, in its particulars of claim, averred that the second defendant, Mr Dube, who was the driver of the Ni-da at the time of the collision, acting in the course and scope of his employment, was the sole cause of the collision in that:

[6.1] he failed to keep a proper lookout;

[6.2] he failed to take cognisance of other vehicles in his vicinity;

[6.3] he failed to take adequate steps to avoid the collision when, by the exercise of reasonable skill and care he would and should have done so; and

[6.4] he executed a turning manoeuvre when it was not safe to do so.

[7] On the other hand, the first defendant averred that the sole cause of the collision was due to the negligence of the driver of the plaintiff's vehicle who was negligent in one or more or all of the following respects:

[7.1] he failed to keep a proper lookout;

[7.2] he failed to take reasonable steps to avoid a collision under circumstances where it would reasonably be expected of him to avoid the collision;

[7.3] he failed to take evasive action;

[7.4] he failed to apply the brakes of the plaintiff's vehicle timeously and/or at all and/or adequately;

[7.5] he failed to display due care and skill in driving plaintiff's vehicle;

[7.6] he failed to drive the plaintiff's vehicle with proper care and skill and with due consideration for other road users including the first defendant's vehicle; and

[7.7] he drove the plaintiff's vehicle into the rear of the first defendant's vehicle.

[8] At issue is whether the plaintiff has discharged the onus of proving that the second defendant's negligence was the sole cause of the collision. To prove its case the plaintiff led the evidence of its member, Robbie Sewraj and its expert, Robert Neville Fletcher. I will not repeat all the evidence, except where it is necessary as it is on record. Mr Sewraj testified that he serviced the Cemisha regularly even though he was not a qualified mechanic. He stated that he had serviced the brakes of the Cemisha about three weeks prior to the

accident but did not have any records to prove same. He testified that on the day of the collision, the Cemisha had left the yard at about 05H00 and that it was on its way back to the yard after having completed a round trip of approximately 240kilometres when the collision occurred. He also testified that the driver of the Cemisha had died during October 2011. Even though Mr Sewraj knew the whereabouts of the truck assistant, he was not called to testify.

[9] The next witness for the plaintiff was Mr Fletcher, a consultant for an accident reconstruction company. His main role is to reconstruct accident scenes based on the evidence supplied to him and the one that he collects. In this matter, Mr Fletcher was instructed during June 2010 to examine the photographs he had been supplied with and to indicate, where possible, the manner in which the collision occurred, the cause of the collision and any other contributing factors. He examined the photographs and the scene of the collision to gain an impression of what the topography was like, what the road conditions might have been like at the time of the collision and any other extraneous information that was relevant. He also looked at the photographs depicting the trucks in order to ascertain which truck had collided with the other.

[10] The first photograph he considered was marked exhibit 'D'. It showed skid marks of the Cemisha that appeared to come towards the photographer. The skid marks were marked points A, B, C and D respectively on exhibit 'D'. In his view, points A and B showed the commencement of the skid marks and points C and D were where they ended. In his view, the Cemisha was braking with locked wheels hence the skid, which is the black line mark left on the road. In skid mark B, the left hand front tyre of the Cemisha was locked and sliding which resulted in that skid mark. The kink or hook in his view represented the point where the left front of the Cemisha impacted with the left rear of the Ni-da's trailer. That impact probably destroyed the steering wheel and caused

the left front tyre wheel to incline inwards, hence the hook or kink in the tyre mark.

[11] Mr Fletcher also took road width measurements and found that each lane was approximately 3.7 metres wide and the emergency lane was about one metre wide. In his view, at the time of collision the Ni-da's trailer was projecting about halfway or more into the Cemisha's driving lane. The Ni-da had almost completed its turn off the road but not entirely. He measured the access distance of the dirt road and its width and constructed a plan of the accident scene which was handed into evidence as exhibit 'E'. Mr Fletcher also measured the length of the skid marks caused by the Cemisha.

