

Reportable:	YES / NO
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Circulate to Magistrates:	YES / NO
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	NO

IN THE HIGH COURT OF SOUTH AFRICA

(Northern Cape Division)

Case Nr: 1442/2004

Case Heard: 12&13/06/2006

Date delivered: 30/06/2006

In the matter:

Section 1.1 D J BOSMAN TRANSPORT (PTY) LTD PLAINTIFF

versus

Section 1.2 NATRO FREIGHT (PTY) LTD 1ST RESPONDENT Section 1.3 THE PREMIER OF THE NORTHERN CAPE 2ND RESPONDENT

Coram: Olivier J

JUDGMENT

OLIVIER J:

[1]

The plaintiff, D J Bosman Transport (Pty) Ltd, issued summons against the first defendant, Natro Freight (Pty) Ltd, and the second defendant, The Premier of the Northern Cape. The plaintiff's claim is based on damages to a vehicle ("*the Bosman vehicle*") after a collision between the Bosman vehicle and the load on the first defendant's vehicle ("*the Natro vehicle*"), which were escorted by two traffic officers who were employees of the second defendant.

[2]

The first defendant denied liability on the part of its employee (driver) and pleaded that the collision had been caused by the negligence of the driver of the Bosman vehicle. In the alternative the first defendant pleaded that the negligence of the plaintiff's driver and of the second defendant's employees contributed to the accident and prayed for an apportionment in terms of the provisions of the Apportionment of Damages Act, 34 of 1956. The first defendant also instituted a counterclaim against the plaintiff for the damages suffered by it.

[3]

As far as the merits are concerned the second defendant similarly denied any form of negligence on the part of its employees. In the alternative it pleaded that the collision had been caused by the negligence of the plaintiff and/or the first defendant.

[4]

The second defendant initially also filed a special plea on the basis that the plaintiff had failed to comply with the provisions of the Institution of Legal Proceedings against certain Organs of the State Act, 40 of 2002. The plaintiff then applied for condonation and at the commencement of the trial such condonation was granted by agreement between the parties concerned.

[5]

It was at that stage also ordered, by agreement between all three parties, that the issues in this matter be separated on the basis that the only issue to be decided at this stage is whether the collision was caused by the negligence of one or more of the parties and, if so, the degree of negligence on the part of such party.

[6]

The following facts were common cause for the purposes of this issue:

- 6.1 The collision occurred on the 28th of May 2003 on the N12 national road between Britstown and Strydenburg, an area within the jurisdiction of this Court. Although there was some dispute about the exact time of the collision it was common cause that it had occurred during daytime, with good visibility, and on a tarred road.
- 6.2 The Bosman vehicle was driven by mr Wayne Erasmus, who died as a result of injuries sustained in the accident. It had approached the area from a southerly direction, in other words from Britstown in the direction of Strydenburg.
- 6.3 The Bosman vehicle approached the area and the scene of the accident behind a vehicle driven by mr Samuel Terry Fortune, an employee of a firm called Liebentrans (*"the Liebentrans vehicle"*), which vehicle had also been travelling in the direction of Strydenburg.
- 6.4 Both the Bosman and Liebentrans vehicles were trucks or heavy

vehicles, comprised of so-called horses and trailers.

6.5 The Natro vehicle was driven by mr Maxwell Kasiyamhuru and was approaching the area from a northerly direction, in other words from Strydenburg in the direction of Britstown.

6.6 Although the Natro vehicle also consisted of a horse and a trailer it carried an abnormal load, consisting of a steel structure which weighed 8 tons and which, more importantly, was 6,4 metres wide, causing it to protrude from each side of the Natro vehicle's trailer by 1,9 metres.

6.7 The road consisted of one lane for traffic in each direction. In the area where the collision occurred the width of the lane (in other words between the double barrier line separating the two lanes and the yellow line) in which the Liebentrans and Bosman vehicles were traveling was approximately 3.160 metres, that of the so-called emergency lane on that side of the road (in other words the area between the yellow line and the so-called shoulder of the road) 0,89 metres and that of the gravel shoulder area (in other words between the shoulder on that side of the road and the embankment) approximately 0,7 metres. The total distance between the yellow line and the embankment on that side of the road was therefore approximately 1,6 metres.

6.8 The point of impact was within the lane for traffic from Britstown to Strydenburg, in other words the lane in which the Liebentrans en Bosman vehicles had been traveling.

6.9 The collision occurred, for vehicles approaching from Britstown, after having moved up a slight uphill or incline and shortly after a bend to the left in the road (around a small hill which obstructs the view for traffic from both directions). The bend around the hill ("the first bend") is actually a more pronounced part of a long curve to the left and is then followed by another more pronounced bend ("the second bend") to the left. The collision occurred between these two pronounced bends. It was never disputed that this area is correctly reflected on a sketch plan (handed in by the first defendant as exhibit "B" and also included in the bundle of documents, exhibit "A", at page 107) and on the photographs which was also submitted by the first defendant and also formed part of the bundle of documents.

6.10 The first defendant had been in possession of a valid exemption permit ("*the permit*") authorising it to transport the load. The Natro vehicle was, as already mentioned, escorted by two traffic officers.

INSPECTION IN LOCO

[7]

At the commencement of the trial mr den Hagen, on behalf of the plaintiff, applied for an inspection **in loco** at the scene of the accident, which is apparently some two hours drive from here.

[8]

This application was brought against the background of the fact that I had, earlier during the same day and in the presence of all the parties, viewed video footage of the area and of the scene where the collision had occurred. A description of this footage was formulated by agreement between the parties and handed in as exhibit "C" and reads as follows:

"Observation iro video

1. *The video 1stly depicts a vehicle traveling in the direction of a small hill to the right of vehicle.*
2. *The gradient is slightly upwards*
3. *The vehicle goes through a bend, after which the road straightens somewhat.*
4. *It then goes through another bend (which leads around the hill) and at the start of this bend the two lanes are divided by a solid line.*
5. *The video depicts the embankment on the left side of the road and shows it sloping down to veldt.*
6. *The video depicts a motor vehicle approaching the small hill from the opposite side (ie with the hill to its left).*
7. *The gradient is slightly upwards.*
8. *As the vehicle goes round the bend, the gradient and curve flattens out."*

(Paragraphs 1 to 5 are based on the view as the area is approached from a northerly direction, in other words from the direction of Strydenburg.)

