

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)



**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG**

Not Reportable

Case No: RAF765/2023

In the matter between:

MARNUS WILHELM LINDE

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

Coram: Masike AJ

Date Heard: 29 July 2025, 30 July 2025, 30 September 2025, 1 October 2025, 27 October 2025, and 3 November 2025

Judgment is handed down electronically by distribution to the parties' legal representatives by e-mail, and released to SAFLII. The date that the judgment is deemed to be handed down is **3 JUNE 2026 at 11h00**.

Summary: Civil Trial – Motor vehicle collision - Two irreconcilable versions before the court – technique to be employed by the court in resolving factual disputes – duty of a driver of a motor vehicle towards other motorists – duty of driver of a motor vehicle to keep a proper lookout when driving over an incline – duty to avoid a collision by exercising reasonable care.

JUDGMENT

MASIKE AJ

Introduction

[1] On 23 October 2021, between the early hours of 2:00 am and 3:00 am, on the R34 road between Vryburg and Schweizer-Reneke, a motor vehicle collision occurred between a motor vehicle bearing registration letters and numbers H[...] there and then driven by Marinus Wilhelm Linde (‘the plaintiff’) and a motor vehicle bearing registration letters and numbers C[...], there and then driven by Mr Bongani Bhuqa (‘the insured driver’).

[2] In the particulars of claim of the plaintiff, it is alleged that the collision occurred as a result of the sole negligence of the insured driver, who was negligent in one or more of the following respects: the insured driver failed to give adequate warning of his intention to reduce speed, turn or stop, he failed and/or neglected to stop the vehicle off of a public road, he failed and/or neglected to stop the vehicle on a public road where it would not or would not likely constitute a danger/hazard or an obstruction to other traffic, he failed and/or neglected to stop the vehicle in a safe place, he failed and/or neglected to

keep a proper lookout, he failed to avoid the collision when by the reasonable care, skill, and the taking of reasonable precautions, he could and should have done so, he failed to properly control the vehicle and he failed to drive the motor vehicle with the necessary skill expected of a reasonable driver in the circumstances.

[3] It is alleged in the particulars of claim of the plaintiff that as a result of the collision, the plaintiff sustained injuries in the form of open wounds to his face, cheek and forehead, a nasal fracture and wound to the scalp, and occiput. As a result of the collision, the plaintiff has instituted an action against the Road Accident Fund ('the defendant'). The action against the defendant is instituted due to the provisions of s 17(1)(a) of the Road Accident Fund Act, Act No 56 of 1996, as amended ('the Act')¹. The defendant had defended the action.

[4] The defendant raised two special pleas to the particulars of the plaintiff's claim. The defendant relies on regulation 3 of the 2008 Regulations under the Act. The defendant alleges that this Court does not enjoy the jurisdiction to make a finding as to whether the plaintiff's injury is a serious injury and does not have jurisdiction to make a finding regarding whether the plaintiff is entitled to claim non-pecuniary loss against the defendant.

¹17 Liability of Fund and agents

(1) The Fund or an agent shall-

(a) subject to this Act, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of the owner or the driver thereof has been established; be obliged to compensate any person (the third party) for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself or the death of or any bodily injury to any other person, caused by or arising from the driving of a motor vehicle by any person at any place within the Republic, if the injury or death is due to the negligence or other wrongful act of the driver or of the owner of the motor vehicle or of his or her employee in the performance of the employee's duties as employee: Provided that the obligation of the Fund to compensate a third party for non-pecuniary loss shall be limited to compensation for a serious injury as contemplated in subsection (1A) and shall be paid by way of a lump sum.

[5] It is alleged in the plea of the defendant that the plaintiff has failed to submit himself to an assessment by a medical practitioner in accordance with the Regulations², and in terms of the Regulations he was obliged to obtain from the medical practitioner concerned a Serious Injury Assessment Report, completed in accordance with the Regulations of the Act, and in which form, the findings of the medical practitioner were to be recorded.³ It is alleged in the plea that the defendant is only obliged to compensate third parties for non – pecuniary loss provided in the Act, if the claim is supported by a Serious Injury Assessment Report submitted in terms of the Act and Regulations, and the defendant is satisfied that the injury has been correctly assessed as being a serious injury in terms of the method provided in the Regulations.

[6] The second special plea is also based on regulation 3 of the Regulations of the Act. It is alleged that the defendant has failed to submit a Serious Injury Report; the defendant has pleaded that it directs the plaintiff to undergo an assessment to determine whether his injuries are serious under the Regulations. It is alleged that the defendant is not obliged to compensate the plaintiff for non-pecuniary loss as averred until his alleged sustained injuries are determined to be serious in nature.

[7] In addition to the special pleas, the defendant has pleaded over to the particulars of the plaintiff's claim. The defendant denies any liability towards the plaintiff. The defendant denied that the collision occurred as a result of any negligence on the part of the insured driver, as alleged by the plaintiff.

² Regulation 3(1)(a) of the Act

³ Regulation 3(1)(b) (i), (ii), (iii), (aa), (bb), (cc), (dd), (iv), and (v) of the Act

[8] The defendant has pleaded in the alternative that, if this Court finds that the insured driver was negligent as alleged by the plaintiff, the alleged negligence did not cause and/or contribute to the collision. The defendant further pleaded that the plaintiff contributed to the negligence by failing to have due regard for the road signs and rules of the road. He drove his motor vehicle at an excessive speed in a build-up area. He failed to have due regard for other road users. He failed to apply the brakes of his motor vehicle in a dangerous place under the circumstances. He failed to keep his motor vehicle under proper control and care. He failed to avoid the collision.

[9] The defendant further pleaded in the alternative that if this Court finds that the insured driver was negligent, and the said negligence caused and/or contributed to the collision, then in that event the defendant pleaded that the plaintiff was negligent and the negligence of the plaintiff should be taken into account in terms of the provisions of the Apportionment of Damages Act 34 of 1956. The defendant denies that the plaintiff sustained injuries as a result of the collision.

[10] Before the plaintiff's evidence was led, this Court was told that the defendant would not be pursuing the two special pleas and that the defendant had conceded that the plaintiff had complied with the Act and the Regulations. The parties in a pre-trial minute dated 23 February 2024 agreed that the merits would be separated from the quantum in accordance with Rule 33(4) of the Uniform Rules of Court. The matter is accordingly before this Court for the determination of the question of liability only.