[12] Mr Fletcher testified that the purpose of measuring the skid marks as accurately as possible is to determine the likely approaching speed of the Cemisha when the driver would have first applied his brakes, and also to determine the probable distance that the Cemisha was from the Ni-da when the driver first applied his brakes. Various factors are necessary to calculate the speed. Firstly, it is necessary to measure the friction co-efficiency of the surface of the road. Friction co-efficiency varies according to the type of surface on which an object rolls or walks. If there is no friction there will be no movement. However, if there is sufficient friction there will be a rolling motion, more like a curling friction. This means that there will be a binding between the surface of the material on which you are moving and the object that is moving on that surface. The quality of the movement depends on the coefficient of the friction.

[13] Secondly, it is necessary to determine the probable initial speed of the Cemisha and the final speed, which will be zero in this instance as it was forced to a stop by the Ni-da trailer. It is also necessary to measure the longest braking mark on the surface where the vehicle is travelling (skid marks) and to consider

the road surface. However, it is more necessary to accurately measure the length of the skid marks than it is the coefficient of friction. The influence of the coefficient of friction is less than the influence of measuring distance. Mr Fletcher further testified that as he only inspected the road three years after the collision had occurred he used the standard table of coefficients of friction to calculate the co-efficiency of that road. Those appeared at page 68 of his report which was handed into evidence as exhibit 'B'. The tables are produced by the Council for Scientific and Industrial Research (CSIR) in Pretoria and are globally held as reasonable coefficients of friction.

[14] In terms of the table, it was agreed that the road was asphalt or tarred, and the road surface was polished by traffic. The road conditions were dry and Mr Fletcher chose a coefficient friction of 0.65 because it appeared to him that the speed of the Cemisha was greater than 48 kilometres an hour. From this he produced the table at page 55 of exhibit 'B'. In summary, what that table explains is that if the truck had braked to zero, (which did not happen in this instance as the truck was forced to a stop by the Ni-da's trailer) which is skid length as measured, and the braking length was 28.3 metres as measured, plus all the other assumptions namely, coefficient of friction was 0.65, the truck tyre drag coefficient being 0.4875 (which was an estimate as he had not inspected the tyres of the Cemisha at the time of the collision) and break efficient at 0.8 and gravity at 9.81, then the calculation indicates that the truck would have been travelling at 53 kilometres an hour when it first applied its brakes and would have come to a standstill. As the worst case scenario the Cemisha would have been travelling at 70 kilometres per hour before the accident.

[15] Regarding the Cemisha's lighting, Mr Fletcher testified that the truck would have had forward lighting consisting of two headlights with two settings, a beam which is capable of illuminating not less than 100 metres ahead of it and

the dipped which is capable of illuminating any object between 40 and 50 metres ahead of it. He further testified that because the reflective tape of the Ni-da was dirty and in his view incorrectly positioned, he believed that the driver of the Cemisha would have had great difficulty in observing the Ni-da manoeuvring across his line of travel at a right angle or over a right angle, given that the Ni-da was dark blue in colour and carrying reinforcing steel rods which were dark grey in colour.

[16] According to Mr Fletcher, page 67 of exhibit 'B' dealt more with the requirements pertaining to the reflective tape material and was an extract from the National Road Traffic Act 93 of 1996 and its regulations. He testified that in terms of regulation 357(1)(a)(iii) the entire length of the truck needs to be illuminated, both the horse and the semi-rigid trailer. The material, according to an extract from a publication called the A to Z of Road Transport Terminology and Related Information 2010 volume 5 by Fleetwatch, must not be less than 50mm and not more than 60mm wide and must bear the SABS approval mark at the intervals of at least 0.5 of a metre.

[17] In his view the reflective tape of the Ni-da should have been positioned similarly to the truck which appeared third from the top of page 51 of exhibit 'B'. The reflective tape should therefore be above the wheels of the semi-trailer as that would be a better way of demonstrating the 80% requirement of the length of the trailer. This would also keep the tape cleaner and make it easier for the driver of the truck to periodically walk around the trailer and clean the tape.

