

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No. : 2515/2006

In the matter between:-

M DE JAGER

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

HEARD ON:

3 DECEMBER 2007

JUDGMENT BY:

RAMPAI, J

DELIVERED ON:

18 SEPTEMBER 2008

[1] The matter came to court by way of action proceedings which were initiated on 12 June 2006. A road accident took place at Koppies on 3 July 2004. It occurred between Kroonstad and the Kroonvaal Plaza at Parys. The precise scene of the accident was in the vicinity of the Koopies turnoff on the N1 national road. Three motor vehicles were involved in this accident. The first was a trailer with registration number PTM297GP and a Volvo truck with registration number NPN45323 which was pulled the trailer and driven by a certain Mr. Solomon Khambule. The third

was a twin cab van with registration number CSZ956FS which was driven by Mr. Louis Jakobus de Jager. The physical collision was between the trailer and the bakkie. The plaintiff was a passenger in the bakkie.

- [2] In the summons the plaintiff claims compensation in the amount of R418 484,96 as damages she allegedly suffered as a result of certain bodily injuries she sustained in the aforesaid accident. She prays for judgment in this amount.
- [3] In the particulars of claim annexed to the summons the plaintiff alleged that the aforesaid accident was caused by the exclusive negligence of the aforesaid Mr. Khambule. Among others, the alleged principal grounds of negligence attributed to him are that:

“5.2 ‘n Vragmotor in die nag en in erge mistige weer op ‘n openbare pad bestuur het wat ‘n sleepwa getrek het sonder om seker te maak dat die sleepwa se elektriese koppeling aan die vragmotor korrek en behoorlik gedoen is en in ‘n werkende toestand is;

5.3 ‘n Vragmotor in die nag en in erge mistige weer op ‘n openbare pad bestuur het sonder om homself daarvan te

vergewis dat die sleepwa wat deur die vragmotor getrek is, se agterligte brand en/of in 'n werkende toestand is;

5.4 'n Vragmotor in die nag en in erge mistige weer op 'n openbare pad bestuur het sonder om seker te maak dat die sleepwa wat deur die vragmotor getrek is vir verkeer wat dit van agter genader het, sigbaar was;"

[4] In its plea the defendant denied all the grounds of negligence attributed to Khambule and averred that he was not negligent in any manner whatsoever. Accordingly the defendant prayed that the plaintiff's claim be dismissed with costs. The plea was filed on 20 July 2006.

[5] Simultaneously with the filing of its plea, the defendant also filed a third party notice in terms of rule 13 of the Uniform Rules of Court. The notice, together with annexures thereto, were properly served on Mr. L.J. de Jager, the driver of the Isuzu bakkie in which the plaintiff was travelling as a passenger.

[6] In the first of the three annexures to the notice in terms of rule 13, the defendant alleged that the negligence of De Jager in the driving of the bakkie was the sole cause of the

collision alternatively a contributory cause thereof. Among others, the defendant relied upon the following grounds of negligence on the part of De Jager:

- (i) that he failed to keep a proper lookout;
- (ii) that he failed to apply the brakes of the bakkie timeously or at all when by doing so he could have avoided the collision;
- (iii) that he failed to drive and manage the bakkie with reasonable skill;
- (iv) that he travelled at a dangerous speed having regard to the diminished visibility on the day in question; and
- (v) that he failed to drive the bakkie at such a speed thus to enable him to take evasive action or to bring the bakkie to a standstill within the range of his vision.

Vide paragraph 9 of the first annexure.

- [7] The defendant also pleaded that should it be found that Khambule was negligent, which allegation the defendant denied, then in that event, the defendant pleaded that De Jager was also negligent and that his negligence was the contributory cause of the accident; that the defendant's insured driver and the third party were jointly and severally

liable for the plaintiff's damages and that such damages should be apportioned according to the respective degrees of fault on the part of the drivers involved.

- [8] The third party, De Jager, failed to file a plea to the notice in terms of rule 13. He later confirmed at the trial that he received the third party notice together with the three annexures thereto and that he would abide by the judgment of the court.
- [9] On 28 May 2007 the parties held a pre-trial conference in Bloemfontein. Adv. A. Williams and Attorney F.J. Kapp attended the conference on behalf of the plaintiff and Attorney A. Ostermeyer on behalf of the defendant. Among others, they agreed to have the merits and the quantum separately adjudicated. On 3 December 2007 at the commencement of the hearing the agreement was conveyed to me. I then made an order in terms of rule 33(4). Therefore this judgment concerns the merits only. The issue of quantum stands over.

[10] The plaintiff was not the driver of any of the two motor vehicles involved in this accident. She was a passenger in the bakkie. As such she was an innocent victim. Since she was not a wrongdoer, the defendant cannot plead apportionment against her. Because she is an innocent claimant she only needs to prove the proverbial 1% negligence on the part of the defendant's insured driver, Khambule, in order to recover full compensation from the Road Accident Fund, as the defendant.

[11] It was conceded on behalf of the defendant that this is the true legal position. Should I find that Khambule was negligent to a certain extent and that his negligence, in one way or the other, contributed towards the accident, which allegation the defendant denies, and that De Jager, as a third party, was also negligent to a certain extent and that his negligence contributed towards the accident, then in such an event the defendant will be entitled to an order whereby De Jager is held liable to contribute to the defendant a portion of the full compensation the defendant might be held liable to pay to the plaintiff.