[9]

Furthermore the first defendant had filed a notice in terms of Rule 36(10) in respect of, **inter alia**, the photographs and the sketch plan already referred to, to which neither the plaintiff nor the second defendant ever objected.

[10]

In motivation of his application mr den Hagen stated, in somewhat vague terms, that the incline and decline in the road and the bends do not appear properly from the video footage, that the "*distance is out of focus*" and that what lies beyond and before the first bend and the point of impact do not appear from the footage. It was not at that stage explained what the plaintiff's case would be as far as these aspects

were concerned or whether there would be any dispute in this regard.

[11]

Mr den Hagen furthermore relied on a submission by the author of **Delictual Liability in Motor Law** (at page 478) to the effect that the refusal to hold an inspection would amount to a refusal to admit real evidence and would constitute an irregularity in the proceedings. It would appear as though the author's attitude is that a Court should not have a discretion in this regard.

[12]

As interesting as this proposition might be, it is not the position in our law, which is to the effect that the purpose of such an inspection is to enable a Court to follow and apply the evidence and that a Court does indeed have a discretion as to whether to hold such an inspection or not (see **R v Roberson** 1958 (1) SA 676 (AD) at 679E-G and **S v Solani en Andere** 1987 (4) SA 203 (NC)).

[13]

The application for the inspection **in loco** was refused and it was pointed out to Mr den Hagen that the need for such an excursion could be reconsidered at a later stage; if need be as soon as immediately after the evidence-in-chief of the first and only witness on behalf of the plaintiff, Mr Fortune. Mr den Hagen, however, never raised the issue again, to my mind quite understandably. None of the witnesses experienced any difficulty whatsoever in describing the scene and the events with the aid of the photographs and the sketch plan. The characteristics of the general area and of the scene of the collision were in fact never in dispute.

PLAINTIFF'S CASE

[14]

The crux of Fortune's evidence was that he had been travelling from Cradock. When he joined the N12 road at Britstown in the direction of Strydenburg he saw the Bosman vehicle approaching from the south. As he drove towards Strydenburg the Liebentrans vehicle kept behind his vehicle by more or less a truck length (approximately 22 metres) and never attempted to overtake his vehicle.

[15]

When he drove around the first bend he noticed the Natro vehicle and its abnormal load, and only then the vehicle of the traffic officer (Ms E H Welkom) in front of it. According to him Welkom's vehicle was no more than 20 to 30 metres in front of the

Natro vehicle. He noticed that the load of the Natro vehicle was overhanging its trailer on both sides.

[16]

When he realised that Erasmus would not be able to see the Natro vehicle and its overhanging load he decided to warn him and turned his vehicle's hazard lights on and off twice and then turned them on again and left them on. According to him there is an understanding among drivers of heavy vehicles that they will warn one another if the need arises.

[17]

At the same time Fortune slowed down and proceeded to move to the left and out of his lane, and the Bosman vehicle followed suit. Fortune's evidence was that he moved to the left until the right front wheel of the horse of the Liebentrans vehicle was on the yellow line, with the wheels on the other side of the vehicle on the far side of the shoulder. Although he had not planned on actually stopping, he was eventually forced to do so by the presence of a storm water drain on the left-hand side of the road.

[18]

According to Fortune the Bosman vehicle came to a complete standstill approximately one to two metres behind the Liebentrans vehicle's trailer (which was a refrigerator and would, according to Fortune, have obscured Erasmus's view of the abnormal load on the Natro vehicle). Although the Bosman vehicle had also moved to the left when Fortune proceeded to do so, Fortune noticed (in his rear-view mirror) that the Bosman vehicle had not moved as far left as the Liebentrans vehicle. It was Fortune's estimation that, when the Bosman vehicle was eventually stationary, the right-hand side of its horse was about half a metre to one metre further into their lane than the right-hand side of the horse (cabin) Fortune was sitting in.

[19]

When the Natro vehicle and its abnormal load passed him where he was sitting on the right-hand side of his vehicle, the red flag attached to the load on the side nearest to him were so close to Fortune's window that he thought the load was going to hit his trailer. As he anxiously watched in his rear-view mirror he saw the load missing his trailer but hitting the horse (cabin) of the Bosman vehicle.

[20]

Fortune's evidence was furthermore that the impact of the collision between the load and the Bosman vehicle caused the horse of the Bosman vehicle to swivel, with the result that its left front side impacted with the right rear side of the Liebentrans vehicle's trailer. The Bosman vehicle was dragged towards the middle of the road by the load after Kasiyamhuru had, supposedly in reaction to the impact, swerved to his left. In the process the Liebentrans vehicle was bumped forward by more or less between half a metre and one metre.

[21]

According to Fortune he then went to Erasmus, where he was still sitting in the Bosman vehicle, but noticed that Erasmus's one leg had been completely severed and that nothing could be done to help him.

[22]

Fortune then proceeded to where the traffic vehicle driven by Mrs Hofsta (and which had been following the Natro vehicle) had stopped and asked Hofsta how the Natro vehicle could have been allowed to travel at such a high speed. Fortune's evidence was that she then replied that they had not been speeding and that the Natro vehicle had been travelling at approximately 50 km per hour.

[23]

In Fortune's estimation the Natro vehicle had been travelling at a speed of no less than 50 km per hour, and probably in excess thereof. It was clear from Fortune's evidence that he blamed the collision on the fact that the Natro vehicle had been travelling too fast in the prevailing circumstances and that it had failed to stop, and also on the fact that Welkom had not preceded the Natro vehicle by much more than a mere 20 to 30 metres, so that she could give sufficient warning of the oncoming abnormal vehicle.

[24]

Fortune made a very good impression as a witness. He appeared self-confident, but at the same time never hesitated to concede particulars he could not remember. This does not mean that his evidence is free from criticism. It is so that he appeared to contradict himself on the time of the collision, but in view of the fact that it was common cause that the collision had occurred during daytime and in good visibility this was immaterial.