[18] Furthermore, Mr Fletcher also considered the stopping sight distance, which is a series of distances drawn together to indicate the stopping sight distance that a driver can safely pull up in an emergency without hitting an obstruction in front of him. Simply put, the driver must see the object and try to

stop the vehicle without hitting that object. This was calculated using various assumptions.

[19] A diagram at 17.14 at page 58 of exhibit 'B' reflects a graphical representation of a typical truck braking sequence which shows how the stopping sight distance is calculated. What happens first is that the driver has to see an object. The table at page 38 of exhibit 'B' is established by the CSIR and it indicates a reaction time response varied within a range of 0.8 to 4.5 seconds depending on the individual. As Mr Fletcher was unable to measure the Cemisha's driver's actual reaction time, it was common to use an average which would be 1.6 seconds as the reaction time. Thereafter the brain energises the foot to brake. Mr Fletcher also assumed that at the time of the collision the Cemisha had standard headlamps appropriate for the type of the vehicle at a dipped setting, which enables the road to be illuminated for about 40 to 50 metres ahead of him, and assumed that he was travelling at 70 or 80 kilometres per hour. In those circumstances the stopping sight distance would be 75.5 metres.

[20] Simply put this would mean that the Cemisha's driver, when he first saw the Ni-da, braked for a skid mark of 28.3 metres, would have had an air brake application time of 0.25 of a second, which at 70 kilometres per hour is just under 5 metres and his reaction time would have added another plus minus 30 metres to have come to a safe stop. However he did not come to a safe stop but had tried to stop within 28 metres. He probably therefore first saw the object when it was about 50 metres away from him.

[21] Mr Fletcher also testified that the other principle he could have used to determine the speed the Cemisha was travelling at the time of the collision is the conservation of linear momentum. However, this was not considered as it

required accurate measured angles between the vehicles. Kinetic energy could also have been used but it was not as it requires an accurate measurement of the speed of the two vehicles. Furthermore, one cannot deduce an accurate speed a vehicle was travelling in by merely looking at the damage caused as depicted on the photographs.

[22] It was put to Mr Fletcher that the evidence of the second defendant would be that the Ni-da had three sets of indicators, two in the front of the horse, two at the back of the horse and two at the back of the trailer and these were switched on before the truck commenced its left turn onto the dirt road, which lights would have been visible to the driver of the Cemisha without him being directly behind the truck. Mr Fletcher's response was that this was not necessarily so as it would depend on how clean the lights (being the indicators) were at the time. Furthermore, he testified that the light of the indicator is a cone. It emanates from a single point and flares out. If one is outside the limit of the cone then they cannot see the light. He could not say what distance would be outside the limit.

[23] It was also put to him that the reason why the reflective tape was affixed to the chassis of the truck and not to the sides of the bed of the trailer was to avoid damage to the tape by forklifts and other loading equipment loading on and off the trailer but Mr Fletcher found this reasoning surprising. He, however, agreed with the second reason that if a tarpaulin is put over the items on the back of the trailer, the tarpaulin will be fastened underneath the bed of the trailer which would then cover the reflective tape. He however insisted that the tape should be displayed in accordance with the regulations he referred to earlier. However I could not find this regulation on perusal of the Regulations and the Act.

[24] It was also brought to Mr Fletcher's attention that the regulations do not provide for the tape having to be affixed to the side of the bed of the trailer and his response was that regulations merely show examples and are shown pictorially. It was also put to him that the reflective tape is checked before the vehicles are issued with certificates of fitness and licensing and if it does not comply then the license cannot be renewed and he confirmed the proposition. It was not in dispute that the Ni-da had the necessary license but he suggested that maybe at the time of renewal of the license the reflective tape was in order. It was also put to him that the second defendant would testify that after having passed the bridge on the R102 road no vehicles passed him on the right hand side and there would have been no reason for the Cemisha's lights to be on dipped. His response was that his assumption of which lights were used was a matter of choice by him.. He was criticised for this choice and failure to make estimation if the lights were on beam as it was suggested that it was biased in favour of the plaintiff.