[12] If that situation arises, I will then have to determine the precise percentage of the contribution which De Jager, as a co-wrongdoer, would have to make to the defendant, as a co-wrongdoer, by virtue of Khambule's negligence. The degree of De Jager's negligence, if any is proven, will determine how much contribution he would ultimately have to pay once the quantum of the plaintiff's claim has been proven. That, as I have already indicated, will have to be determined sometime in the future.

[13] It has to be borne in mind that the third party has not denied liability for any damages the plaintiff might have suffered and has not pleaded that the defendant was exclusively liable therefore. The third party has not participated in the proceedings before me as a litigant. He only participated as a witness for the plaintiff and indicated that he would abide by the decision of the court. This accords well with the principle of our law that to the effect that where a victim suffers damages as a result of the combined negligence of two joint wrongdoers but sues only one wrongdoer, who fully compensates the victim, the wrongdoer who has been sued, provided he has paid, has a remedy in the form of a right of

recourse against the wrongdoer who has not been sued and who has, therefore, not paid his share of the victim's damages caused by his contributory wrongdoing.

[14] I am therefore called upon to establish the respective degrees of fault, if any, of each of the two drivers concerned and once this has been done, to grant orders in favour of the plaintiff for separate judgments against the defendant and the third party in terms of section 2(8) Apportionment of Damages Act, 34 of 1956. See prayers (a) and (b) of the notice in terms of rule 13. Alternatively, I may grant orders in favour of the plaintiff, against the defendant and the third party jointly and severally, in accordance with prayers (c), (d) and (e) of such notice in terms of section 2(6).

[15] Insofar as the merits only are on trial, it would be permissible to grant a cost order in favour of the defendant against the third party in terms of which the third party is directed to pay the defendant's costs relative to the notice in terms of rule 13 in full and in addition thereto a cost order in favour of the defendant against the third party in terms of which the third party is directed to contribute to the defendant such portion

of the plaintiff's costs as may be equitable in accordance with the third party's degree of fault.

[16] It follows therefore that there are three possible scenarios. If De Jager was the sole cause of the collision between the trailer and the bakkie, then the plaintiff's summons against the defendant will have to be dismissed with costs. If Khambule was the sole cause of the collision between the trailer and the bakkie, then the defendant's subsidiary claim by virtue of the notice in terms of rule 13 will have to be dismissed with costs and the plaintiff's summons granted with costs. If both De Jager and Khambule were negligent and their combined negligence was the cause of the plaintiff's alleged injury and damages, then judgment may be granted in terms of section 2(6) or 2(8).

[17] The version of the plaintiff was narrated by two witnesses, namely Marisa De Jager, the victim and the plaintiff, and Louis Jakobus de Jager, the bakkie driver, also described as the third party in these proceedings. I shall evaluate their evidence later. At this juncture suffice to say that the plaintiff and her witness testified that the collision occurred in the

early hours of the morning while it was still dark, just prior to 05h00. The scene of the accident was covered in a dense fog and they attributed the collision to the fact that the taillights of the trailer were off at the time of the collision.

[18] The version of the defendant was also narrated by two witnesses, namely Phillipus Jakobus Kotze, the first police officer to arrive on the scene and Solomon Khambule, the truck driver, also described as the insured driver in these proceedings. Khambule testified that, prior to the collision he was driving the horse and trailer at the speed of 80 k.p.h. Although there was mist on the road it was a very light fog which did not make it unsafe for him to drive at that speed. He slept over at Kroonstad that particular night. Before he resumed his trip early the next morning he checked all the lights of the truck and the trailers and ascertained that they were all in good working conditions.

[19] On the highway, just a short distance outside of Kroonstad, he was stopped at the weigh bridge where his vehicle was inspected by a traffic inspector for roadworthiness. The traffic inspector found nothing wrong with the taillights of the

trailer or of the horse for that matter. The bakkie in which the plaintiff was the passenger crashed into the rear of the trailer. After the collision the taillights of the trailer though displaced, still functioned as prior to the collision. The tailboard to which the taillights were connected was partially dislodged together with the taillights and ended up hanging and facing downwards on account of the impact.

[20] He denied the suggestion that the collision took place because the taillights of the trailer were not lit or functioning or that a very dense fog made the horse and trailer invisible on the highway. Kotze testified that while he was on the scene nobody complained to him that the taillights of the trailer were not working at the time of the collision.

[21] The two versions presented are irreconcilable. On the one hand the evidence presented by and on behalf of the plaintiff is that the taillights of the trailer were not burning at the time of the collision. On the other hand the evidence presented on behalf of the defendant was that the taillights of the trailer, contrary to the plaintiff's version, were burning not only at the

time of the collision but at all times prior to and subsequent to the collision.

- [22] In **STELLENBOSCH FARMERS' WINERY GROUP LTD AND ANOTHER v MARTELL ET CIE AND OTHERS** 2003 (1) SA 11 (SCA) the court per Nienaber JA redefined the techniques generally employed by the court in resolving factual disputes where there are two irreconcilable versions before it. It held that to come to a conclusion on the disputed issues the court must make findings on the credibility of the various factual witnesses, their reliability of their testimonies and the probabilities thereof. In **DREYER AND ANOTHER NNO v AXZS INDUSTRIES (PTY) LTD** 2006 (5) SA 548 (SCA) at par. [30] Brand JA referred to the foregoing general technique and approved the way it was employed in **NATIONAL EMPLOYERS' GENERAL INSURANCE CO LTD v JAGERS** 1984 (4) SA 437 (E) at 440D – H and **STELLENBOSCH FARMERS' WINERY GROUP LTD AND ANOTHER v MARTELL ET CIE AND OTHERS**, *supra*, and described such technique as the proper approach in resolving factual disputes where there are two irreconcilable versions.