The evidence of the plaintiff

[11] The plaintiff led the evidence of two witnesses in support of his case. The plaintiff himself and Mr Reinhardt Du Plessis ('Mr du Plessis'). The plaintiff testified that on 23 October 2021, at about 2:00 am, he was driving a motor vehicle bearing registration letters and numbers H[...]. He was driving on the R34 road from Schweizer-Reneke to Vryburg. There was an incline on the road. Just after he came over the incline, the plaintiff's motor vehicle collided with the trailer of a stationary truck heading in the direction from Schweizer-Reneke to Vryburg.

[12] The plaintiff testified that he swerved to the right and applied the brakes to his motor vehicle to avoid the truck's trailer, but collided with it. The plaintiff described the road on which he was travelling as a double lane in both directions. A double lane heading in the direction towards Vryburg from Schweizer-Reneke, and a double lane heading in the direction towards Schweizer-Reneke from Vryburg. The plaintiff testified that it was dark, visibility was limited, and the road surface was dry. The plaintiff testified that he had no visibility while going over the incline. The plaintiff said there were no streetlights where the collision occurred. The streetlights are on as you are near the town of Vryburg. The plaintiff testified that the speed limit at the collision site was 80 km/h.

[13] The plaintiff was asked by his counsel if there were many other cars travelling on the road whilst he was driving. The plaintiff replied by saying that yes, it is quite a busy road, there was as far as the plaintiff knew when the collision occurred, there was a lot of traffic that had already piled up because of the accident that happened beforehand, that is why the traffic was piling up because of the accident

[14] The plaintiff testified that he noticed the truck's trailer when he was about 10 meters from it. There were no lights, no reflector triangle indicating a vehicle on the road. The truck and its trailer were in the right lane of the double-lane highway heading into Vryburg from Schweizer-Renke. There were no vehicles coming from the opposite direction. The left wheel of the motor vehicle driven by the plaintiff struck the right corner of the trailer of the truck. After the collision, the plaintiff did not speak with the police at the scene. The plaintiff testified that as a result of the collision, he suffered injuries to his face, back and head. Plaintiff testified that he could not see what was happening in the left lane and took a chance to take the right lane to try to avoid the trailer of the truck.

[15] The plaintiff was shown photographs of the Schweizer – Reneke and Vryburg Road ('the road') on which the collision occurred. He confirmed that it was indeed the road on which the collision occurred and testified that it happened just after passing the incline. The plaintiff testified that the motor vehicle he was driving on the morning of 23 October 2021 was a Toyota Land Cruiser single cab ('the Land Cruiser'). The plaintiff testified that if there had been some indication of the stationary truck and trailer, he would have avoided the collision. The plaintiff testified that the lights of his Land Cruiser were on and working.

[16] Under cross-examination, the plaintiff accepted that at the time of the collision, the police had closed both directions of the road because of the earlier motor vehicle accident. The plaintiff testified that there were other vehicles in front of the truck and trailer, which had been stopped by the police. There were emergency vehicles on the scene. He said he saw these vehicles after the collision. He said he was not certain whether the emergency vehicles' lights were on. The plaintiff insisted that if the trailer's lights or hazards were on, he

would have seen it. It was put to the plaintiff that the trailer of the truck that he collided with had reflective tape ('the chevron') at the back. The plaintiff, in reply, said he could not confirm having seen the chevron.

[17] Under cross-examination, the plaintiff testified that, at the incline on top of the hill, as it descends, the road starts to level off about 100 meters down. He told the Court that about 100 meters from where the road started to level, he collided with the truck and trailer. It was put to the plaintiff that he drove his motor vehicle at an excessive speed in a built-up area. The plaintiff denied this and insisted that, at the time of the collision, the speed limit was 80km/h and that he was driving at 70km/h. It was further put to the plaintiff that he failed to have regard for other road users, and that he failed to apply the brakes of his motor vehicle at a dangerous place and to avoid a collision, which he was required to do. He denied this. When challenged with the accident report and informed that the officer who filled in the accident report would testify that the accident was a 'side swipe', the plaintiff insisted that it was a 'rear-end collision'.

[18] Upon re-examination, the plaintiff was referred to the photographs at pages 39 and 40 of Index Bundle 1 – Rule 35(9). The photographs show a single-cab Land Cruiser with damage to the bull bar, bonnet, and roof. The plaintiff confirmed that the photographs are of the Land Cruiser he was driving on 23 October 2021. On the examination of the accident report, this Court observed that the officer who filled in the accident report on the section dealing with 'Vehicle Damage' marked the section reading 'multiple' as it relates to the Land Cruiser.

[19] The plaintiff then called Mr du Plessis. The evidence of Mr du Plessis is that on 23 October 2021, he was called to the scene of a motor vehicle accident between a panel van and a motorcycle on the road ('the motor vehicle accident'). Mr du Plessis was called by his brother. He was involved in a motor vehicle accident. Whilst assisting his brother, he heard a big crash. When he heard the big crash, the police and emergency services were still busy clearing the scene of the motor vehicle accident. Both directions of the road were closed. When he heard the big crash, he was with one of the police officers at the scene of the motor vehicle accident. The police officer told him to take his brother home. About 30 cars were lined up due to the road closure. The queue was about 400 meters long. Mr du Plessis spent about 10 to 15 minutes at the scene of the motor vehicle accident before he was told that he could take his brother home.

[20] Mr du Plessis testified that there are street lights at the scene of the motor vehicle accident, but there are no lights at the scene of the collision. Mr du Plessis returned to the scene of the motor vehicle accident. On his way back, he saw the plaintiff's Land Cruiser, he was worried because the plaintiff is his friend. He was told by a police officer, whose name and further particulars he did not know, that the plaintiff had been taken to the hospital. Mr du Plessis testified that it was very dark. Mr du Plessis also testified that the collision occurred near the incline, just after passing the incline, heading in the direction of Vryburg from the direction of Schweizer-Reneke. Mr du Plessis testified that the distance from the motor vehicle accident site to the collision site could be about 800 meters. He testified that it could take about 10 minutes to walk between the two sites.

[21] Under cross-examination, Mr Du Plessis informed the Court that he and the plaintiff are friends, and they grew up together. No one indicated that there was an accident at the scene of the motor vehicle accident. The emergency vehicles' lights were on. The collision occurred about 400 meters from the 60km/h board. It was put to Mr du Plessis that the defendant's witnesses will testify that the collision occurred much closer to Vryburg and further away from the incline. Mr du Plessis denied this. This was the plaintiff's case.