[25]

His evidence that he had been travelling at a speed of between 77 and 80 km per hour was inconsistent with the plaintiff's further particulars, according to which he had been travelling at a speed of between 80 and 90 km per hour. He was, however, never afforded the opportunity in cross-examination to comment on this. In any event, in view of the fact that it was never seriously disputed that he had eventually pulled over and stopped in time, the speed at which he had been travelling before then was not really that important.

[26]

Fortune appeared to be uncertain of whether Welkom's vehicle had displayed warning signs like flashing lights, but it should be kept in mind that more than three years had elapsed since the events.

[27]

Miss de Kok, who appeared on behalf of the first defendant, also criticised Fortune's evidence on the basis of it being improbable that, on his version, the Bosman vehicle would have impacted with the Liebentrans vehicle's trailer. On the available evidence it is, however, impossible to come to this conclusion. On Fortune's estimation, formed while he was sitting and observing the events (which had probably unfolded quite quickly) in his rear-view mirror, this distance between the two stationary vehicles could have been as little as one metre. The load hit only the right front side of the horse of the Bosman vehicle, behind which there had been a trailer loaded with apples.

[28]

Furthermore Fortune's evidence was that the load, which had hooked onto the Bosman vehicle after the collision between them, had broken loose and eventually fell off and it is unknown what effect (if any) it might have had on the movement of the Bosman vehicle after the initial impact. In my view it would be unfair, under these circumstances, to speculate that the momentum of the impact would rather have moved the whole of the Bosman vehicle (including its loaded trailer) backwards and on this basis to reject Fortune's version of improbable.

[29]

Fortune's evidence that, after the collision between the load and the Bosman vehicle and when he moved to the back of his trailer, the Bosman vehicle was still only about one metre from the rear of his trailer, was left unchallenged and would on the face of it also be inconsistent with the theory that it would (on the first defendant's version) have been moved backwards by the momentum of the impact.

[30]

Although Fortune was a single witness he was in a sense an independent witness who had nothing to loose or to gain from the findings of this Court.

FIRST DEFENDANT'S CASE

[31]

This first defendant also depended upon the evidence of a single witness, **viz** mr Kasiyamhuru. His version, very briefly, was that he rounded the second bend on his way in the direction of Britstown and then saw the Liebentrans and Bosman vehicles approaching from the opposite direction and after they had already rounded the first bend. He was driving on the extreme left-hand side of the road and made use of the emergency lane. He slowed down. He saw the Liebentrans vehicle slowing down and moving to its left. The Bosman vehicle, however, did not move to its left, but rather appeared to move to its right and further into its lane (and in the direction of the lane of the Natro vehicle). His load collided with the Bosman vehicle and he then stopped. According to his evidence-in-chief there was nothing else he could have done to avoid the collision.

[32]

The quality of Kasiyamhuru's evidence, and the impression he made as a witness, was in stark contrast to that of Fortune. Kasiyamhuru appeared hesitant and uncertain, at times spoke inaudibly and on occasion needed long periods to consider what should have been simple answers. There are also several material inconsistencies and improbabilities in his version, even when measured against the rest of the evidence tendered by the first defendant itself.

[33]

In his evidence-in-chief Kasiyamhuru said that he did not drive faster than 50 km per hour. He said that he had been **au fait** with the provisions of the permit and that it required him to travel at a speed of between 60 and 70 km per hour. It is, however, quite clear that the permit required him to limit his speed to 40 km per hour in areas where his "*sight distance*" was less than 300 metres (and otherwise to a maximum speed of 60 km per hour).

[34]

On the first defendant's own version, and more particularly according to its sketch

plan, Kasiyamhuru's "*sight distance*" (to the first bend) must have been less than 300 metres well before he reached the point of impact. During cross-examination Kasiyamhuru's evidence was that he had been travelling at between 40 and 45 km per hour before he started slowing down. On this version he could not have exceeded 45 km per hour, which would mean that he in effect adjusted his evidence regarding his maximum speed when confronted with the provisions of the permit.

[35]

The matter of the speed at which Kasiyamhuru had been travelling is relevant, not only as regards his credibility but also as regards the cause of the collision. It could explain why he had not stopped timeously, and it could be the basis for a finding that he had, in failing to slow down adequately, failed to take reasonable steps to avoid the collision when he could have done so. These are allegations which the plaintiff indeed made in the particulars of claim.

[36]

Kasiyamhuru's evidence-in-chief was that he slowed down to negotiate the first bend. This was, in the first place, never put to Fortune. The question would also arise why it would have been necessary for him to slow down for the first bend, because he had just come through the second bend.

[37]

During cross-examination Kasiyamhuru at first said that the reason for his slowing down was the approaching Liebentrans en Bosman vehicles, but when reminded of his evidence-in-chief he reverted to his earlier version.

[38]

His evidence was furthermore that Welkom had been travelling between 100 and 120 metres ahead of him and that, at the stage when he noticed the Liebentrans and Bosman vehicles coming around the first bend, her vehicle had already disappeared around it in the opposite direction. However, when regard is had to the first defendant's sketch plan (and the measurements thereon) it is quite clear that, if Welkom had been driving even as far as a 120 metres ahead of the Natro vehicle, she could even at the time of the collision not have been around the first bend or out of Kasiyamhuru's view.

[39]

Kasiyamhuru's evidence was that he did not bring his vehicle to a complete standstill before the collision because he had been under the impression that the Bosman vehicle was going to stop. Such an expectation would, however, have been inconsistent with his earlier evidence to the effect that the Bosman vehicle never slowed down or moved to its left. How could he, under those circumstances, have formed the impression that it was going to stop?

[40]

According to Kasiyamhuru his vehicle was approximately 10 metres from the Bosman vehicle when it veered to its right and he only then realised that it was not going to stop. The first problem that I have with this version is that it would not fit in with his earlier evidence that the Bosman vehicle had never slowed down or moved to its left. If that had been the case the realisation that the Bosman vehicle was not going to stop would have come to Kasiyamhuru at a much earlier stage (than only when it veered in his direction), when he noticed that the Bosman vehicle was not slowing down or moving to its left.

[41]

A second problem with this aspect is that it was Kasiyamhuru's own evidence that, although he had on his version slowed down before the collision, it was only after the collision that he had actually "*stepped*" on the brakes to stop. Why would he not have done so when he realised that the Bosman vehicle was not going to stop and before the collision?