[23] In **RONDALIA ASSURANCE CORPORATION OF SA LTD v MTHOMBENI** 1979 (3) SA 967 (AD) the facts showed that a Fiat bus driven by the respondent's husband had been travelling at night behind three other buses on a gravel road. The Fiat bus was in the process of overtaking the third bus when it collided with the Mercedes bus approaching from the opposite direction. The two buses collided in the cloud of dust, thrown up by the third bus. In upholding the appeal the court found per Calgut AJA that, the driver of the Mercedes Benz bus on whose alleged negligence the respondent was suing the appellant, had had no reason to anticipate that a motorist coming in the opposite direction would be so foolhardy or so reckless as to deliberately enter and travel in the dust cloud of the vehicle ahead of it in circumstances which would cause such motorist to be travelling blind. Such conduct on the part of the driver of the Fiat bus was not foreseeable by the driver of the Mercedes Benz bus. The court held that the Fiat bus driver, who blindly drove in a dust cloud close behind another bus, and worst still, tried to overtake it in the blinding dust cloud, was exclusively to blame for the resultant collision. In that case the collision was head on.

[24] Another case where a motorist field of vision was severely diminished by a cloud of dust is **SANTAM**

VERSEKERINGSMAATSKAPPY BPK v SWART 1987 (4)

SA 816 (A) at 817 and 820. In that case a bakkie crashed into the rear of a stationary truck in a thick cloud of dust. The dust was caused by the third motor vehicle, a combination of a truck and a trailer behind which the bakkie was travelling. The mobile truck and trailer were able to pass the stationary truck but the bakkie was not. The court held that although the driver of the stationary truck was the main cause of the collision, the driver of the bakkie drove too close behind the cloud of dust caused by a truck and trailer to afford himself a proper opportunity of dealing with any unusual circumstances and also that the driver of the bakkie was contributarily negligent in relation to the subsequent collision with the stationary trailer in the dust. See also **NKUTA v**

SANTAM ASSURANSIE MAATSKAPPY BPK 1975 (4) SA

848 (A) and **GROBBELAAR v FEDERATED EMPLOYERS**

INSURANCE CO LTD EN 'N ANDER 1974 (2) SA 225 (A).

In that case a truck was parked in a road around a sharp bend. Later a sedan approached the stationary truck from behind. The sedan driver was unaware of the stationary

truck around the blind spot. The court held that the truck driver was grossly negligent and the sedan driver contributarily negligent. The court found that the latter had failed to keep a proper lookout.

- [25] In general where one motor vehicle collides with another motor vehicle which is in motion from behind, human experience is readily inclined to accept that in such circumstances it is most unlikely that such a collision would not have taken place unless the driver of the rear motor vehicle was in one way or the other negligent. In other words a reasonably objective bystander who witnesses such collision will form the first impression that *prima facie* the collision was occasioned by the negligence of the rear driver. The maxim *res ipsa loquitur* applies in such a scenario. The maxim conceptualises the circumstances in which a defendant is required to give an explanation for the occurrence for which he is obviously to blame in default of such an explanation been held liable. See Cooper, **Delictual Liability in Motor Law**, 1996 edition on p. 100 – 101; **UNION AND SOUTH WEST AFRICA INSURANCE CO LTD v BEZUIDENHOUT** 1982 (3) SA 957 (AD) at 965B and **FIG**

BROTHERS (PTY) LTD v SOUTH AFRICAN RAILWAYS

AND HARBOURS AND ANOTHER 1975 (2) SA 207 (CPD)

at 211H.

[26] In our civil law there are no two inquiries, first, to establish whether the plaintiff has discharged the onus of proving on a balance of probabilities that the defendant was negligent and secondly to embark on another inquiry to determine whether the defendant has proven his defensive explanation on a balance of probabilities. There is only one inquiry namely, has the plaintiff, having regard to all the evidence in the case, discharged the onus of proving, on a balance of probabilities, the negligence she has averred against the defendant. See **ARTHUR v BEZUIDENHOUT AND MIENY** 1962 (2) SA 566 (AD) at 574A - B per Ogilvie Thompson JA.

[27] The maxim *res ipsa loquitur*, where applicable, and I think it is in this case, gives rise to an inference rather than to a presumption. Ordinarily if two motor vehicles travelling in the same direction on a straight road collide the incidence of the onus of proof is not altered by the maxim *res ipsa loquitur*. The maxim merely casts an evidential burden of rebuttal on

the defendant. Usually once the rear end collision is proven by the plaintiff, more often the driver of the front vehicle, such an incident *per se* gives rise to the inference of negligence on the part of the rear driver. Through this inference he, the rear driver, is then called upon to adduce evidence to the contrary. He must tell the remainder of the story, as Ogilvie Thompson JA would say.

- [28] The speed of travel and the range of vision have been debated over the years in books, schools and courts of law. Caselaw is not always coherent about these important aspects relative to driving. Cooper, **Loc.cit.et.seq**, p. 58. Although there is no general rule that a driver must regulate the speed of his vehicle according to the range of his or her vision, the facts peculiar to each case will always be scrutinised so as to establish whether the driver should have reduced speed or not. In **HOFFMAN v SOUTH AFRICAN RAILWAYS AND HARBOURS** 1955 (4) SA 476 (AD) at 478 – 479 Schreiner ACJ remarked that the facts of each case were decisive and that the ultimate issue was always whether the facts established negligence rather than whether they show that the driver in question failed to keep his speed

within the range of his vision. The distinguished judge concluded by saying that the failure of the driver to adjust his speed accordingly, may in a particular case be a crucial factor in deciding whether or not there was negligence. See **LICHABA v SHIELD VERSEKERINGSMAATSKAPPY BPK** 1977 (4) SA 623 (O) at 629E per Fleming AJ.

