

SOUTH AFRICA / JUDGMENT

B and B Eiendomme (Edms) Bpk v Find A Load (2335/2016) [2016] ZAFSHC 91 (12 May 2016) [2016] ZAFSHC 91

COURT

Free State High Court, Bloemfontein

BEFORE

Nicholson AJ

CASE / FILE NUMBER

2335/2016

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IN

THE HIGH COURT OF SOUTH AFRICA,
FREE

STATE DIVISION, BLOEMFONTEIN

Case

No 2535/2016

In

the matter between:

B
& B EIENDOMME (EDMS)
BPK
Plaintiff
and
FIND-A-LOAD
Defendant

CORAM:

NICHOLSON AJ
HEARD

ON:

19 & 20 APRIL 2016
DELIVERED

ON:12 MAY 2016

JUDGMENT

BY: NICHOLSON AJ

Representation of the parties.

[1] Mr. van Aswegen appeared for the plaintiff and Mr. Steenkamp appeared for the defendant.

Introduction

[2] This matter flows from a motor vehicle accident that took place between a vehicle owned by the plaintiff,

a BMW 650 Sport, registration number [6.....] and a truck and two trailers (the Link), registration [F.....] owned by the defendant. The accident occurred between 9 and 10 a.m. on the morning of 17 December 2014 at or near the

intersection of Nelson Mandela Drive and Parfitt Avenue in Bloemfontein.

[3] It is alleged that the plaintiff suffered damage as a consequence of the collision and the defendant has lodged a counterclaim for its alleged damage.

[4] The parties to this matter agreed to separate the merits and quantum in this matter and then further agreed to approach this court only for a ruling on the issue of negligence. The matters of locus standi and quantum to stand over for later determination. It thus fell to this court to assess negligence only.

The

facts

[5] On the morning of 17 December 2014, the plaintiff's vehicle, BMW registration number [6.....], was being driven on Nelson Mandela Drive, Bloemfontein, in the direction of Parfitt Avenue by one Mr. C A Troskie, a 78 year old resident of Bloemfontein. On the same date, the defendant's vehicle, a truck with two trailers (the Link), registration [F.....], was being driven on the same road and in the same direction as the plaintiff's vehicle, by Mr. N E Ndamane, an adult male employee of the defendant and resident of Bloemfontein.

[6] It is common cause that it was the intention of both drivers to turn left onto Parfitt Avenue using the slipway to Parfitt Avenue located immediately before the traffic lights at the intersection of Nelson Mandela Drive and Parfitt Avenue. The traffic was light, the road was dry, in good condition and visibility was good.

- [7] It is also common cause that Nelson Mandela Drive has a number of lanes travelling in each direction approaching the intersection and that the two lanes to the extreme left are demarcated with a broken white line until a point close to the entrance to the slipway, at this point, the lane markings become solid white barrier lines and the extreme left-hand lane becomes a left turn only lane and markings on the road in the lane to its right indicate that traffic may proceed straight only. (See photos 1 & 8 of plaintiff's trial bundle.) The defendant's vehicle was in the second lane from the left as it approached the intersection. It is furthermore, common cause that it is necessary for a vehicle of the length of the Link (22m comprising of cab/horse 4m, first trailer 6m and second trailer 12 m) to use two lanes when turning, so as to avoid possible damage to property or injury to person by the trailer(s) running up onto the sidewalk/pavement in the course of the turn.
- [8] The parties agree that a collision took place between the plaintiff's and defendant's vehicles when the Link turned left to the slipway, crossing the extreme left-hand lane. The turn was executed at the start or just beyond the start of the solid white barrier line dividing the lanes. (See Exhibits B, D & E.) The plaintiff's vehicle sustained damage to its right side as a consequence of the collision. (Photos 2, 3, 4 & 7 of plaintiff's trial bundle.)
- [9] The parties, however, dispute the position of the plaintiff's vehicle prior to the collision, the relative positions of the vehicles at the time the collision occurred, the exact circumstances that gave rise to the collision and, most importantly, who was at fault in causing the collision. The parties are also in dispute regarding where and to what extent, if any, the Link was damaged as a consequence of the collision. No expert evidence was led by counsel for either party.