The evidence of the defendant

[22] The defendant led the evidence of 4 witnesses. Constable Dorah Abueng, Mr Thamani Raphalalani, Sergeant Samuel Brooks, and the insured driver. The insured driver testified that he is employed as a driver. On 23 October 2021, he was the driver of the truck which was involved in the collision. He was alone in the truck. The collision occurred at around 3:00 am. He testified that, after he drove over the incline, or in the words that he used, 'when he came to the edge of the skid', he managed to see that there is an accident on that 'skid hill', he reduced the speed of the truck, he was able to slow down the truck and bring it to a standstill behind the other motor vehicles, which had been stopped by the police because of the motor vehicle accident. As he waited in the queue with the engine of the truck running, he heard a loud crash from the back of his truck. He looked in the truck's right mirror and saw the plaintiff's Land Cruiser. He then realised that the Land Cruiser had collided with the trailer. After the collision, he alighted from the truck and went to look at the damage to the trailer. He saw that the damage was on the right side of the trailer, that the landing legs were damaged on the right, and that the back of the truck was damaged on the right.

[23] He saw that the plaintiff was still in his Land Cruiser. The plaintiff was alone. While he was looking at the plaintiff, he saw the police approaching the collision scene. He could not estimate the distance from the motor vehicle accident scene to the collision scene, but maintained that it was not far. The police took his information, and the plaintiff's, and the plaintiff was assisted by emergency personnel and taken to the hospital by ambulance. The 'breakdown' assisted with the plaintiff's Land Cruiser. The insured driver requested the 'breakdown' to assist him in pulling the truck's wheels out. The insured driver confirmed that it was dark at the time of the collision. He testified that there were about 5 other motor vehicles ahead of the truck, and that their lights were on; some had their hazards on.

[24] The insured driver testified that the truck and trailer lights were on, the hazards were on, and that the trailer had a chevron that reflected light when illuminated. The insured driver testified that the police and emergency vehicles' lights were on, including their emergency lights. He could see the emergency lights of the emergency vehicles and the police vehicles from where he had stopped the truck and trailer. The insured driver testified that the speed limit at the collision scene was 60km/h. The insured driver was shown photographs of the road on which the collision occurred. He denied that the collision occurred closer to the incline, as the plaintiff testified.

[25] Under cross-examination, the insured driver testified that he was driving from Johannesburg to Kuruman and had rested at Delareyville for about 30 minutes. He was asked how long it takes him to drive from Johannesburg to Kuruman. He told the court it would take about 5 hours, depending on traffic and stop-and-go, but if there are no challenges, it would take him 5 hours. He testified that he could not estimate the distance in meters from the collision

scene to the motor vehicle accident scene. He insisted that the two scenes were not far apart from each other.

[26] The insured driver was referred to the statement of Constable Dorah Abueng ('Constable Abueng'), in which she states that she was informed by the crew that another accident had occurred and that they went to the scene of the second accident. The insured driver testified that he was not with Constable Abueng when discussing the collision with the crew. He testified he did not know who told Constable Abueng about the collision. The insured driver was then referred to his own statement. He was asked why the statement was headed 'Statement by Suspect'. The insured driver replied that, under the law, you are regarded as a suspect; the officer who took the statement is the only person who can explain why the statement is headed 'Statement by Suspect'. The insured driver was asked if he had been investigated for reckless and inconsiderate driving. He told the Court that a white person called him about the collision. Another person in a white vehicle asked how the collision occurred and was asked to come to court to give evidence; that is why he is in court on 30 July 2025.

[27] The insured driver testified that he waited about 10 minutes in the queue before the collision. He informed his employer of the motor vehicle accident and that delivery of his load to Kuruman would be delayed. After he reported the delay, he heard the loud crash at the back of the truck. He was referred to the accident report, which was filled in by Officer Samuel Brooks ('Sergeant Brooks'). It read that the collision was a 'side swipe'. The insured driver testified that Sergeant Brooks had made a mistake in the accident report; he said that the plaintiff's motor vehicle collided with the right rear of the trailer. The insured driver was asked when he switched on the truck's and the trailer's

hazards. He said he switched them on after the incline, after he saw the motor vehicle accident, to warn vehicles approaching from the rear that one was ahead and that a motor vehicle accident was ahead.

[28] It was put to the insured driver that the plaintiff testified that the truck and trailer's lights and hazards were off. The insured driver was adamant that the truck and trailer's lights and hazards were on and in working order when he left Johannesburg. He further checked that the truck and trailer's lights and hazards were working in Delareyville. The distance between Delareyville and Vryburg was estimated by the insured driver to be about 90km. The truck was clean when it left Johannesburg, and the insured driver said he doubted that a little dust would affect the chevron's reflective material. He insisted that the truck and trailers' lights and hazards were on at the time of the collision.

[29] It was put to the insured driver that the scene of the collision site was closer to the incline, and not at the site that he had identified, which is closer to the city of Vryburg. It was put to the insured driver that the collision occurred some 400 meters from the incline. The insured driver denied this. When asked why he was so certain about the collision site, the insured driver told this Court that it was not far from the motor vehicle accident site, which is why he was certain of the collision site. He also said there was a concrete sewer cover next to the road, near the collision site. That is why he was certain of the site of the collision. The insured driver pointed out the concrete sewer cover shown in the first photograph on page 281 of Index Bundle 4 – Rule 35(9) documents as the one next to the collision site. The insured driver was asked how certain he was that there were no other concrete sewer covers on the road. He answered that he does not know any others besides the one he mentioned.

[30] The second witness for the defendant was Mr Thomani Silas Raphalalani ('Mr Raphalalani'). Mr Raphalalani is employed by the defendant as a claims investigator. At the time he investigated the matter, he had been employed by the defendant for 4 years. He described his duties as visiting police stations to obtain documents, consulting with witnesses who observed motor vehicle accidents, and engaging other stakeholders.

[31] Mr Raphalalani told the court that the docket of the collision was opened at Vryburg Police Station. He received the docket, which included the A1 statement, the accident report, and the insured driver's statement. He noted that the warning statement of the plaintiff was not in the docket. He considered the documents and wanted to do an inspection in *loco*. He also wanted to consult the police officers who were on the scene on the date of the collision. He went to the road where the collision occurred, as pointed out to him by Constable Abueng, and Sergeant Brooks. With the assistance of Constable Abueng and Sergeant Brooks, they pointed out where the collision occurred, where the plaintiff's Land Cruiser stopped after the collision, and where the insured driver's truck and trailer were positioned thereafter. Mr Raphalalani placed cones of various colours on the road to reconstruct the positions of the truck and trailer, and of the Land Cruiser after the collision. He took photographs of the pointing out, using his cell phone.