- [29] I deem it necessary to summarise the version of the plaintiff and that of her witness collectively. They testified that the vision in front of the bakkie was severely curtailed as a result of a thick cloud of mist. The first they saw of the obstacle on the road was a chevron attached to the rear of the trailer. The taillights of the trailer were not burning at the time they first saw the chevron and they were not burning at the moment of the collision. The bakkie collided heavily with the trailer from the rear and it was extensively damaged. They were not immediately aware that the mechanical horse and trailer had stopped after the collision. They only became aware that it had stopped further up the road once a second truck had arrived on the scene and stopped behind the trailer.

[30] They then walked from the bakkie to the first truck where they discovered that the rear lights of the trailer were not working. They also noticed that the hazard lights of the truck were never switched on. A conversation then ensued between the two drivers regarding the status of the taillights of the trailer at the time of the collision. The one saying they were not working, the other maintaining that they were. The couple then returned to their bakkie. Not so long thereafter they noticed that the taillights of the trailer were burning. They averred that the taillights became operative after the truck driver or other persons had attended to the electrical coupling between the trailer and the truck.

[31] Similarly I deem it necessary to give a summary of the testimony of the defendant's witness. The truck driver testified that he was an employee of Alex Carriers. He was obliged to telephone his employer about any mechanical problems the truck could manifest on the road. The company policy was that if he received a traffic ticket in connection with any mechanical defects of the truck which he had not reported, he would be liable for the payments of such traffic fines. He was on his way from Cape Town to

Johannesburg. The truck was pulling two trailers, both of which were loaded with cargo. He left Cape Town at 02h00 the day before. He slept over at the Ultra City on the outskirts of Kroonstad.

[32] He resumed the journey from Kroonstad to Johannesburg in the early hours on 3 July 2004. Before he did so, he and his truck assistant inspected all the lights, tyres, brakes and indicators of the truck and its trailers. All were in order. There was a coupling electrical cord connecting the horse to the first trailer and the first trailer to the second trailer. It was a double electric connection. Each trailer and the truck had a chevron fixed to its back. There was a clamp which secured the connection between the horse and the first trailer. Similarly a clamp secured the connection between the two trailers. When he turned on the lights of the horse, the lights of both trailers simultaneously turned on.

[33] A traffic inspector pulled him off the highway at the weigh bridge outside Kroonstad and inspected the truck and its trailers. No faults were detected. He then proceeded. He was travelling at a speed of 80 k.p.h. in a northerly direction.

There was a thin cloud of mist which did not impair his vision at all. Between Kroonstad and the scene of the accident at Koppies there were motor vehicles that were travelling in both directions and that passed the truck.

[34] Shortly before the accident he saw the lights of a motor vehicle that was approaching him from behind. The next moment he heard the truck rocked from behind. Soon thereafter he saw a vehicle as it was spinning off the road on the left hand side. He saw this in the mirrors of the truck. The final resting positions of the two motor vehicles after the accident were about 100 – 200 metres apart. He and his assistant alighted from the truck, left its headlamps on and started inspecting it and its trailers. They discovered that the tailboard was hanging down and that the taillights of the second trailer, which were attached to the tailboard, were also hanging down but still burning. The two bars at the back of the trailer to which the tailboard was attached, were only damaged but not completely severed from the trailer.

[35] The second truck stopped parallel to the stationary truck, ascertained what the problem was and drove off again. He

and his assistant then walked to the twin cab bakkie. There the driver claimed that the taillights of the second trailer were not working. He disputed the claim and invited the bakkie-driver to the trailer where he showed him that the taillights of the trailer were still working. Later on the police arrived. He explained to them what had happened. After doing so, they fastened the tailboard to the horizontal tailboard bars. Constable Kotze testified in a nutshell that the driver of the bakkie did not tell him on the scene of the accident that the taillights of the trailer were not working and that he would have recorded it if he had done so.

[36] On the strength of the foregoing evidence as a whole, Mr. Williams, counsel for the plaintiff, submitted that the version of the plaintiff as supported by her witness, was to be preferred to that of the defendant as presented by its witnesses. He urged me to find that the truckdriver, the defendant's witness, was the sole cause of the accident. Mr. Daffue, counsel for the defendant, differed. He urged me to find that the driver of the bakkie, in other words, the plaintiff's witness, was the exclusive cause of the accident.

[37] I now proceed to examine the facts, evaluate the evidence and access the witnesses. I do so in order to make findings that will enable me to come to the conclusion on the disputed issues. In my view there are two critical issues. The first is whether or not the taillights of the second trailer were burning at the time of the collision; the second is whether or not the density of the cloud of mist was thick or thin in the vicinity of the scene of the accident at the time of the accident.

[38] The prelude to L.J. de Jager's evidence was that he and the plaintiff were divorced. On his own version the marriage subsisted for approximately six years from the year 2000. The collision occurred on 3 July 2004 well within the six year period of the marriage. Therefore, the bonds of marriage were still very much subsisting at the time. Some three months later, on 27 September 2004, his wife, the plaintiff, signed a sworn statement about the accident. See item 2 exhibit A. Apparently the defendant was never furnished with any sworn statement made by him in support of the claim of his wife. Since he blames the truckdriver for the accident and exonerates himself, one would naturally have expected him to have made such a statement. He was, after

all, her only eyewitness. I am tempted to think that he did not do so as early as his wife did because he did not honestly believe that the truckdriver was as negligent as he now wants me to believe.