[25] When asked what difference it would have made as far as the visibility of the Ni-da if the Cemisha's lights were on beam or dipped, his response was that the Ni-da was virtually invisible as it was at night, angled across the road and dipped or beam head lights would not have been relevant. He agreed with the proposition that there seemed to have been no attempt by the Cemisha's driver to move or swerve to the right hand side of the road in order to avoid the collision as the skid marks were straight. However, he testified that it is quicker to brake than to swerve to another direction but this would depend on the mind of the driver. It was also put to him that the fact that the driver had been up since at least 05H00 that morning could have affected his reaction time and he agreed that that could be the case. He also agreed that it was possible that the tyre of the Ni-da could have come off the rim because of the impact of the collision and the trailer moved sideways.

[26] He agreed that if the Cemisha's headlights were on beam, the driver would have seen twice the distance of 40 or 50 metres referred to earlier. Further, if the reflective tape was in a good condition it would be reflected at the same distance but if dirty very little would be reflected back. Furthermore, he testified that if the Cemisha's driver was tired, drowsy or asleep prior to the accident his reaction time would be greatly reduced. That in a nutshell was the plaintiff's case.

[27] The second defendant, Mr Robin Dube, who was the driver of the Ni-da at the time of the collision, testified that he was driving on the R102 on the evening of 30 October 2009. When he approached the left turn off, he looked at his rear view mirrors and found that there was nothing behind him. He thereafter switched on his indicators and started turning to the left of the road. Once he had turned and the horse of the truck was on the gravel road, a few seconds before the trailer would have come off the tarred road, he realised that the trailer was moving sideways and something had collided with the trailer. As he had not seen anything in the rear view mirrors, he stopped and got out of the truck. He walked to the rear of the truck and saw that a truck had collided with his trailer.

[28] He had difficulty observing this but was helped by a person he had passed on the road before making the turn to the left and told him that another truck had collided with the rear of his trailer. At that stage he heard someone in the Cemisha screaming for help. One of the bundles of steel that was loaded on the Ni-da trailer had dislodged and was now in the cab of the truck, pressed against the chest of the passenger in the Cemisha. The driver of the Cemisha was at that stage lying on the other side of the road and was injured. His leg was broken and the bottom part of his leg was trapped in the truck.

[29] Mr Dube testified that his headlights were on beam from the point under the bridge to where he turned left as he had not passed any vehicles on his right driving in the opposite direction requiring him to put them on dim. As his truck had three sets of indicators, one at the front of the horse, one on the side of the cab, one behind the rear wheels of the horse and two at the rear of the trailer, he had checked his lights when he had stopped in Howick earlier that day taking a rest and had found that they were working. When he examined his truck after the accident, he found that the bundle of steel in his trailer, namely the ones that were on the right hand side had moved towards the driver of the Cemisha and the ones on the left had shifted to the left hand side and looked as though they would fall off the truck.

[30] The police and ambulance arrived at the scene and offered assistance. It was suggested at some stage, during that evening that Mr Dube drive his truck forward so that the steel pressing against the passenger of the Cemisha could be removed. This was however abandoned as the bundle of steel was pulling him (the passenger) in the Cemisha. Mr Dube confirmed that he had seen Mr Sewraj at the scene of the accident but that it was the following morning and not on the night of the collision. He also confirmed that they, in their company, never travel with expired vehicle licenses as the licenses on their vehicles are renewed even before they expire. Mr Dube also confirmed under cross-examination that it was company policy to wash the truck before a long journey like the one he took.