The Evidence

- [10] Counsel for the plaintiff led two witnesses. The first was the driver of plaintiff's vehicle on the day in question, one Mr. Troskie. It was established that Mr. Troskie is an elderly gentleman, resident in Bloemfontein and in possession of a valid driver's license. It was further established that Mr. Troskie is an experienced driver both in the South African and international context and that he has lived and driven in Bloemfontein for some considerable time, being familiar with the road and traffic conditions in the city and, more especially, in the area in which the accident took place. In addition, Mr. Troskie was shown to have driven as a racing car driver and as a stunt driver in the past. This demonstrated that he is a skilled, experienced and competent driver. Defense was quick to point out on cross examination, that this history may expose a somewhat fearless attitude to driving, a perception that the witness was quick to dismiss.

- [11] It was Mr. Troskie's evidence that the accident was caused by the fault/ negligence of the defendant's driver who turned the Link left across the extreme left-hand lane of Nelson Mandela Drive without giving a clear or timeous indication of his intention to turn, crossing a solid white barrier line without keeping a proper lookout for traffic on his left and that he failed to take steps to avoid an accident in circumstances where the exercise of reasonable or proper care would have permitted him to do so.
- [12] Mr. Troskie further indicated that he had been aware of the Link travelling alongside him whilst he was in the extreme left-hand lane as he approached the slipway from Mandela Drive into Parfitt Avenue but, that he was not concentrating on that vehicle but rather on the lane ahead of him, which was empty of traffic. It was his testimony that the vehicle that he was driving was alongside the front of the first trailer of the Link as the vehicles approached the slipway.
- [13] In Mr. Troskie's opinion, the Link was moving very slowly, more slowly than his own vehicle was travelling. He estimated his speed in approaching the slipway was between 30 and 40 kilometers per hour and that of the Link was approximately 15 to 20 kilometers per hour.
- [14] It was Mr. Troskie's evidence that the truck moved left without warning and that the indicator lights on the Link were not activated until the Link was already turning. It is his contention that the plaintiff's vehicle was struck on the right rear from behind by the first trailer of the link which then dragged the car some distance. He testified that his immediate response was to brake but then he realized that if he continued to slow down or stop, the car would end up beneath the Link's trailers and he released the brake. He testified that he was compelled to steer the car onto the pavement to avoid going under the trailer and that, as he was using both hands to control the car, he had to rely on his passenger to sound the hooter to alert the truck driver to the fact that his car was being dragged along by the Link. Mr. Troskie alleged that he could not have avoided the accident by reducing his speed, increasing his speed or by stopping. The cab/horse of the Link was in front of him and the rest of the second trailer was still taking the turn behind.
- [15] The Plaintiff's second witness, Ms. Troskie, was the wife of the first witness. She is an adult female. The witness testified that she had been a passenger in the front left seat of the plaintiff's vehicle at the time of the collision on 17 December 2014. Ms. Troskie confirmed when and where the collision took place. She also confirmed that the plaintiff's vehicle was in the extreme left-hand lane of Nelson Mandela Drive, travelling towards the intersection with Parfitt Avenue immediately before the collision took place. She further confirmed that the Link was travelling in the same direction and in the lane immediately to the right of plaintiff's vehicle immediately before the collision occurred. She indicated that she became aware that the vehicles had collided when she heard the sound of the rear right window of the plaintiff's vehicle breaking. She also confirmed that the driver of the vehicle in which she was travelling did not sound the hooter before the collision but that, as the plaintiff's vehicle was in danger of going under the trailer of the Link, and the driver of the plaintiff's vehicle was focused on keeping the vehicle from being dragged under the Link, she pressed

the hooter.