[39] Counsel for the defendant submitted that the couple intended to create a false impression that the twin cab driver was totally unbiased and that there was no reason for him to subjectively testify in favour of the victim, his former wife. But notwithstanding the dissolution of their marriage through divorce, it later emerged during the course of the hearing, that the couple continued to stay together as husband and wife. In opening his testimony by telling the court that he and the plaintiff were divorced without at the same time revealing that, notwithstanding such divorce, they were still cohabiting at the time of the hearing, the gentleman was less than candid to the court.

[40] There are a number of reasons why, in my view, the evidence of this witness cannot be treated as that of a reasonably objective witness. The fact that, at the time of the hearing he and the plaintiff were still intimately involved,

though legally divorced. The fact that he has been cited as a third party who may potentially be held liable to make a contribution towards the amount of damages which the defendant might eventually be ordered to pay to the plaintiff as compensation. The fact that he attempted to create the impression that he had no motive to give evidence favourable to the victim or claimant. The fact that he adjusted his evidence to bring it in line with the victim's affidavit that was annexed to her claim form, coupled with the fact that the victim, now the plaintiff, still had to testify.

- [41] His original testimony was that the truck had stopped over a distance of approximately 100 metres to 200 metres from the area of impact. However, he later changed the distance to 500 metres and 600 metres. I have to mention that the adjustment was done after a teabreak. The suspicion that he might have discussed the case with someone during the adjournment while he was still under cross-examination and in breach of the warning by the court, is not unthinkable. It is not always easy for survivors of road accidents to estimate distances when they are confronted with sudden situations involving vehicles in motion. But here the story is different.

The critique is not levelled against the accuracy of the distance or otherwise. If he had adhered to his original estimated maximum distance of 200 metres, which was 400 metres less than the maximum distance estimated by the plaintiff, nothing much would have turned on the discrepancy, huge though it is. By attempting to narrow the magnitude of the discrepancy he clearly improvised his evidence and demonstrated that he was prepared to help the plaintiff at all costs. Certainly he seriously compromised his objectivity.

- [42] He wants me to believe that the taillights of the trailer did not work prior to the collision and that they were damaged as a result of the collision, but that after a while the same taillights were repaired by either the personnel of the second truck or the insured driver himself, since they suddenly started burning shortly before the arrival of the two policemen. According to this witness the collision between the bakkie and the trailer was brought about by the combination of two factors. The first was poor visibility on account of a dense cloud of mist and secondly a truckdriver who was towing a trailer at night with the taillights that were not burning. The

defective taillights more than the thick mist were largely to blame for the collision, according to him. Now if these were indeed the prevailing and primary factors which caused the accident, one would naturally have expected an innocent driver in such a situation not only to have mentioned these critical issues to the policemen on their arrival on the scene, but also to have made a statement within a reasonable time about these factors, particularly the conduct of the offending driver who had created a dangerous situation on a highway by pulling a trailer without burning lights at night.

[43] For the reasons enumerated above I have come to the conclusion that the credibility of this factual witness was seriously tarnished. He had an obvious motive to safeguard the interests of someone close, dear and intimate to him.

[44] As regards the reliability of his evidence it must be kept in mind that he was on his way from Welkom in the Free State to Steelpoort in Mpumulanga. He was supposed to make the forward and the return trip on the same day. Since he had a considerable distance to travel, he woke up in the early hours of the morning at 03h00. He alleged that between

Kroonstad and Koppies he drove in a thick cloud of mist. The density of the mist was even throughout the particular stretch of the highway. The thick density of the fog remarkably impaired his field of vision.

- [45] During direct examination he did not want to say how far the truck was in front of the bakkie when he for the first time saw the chevron on the road in front of him. However, during his cross-examination he estimated that the bakkie was approximately 20 – 30 metres when he first saw the chevron sign. His testimony was that he saw the chevron sign and the chevron sign alone. He could give no sound explanation as to why he never saw the truck itself or its trailer. It was also his evidence that notwithstanding the mist he could see the road ahead of him for a distance of approximately 60 – 100 metres. Again he could offer no sound explanation why he was unable to see the chevron or the truck itself from a distance of at least 60 meters. On his own version although the cloud of mist was dense, his impaired field of vision was about 100 metres.

[46] It must also be borne in mind that he probably would have been able to take an appropriate evasive action if he had noticed the truck or even the chevron itself from a distance of 60 metres. His failure to give a sound explanation in this regard suggests that he was not keeping a proper look out. It makes his evidence unreliable.

[47] On his own evidence a certain motor vehicle safely overtook the bakkie and apparently also safely overtook the trailer with no burning taillights. The fact that there was a motorist travelling at a comparatively higher speed than the bakkie who was able to avoid the collision suggest that the driver of the bakkie had a much better chance of avoiding the collision on account of the slower speed at which he was travelling. The safe manoeuvre of that other car also tends to support the testimony of the truckdriver to the effect that the density of the cloud of mist was so thin that it did not impair his field of vision. If the fog was as thick as the bakkie-driver says it was and the trailer as invisible as he says it was, this other car would probably have been the one that crushed into the rear of the invisible trailer before the bakkie arrived on the scene. The fact that one motorist was able to see the trailer

whereas the other was not, suggests that the one was more alert than the other.