[31] Mr Dube however conceded that he had never received instructions that whilst on a long trip he should check the reflective tape and ensure that it was clean at all times. He did confirm though that he had cleaned the tape when his vehicle was stationary in Howick. Mr Dube further testified that in his 40 years of driving he cannot remember a time where he had not seen a reflective tape

light because it was dirty, especially if lights were shone on the tape. It was put to Mr Dube that when the collision occurred, the trailer of the Ni-da was closer to the white line than to the yellow line of the road. His response was that the rear wheels of the Ni-da's trailer were on the yellow line as depicted in photo 'D2'. The portion left on the road was the one from where the rear wheel ended up until the tip of the trailer. And therefore the Cemisha, according to him, had not tried to move either to the right or the left but was where it was supposed to be.

[32] Mr Dube also testified that if another vehicle was following him it should have seen the trailer first and that the cab would have been visible at the top as it is higher than the trailer. Also the indicators would have been visible, as depicted in photo 'D2', even though they had fallen down as a result of the collision.

[33] The next witness for the defendants was Mr David Gibb. He has experience in dealing with heavy duty vehicles, has produced videos on defensive and economical driving techniques and has written a book on the safe operations of heavy articulated vehicles. He has also attended a taco graph analysis course. Mr Gibb regards himself as an expert in monitoring driver performance and identifying abnormal recordings prior to accidents, especially those caused by driver fatigue. He investigates causes of accidents especially in heavy duty vehicles like trucks and buses. In 1980 he obtained a certificate in accident reconstruction and in 1987 he obtained a certificate in technical road transportation. He has a sound mechanical knowledge of both light and heavy vehicles.

[34] The gist of his evidence was that in order for one to calculate the friction coefficient they would need accurate information otherwise the calculation will

be incorrect as it is wrong, unreliable and unacceptable to use assumptions. The accurate information needed includes knowledge of the road surface at the time of the collision and the condition of the tyres of the vehicles. Furthermore, one could not measure the skid marks as there were gaps between points B and D and shorter than A and C as depicted in exhibit 'D'. In his view, the information provided was inaccurate for one to be able to calculate the approaching speed of the Cemisha immediately prior to the collision.

[35] His observation was that there was a high impact on the Cemisha and his opinion was based on the fact that there was massive damage caused to the Cemisha. He testified that the fact that the Jaws of Life were used to assist getting the passenger out of the Cemisha was an illustration of the high impact. Under cross-examination Mr Gibb was criticised for not being able to give any opinion on mechanical workings of vehicles as he did not possess a tertiary qualification in mechanical engineering. He however denied this and testified that he had the experience and knowledge. He conceded that the reflective tape of the Ni-da was not clean but in his view it was still reflective and this was depicted on the photographs taken during the evening of the collision. He conceded that the dirt on the tape would have reduced its visibility.

[36] It was put to him that had the Ni-da's driver waited and checked properly before executing the turn and ensuring that it was clear, the collision would not have happened. His response was that if Mr Dube had seen the truck approaching and maybe miscalculated the distance then the proposition would be possible. He agreed with the suggestion that if he did not know the circumstances that would have adversely affected the concentration levels of the Cemisha's driver then his reaction time would be that of an average person. Mr Gibb testified he could not prepare a report on the collision as he had not

visited the scene shortly after the collision and therefore there was no accurate information he could have used. That, in a nutshell, was the defendant's case.

[37] Plaintiff's counsel, Mr Broster, argued that the plaintiff had proved that the second defendant's negligence was the cause of the collision and that the defendants should be held liable for all the damages suffered by the plaintiff arising out of the collision. He submitted that the evidence had established and it must be accepted as proved that the Cemisha was in good order prior to the collision and that its brakes and lights were working well. He further submitted that the second defendant's negligence must be inferred from the proved facts in this matter. Mr Broster submitted that it could be inferred from the facts that the second defendant did not check his rear view mirror properly and ensure that he could execute the turning manoeuvre safely before executing the turn.