- [16] Ms. Troskie testified that she was under the impression that it was the first trailer of the Link that had struck plaintiff's vehicle. She admitted however, that she could add nothing further to the testimony as she was not paying attention at the time and was not generally very observant.
- [17] Cross examination of the Plaintiff's witnesses did not cause them to deviate meaningfully from their evidence in chief.
- [18] Three witnesses were led for the defense. The first of these was Mr. Ndamane, the driver of defendant's vehicle. Mr. Ndamane is an adult male. He too is an experienced driver with a valid driver's license, who is familiar with the traffic patterns in and around Bloemfontein. Mr. Ndamane indicated that the route he was travelling on the date the collision took place was a regular route that he had driven on numerous previous occasions.
- [19] Mr. Ndamane testified that immediately before the collision with the plaintiff's vehicle he had been travelling in the lane, second from the left, approaching the intersection of Nelson Mandela Drive and Parfitt Avenue. He indicated that it was necessary for him to approach the intersection in this lane, despite his intention to turn left, because the length of his vehicle (22m) required a wide turn in order not to endanger other road users, property or pedestrians on the sidewalk.
- [20] It was Mr. Ndamane's testimony that he indicated his intention to turn left well in advance of the intersection and that he carefully checked his mirrors for traffic approaching from behind or traffic alongside the Link before commencing the maneuver. It was his testimony that the cab and the first trailer were already in the slipway to Parfitt Avenue when he became aware of the collision when the Link felt as though it were driving over the pavement. He testified that his passenger then indicated a car had "gone into them". Mr. Ndamane testified that he saw plaintiff's vehicle for the first time when he climbed down from the cab/ horse of the Link. He indicated that he had not seen it at any time prior to the collision.
- [21] Mr. Ndamane further indicated that it was his belief that the plaintiff's vehicle had sped up and tried to overtake the Link as it entered the slipway, (see exhibits B, D & E) that the driver of that vehicle was driving at an excessive speed and that he could have avoided the collision by keeping a proper lookout and exercising reasonable care. He admitted however, that this was speculation given that he did not see the plaintiff's vehicle prior to the collision taking place.
- [22] Mr. Ndamane indicated that the maneuver to turn left was done at very slow speed (10-20 kilometers per hour) and that he had paused briefly at the yield sign to Parfitt Avenue immediately before the collision occurred. He indicated that he had stopped immediately he became aware of the collision. He estimated his vehicle had travelled no more than 2 to 3m from the point of impact when the vehicle came to a complete stop. (See photos 2, 3, 5, 9 &

10.) Mr. Ndamane stated that he did not ask for, nor did he receive any assistance in checking for traffic on his left from his passenger, the driver's assistant who had been travelling in the cab with him at the time of the collision. He stated that the mirrors were sufficient to give him a good view of any vehicle approaching his vehicle from behind or to his right or left. He stated emphatically that his view was not obstructed in any way.

[23] Mr. Ndamane indicated that at the moment of the impact, he was focused on the traffic with which he was in the process of merging,

approaching him from the right on Parfitt Avenue. He also indicated that once the cab/horse of the Link was in the slipway, he no longer had any view along the left side of the trailers as they were in the turn. He stated that the plaintiff's vehicle struck the second trailer of the Link, damaging the tool box. (See Exhibit C, comprising two photos of the alleged damage.)

[24] It was Mr. Ndamane's assertion that he could not have avoided the collision in any way and that the sole cause of the collision was the negligence of the driver of the plaintiff's vehicle who drove at an excessive speed, failed to keep a proper lookout and failed to avoid an accident in circumstances where, had he kept a proper lookout, he would have been able to do so.