[48] It is highly probable that the one who did not timeously see the trailer on the road was having a lapse of concentration at a critical moment immediately prior to the collision. Bearing in mind the hour of the night at which the bakkie-driver woke up, it is not unthinkable that he momentarily lost concentration at a critical moment. I am persuaded by the submission that bearing in mind the fact that the trailer was at least 20 metres ahead of the bakkie when the driver of the bakkie first became aware of the chevron and the maximum speed of 60 k.p.h. at which the bakkie was travelling, the probabilities strongly suggest that a reasonably careful driver would have been able to take appropriate evasive action and that the accident would not have occurred. His failure to avoid the accident even at that distance and regard being had to his evidence that he slammed the brakes – may well be indicative of a high speed at which he was driving.

[49] In the light of the foregoing I have come to the conclusion that the evidence of the driver of the bakkie is somewhat unreliable in certain important respects.

[50] As regards the probabilities it must be kept in mind that while the two motor vehicles were still in motion on the highway the bakkie-driver had failed to notice the truck that was only 20 metres ahead of him. But what I find amazing is that when the two vehicles were stationary and approximately 100 – 200 metres apart he was able to see the truck which he could not see when it was 20 metres ahead of him. To say that he was able to see the truck at its final resting position because the second truck had illuminated the scene does not convince me because while the two vehicles were mobile the bakkie itself had illuminated the road. The beam range of the bakkie was at least 100 metres. The truck fell squarely within that beam range. Moreover, if the dense fog had made it impossible for him to see the truck 20 metres ahead of him immediately prior to the collision, that same dense fog would have made it even much more difficult to see the same truck at a distance of 100 metres away from him.

[51] Bearing in mind the evidence of the bakkie-driver that the impact was quite forceful and in view of the extensive damage to the bakkie itself whose engine cap was completely ripped off and also bearing in mind the considerable distance he had to cover twice on one and the same day, his claim that he was travelling at a speed of at most 60 k.p.h. seems improbable.

[52] In my view the testimony of the driver of the bakkie has some worrying improbable features. If his original evidence is true that he could see the stationary truck from an estimated distance of about 200 metres, then it must be accepted that it corroborates the evidence of the truck driver that the cloud of mist was thin and not impairing a driver's vision. If his second or improvised evidence is true that he could see the same stationary truck from an estimated distance of about 600 metres, then the cloud of mist may as well be completely disregarded as factual issue in dispute. In such a situation there would be even a stronger corroboration for the evidence of the driver of the truck. Once again the end result is the same. It means that the accident could probably have been avoided even if the taillights of the trailer were not

functioning. The probabilities are that the reflective chevron ought to have made the truck visible to any reasonably careful driver.

[53] The plaintiff herself testified. The essence of her evidence was that while the truck and the bakkie were mobile on the highway, she did not at all see the truck that was moving ahead of them. Like the driver of the bakkie the only obstacle that she first saw on the road was the chevron sign at a distance of about 9 meters in front of the bakkie. However, after the accident she was able to see the stationary truck at a much longer distance of about 150 metres in the lights of the second truck. If the beam range of the lights of the bakkie made it possible for its driver to have a field of vision of 100 metres ahead, she should have been able to see the trailer at that distance. If dense fog was the problem which made it impossible for her to see the trailer while in motion, the same dense fog should have prevented her from seeing the trailer when it had come to a standstill.

[54] She was simply unable to give any logical explanation for the discrepancy. There was no suggestion in her evidence or

that of her then husband to the effect that when she saw the stationary truck the thick cloud of mist had quickly evaporated. I find it incredible that she did not see any part of the insured truck or for that matter the trailer it was pulling on the road. The lights of the second truck made it possible for her to see the stationary trailer she said. So too must the lights of the bakkie itself have enabled her to see the same mobile trailer on the highway.

- [55] Before the arrival of the second truck on the scene, she was under the impression that the bakkie had collided with an unidentified motor vehicle. She thought the truck pulling the trailer without lights did not stop. Her witness was under the same impression. She corroborated her witness that they walked to the truck and denied the suggestion that the truckdriver and his assistant walked to the bakkie. But she contradicted her witness as to what transpired when the two drivers met. Her evidence was that the driver of the bakkie confronted the driver of the truck because they were tempering with the taillights of the trailer.

[56] However, her witness never testified that he confronted the truckdriver and warned him to refrain from repairing the dead taillights of the trailer before the police arrived. What he did mention in his testimony was that the two drivers had a discussion about the taillights of the trailer and that they differed as to whether they were working or not. Since there is harmony between the two drivers as to the content of the conversation they had about the taillights, it follows that the plaintiff's version in this regard is incorrect.

[57] It has to be mentioned that in her primary testimony she did not mention the current status of her relationship to her witness. At the end of her testimony I still laboured under the impression that she and the witness were divorced. It was only during cross-examination that it came to light that the two were still intimately involved notwithstanding their divorce. This belated revelation of the true status of their relationship, in a way, appears to suggest that she was also less than candid to the court about the relationship.

[58] In her testimony she estimated that the stationary trailer was approximately 150 metres away from her when she first saw

it. This was in sharp contrast to the averments she made in paragraph 4 of her sworn statement – exhibit A. Counsel for the defendant argued that she drastically decreased the distance from 600 metres to 150 metres because she was made aware of the improbability of her evidence. She might also have contradicted her previous statements by a desire to rescue her witness whose credibility was dented by improvising his evidence to bring it in line with her prior statement. It seems to me that she was trying to refute the insinuation that they had discussed her previous statement during the adjournment. The critique that this external contradiction between her court testimony, and her extra curial statement, tends to suggest that she is the type of a witness who will not hesitate to adjust her evidence in order to succeed with her claim is not farfetched.