[38] Furthermore, Mr Broster submitted that it ought to be accepted that the Cemisha was travelling with its lights on dip and therefore its driver could only have seen the obstruction in his path approximately 30 to 40 metres before colliding with the Ni-da. Further, as the skid marks were about 28 metres in length, this shows that the brakes of the Cemisha locked and the driver lost control. He submitted that the defendants failed, throughout the trial, to adduce evidence to show that the Cemisha was travelling at an excessive speed, beyond 80kilometres per hour or evidence to show a mechanical fault in the brakes or lights of the Cemisha or that the Cemisha's driver was suffering from fatigue or anything else that could adversely affect his reaction time.

[39] Mr Broster submitted that Mr Fletcher's evidence regarding the measurements of the skid marks, his calculation of the minimum speed at which the Cemisha's driver could have been driving and stopped safely before hitting the object as well as his general observations with regard to lighting, distance of view and sight stopping distance ought to be accepted as reliable as it was based

on his expertise and knowledge and in his view it had not been challenged by Mr Gibbs's testimony.

[40] Ms Jaarsveld, on behalf of the defendants submitted that the plaintiff had failed to discharge the onus to prove that the collision was caused by the negligence of the second defendant. She submitted that the only inference that can be drawn is that the Cemisha either travelled at a speed which was excessive under the circumstances, and/or that the Cemisha's driver failed to keep a proper look out as was required of him and was therefore negligent in this regard. She criticized Mr Sewraj's evidence that he serviced the vehicle including its brakes as he was not a mechanic and there was no documentary evidence in the form of records to prove this fact.

[41] She also criticized Mr Fletcher's evidence on the basis that he only inspected the scene of the collision some three years after it had happened and that there was no evidence presented that the co-efficiency at the time of the collision would have been the same three years after the collision. Ms Jaarsveld submitted that the failure to inspect the Cemisha's tyres would also have resulted in inaccuracy in calculating the friction co-efficiency and the estimated speed of the truck prior to the collision. She further described Mr Fletcher's calculation of the approaching speed of the Cemisha as of no value as an incorrect formula had been used to determine the speed and that various assumptions instead of accurate information were used.

[42] Ms Jaarsveld further submitted that Mr Fletcher's evidence as an expert should be rejected in its totality as it was biased in favour of the plaintiff and was not objective. She submitted that the evidence of an expert is meant to assist the court to reach a conclusion and should not favour any party to the proceedings. She therefore, submitted that in the circumstances, the plaintiff

had failed to discharge the onus of proving the second defendant's negligence as the cause of the collision.

[43] What is at issue and which needs to be decided is whether the plaintiff has proved that the second defendant was negligent in his driving of the Ni-da and whether that negligence was the cause of the collision? Also, as the defendants lodged a counterclaim, the same question must be posed as to whether the driver of the Cemisha was negligent and caused the collision.

[44] According to the plaintiff's particulars of claim and the evidence that it led, the second defendant was the sole cause of the collision in that:

- (a) he failed to keep a proper lookout;
- (b) he failed to take cognisance of other vehicles in his vicinity;
- (c) he failed to take adequate steps to avoid the collision when, by the exercise of reasonable skill and care he could and should have done so; and
- (d) he executed a turning manoeuvre when it was not safe to do so.

It also pleaded as follows to the defendants counterclaim:

'the second defendant was negligent in the following additional ways:

- (a) he failed to take evasive action;
- (b) he failed to drive the first defendant's vehicle with proper care and skill and with due consideration for other road users including plaintiff's vehicle;
- (c) he parked his vehicle across the road of travel of the plaintiff's vehicle'.

[45] However the uncontradicted testimony of the second defendant was that when he approached the turn off, he looked in his rear view mirrors to check whether anything was coming from behind him and found nothing approaching. Furthermore, there were no vehicles in front of him. He then turned on his indicators and commenced the left turn. After he had turned, but before the

trailer came off the tarred road, he realised that something must have hit him as his truck was moving sideways. It was not disputed that his indicators were all working including those at the rear of the trailer.