[32] He told the court that, when he considered the plaintiff's affidavit alongside the docket entries, he identified several discrepancies. He told the court that after his investigations, he found that the collision occurred in a 60km/h zone, not an 80km/h zone as alleged by the plaintiff. He calculated the distance from the top of the incline to the collision site. He informed the court that, based on his investigations, the plaintiff collided with the insured driver's

truck and trailer approximately 800 meters after the plaintiff drove over the incline. He told the court that at the top of the incline, you are at the highest point of the road, and the rest of the road proceeding into the city of Vryburg is at a lower level. When you are at the top of the incline, you have a clear view of everything that is at the bottom without any obstructions. Mr Raphalalani told the court that, in his opinion, the plaintiff would have seen the emergency vehicles' lights from the top of the incline.

[33] Mr Raphalalane told the court that when he consulted with Sergeant Brooks and Constable Abueng, they told him that on the morning of the collision, there were three emergency vehicles at the scene of the motor vehicle accident, with their lights on. A South African Police Services motor vehicle with its blue lights on, the ambulance with its red lights on, and the third emergency vehicle, the fire brigade, with its red lights on. Mr Raphalalalani told the court that, in his opinion, the plaintiff would have seen the emergency lights of the police, ambulance and fire brigade at the top of the incline because they were at a lower level. He said that, given the time of the collision, the reduced light made the emergency lights more visible than during the day. Mr Raphalalalani went on to tell the court that, in his opinion, the plaintiff had room to slow down and bring his vehicle to a stop without colliding with the truck and trailer, which was about 200 meters from the scene of the motor vehicle accident.

[34] Mr Raphalalalani further told the court that Constable Abueng had told him that, after the collision, she saw the truck's lights were on and that the trailer had a chevron at the back. He concluded that the merits of the collision were not in favour of the plaintiff. He prepared a report for the defendant and recommended that the plaintiff's claim be repudiated.

[35] Under cross-examination, Mr Raphalalani told the court that the inspection in *loco* was held on 10 October 2023. It was pointed out to Mr Raphalalani that Constable Abueng deposed to her statement regarding the collision on 10 October 2023. He was asked if he told Constable Abueng what to include in her statement. He replied that he did not instruct Constable Abueng on what to include in her statement, but he did indicate to her that she should include that the truck and trailer lights were on and that the trailer had a chevron. Mr Raphalalani was asked if he had ever considered that the information received from Constable Abueng and Sergeant Brooks could be mistaken. The site of the collision to the motor vehicle accident was provided by Constable Abueng and Sergeant Brooks. He replied that he relied on the information of Constable Abueng and Sergeant Brooks because they had no reason to mislead him.

[36] It was put to Mr Raphalalani that the plaintiff testified that he did not see the truck and the trailer because its lights were off, and that he only saw it when he was 10 meters away from the trailer. Mr Raphalalani replied that if the plaintiff's Land Cruiser lights were on, he would have seen the chevron at the back of the trailer and would have slowed down and avoided the trailer. Mr Raphalalani conceded that he is not an accident reconstruction expert. It was put to Mr Raphalalani that his conclusions on where the collision occurred, the point of impact between the Land Cruiser and the trailer of the truck, are his own opinions. He agreed but stated that his opinion is based on facts received from witnesses. It was put to Mr Raphalalani that the plaintiff and Mr du Plessis testified that the collision occurred near the incline. He denied the correctness of the plaintiff's and Mr du Plessis's version of where the collision occurred. Mr Raphalalani told the court that it would not make sense for the police in the

sketch plan of the accident to include Factory Way; if the collision occurred far from that road, they would have used the nearest point of reference.

[37] Under re-examination, Mr Raphalalani told the court that the phrase ‘multiple refers’ in the accident report means the motor vehicle is totalled and that damage is everywhere. Mr Raphalalani conceded that there could be mistakes on the accident report.

[38] The defendant then called Sergeant Brooks. His evidence was that he is employed by the South African Police Services, and he holds the rank of Sergeant. He is currently stationed at Vryburg detective services. On 23 October 2021, he was on patrol with Constable Abueng. They received a call from Constables Phele and Mogokotleng for assistance regarding a motor vehicle accident on the road. The accident occurred on the Schweizer–Reneke road at the corner Victoria Avenue or Factory Way. Emergency services, including an ambulance and the fire brigade, were at the scene of the motor vehicle accident. Whilst he was at the scene of the motor vehicle accident, a person approached him and said that a bakkie and a truck had collided. The site of the collision was not very far from the site of the motor vehicle accident. He walked to the collision scene; it took him about a minute. At the scene of the collision, he found a Land Cruiser, the truck and the trailer. He observed that the Land Cruiser on the left had side had collided with the right rear side of the trailer. He was with Constable Abueng at the time. He was informed by a Fire and Emergency employee about the collision.

[39] At the scene of the collision, he found the plaintiff in the Land Cruiser, bleeding from his forehead. The plaintiff was alone in the Land Cruiser. The truck driver was not injured. He returned to the motor vehicle accident scene

and asked the ambulance crew to assist the plaintiff. The ambulance service crew arrived at the collision scene and transported the plaintiff to the hospital. Sergeant Brooks identified the road on which the collision occurred in the same way that the plaintiff did. It is a double road leading into the city of Vryburg from Schweizer-Reneke, and a double road leading out of the city of Vryburg to Schweizer-Reneke. He confirmed that he works on that road a lot. He is familiar with the road because his offices are situated at the corner of Victoria Avenue.

[40] The truck and trailer that the plaintiff collided with were among the vehicles stopped by the police following the motor vehicle accident. He confirmed that the speed limit at the site where the collision occurred is 60km/h. In addition, he confirmed that there are no street lights at the collision site. He confirmed that a docket had been opened, as is standard procedure when a person is injured in a motor vehicle collision. He completed the accident report. When faced with what Mr du Plessis told the court, that it would take 10 minutes to walk from the site of the motor vehicle accident to the site of the collision site, he said he did not agree with Mr du Plessis. When told that the plaintiff told the court the speed limit at the collision site is 80km/h, he insisted it is 60km/h. Sergeant Brooks was shown the photographs that were taken by Mr Raphalalani. He confirmed that he was present when they were taken and that he was with Constable Abueng and assisted with the reconstruction of the collision scene, using cones, which was conducted on the road on 10 October 2023 by Mr Raphalalani.

[41] Sergeant Brooks confirmed that there is an incline on the road, but that it is a few hundred meters from the site of the motor vehicle accident. He confirmed that from the incline, one can have a clear view of the motor vehicle

accident site. Sergeant Brooks confirmed that the lights of the truck were on when he arrived at the scene of the collision. The insured driver showed him the damage to the truck and trailer. The truck struggled to move due to damage to the tyre. Sergeant Brooks confirmed that when he filled the accident report, he indicated that it was a ‘side swipe’ and the damage to the Land Cruiser was multiple damages. Sergeant Brooks denied that the collision occurred closer to the incline and insisted that it occurred near the site of the motor vehicle accident.