[42]

Kasiyamhuru could not remember noticing the Bosman vehicle collide with the Liebentrans vehicle. Why would he not have seen this (and most certainly remembered it) if it had indeed happened? It was his own evidence that he had no problem in observing both the Liebentrans and Bosman vehicles from the moment they came around the first bend.

[43]

It is so that his version was that the Bosman vehicle had been travelling very close behind the Liebentrans vehicle. This would not, however, have prevented him from observing such an impact once the Bosman vehicle moved out from behind the Liebentrans vehicle; especially if it had been the left front side of the Bosman vehicle that collided with the right rear of the Liebentrans vehicle's trailer.

[44]

In any event, I find it inherently improbable, on the evidence as a whole, that the Bosman vehicle would have been travelling so closely behind the Liebentrans vehicle at a high speed.

[45]

Fortune's evidence was that the Bosman vehicle had been following him from Britstown (and I see no reason for doubting Fortune's evidence in this regard). This would mean that the Bosman vehicle would have been travelling at more or less the same speed as the Liebentrans vehicle; and it was never suggested that Fortune had been speeding.

SECOND DEFENDANT'S CASE

[46]

Mr Mphaga, who appeared on behalf of the second defendant, presented the evidence of the two traffic officers who had been escorting the Natro vehicle, miss Welkom (who had been travelling ahead of the Natro vehicle) and mrs Hofsta (who followed behind it).

[47]

Hofsta's evidence was that, as she was following the Natro vehicle and as they were approaching the first bend, she saw the Liebentrans vehicle approaching from the opposite direction, after having negotiated the first bend. The Liebentrans vehicle appeared to slow down and to move to its left. The Bosman vehicle, which had been following closely behind the Liebentrans vehicle and at a high speed, then moved out from behind the Liebentrans vehicle's trailer and then collided with the load on the Natro vehicle.

[48]

If Kasiyamhuru was an unsatisfactory witness, I am afraid that Hofsta was even worse. Apart from material inconsistencies and improbabilities in her version she also made an extremely poor impression as a witness. She was hesitant to answer simple, but important, questions and openly attempted to avoid answering others.

[49]

Whereas her evidence had initially been that the Bosman vehicle was struck as it moved out from behind the Liebentrans vehicle's trailer, she later quite clearly adjusted her version in this regard and testified that what had actually transpired was that the Bosman vehicle had moved out from behind the Liebentrans vehicle's trailer, and in the process collided with it, and that it was only when the Bosman vehicle was actually attempting to move back to its left that it was struck by the load.

[50]

This version was never put to any of the other witnesses in cross-examination. In elaboration of this new version Hofsta also stated that the Bosman vehicle's machine had "*ceased*" as it was attempting to move back to its left. She was, however, unable to explain how she would have known this and this statement was also inconsistent with her later evidence that the Bosman vehicle's machine had still been idling even after the collision had occurred.

[51]

Hofsta's evidence was that, at the moment of the impact, the Liebentrans vehicle's left wheels were on the yellow line on its side of the road, but that the rest of its structure was therefore within its lane.

[52]

I have several problems with this evidence. In the first place it was never put to Fortune, when he quite clearly stated that his vehicle's left wheels had at that stage not only been off the road, but in fact almost onto the embankment on that side of the road.

[53]

Secondly it would mean that the point of impact would have been much nearer to the middle of the road, or even possibly within the Natro vehicle's lane. This would follow from the fact that the horse of the Liebentrans vehicle was approximately three metres wide (and its trailer even wider), while the particular lane was only 3.160 metres wide. If the Bosman vehicle had then moved out from behind the Liebentrans vehicle to such an extent that its left front side impacted with the right rear side of the Liebentrans vehicle's trailer, its right

front would have been well into the Natro vehicle's lane.

[54]

Not only was there never any evidence to this effect, but it was in fact not in dispute that, although there was no agreement as to the exact position of the point of impact, it had been well within the lane in which the Liebentrans and Bosman vehicles had been travelling. It was the first defendant's version as illustrated on its sketch plan, and it was also Fortune's version.

[55]

Hofsta's version, at least initially, was that she had been travelling approximately 50 metres behind the Natro vehicle and that she had positioned her vehicle in the middle of the road so that she could see past the Natro vehicle and could observe oncoming traffic and that this is how she saw the collision. She was not, however, prepared to commit herself on more or less where the point of impact might have been. Why would she not have been able to at least express an opinion in this regard? At a later stage she was nevertheless prepared to concede that the Bosman vehicle's right front wheel had been within its own lane at the moment of impact.

[56]

In cross-examination Hofsta adjusted her initial version of the position of the Liebentrans vehicle and conceded that it had moved further to its left than she had indicated earlier, but according to her only after having passed a storm water drain. Fortune's evidence that he had brought his vehicle to a complete standstill before reaching the drain was never challenged by Mr Mphaga.

[57]

Hofsta said that she could not say whether the Liebentrans vehicle had stopped before the collision. Why would she not have been able to see that, while the Liebentrans vehicle was in front of the Bosman vehicle and, on her version, in clear view?

[58]

Whereas she at first denied that the Bosman vehicle had made any attempt to pull over to its left, she later admitted that it did, but was unable to explain why it would have moved to its left, as if to pull off the road like the Liebentrans vehicle, if it had indeed wished to overtake the Liebentrans vehicle.

[59]

In her evidence-in-chief she stated that she had seen the Bosman vehicle for the first time when it moved out from behind the Liebentrans vehicle (as it had been travelling so close to the Liebentrans vehicle that it was obscured from her view until then). In cross-examination on behalf of the plaintiff she contradicted herself by stating that she saw both vehicles simultaneously and she then denied having testified differently earlier.

[60]

Towards the end of her cross-examination Hofsta conceded that the Natro vehicle had impaired her vision. This was in contrast with her earlier evidence that she had been travelling in the middle of the road to enable her to see past the Natro vehicle and would in itself mean that her evidence could not serve as corroboration for that of Kasiyamhuru.

[61]

Hofsta's evidence was that the Natro vehicle had been travelling at 40 km per hour. I have already dealt with the evidence of the driver of that vehicle in this regard. Furthermore Hofsta made no mention of any reduction in the speed of the Natro vehicle prior to the collision, as alleged by Kasiyamhuru.