[46] He further testified that after he had passed the bridge on the R102 up to the point of the turn off, his lights were on beam as there were no vehicles driving in the opposite direction. In all probability a vehicle following him would have had its headlights on dip if it saw him but if it did not then its lights would have been on beam. He further testified that the lights on the cab would have been visible to another road user even when he had made his turn to the left. Even though he had conceded that his reflective tape was dirty, he testified that it was still reflective. There was no evidence disputing that it was not reflective but it was suggested to him that it might not have been as reflective, meaning that its visibility would have reduced but not that it was not visible.

[47] In my assessment of his evidence, I can find no fault on the part of the second defendant. He kept a proper lookout and took cognisance of other vehicles in his vicinity when he looked in his rear view mirrors and saw no cars approaching behind him or approaching ahead of him. By switching on his indicators, he took the necessary steps to ensure that other road users, especially those behind him, could see his truck and that care and skill was reasonable to avoid any collision. This was also assisted by his reflective tape which is clearly visible as depicted on the photographs on pages 97 and 99 of exhibit 'C'. In any event there was no evidence presented before me that the Cemisha's driver did not or could not have seen the reflective tape.

[48] In my view, there is nothing more that the second defendant could have or ought to have done in order to avoid the collision. I was impressed by his demeanour in the witness box. He gave an honest, logical and credible account of what happened on the night of the collision. He readily conceded obvious

things like the reflective tape being a bit dirty and that his employer never told the employees to clean the reflective tapes when they were out on long trips. This, he could easily have disputed but he chose to be candid and told the truth. On these reasons alone the plaintiff's claim ought to be dismissed as it failed to prove the second defendant's negligence.

[49] Furthermore, there was nothing to gainsay his evidence. At best there were merely propositions that the reflective tape might not have been as reflective but we do not know that that was the case as the Cemisha's driver did not testify. As held in *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E-G:

'For the purposes of liability *culpa* arises if -

(a) a *diligens paterfamilias* in the position of the defendant-

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

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

(b) the defendant failed to take such steps.'

As alluded to above this was never shown or proved to have been the case with the second defendant.

[50] However, for the sake of completeness and in relation to the counter claim, I will deal with Mr Fletcher's evidence. I will not repeat it in its entirety as it is on record and I have summarised it in the preceding paragraphs. His evidence is based on assumptions as there was no evidence by the driver of the Cemisha as he passed away in October 2011. Further there was no indication that he had consulted with him at any point after the action was launched. His death was almost two years after the collision and a year after the summons had been issued by the plaintiff.

[51] Furthermore, the assistant truck driver who is still alive and whose whereabouts are known to Mr Sewraj, was, for whatever reason not called to testify. In my view, failure to call him entitles me to draw an adverse inference on the plaintiff's case that it lacked confidence in him as a witness and that he might not have supported its case. His evidence, in my view was important even if he had not seen how the collision occurred. He, for instance would have shared some light on their activities during the day which could have assisted Mr Fletcher in some of his assumptions relating to the driver's reaction time. I have made my point about the assistant and, I turn now to deal with Mr Fletcher's evidence and his conclusions.

[52] His conclusion was that the skid marks were 28.3 metres in length and the likely approaching speed of the Cemisha when brakes were first applied was just under 53 kilometres per hour. He assumed that the lights on the Cemisha would have been on dip illuminating an object about 40 to 50 metres ahead of him. He had no factual basis for his assumption. In my view, in light of the second defendant's evidence that after he had passed the bridge there was no oncoming traffic and the area was dark, it is highly probable that the headlights of the Cemisha would have been on beam and therefore the driver should have been able to see an object about 100 metres away. I therefore reject Fletcher's evidence on this assumption. In any event his evidence is not objective in this regard and favours the plaintiff and that is something he ought not to do as an expert witness (see *Stock v Stock* 1981 (3) SA 1280 (A) at 1296 E-F; *Jackson v Jackson* 2002 (2) SA 303 (SCA) para 16 and *P v P* 2007 (5) SA 94 (SCA) paras 18 and 21).