[42] Under cross-examination, Sergeant Brooks said that it is standard practice to make a statement when a person is injured as a result of a motor vehicle collision. He made a statement on 23 October 2021. He testified that he questioned the insured driver to obtain the insured driver's account of how the collision occurred. He could not take the statement of the plaintiff because he was bleeding profusely at the scene of the collision. At the hospital, he was told that he could not see the plaintiff. He confirmed that Constable Abueng made a statement for the investigator of the defendant, Mr Raphalalani.

[43] Sergeant Brooks testified that he marked the collision as a ‘side swipe’ because the damage to the truck and trailer was to the right side, the truck was stationary, and the Land Cruiser was overtaking. When confronted with the version of the plaintiff and that of the insured driver that it was not a ‘side swipe’ collision but rather a ‘rear-end collision’, he said that he did not have a comment. Sergeant Brooks confirmed that he did not measure the distance from the site of the collision to the site of the motor vehicle accident. He estimated the distance to be between 100 and 150 meters. He confirmed that he heard the collision but did not immediately go to the collision scene because he and his colleagues were still assisting at the motor vehicle accident scene. He said he

was told about the collision after 2 minutes of hearing the sound. He said it took about a minute to walk to the collision site. He confirmed that the truck's front lights were on, but could not recall whether the trailer's lights were on or whether the trailer had a chevron.

[44] Sergeant Brooks was shown photos of the scene reconstruction from Index Bundle 4 – Rule 35(9), page 279. He confirmed that that is where the collision occurred. He confirmed that the cones are placed 100 meters from Victoria Avenue. He confirmed that on the date of the reconstruction, Mr Raphalalani measured the distance between the collision site and the motor vehicle accident site. When asked why he was certain that the site identified to Mr Raphalalani was the site where the collision occurred, he said he had lived his entire life in Vryburg and was familiar with the area where the collision and the motor vehicle accident occurred. It was put to Sergeant Brooks that the plaintiff and Mr du Plessis testified that the collision occurred closer to the further tree depicted on page 279 of Index Bundle 4 – Rule 35(9). Sergeant Brooks told the court that the tree is closer to the incline and that is not where the collision occurred.

[45] Sergeant Brooks was referred to his statement he made on 23 October 2021. It was pointed out that in paragraph 6 of the statement, he stated that he did not give anyone permission to drive recklessly or negligently. He requests a further police investigation into the matter. He was asked whether he had any input on the further investigation and replied that he did not. He said because an injury resulted from the collision, both drivers are considered suspects.

[46] The defendant then called Constable Abueng. Constable Abueng told the court that she is a member of the South African Police Service. On 23 October

2021, she was with Sergeant Brooks. They were assisting on the road with a motor vehicle accident when Sergeant Brooks told her of the collision. Sergeant Brooks told her that he had been told about the collision by another person. She walked to the site of the collision with Sergeant Brooks. On arrival, she found the truck with its lights and hazards on. The Land Cruiser was on the side of oncoming traffic. The truck driver told her the Land Cruiser had crashed into the truck and trailer. The truck was stationary at the time of the collision. She observed that the plaintiff was alone in the Land Cruiser. The truck driver showed her the damage to the truck and trailer. Constable Abueng told the court she observed a chevron at the back of the trailer. She said she would describe the collision as a 'side swipe'.

[47] Constable Abueng told the court that she was not in a position to state the distance between the motor vehicle accident site and the collision site, but that it is within walking distance. She estimated it to be within 1 minute of each other. Constable Abueng told the court that this was not the first time she had been on that road; she was very familiar with it. She confirmed that a police vehicle and an ambulance were at the scene of the motor vehicle accident. She confirmed that you could see the emergency lights of the police vehicle and ambulance from far off. She confirmed that a docket was opened for the collision. Sergeant Brooks made a statement regarding the collision. She did not make a statement. She made a statement after being asked by Mr Raphalalani. Constable Abueng confirmed that she and Sergeant Brooks assisted Mr Raphalalani in recreating the collision scene.

[48] Constable Abueng was shown the photos taken by Mr Raphalalani of the recreation of the collision scene at page 7 of the defendant's Index – Merits. She confirmed that the collision occurred at that location. On the second picture on

page 7 of the defendant's Index – Merits, she confirmed that the two people in the picture are herself and Sergeant Brooks. Constable Abueng was informed that the plaintiff testified that the collision occurred near the incline. She denied this and insisted that it occurred near the site of the motor vehicle accident, which is far from the incline.

[49] Under cross-examination. It was put to Constable Abueng that she was influenced to depose to the statement she made on 10 October 2023. She denied this and insisted that Mr Raphalalani had requested that she make a statement regarding her observation on 23 October 2021. She denied having been told what to include in her statement. Constable Abueng was asked, given that a period of over two years had elapsed since the collision and since she wrote her statement, could she have forgotten some of the facts regarding the collision. She replied that she had been asked to make a short statement and had not forgotten. She confirmed that the front and the rear lights of the truck and trailer were on, including the right back lights.

[50] It was put to Constable Abueng that the point of impact with the trailer was the right back. Constable Abueng maintained that the point of impact was the corner of the right rear of the trailer, and the Land Cruiser then bumped the right side of the trailer and the truck. She was asked whether the truck's back lights were on the corners or sides of the truck. She replied by saying she could not recall. Constable Abueng was asked about the photographs at Index Bundle 4 – Rule 35(9). She pointed out the site of the collision in the photographs. Constable Abueng insisted that she was sure about the site because of the site of the motor vehicle accident and the buildings in the photographs. Constable Abueng was asked about the tree that the plaintiff and Mr du Plessis had indicated that the collision occurred near it. She denied this, including what was

put to her that the collision occurred before the 60km/h sign. The defendant then closed its case.

Legal Principles

[51] It is trite that the onus rests on the plaintiff to prove the defendant's negligence, which caused the damages suffered, on a balance of probabilities. It is further trite that every driver bears a duty of care towards other motorists to keep a proper lookout and to take reasonable steps to avoid a collision. In *Kruger v Coetzee*⁴ Holmes JA, writing for the court, said that the issue of negligence involves a twofold inquiry. The first question is whether the harm was reasonably foreseeable. The second question is whether a *diligens paterfamilias* would take reasonable steps to guard against such an occurrence, and whether the defendant failed to do so. The second inquiry is often referred to as 'duty'.