[62]

Her evidence about the distance between the Natro vehicle and Welkom's vehicle (which was for all practical purposes similar to Kasiyamhuru's version in this regard) was also inconsistent with the distances on the sketch plan and I was informed at the outset of the trial that there was no dispute regarding the measurements. It is in any event difficult to conceive how Hofsta would have been able to estimate this distance from where she had been travelling behind the Natro vehicle.

[63]

Hofsta's evidence that Welkom had informed her by radio that she was going to drive ahead and past the first bend to warn oncoming traffic was strange. Although it was consistent with Welkom's evidence in this regard, the question would arise why it would have been necessary for Welkom to inform her of this.

[64]

I also find it difficult to accept Hofsta's denial of having spoken to Fortune after the collision. It is almost impossible to conceive of any reason why Fortune would have fabricated such a discussion between the two of them.

[65]

This brings me to Welkom's evidence. According to her she had been travelling approximately 100 to 150 metres ahead of the Natro vehicle when she decided to move further ahead and around the first bend in the direction of Britstown, to warn oncoming traffic. She saw the Liebentrans and Bosman vehicles on the Britstown side of the bend (and of the hill) and by means of her vehicle's flashing blue light and headlights, and also by means of hand signals, cautioned them to slow down. When she noticed these vehicles for the first time, she could still see the Natro vehicle in her rear-view mirror.

[66]

Welkom's evidence was that the Liebentrans vehicle then slowed down and moved to its left, but not the Bosman vehicle, which had been travelling at a high speed and only approximately one to two metres behind the Liebentrans vehicle.

[67]

Although Welkom did not, on the face of it, make such a bad impression as a witness, there are quite a number of inconsistencies and improbabilities in her version.

[68]

The first problem one again revolves around how far ahead Welkom's vehicle was ahead of the Natro vehicle when her vehicle came into Fortune's view. In cross-examination on behalf of the second defendant this distance was stated as having been between 100 and 150 metres. Although Welkom also alluded to this distance I understood her to refer to it as having been the distance between her vehicle and the Natro vehicle before she decided to accelerate and to move further ahead and around the bend; which would mean that she would then actually have moved much further ahead of the Natro vehicle by the time her vehicle came within Fortune's view.

[69]

However, even if Welkom's vehicle had been 150 metres ahead of the Natro vehicle

when it had come into Fortune's view it could, on Welkom's own version and according to the sketch plan and the measurements thereon, not have been around the first bend in the direction of Britstown at that stage.

[70]

Welkom's evidence was that, at the stage when the Liebentrans and Bosman vehicles came into her view, she could still see the Natro vehicle in her rear-view mirror. This would of course have been in accordance with Fortune's version, but completely inconsistent with her own version, as well as that of Kasiyamhuru.

[71]

On her own version she would already have been around the bend at that stage and it, and more importantly the hill, would have been between her and the Natro vehicle. It was common cause that, for traffic approaching from the direction of Britstown, the hill obstructed the view around the bend to the north. If she had already been on the Britstown side of the first bend when first noticing the Liebentrans and Bosman vehicles, and the Natro vehicle was at that stage still on the Strydenburg side of the first bend, it would not have been possible for Welkom to see the Natro vehicle in her rear-view mirror.

[72]

Furthermore Kasiyamhuru's version was that Welkom's vehicle had already moved out of his view when he noticed the approaching Liebentrans and Bosman vehicles and on his version it would therefore have been impossible for Welkom to see him in her rear-view mirror at that stage.

[73]

Welkom's version of the speed at which the Bosman vehicle had been travelling and the distance between it and the Liebentrans vehicle, and more importantly about the Bosman vehicle not having slowed down or moved to its left, is also in my view improbable. If the distance between the Liebentrans and Bosman vehicles had been only one to two metres before the Liebentrans vehicle started to slow down, but the Bosman vehicle continued at the same high speed it had been travelling at before then, it would in all probability have collided with the rear of the Liebentrans vehicle's trailer (especially because, as already mentioned, there was no suggestion that the Liebentrans vehicle had been speeding).

[74]

At the very least the Bosman vehicle would, in the circumstances, have gained on the Liebentrans vehicle very quickly and it is difficult to conceive how, when they eventually came into Kasiyamhuru's view, the Bosman vehicle could then still have been behind the Liebentrans vehicle.

[75]

Welkom's evidence-in-chief was that she had also warned the Liebentrans and Bosman vehicles by waiving her arm and hand inside her vehicle. At a later stage she alleged that her arm had been outside the vehicle. In her written statement she made no mention at all of any such warning sign.

[76]

It is in my view in any event completely unlikely that Erasmus would not have heeded Welkom's warnings, especially when he would clearly have seen Fortune do so.

EVALUATION

[77]

As already indicated I regard Fortune's evidence as credible and I have no hesitation in rejecting Kasiyamhuru's evidence where inconsistent therewith. Although it is (for reasons that will become clear in due course) not necessary to do so, I would have had no hesitation in following the same approach as regards the evidence of Hofsta en Welkom. I will therefore consider the question of negligence on the basis of both the Liebentrans and Bosman vehicles having come to a complete standstill between the first and the second bend prior to the collision.

[78]

Mr den Hagen placed great emphasis upon the conditions of the permit, and especially clause 6 thereof, in terms of which the driver of a vehicle such as the Natro vehicle had to give preference to other road users and should, where necessary, pull off to let other traffic pass. I think that this would be the wrong approach to follow when measuring Kasiyamhuru's actions against that of the reasonable person (see **Kruger v Coetzee** 1966 (2) SA 428 (A) at 430E-G).

[79]

The mere fact that such a condition might not have been complied with would not **per se** constitute negligence (compare **De Jong v Industrial Merchandising**

Company Co (Pvt) Ltd 1972 (4) SA 441 (R) and **Malherbe v Eskom** 2002 (4) SA 497 (O) at 505I).