[53] The other assumption by Mr Fletcher was that the Cemisha's driver's reaction time when he first saw the object would have been 1.6 seconds. However, according to the evidence this would have been the case if the driver

was not affected by any of the factors that disturbed the reaction time like fatigue, drowsiness, being drunk or being on medication. The evidence of Mr Sewraj was that the driver had left his yard at 05h00 that morning. Even though he ought to rest when the assistant is offloading the truck he conceded that he could have assisted the assistant in offloading. He was driving back to the yard at the time of the accident which was at 21H30.

[54] In my view, it is highly probable that the driver of the plaintiff's truck was tired that evening and could have been drowsy. This is in light of the fact that he probably had woken up at about 04H00 or 04H30 that morning in order to leave at 05H00. At the very least he was up for about 17 hours that day. It is reasonable to expect that he would be fatigued and his reaction time should have been reduced to factor this issue. Instead, Mr Fletcher chose not to and this was favourable to the plaintiff and his evidence cannot be held to be appreciable assistance to this court.

[55] Mr Fletcher was again biased towards the plaintiff when he estimated the approaching speed of the Cemisha to be under 70 kilometres per hour. This he purely based on the fact that the speed limit in that area is 80 kilometres per hour. He therefore was biased towards the Cemisha's driver that he was a law abiding citizen. This is contrary to the damage caused to the Cemisha. In all probability, and the fact that Jaws of Life were used to get the Cemisha's assistant out of the truck, the Cemisha was travelling at a speed higher than the 80kilometres which is the lawful speed in that area. In any event, the approaching speed of the Cemisha could not be accurately calculated as the Cemisha did not come to a stop on its own but it was forced to stop by the Ni-da's trailer.

[56] Furthermore, the road surface at the scene was never inspected during the month or the year of the collision. The tyres of the Cemisha were also never checked during that period. Mr Fletcher's calculations therefore cannot be accurate. As held in *MV Banglar Mookh, Owners of MV Banglar Mookh v Transnet Ltd* 2012 (4) SA 300 (SCA) para 50, quoting with approval from *Biddlecombe v Road Accident Fund* (797/10) [2011] ZASCA 225 (30 November 2011):

'the expert tasked with reconstructing what occurred is often dependent for the reconstruction not simply on the application of scientific principle to accurate data but on calculations based on imperfect human observation. The fact that the reconstruction rests on a potentially imperfect foundation is the reason for caution in determining its evidential value.'

[57] Accordingly, I am satisfied that the most plausible inference to be drawn from the proven facts and evidence is that the plaintiff's driver was negligent in his driving of the Cemisha in that he failed to keep a proper lookout and failed to take reasonable steps to avoid a collision when he could have done so by taking evasive action. He further failed to apply the brakes of his truck timeously and thus failed to drive the truck with proper care and skill and with due consideration for other road users including the second defendant and therefore caused his truck to collide with the first defendant's.

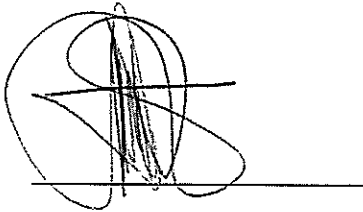
[58] Accordingly the plaintiff has failed to discharge the onus to prove the second defendant's negligence. In the result I make the following order:

Order

The plaintiff's claim against the first and second defendants is dismissed with costs. The first defendant's counterclaim against the plaintiff succeeds with costs.

Order

The plaintiff's claim against the first and second defendants is dismissed with costs. The first defendant's counterclaim against the plaintiff succeeds with costs.

A handwritten signature in black ink, appearing to be 'Poyo Dlwati J', written over a horizontal line.

Poyo Dlwati J

Appearances

Date of Hearing	: 24, 25 April 2015 and 14 April 2016
Date of Judgment	: 27 September 2016
Counsel for Plaintiff	: J P Broster
Instructed by	: Pather & Pather Attorneys Inc c/o Messenger King
Counsel for Defendant	: M E Van Jaarsveld
Instructed by	: Grant & Swanepoel Attorneys