[52] On the issue of duty, it is a further trite principle that a driver of a motor vehicle has a duty to remain alert, to continuously scan the road ahead for obstructions or potential obstructions. In *Nogude v Union and South-West Africa Insurance Co Ltd*⁵(*Nogude*), Jansen JA writing for the court said the following:

'A proper look-out entails a continuous scanning of the road ahead, from side to side, for obstructions or potential obstructions (sometimes called "a general look-out": cf. *Rondalia Assurance Corporation of SA Ltd. v Page and Others*, 1975 (1) SA 708 (AD) at pp. 718H - 719B). It means -

⁴ 1966 (2) SA 428 (A) at 430E – F

⁵ 1975(3) SA 685 (A)

"more than looking straight ahead - it includes an awareness of what is happening in one's immediate vicinity. He (the driver) should have a view of the whole road from side to side and in the case of a road passing through a built-up area, of the pavements on the side of the road as well".⁶

[53] Equally on the issue of duty, in *Road Accident Fund v Grobler*⁷ Hancke AJA writing for the majority said that when a person is confronted with a sudden emergency not of his own doing, it is, wrong to examine meticulously the options taken by him to avoid the accident, in the light of after-acquired knowledge, and to hold that because he took the wrong option, he was negligent. The test is whether the conduct of the respondent fell short of what a reasonable person would have done in the same circumstances.

[54] In *Manderson v Century Insurance Co Ltd*⁸ (*Manderson*) Van den Heever JA, writing for the court, said the following:

‘To my mind a man who travels in the dark at a speed which, because of the condition of the road or for some other reason, does not enable him to pull up within the range of his vision, is prima facie guilty of negligence. In doing so he accepts risks of injury to others which he is not entitled to take, for he is prepared to drive a potentially dangerous thing over a part of the road which he has not surveyed with his eyes - in other words blindly.’

[55] In *Mthethwa v Shield Insurance*.⁹ The court held that the question of whether a driver of a motor vehicle who collides with an unlit, slow-moving, or stationary object in the dark is, in fact, negligent is closely related to whether the driver could have seen the object in time. If the object was not timeously visible, and the driver of the vehicle who collides with the object exercised all

⁶ *Nogude* at page 688A

⁷ (96/06) [2007] ZASCA 78; [2007] SCA 78 (RSA) ; 2007 (6) SA 230 (SCA) (31 May 2007) para 12

⁸ 1951 (1) SA 533 (A)

⁹ 1980 (2) SA 954 (A)

reasonable steps, i.e., had the lights of his vehicle on, and the driver of the motor vehicle had no reason to anticipate the presence of an unlit, slow-moving, or stationary object on the road at that time, the driver will not be negligent.

[56] Where there are two irreconcilable versions before the court, the test to be applied in resolving factual disputes has been set out in *Stellenbosch Farmers' Winery Group Ltd. and Another v Martell & Cie SA and Others*¹⁰ at paragraph 5 as follows.

‘The technique generally employed by courts in resolving factual disputes.....may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court’s finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness’s candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness’s reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party’s version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court’s credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.’

¹⁰ (427/01) [2002] ZASCA 98; 2003 (1) SA 11 (SCA) (6 September 2002)

Analysis

[57] It is submitted in the plaintiff's written submissions that the defendant did not plead that the plaintiff failed to keep a proper lookout and, as a result, contributed to or caused the collision. It was further submitted in the written submissions of the plaintiff that, notwithstanding this omission, the case of the defendant implicitly relies on this very allegation. The defendant relies on the insured vehicle's lights and hazards being on, suggesting that the plaintiff failed to maintain a proper lookout. It is submitted that the defendant cannot rely on unpleaded allegations to advance its case and that the defendant should be confined to the grounds of negligence expressly set out in its plea, and no reliance can be placed on any argument or evidence outside those pleaded allegations.

[58] It would be apt to quote the plea of the defendant at paragraphs 5.2, 5.2.1, 5.2.2, 5.2.3, 5.2.4, 5.2.5 and 5.2.6. The plea of the defendant reads as follows:

'5.2 In the event the above Honourable Court finding that the insured driver was negligent, which is still denied, then in that event the Defendant denies that the said negligence caused and/or contributed to the collision aforesaid and the Defendant specifically avers that the Plaintiff contributed to the negligence in one or more or all of the following aspects: -

5.2.1 He failed to have due regard to the road sign and rules of the road.

5.2.2 He drove his motor vehicle at an excessive speed in a build-up area.

- 5.2.3 He failed to have due regard to other road users.
- 5.2.4 He failed to apply the brakes of his motor vehicle at a dangerous place in the circumstances.
- 5.2.5 He failed to keep his motor vehicle under proper control and care.
- 5.2.6 He failed to avoid the occurrence of the collision.’

[59] I have considered paragraph 5.2.3 of the defendant’s plea in particular. The word ‘due’, in the *Dictionary of Legal Words and Phrases*¹¹, is defined as that which is owing and has matured. The words ‘have regard to’ in their ordinary meaning simply mean ‘bear in mind’ or ‘do not overlook’.¹² The words ‘due regard’ simply mean giving appropriate attention, care, or consideration to something, and taking factors, rules, or people’s rights into account when making a decision or taking action. As stated above, every driver bears a duty of care towards other motorists to keep a proper lookout and to take reasonable steps to avoid a collision. When taking reasonable steps to avoid a collision, the driver is expected to keep a proper lookout. The defendant may not have pleaded that the plaintiff failed to keep a proper lookout, but from the reading of paragraphs 5.2, 5.2.1, 5.2.2, 5.2.3, 5.2.4, 5.2.5, and 5.2.6, the allegations pleaded therein, either in part or in total, are synonymous with the words ‘failure to keep a proper look out’.

[60] I am accordingly not persuaded that the case of the defendant should be confined as submitted in the written submissions of the plaintiff. In my view, the defendant has pleaded that the plaintiff failed to keep a proper lookout and, as a result, contributed to or caused the collision.

¹¹ Volume 1 A-D, at page 441

¹² *Joffin and Another v Commissioner of Child Welfare, Springs, and Another* - 1964 (2) SA 506 (T) at page 508F

[61] The location of the collision and whether the truck and trailer's lights and hazards were on before the collision are hotly disputed issues between the plaintiff, the plaintiff's witness, the insured driver, and the defendant's factual witnesses. The plaintiff and his witness, Mr du Plessis, contend that the collision occurred near the incline, whereas the insured driver and the factual witnesses for the defendant contend that the collision occurred further away from the incline. The plaintiff contends that the lights and the hazards of the truck and trailer were not on, whereas the insured driver contends that the lights and hazards of the truck and trailer were on before the collision. Sergeant Brooks contends that the truck and trailer's lights were on, and Constable Abueng contends that the truck and trailer's lights and hazards were on; they did not see the truck and trailer before the collision.