[80]

It would in any event in my view be unreasonable, and indeed impractical, to regard the conditions in clause 6 of the permit as an absolute requirement and a rule to be followed by the driver of an abnormal vehicle under any circumstances whatsoever, and in this regard I respectfully agree with the remarks made in **Mapalala v Marine & Trade Insurance Co Ltd** 1979 (4) SA 735 (N) at 742E-G. In my view the question is simply whether, on Fortune's version, the reasonable person in the position of Kasiyamhuru "*would foresee the reasonable possibility of his conduct ... causing ... patrimonial loss ... and would take reasonable steps to guard against such occurrence*" and, if so, whether Kasiyamhuru failed to take such steps.

[81]

It is clear that Kasiyamhuru did not take any steps at all to avoid the collision between the overhanging load and the Bosman vehicle. On his own version he did not attempt to move the Natro vehicle further to his left and kept on driving on what was according to him the extreme left side of the road, but still upon the road surface.

[82]

Although Kasiyamhuru testified that he had slowed down prior to the collision, this version was not put to Fortune; despite the fact that Fortune was cross-examined at length about the speed at which the Natro vehicle had been travelling. Hofsta made no mention of any such reduction in speed.

[83]

Even on his own evidence Kasiyamhuru would in any event have been slowing down to negotiate the first bend, and not to avoid a collision with any of the Liebentrans or Bosman vehicles, which would at that stage have been much closer to him than the first bend. Although his evidence was not satisfactory in this regard, as already pointed out, he eventually persisted in this version and could therefore, on his own evidence, not have made any attempt to slow down **to avoid the collision**. To put it differently, even on Kasiyamhuru's own version he never considered the possibility of slowing down before reaching the Liebentrans and Bosman vehicles and in an attempt to avoid any possible collision.

[84]

On his own evidence he never attempted to bring the Natro vehicle to a complete standstill prior to the collision. Even if he had been reducing speed in order to negotiate the first bend, his own evidence was to the effect that he only “stepped” on his brakes, as he put it, after the collision.

[85]

I am of the view that the reasonable man in the position of Kasiyamhuru would have foreseen the possibility of the load colliding with the Bosman vehicle. On Fortune’s version he saw, from where he was sitting in the driving seat of the Liebentrans vehicle and in his rear-view mirror, that the Bosman vehicle was overhanging into “their” lane about a metre further than the front of his vehicle, and if he was able to observe this I can see no reason why Kasiyamhuru, who had been approaching from the opposite direction and in the opposite lane, should not also have observed it.

[86]

It was very clear from Fortune’s evidence that he had brought his vehicle to a gradual stop and not abruptly. His evidence in this regard was never challenged. On Fortune’s version the same would have applied to the Bosman vehicle and Kasiyamhuru would in all probability therefore have had enough time to take steps to attempt avoiding a collision.

[87]

Fortune’s evidence was that the right-hand side of the loaded steel structure narrowly missed the trailer of his vehicle; to such an extent that he had obviously been quite anxious about it colliding with the trailer of the Liebentrans vehicle.

[88]

When regard is had to the measurements on the sketch plan it appears that the width of the Natro vehicle and of the emergency lane on that side of the road was respectively 3,170 and ,950 metres (in total 4,12 metres), while the total width of the load on the Natro vehicle’s trailer was 6,4 metres. In my view it would be the duty of a reasonable driver in the position of Kasiyamhuru to ensure that he had a good idea of how far the load on his vehicle was overhanging into the lane of oncoming traffic and to be aware that the effect thereof might even worsen when negotiating a bend (see **Bawa v Santam Insurance Co Ltd** 1976 (2) SA 167 (N) at 169G-H). Insofar as the contrary might have been held in the **Mapalala** case at 742 -743 I must respectfully disagree.

[89]

I cannot see how it could be reasonable for such a driver, who conveys a load which he/she knows constitutes an obstruction in the way of oncoming traffic, to simply adopt the attitude that it is for other road users to establish what part of the road surface is going to remain available to them and that he/she is under no obligation in this regard. In fact, in my view the driver of a vehicle conveying an abnormal load such as this would surely bear a heavier burden in this regard than other road users.

[90]

Kasiyamhuru should therefore have realised that, even with the Liebentrans vehicle having almost moved out of its lane completely, the load was going to move very close past it and he should, with this in mind, have decelerated not merely to such an extent as to be able to negotiate the first bend (beyond the Liebentrans vehicle), but indeed to be able to pass the Liebentrans vehicle much slower than he actually did. In the **Mapalala** case a speed to 15 to 20 km per hour was regarded as reasonable for such a vehicle and in that case the area where the fatal accident occurred was “a fairly open portion of road with no noticeable undulations or sharp bends”.

[91]

At the very best for Kasiyamhuru he had been travelling at 40 to 45 km per hour in an area where there were bends. It is highly unlikely that he would, by merely gradually reducing his speed, not even applying the vehicle’s normal brakes and only with a view to reduce his speed in time for the first bend (beyond the Liebentrans and Bosman vehicles), have been able to reduce his speed to as low as 15 to 20 km an hour by the time he reached those vehicles. Had he been travelling at such a low speed when suddenly confronted with the Bosman vehicle veering to its right about 10 metres in front of him (on Kasiyamhuru’s version), he would have been able to “step” on his brakes before the collision.

[92]

Even if Kasiyamhuru had reduced speed as alleged he would therefore still have moved passed the Liebentrans vehicle much too fast and very close to it. The fact that it was only after the collision that he “stepped” on the brakes and swerved to his left, in my view clearly indicates that Kasiyamhuru had not realised that his load was passing so close to the Liebentrans vehicle and that it might impact with the Bosman vehicle.

[93]

Had he travelled at a lower speed and kept a proper lookout to his right, he would

have realised the danger. He would also probably then have been able to take avoiding action by moving further left, even if it had entailed also moving onto the gravel shoulder on his side of the road, or to stop completely if need be.

[94]

On Kasiyamhuru's own version the safest option would have been for Welkom to see to it that all oncoming traffic completely pulled off before reaching the particular section of the road, where there were bends and where the emergency lanes were considerably narrower. He conceded that there would then not have been a collision. Kasiyamhuru must therefore have been aware of the fact that the area between the two bends was a dangerous area within which to pass oncoming traffic – and all the more so heavier vehicles – and it was against this background that he failed to slow down timeously or adequately or to stop before the collision.