[59] As regards reliability it has to be borne in mind that she woke up quite early on the day in question and that she was a passenger. The fact that she saw the chevron when the bakkie was dangerously close, indicates that she was not quite alert. It diminishes the reliability of her observations. If she could not see a huge trailer 9 metres ahead of her, how

reliable can her evidence be that she saw small figures of five men or so between the trailer and the truck $\pm$ 600 metres away fiddling with the electric coupling cord before the police arrived. From their bakkie $\pm$ 600 metres away and at an acute angle it would have been very difficult if not impossible for her to see someone between the truck and any of its trailers. If her evidence was that the men were doing some repair work behind the trailer, her evidence would not be so doubtful and unreliable. Besides, she and her witness did not physically examine the electric coupling and found any misconnection or undue tampering. The fact that she did not mention that the truck was pulling two trailers may suggest that she never walked over to the truck as the truck driver said or that she was not particularly observant. Therefore, it is unclear as to precisely where the alleged repairs were done.

- [60] As in the case of the bakkie-driver there is no reasonable explanation as to why she did not see the truck or the trailer while in motion but in close proximity to the van whereas she was able to see the stationary trailer when it was about 600 metres away or 150 metres away. If, for argument sake, it is

accepted that she was indeed able to see the stationary truck from such a distant final resting position, it could only be that the cloud of mist was not as thick as she and her witness claimed it was. And this is precisely what the truck drivers said. Now if the mist is eliminated from the equation there is no explanation again why it was not possible for her and her witness to see the insured vehicle at any stage while it was mobile on the highway, save for the chevron, at the back of the trailer.

[61] In my view there are a number of unfavourable aspects as regards the reliability of the plaintiff's evidence.

[62] As regards the probabilities of her evidence the same critique which I levelled against her witness applies to the plaintiff as well. I have no further comments to make.

[63] Kotze was an inexperienced policeman by all accounts when he attended the scene of the accident on 3 July 2004. It is clear that he did not adequately interview the two drivers involved. It is quite possible therefore that because he did not take adequate notes he did not remember details of the

explanations given to him or the observations that he personally made on the scene.

[64] Notwithstanding his inexperience this police witness stated that he did not remember that the bakkie driver had ever complained to him on the scene about the defective taillights and that the truck driver had repaired them after the collision. It is important to remark that although he did not complete the accident report form correctly or at all in certain respects he did complete the portion where a brief description of the accident is required. If the driver of the bakkie had informed him that the thick fog and the trailer without taillights were the factors which caused him to collide with the trailer, he would probably have noted it since that information would have been the real essence of the description of the accident.

[65] It must also be kept in mind that the driver of the bakkie made no affidavit to the police, made no affidavit to the victim's attorneys and filed no plea to the defendant's notice in terms of rule 13. These objective instances of his silence strengthen Kotze's evidence that L.J. de Jager did not blame S. Khambule for the accident. Moreover, when he had an

opportunity to support his wife as to what truly happened he preferred to keep quiet. When he had to refute false allegations levelled against him by the defendant on the strength of the information obtained from the driver of the truck, he once again kept quiet. His behaviour subsequent to the accident enhances the veracity of Kotze's evidence that no allegations pertaining to the taillights were made to him on the scene. The description of how the accident took place as appears on page 8, exhibit A, is sufficiently consistent with the evidence of the truck driver. The police witness must have obtained this description on the scene as a unanimous version of both drivers. He was a neutral witness. He had no reason to record one version favourable to one driver and disregard the version favourable to another.

[66] In the light of the foregoing I have come to the conclusion that, notwithstanding his inexperience, inadequate interview and inadequate notes taken and the poor manner in which the accident report was completed, the evidence of this witness cannot be completely disregarded, as counsel for the plaintiff had urged me. It was never suggested that he was

an untruthful witness. I do not think that such a suggestion would have been justified, but the probabilities favour his version. In conclusion, I have to add that he was a completely neutral witness. I do not doubt his credibility. Therefore, he had no reason at all to testify falsely in favour of any of the parties involved.

[67] Khambule had no interest in the outcome of the case. Therefore there was no reason for him to tell lies. He was not in danger of any criminal prosecution arising from the collision. Similarly he was not in danger of any possible civil claim against him. In short, he was an unbiased witness. His evidence was that at the time of the collision the truck was travelling at a speed of 80 k.p.h. the permissible legal limit for trucks on our roads. His version was that for him it was possible to drive at the maximum speed because his field of vision was not in any way impaired.

[68] He admitted that there was mist on the scene but according to him it was a thin cloud of mist which was why he was able to travel at the maximum speed permissible for an articulated truck. He gave a credible account of the procedure he

adopted before he set out to resume his journey from Kroonstad in the early hours of that particular morning. His actions were in accordance with company policy and the knowledge that, unless he did so he would run the risk of been ticketed by traffic inspectors and burdened with the financial obligation to pay such a traffic fine out of his pocket.

[69] Counsel for the plaintiff criticised him for saying that he and his truck assistant were together on the ground as they were inspecting, among others, the taillights of the truck and its trailers. The criticism has no merits. If Khambule had remained in the cabin to switch on its lights, indicators, taillights and so on while the assistant was on the ground, he would have been told that his evidence that the taillights were working was hearsay. His evidence was that his assistant was not a co-driver. He was a truck assistant and nothing more. Therefore, it is understandable that he could not let such a person to remain in the cabin and to fiddle with the controls while he was on the ground to make sure that the taillights were functioning properly.

[70] He was not thoroughly cross-examined on the point. He probably switched on say the right-hand-side indicators and then alighted from the truck, joined his assistant on the ground and the two together made doubly sure that all such indicators were working. He could have followed the same procedure with the left-hand-side indicators and the same with the taillights.