[62] The plaintiff appeared to me to be comfortable in the witness box; he recollected the events of the morning in question, the best he could. He was, in my view, honest in conceding what he did and did not see on the dark morning of the collision. It is in my view obvious that the plaintiff had a bias for this Court to accept his version and reject the version of the defendant. If this Court finds that the truck and trailer lights and hazards were off, it would mean the insured driver was negligent, and that the collision occurred as a result of his negligence. If this Court finds that the collision occurred near the incline, it would equally suit the case of the plaintiff as compared to if this Court finding that the collision occurred away from the incline and near the site of the motor vehicle accident, because the question would inevitably be of the plaintiff to explain why he did not see the lights of the emergency vehicles at the site of the motor vehicle accident and the lights of the motor vehicles which were lined up in front of the truck.

[63] The plaintiff testified that, at the top of the hill, he drove for about 100 meters before colliding with the trailer. I understood the plaintiff's evidence to be that, at the top of the hill, the road descends for about 100 meters before levelling, and that is where he alleges that he collided with the trailer. The plaintiff was adamant that, as he was coming over the incline, he did not see the lights of the emergency vehicles or the lights of the motor vehicles that were lined up in front of the truck. This does not mean the lights of the vehicles in front of the truck and trailer were not on, or that the emergency vehicles' lights were not on. Mr du Plessis, the witness for the plaintiff, confirmed that the lights of the emergency vehicles and the vehicles lined up in front of the truck were on. This was later confirmed by Sergeant Brooks and Constable Abueng. The insured driver, who testified that, as he was descending the incline, he saw the emergency vehicles' lights, confirms that the emergency vehicles' lights were on at the scene of the motor vehicle accident. Considering the timing of the motor vehicle accident and the collision, the probabilities lean in favour of the emergency vehicles' lights being on.

[64] The plaintiff's version is that he was driving with his vehicle's lights on and, as he was driving up the incline, had no visibility while going over it. In my view, a reasonable driver, lacking visibility while going over an incline and unaware of what lay on the other side, would have kept his motor vehicle's high beam lights on and would not have driven at a high speed. No evidence was led by the plaintiff given the adverse lighting conditions on the day of the collision, whether he was driving on a dark road with the Land Cruiser's high beams on or with the lights dimmed. The insured driver and Constable Abueng testified that the truck's trailer had a chevron. When asked about the chevron, the plaintiff said he did not see it. A reflective tape chevron reflects light when illuminated.

It is improbable that the plaintiff could not have seen the chevron if he was driving with the lights of the Land Cruiser on, unless the plaintiff was distracted or his view was obstructed. The plaintiff did not present evidence that his view of the road ahead was obstructed, thereby preventing him from seeing the chevron. From the plaintiff's evidence, it remains a mystery why he did not see the chevron on the back of the truck's trailer.

[65] In my view, the plaintiff, at the top of the hill in his Land Cruiser descending the incline, would have had an open, and unobstructed view of the road ahead, including the lower level where the motor vehicle accident occurred. The plaintiff should have seen the lights of the emergency vehicles as he was descending the incline. There was no explanation as to what could have obstructed the plaintiff's view of the lower level of the road when the plaintiff's Land Cruiser was at the top of the hill.

[66] Mr du Plessis appeared to me to be comfortable in the witness box. He did not see the collision or the truck and trailer before the collision. He gave no evidence as to the condition of the truck and trailer after the collision. When comparing his evidence with that of the insured driver, Sergeant Brooks and Constable Abueng, it appears he exaggerated the number of vehicles lined up on the day of the collision. He was adamant that the collision occurred near the incline. When his evidence is compared with that of Sergeant Brooks and Constable Abueng regarding the distance between the motor vehicle accident site and the collision site, it appears he exaggerated the distance when he said it would take 10 minutes to walk between the two sites. When this Court considers that when the collision occurred, Mr du Plessis said he heard the big crash, it is probable that the site of the motor vehicle accident and the site of the collision were not far from each other. My belief on this issue is fortified by the

evidence of Sergeant Brooks and Constable Abueng, whose evidence is uncontested in stating that it took them 1 minute to walk from the motor vehicle accident scene to the collision scene. Mr du Plessis is the plaintiff's childhood friend, and in my view, there is a risk of bias in favour of the plaintiff's case.

[67] The insured driver appeared to this Court to be comfortable in the witness box. He did not exaggerate his evidence, withstood a lengthy cross-examination, and impressed this Court. The insured driver, in my view, had nothing to gain from misleading the court as to the status of the lights and hazards of the truck and trailer on the day of the collision. It is not the insured driver against whom action had been instituted. He maintained throughout that the truck and trailer lights and hazards were on before and after the collision. He had a proper opportunity to observe where the collision occurred and even referred to the concrete sewer cover as a point of reference. His evidence that he could see the motor vehicle accident site and the lights of the emergency vehicles while descending the incline is probable; the point at which the incline descends is higher on the road than the point where the motor vehicle accident occurred. He would have had a clear and unobstructed view of the road ahead and the site of the motor vehicle accident. His evidence that he switched on his hazards to warn motorists following the truck and trailer of the accident ahead is probable.

[68] Sergeant Brooks was comfortable in the witness box. His evidence is limited to what he observed after the collision. Stripped of the controversies highlighted by counsel for the plaintiff in his written submissions, Sergeant Brooks, in his affidavit, did not make any reference to any lights, hazard indicators, or reflective markings being visible on the insured vehicle. In my view, Sergeant Brooks would gain nothing from misleading this Court that the

lights of the truck were on when he arrived at the scene of the collision and the site where the collision occurred.

[69] Constable Abueng was the last factual witness for the defendant. Equally, her evidence was limited to what she observed after the collision. Constable Abueng seemed a bit uncomfortable in the witness box, especially under cross-examination, but she impressed me as a witness. She was honest with this Court in admitting that she had discussed the events of the collision with Sergeant Brooks before she made her statement as to the events of the day of the collision and that Sergeant Brooks had assisted in refreshing her memory. Constable Abueng would gain nothing from misleading the court about the status of the truck and trailer's lights and hazards on the morning of the collision, that the trailer had a chevron, and the location of the collision site. Her evidence is that the truck and trailer lights and hazards were on, both in the front and the back, and that the trailer had a chevron.

[70] Counsel for the plaintiff submitted in his written submissions that the evidence of Constable Abueng stands in direct contradiction to the evidence of Mr Raphalalani as Mr Raphalalani had testified that he had informed Constable Abueng of the information he required to be included in her statement, but she had insisted that Mr Raphalalani had not dictated what should be contained in her statement. In my view, counsel for the plaintiff is conflating issues. The evidence of Mr Raphalalani was that Constable Abueng told him what she observed on the truck and trailer at the scene of the collision. I did not understand Mr Raphalalani's evidence to be that he fabricated information and told Constable Abueng to say that she had seen the lights, hazards and chevron on the truck and trailer on the day of the collision. I understood his evidence to be that he told Constable Abueng to include the information that she had seen

the lights and hazards of the truck and trailer were on when she examined the front and rear of the truck and trailer. This was information Constable Abueng gave to Mr Raphalalani and not the other way around.