[95]

I am therefore of the view that Kasiyamhuru was negligent by failing to stop timeously, by not keeping a proper lookout and by failing to take reasonable steps to avoid the collision.

[96]

Although similar to a certain extent, there are important differences between the facts in the **Mapalala** matter and those in this matter. I have already referred to the terrain where that collision occurred and to the speed at which that abnormal load had been conveyed.

[97]

In the **Mapalala** case it was held that the driver of the abnormal vehicle could not have foreseen the possibility of "*suicidal conduct*" on the part of the deceased, who had also stopped on the extreme edge of the tar (but with all the wheels of his vehicle still on the tar), and whose head was hit by the overhanging load when the deceased for some inexplicable reason stuck it out of the window of his vehicle.

[98]

In the present case there was no such conduct on the part of Erasmus. He did not all of a sudden do something to obstruct the Natro vehicle, but simply stopped and remained stationary. It is a matter of common sense that, although he might have noticed the horse of the Natro vehicle at an earlier stage, the Liebentrans vehicle's trailer would have

prevented him from noticing the overhanging load until a very late stage; especially when regard is had to the fact that the Liebentrans and the Bosman vehicles were moving through a gradual curve to the left.

[99]

Ms de Kok also referred me to the **Bawa** case. Although that matter also concerned a collision between an overhanging load and an oncoming vehicle, there is once again a clear distinction between the two cases. The vehicle of the plaintiff in the **Bawa** matter was moving past the vehicle conveying the abnormal load when the collision occurred and was therefore not stationary. Having rejected the plaintiff's version that the abnormal vehicle in that matter had unexpectedly veered in his direction the Court found that, had the plaintiff been alert and had he kept a proper lookout, he would have had sufficient time and opportunity to notice the extent to which the load was overhanging and obstructing his lane and to take the reasonable and possible steps to avoid the collision.

[100]

This brings me to the second defendant. The grounds on which the plaintiff relied against the second defendant in its particulars of claim were as follows:

“8.1 They failed to keep a proper lookout;

8.2 *They failed to give timeous and/or adequate warning of the presence and/or approaching presence of an abnormal load on the public road to other road-users;*

8.3 *They failed to display adequate warning devices and boards as is required for the transport of an abnormal load as provided for in Chapter 5 of the guidelines or otherwise;*

8.4 *They failed to stop the First Defendant's vehicle timeously so as not to create a hazard for oncoming traffic, alternatively failed to stop the Plaintiff's vehicle in order to allow the First Defendant's vehicle to pass as they ought to have done;*

8.5 *They failed to take reasonable steps to avoid a collision between the First Defendant's vehicle and the Plaintiff's vehicle in circumstances where they could and should have done so;*

8.6 *They failed to comply with the escort requirements as provided for in Chapter 5 of the guidelines or otherwise;*

8.7 *They failed to comply with the conditions of the permit issued to the First defendant, if any, for conveyance of the abnormal load.”*

[101]

There was no evidence to substantiate the allegations in paragraphs 8.3, 8.6 and 8.7. As regards the remaining grounds, the plaintiff's argument against the second

defendant was based upon two premises, **viz**:

1. that Welkom had been travelling only 20 to 30 metres ahead of the Natro vehicle and too close to it to have given timeous warning of its approach; and
2. that the collision could in any even have been avoided if Welkom had stopped the Liebentrans and Bosman vehicles on the Britstown side of the first bend, where the emergency lanes were much wider.

[102]

It might be argued that both the Liebentrans and the Bosman vehicles in any event eventually had sufficient time within which to pull over and to stop and that it is immaterial how far ahead of the Natro vehicle Welkom had been when she warned them. There is no evidence to the effect that, had Welkom's vehicle been further ahead of the Natro vehicle when "*warning of the presence and/or approaching presence of an abnormal load*", the Liebentrans and Bosman vehicles would have **stopped** at an earlier stage or further to their left.

[103]

The position might, however, have been considerably different if Welkom had indeed stopped those vehicles at an earlier stage, instead of merely warning them to slow down.

[104]

In this regard it must be kept in mind that it was not Welkom's evidence that she had attempted to stop these vehicles. On her own evidence she had merely warned them to slow down. Erasmus and Fortune not only were therefore not informed in express terms that it would be necessary for them to make way for a load overhanging into their lane, but even less were they warned in any way whatsoever that it would be safer to pull off and stop at that point, rather than only when observing what it was that they were being warned against. In fact, the warning to slow down would in itself have implied that it would be safe enough merely to slow down without stopping immediately.

[105]

This brings me to the plaintiff's second contention. It was conceded by Welkom and by Kasiyamhuru that, had the Liebentrans and Bosman vehicles been stopped on the Britstown side of the first bend, where the emergency lanes were much wider and where there was therefore more space for them to pull over, the collision would not have occurred (even if Welkom had been as far ahead of the Natro vehicle as

testified by her, she did not at any stage attempt to stop those vehicles).

[106]

The question remains, however, whether a reasonable person in Welkom's position would have foreseen that, if she did not actually stop the vehicles where there were more space within they could pull off and stop, a collision could occur on the stretch of road between the two bends, and would have stopped them at that stage.

[107]

It was not disputed that the emergency lanes on both the Strydenburg and the Britstown side of the two bends were more than double the width of those in the area between the two bends. This was conceded by Welkom. In my view it could in any event be expected from a reasonable person in her position to have observed the fact that the emergency lane were narrower in that area, and that there were bends to negotiate (rendering it, to say the least, an unsuitable area for vehicles like these to meet), and to act accordingly; either by stopping at the very least heavy vehicles outside that area (if she had indeed been as far ahead of the Natro vehicle as alleged) or by scouting ahead for a suitable area within which to stop such vehicles and to ensure that they were out of the way of the load.

[108]

Welkom knew that she was escorting an abnormal load with a significant overhang into the lane of the oncoming traffic. The reasonable person in her position would have realised that vehicles – and especially vehicles the size of the Liebentrans and Bosman vehicles – would for all practical purposes have to evacuate their lane and that with an emergency lane approximately two metres wide it would be much easier and safer to do so than with an emergency lane of only approximately 0.9 metres wide.

[109]

As it is the Liebentrans vehicle, which had stopped with the right front wheel of its horse on the yellow line and with its left wheels so far to the left and on the shoulder that it was beginning to slant to the left, was obviously only just missed by the overhanging load.