[71] The truck was stopped at the weigh bridge and inspected for roadworthiness. It was still dark. No fault was found by a traffic inspector with the taillights of the truck or any of its trailers. It was his evidence that at that stage the taillights were working as perfectly as they did earlier at the Ultra City where he had first inspected them on his own. Counsel for the plaintiff argued that, no weight should be attached to this evidence because no extract from the logbook of the truck formed part of exhibit A to verify his evidence.

[72] Nothing significant really turns on this critique. He explained how the taillights and the chevron plate were fitted to the tailboard at the back of the trailer. He denied the evidence of the plaintiff and her witness to the effect that the chevron

plate was completely ripped off from the trailer by the force of the impact. I believe him. He was never seen picking it up on the road and replacing. His evidence was that the tailboard partially became loose from the horizontal bars but that it was merely hanging down, with the taillights attached to it also facing down but still burning. His evidence that the taillights themselves were not damaged, is probable. After fastening the tailboard back to the horizontal bars, the burning taillights were once again correctly facing backward and visible. The plaintiff and his witness saw the taillights burning again. As the truck left the scene its taillights were still burning again as before.

[73] It is also significant to remember that his evidence was that he was aware of a motor vehicle which was approaching the truck from behind. His evidence that a few motor vehicles passed the truck, some from the front and others from behind before the accident, was undisputed. Instead the driver of the bakkie indirectly corroborated this evidence. Those that overtook the truck were logically faster and exposed to a greater risk of colliding with the invisible trailer – yet none did.

[74] His evidence was that at first De Jager claimed that the taillights of the trailer were not working. He denied the allegation and immediately invited De Jager to the truck to see for himself. The three men then walked away from the bakkie to the truck, where De Jager saw for himself that indeed the taillights were working, but merely facing down. There was no further discussion about the defective taillights afterwards. Implicitly Kotze's evidence corroborates this. Soon thereafter the police officers arrived on the scene and they heard nothing about the defective taillights.

[75] A brief description of how the accident took place, as recorded on page 8 of exhibit A, is perfectly in line with what any reasonable driver in the position of Khambule would have told the police. He was travelling northwards. The bakkie approached him from behind and for no apparent reason crashed into the rear of the trailer. It was then up to the driver of the bakkie to tell the remainder of the story as to why the bakkie had crashed into the rear of the trailer. **ARTHUR v BEZUIDENHOUT AND MIENY**, *supra*, at 574H – 575A. The remainder of the story was never immediately told on the scene. It only came to light for the first time

approximately three and a half years later. The critique that the witness had collaborated with the plaintiff, as husband and wife, to fabricate a story so that she could succeed with her claim, is understandable.

[76] In the circumstances of the case I have come to the conclusion that, from the evidence as a whole the only legitimate deduction that can be made from the rear-end-collision we are here dealing with, is that the accident was occasioned exclusively by the negligence of the driver of the bakkie. I have come to this conclusion on the grounds that it is clear to me that he did not keep a proper lookout. It would seem that he did not at all apply the brakes or he did not adequately or effectively or timeously apply the brakes. He also failed to avoid the accident when he could and should have avoided it. The inference that attributes negligence to the driver of the rear motor vehicle is, on the facts, justified in this case – *Cooper loc. cit.*, p. 102.

[77] I find that the taillights of the trailer were properly working and that the cloud of mist was not such that it could have impaired the vision of a reasonably careful driver and that in

all the circumstances the accident could and should have been avoided. The ultimate issue in this case is that, in my view, the facts decisively establish zero degree of negligence on the part of the defendant's insured driver. It follows from this that I hold the firm view that the third party was absolutely to blame for the accident. To put it differently, the accident was occasioned by his exclusive negligence in the driving of the aforesaid twin cab van.

- [78] Having regard to all the evidence in the case, it cannot be held by a reasonably objective court that the plaintiff discharged the onus of proving, on a balance of probabilities, the negligence she has averred against the truck driver. **ARTHUR v BEZUIDENHOUT AND MIENY**, *supra*. At the end of the case, I enquired as to where, on all the evidence, the probabilities lie, and adjudged that they were not in favour of the plaintiff, the party who, on the pleadings, bore the onus of establishing that but for the defendant's negligent conduct, the accident would not have happened – **KLAASSEN v BENJAMIN** 1941 TPD 80 on p. 87 – 88 per Schreiner J, as he then was. I want to believe that I have correctly followed the proper approach in my endeavour to

resolve the factual disputes in this case of two irreconcilable versions - **STELLENBOSCH FARMERS' WINERY GROUP LTD AND ANOTHER v MARTELL ET CIE AND OTHERS**, *supra*. Accordingly I am inclined to dismiss the plaintiff's action against the defendant.

[79] The defendant has been successful in its opposition of the action. No reason exists why the defendant should not be entitled to the fruits of its success not only against the plaintiff but also against the third party.

[80] Accordingly I make the following order:

80.1 The plaintiff's action is dismissed.

80.2 The plaintiff is directed to pay the costs hereof to the defendant.

80.3 The third party, L.J. de Jager, the driver of the bakkie, is directed to pay the defendant's costs pertaining to the third party notice in terms of rule 13.

M. H. RAMPAL, J

On behalf of the plaintiff:	Adv. A. Williams Instructed by: Wessels & Smith BLOEMFONTEIN
-----------------------------	---

On behalf of the defendant:	Adv. J.P. Daffue Instructed by: Webbers BLOEMFONTEIN
-----------------------------	---

On behalf of the third party:	No appearance
-------------------------------	---------------

/sp