[71] I have further considered the 'Warning Statement' of the insured driver, which was made on 23 October 2021, against the statement of Constable Abueng, which was made on 10 October 2023, 2 years after the collision, and the statement of Sergeant Brooks, which was made on 23 October 2021, the day of the collision. I noted that the insured driver and Sergeant Brooks made no mention of the chevron in their respective statements; it was first mentioned in Constable Abueng's statement. If, as counsel for the plaintiff contends, the statement of Constable Abueng is based on what Mr Raphalalani and Sergeant Brook told her, and her statement and evidence are not reliable. Where did the information about the chevron come from? I am accordingly satisfied that the assistance of Sergeant Brooks in refreshing the memory of Constable Abueng about the events of the date of the collision did not result in the contents of the statement of Constable Abueng and her evidence being unreliable. The contention that her evidence in this Court should be rejected in its entirety, as sought by counsel for the plaintiff, is without merit, and I decline the invitation to reject the evidence of Constable Abueng.

[73] Counsel for the plaintiff submitted in his written submissions that Sergeant Brooks and Constable Abueng did not leave the motor vehicle accident scene immediately upon hearing the crash; they left after 2 minutes, and it took them 1 minute to reach the collision site. It is contended that this period afforded sufficient time for the insured driver to have switched on the truck's lights after the collision. There is no merit in this submission; it is speculative at best and not supported by the facts. The plaintiff said nothing

about the truck's lights after the collision. He said he saw the lights of the other vehicles that they were on and the emergency vehicles. But surprisingly did not see that the red lights of the ambulance and fire brigade were on and that the blue lights of the police vehicles were on. It is not for this Court to speculate on why the plaintiff was not able to see that the emergency lights of the emergency vehicles were on.

[74] Having considered the version of the plaintiff and his witness, and the version of the insured driver and the witnesses of the defendant, the probabilities lean in favour of the insured driver having stopped the truck and trailer with the lights on, and the hazards of the truck and trailer on. The plaintiff, by his own words, did not see the chevron on the truck's trailer. The probabilities are in favour of the plaintiff not having seen the lights and hazards of the truck and trailer. I have arrived at this conclusion because he not only did not see the chevron on the back of the trailer, but also did not see the emergency lights of the emergency vehicles, the lights of the motor vehicles that were lined up in front of the truck when the Land Cruiser was at the top of the incline and descending.

[75] The probabilities are in favour of the defendant that the collision occurred near the site of the motor vehicle accident. This is because it took Sergeant Brooks and Constable Abueng 1 minute to walk from the motor vehicle accident site to the collision site. This suggests the two sites were close to each other. According to Mr Raphalalani's measurements from the incline to the site of the motor vehicle accident, it is 1 kilometre. This issue was not vigorously challenged on cross-examination. Mr Raphalalani estimated the distance from the site of the motor vehicle accident to the site of the collision to be 200 metres. It is not in dispute that the motor vehicle accident occurred on the

Schweizer-Reneke road at the corner of Victoria Avenue or Factory Way Street. I have further considered that Mr Raphalalani's calculations are based on the pointing out by Sergeant Brooks and Constable Abueng. I agree with what Mr Raphalalani said, that he had no reason to doubt the information from Sergeant Brooks and Constable Abueng on the site of the motor vehicle accident and the site of the collision.

[76] Counsel for the plaintiff, in his written submissions, referred this Court to paragraphs 34, its subparagraphs, and paragraphs 35 to 36 and 73 to 75 of the unreported decision of Gutta J in *Sebate v Road Accident Fund*¹³ (*Sebate*), and the decisions referred to therein by the Honourable Judge, as she then was. I am of the view that the facts of this case are distinguishable from the cases referred to in *Sebate*. The decisions refer to unlit obstructions at night. In the case before this Court, the chevron, the truck's lights and hazards, the lights of the motor vehicles lined up in front of the truck and the presence of emergency vehicles with their emergency lights down the incline at the scene of the motor vehicle accident, would have provided a source of illumination for any driver coming over the incline. In the circumstances, I can hardly describe the insured driver's truck and trailer as an inconspicuous obstruction in the dark.

[77] The plaintiff's evidence is that he was driving at 70km/h before the collision. When the evidence of the insured driver is considered against that of the plaintiff, as it relates to the damage to the truck and the trailer and the damage to the Land Cruiser, common sense suggests that the Land Cruiser must have been travelling at a considerable speed given the damage to the trailer and the truck was on the right back side of the trailer, the landing legs were damaged on the right, and that the back of the truck was damaged on the right.

¹³ Northwest High Court, Mafikeng case no 62/2009 delivered on 8 December 2011

[78] Having considered the facts above, I find that the plaintiff ought to have reasonably foreseen that in the event of an emergency such as he found himself in, he would not be able to bring the Land Cruiser to a standstill or manoeuvre the Land Cruiser into a safe and swift swerve so as to avoid harming other road users. He ought to have reduced the speed of the Land Cruiser, given that he had no visibility while going over the incline and did not know what lay on the other side of the incline. He ought to have reduced his speed, given the warning signs and the lights of the emergency vehicles I have referred to above. I am satisfied that the insured driver took the necessary steps that a reasonable driver ought to have taken in the circumstances. Accordingly, I have concluded that had the plaintiff kept a proper lookout, he would have seen the trailer and the truck ahead and avoided the collision. It follows axiomatically that the plaintiff's claim must fail.

Costs

[79] It is a trite principle in our jurisprudence that costs follow the cause, and I have not found any reason to deviate from this principle. The purpose of an award of costs is to indemnify a successful party who has incurred expenses in instituting or defending an action.¹⁴ In considering the appropriate scale of costs, I have taken into account that the trial in this matter was lengthy but not complex. It was of importance to the defendant.

Order

[80] Resultantly, the following order is made.

¹⁴*Texas Co (SA) Ltd v Cape Town Municipality* 1926 AD 467 at 488

1. Plaintiffs' claim is dismissed with costs on a party and party scale, scale 'B'.

T MASIKE

**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG**

APPEARANCES

For the applicants:

Adv J J Marais

Instructed by:

Honey Attorneys

c/o Labuschagne Attorneys

For the first respondents:

Mr M D Mohale

Instructed by:

The State Attorney

Mahikeng