[110]

It is clear that it would have been much safer for Welkom to have not only warned the Liebentrans and Bosman vehicles of danger at the stage when they were in the

area where the emergency lanes were much wider (and long before the area where the bends were situated), but indeed to have taken steps to see to it that they stopped there and that they were completely out of the way of the overhanging load.

[111]

At an earlier stage of the journey of the Natro vehicle this was done when it had to cross a bridge and, although there might have been slightly more space to pull over in the area of this collision than on the bridge, I think the same action should have been taken when the Natro vehicle had to pass through the area of this collision, where there were bends in the road (which would limit the view of road users and would worsen the overhanging effect of the load), where a hill obstructed the view of road users and where there was obviously very limited space for especially heavy vehicles to pull over and to avoid a collision with the overhanging load.

[112]

Even if it were to be assumed that, if the Liebentrans and Bosman vehicles had been stopped where the emergency lanes were wider, Erasmus would still not have pulled over as far to his left as the Liebentrans vehicle, the probabilities are in any event that he would eventually have stopped further out of the way of the load than he eventually did. There would also have been more space for the Natro vehicle to move to its left and if it had been driven on the far left side of the tar there, it would have been more than a metre further to its left than was the case between the two bends.

[113]

What remains to consider is whether Erasmus had also been negligent. In my view this question can be dispensed of quite easily. It is clear that Erasmus did not pull over as far to his left as the Liebentrans vehicle and that the right side of the Bosman vehicle was protruding into the road and into the lane of travel at least a metre further than that of the Liebentrans vehicle's horse.

[114]

Fortune knew of nothing that would have prevented Erasmus from pulling over to his left further and was constrained to concede that, had he done so, the collision would not have occurred. There was, in other words, sufficient time and space for Erasmus to have avoided the accident.

[115]

Fortune was of the opinion that the reason for Erasmus's failure to move further to his left might have been curiosity and the wish to see what was happening ahead. Fortune was of the view that this would have been any reasonable person's reaction. With this view I do not agree. A reasonable person in Erasmus's position would have realised, from the passing vehicle of Welkom with its warning lights and from Fortune's actions, that something had caused the Liebentrans vehicle to completely leave its lane and to stop.

[116]

It is so that the Liebentrans vehicle's trailer would have obstructed Erasmus's view as regards the overhanging load (and possibly the horse of the Natro vehicle up to a stage). Erasmus should at that stage have foreseen the possibility that the danger he was being warned about might be an approaching overhanging load, because it was Fortune's evidence that in his years of experience as a driver of heavy vehicles he had come across abnormal loads of this nature often. It is therefore not by any means an unusual occurrence and the reasonable person in Erasmus's position would indeed have foreseen it as a possibility.

[117]

I emphasise, however, that the mere fact that the vehicle in front of him had deemed it necessary to pull over and to completely leave its lane should, in the circumstances where Erasmus could probably not at that stage himself see what it was that was causing the Liebentrans vehicle to do so, have warned Erasmus to follow suit and not to drive any further into their lane than the Liebentrans vehicle.

[118]

Erasmus's failure to pull over further to his left in my opinion constituted a failure to take reasonable steps to avoid a collision, when he could have done so; a ground of negligence pleaded by both defendants. It could possibly be argued that the first defendant made this allegation in its plea as a part of its case that the Bosman vehicle had attempted to overtake the Liebentrans vehicle when the collision occurred. This would not, in my view, however prevent the first defendant from also relying upon this allegation on the basis of the Bosman vehicle not having attempted to overtake, but merely not having pulled over far enough; an aspect which had been extensively dealt with in evidence as well as in argument (compare **John Williams Motors Ltd v Minister of Defence** 1966 (3) SA 27 (A)).

APPORTIONMENT OF NEGLIGENCE

[119]

Having found negligence on the part of all three parties it now remains to be considered to what extent the actions or omissions of each of them (or their employees) “deviated from the norm of the **bonus paterfamilias**” (see **South British Insurance Co Ltd v Smit** 1962 (3) SA 826 (A) at 835H-836E and **Jones, NO v Santam Bpk** 1965 (2) SA 542 (A) at 555B-H).

[120]

In my view the degree in which Erasmus’s driving deviated from the norm of the reasonable person was significantly less than that of Kasiyamhuru and the traffic officers (and more specifically Welkom), whose acts/omissions in my view deviated from that norm in more or less in equal degrees.

[121]

In my opinion the damages to be proved by the plaintiff should be reduced by 10 % and, although the plaintiff is holding the two defendants liable both jointly and severally, I would regard their respective shares in the remaining negligence as 45 % each.

COSTS

[122]

Although it might sometimes be prudent to follow the same apportionment when awarding costs (see **Stolp v Du Plessis** 1960 (2) SA 661 (T) and **Wright v Santam Versekeringsmaatskappy Bpk** 1971 (4) SA 105 (NC) at 107F—108A), I am of the view that the plaintiff in this matter was substantially successful to such a degree that it should be entitled to all its costs from the defendants jointly and severally.

[123]

In view of the equal apportionment of negligence between the first and second defendants I am furthermore of the view that each of them should pay its own costs and no order will therefore be made regarding their liability for one another’s costs.

[124]

Whatever the amount of damages might be which the plaintiff eventually proves, I regard this matter as of sufficient complexity to merit costs on the scale of this Court and it is accordingly on this basis that the award regarding costs is made.

ORDERS

The following orders are therefore made:

- 1. The plaintiff's negligence is apportioned at 10 %, and that of the first and second defendants at 45 % each.**
- 2. The first and second defendants are ordered to pay the plaintiff's costs jointly and severally, the one to pay the other to be absolved pro tanto.**

C J OLIVIER
JUDGE
NORTHERN CAPE DIVISION

For the Plaintiff:	Adv den Hagen
Instructed by:	Harvey Nossel & Turnbull c/o Elliot Marais Wilmans & Hay

For the 1 st Respondent:	Adv de Kok
Instructed by:	Fluxmans Inc Kallmeyer & Strime c/o Fletchers

For the 2 nd Respondent:	Adv Mphaga
Instructed by:	Mjila & Partners