[25] The second witness for the defense, Mr. Thekiso, an adult male, testified that he was a passenger in the defendant's vehicle at the time of the collision. He testified that the Link was travelling, as Mr. Ndamane had indicated, in the second lane from the left approaching the intersection with Parfitt Avenue. He stated that he does not have a driver's license and that his role is to take care of the trailers of the Link. This includes but is not limited to, ensuring that when taking corners, the trailers do not mount the sidewalk and cause damage.

[26] Mr. Thekiso testified that the Link was travelling slowly as it approached the intersection and that it had already commenced the turn to the left to Parfitt Avenue at the time the collision took place. He estimated that the link was travelling at a walking pace of approximately 5 kilometers per hour. He testified that the Link did not need to stop at the yield sign to Parfitt Avenue as there was no traffic approaching from the right.

[27] Mr. Thekiso confirmed that the driver did not rely on him to assist in determining whether or not it was safe to turn left and verified that he did not look to his left until the cab/ horse of the link and some of the first trailer were already in the slipway. It was his testimony that the Link was moving "at a walking pace", into Parfitt Avenue when he looked back and saw the plaintiff's vehicle approaching at high speed, approximately 2 to 3 meters from the back of the second trailer. He estimated the speed to be approximately 30-40 kilometers per hour. He testified that the plaintiff's vehicle then ran into the second trailer, nose first. He stated that he alerted the driver to the collision just as he was about to accelerate into Parfitt Avenue. The driver then stopped immediately.

- [28] Under cross-examination this witness testified that he could see along the side of the trailers once the Link was in the slipway as he had a different vantage point from the driver. He was adamant that he had seen the plaintiff's vehicle approach instants before the collision occurred.
- [29] This witness testified that the plaintiff's vehicle collided with the toolbox on the second trailer and not with the first trailer as the plaintiff alleges. He remained firm on this point during cross-examination.
- [30] The final witness for the defense, Ms. Lamour, testified regarding the veracity of a quotation for the damage to the toolbox on the second trailer of the Link. This quotation is dated prior to the collision. Ms. Lamour, who works in the administrative offices of the defendant testified that the document had been obtained by herself after the collision, that it indeed related to the damage caused to the toolbox during the collision and that the party who supplied the quotation must have made an error in entering the date on the document.

The Law

- [31] In determining responsibility for the damage caused by the collision, it is incumbent upon the court to determine whether the drivers of the plaintiff's and/or defendant's vehicles acted negligently in causing the accident. Negligence is determined on the objective test of whether a reasonable person would have been capable of reasonably foreseeing the damage and, having so foreseen, have taken steps to prevent such damage and whether, in the circumstances, the individual failed to take such steps. (H B Klopper *The Law of Collisions in South Africa*. 7th edition, 2003: Chapter 1: General Principles; *Kruger v Coetzee* 1966 (2) SA 428 (A) 430E-G). The test for determination of negligence is well known and comprises of three elements: Would a reasonable person in the circumstances of the actor have foreseen the possibility of harm to others; having so foreseen would he/she have taken steps to prevent that harm; and, finally, did the actor take such steps? See, inter alia, *Flanders and Another v Trans Zambezi Express (Pty) Ltd and Another* 2009 (2) All SA 142 (SCA) at p146. Thus, in the current context, for the driver to be negligent, the damage must have been reasonably foreseeable, a reasonable driver would have taken steps to prevent the damage and the driver failed to take such steps to prevent such damage as a reasonable person would have taken in those circumstances (*Kruger v Coetzee* 1966 (2) SA 428 (A)). A reasonable person is not however, expected to be a prophet. (*Makhatswa v Minister of Defence* 2000 (1) SA 1104 (SCA); *Lomagundi Sheetmetal and Engineering (PVT) Ltd v Sasson* 1973 (4) SA 523 (R.AD) at p 524-525)
- [32] The onus of proving negligence falls upon the plaintiff in this case and on the defendant in respect of the counterclaim. The court must avoid drawing inferences unless consistent with proven facts in this context and may not arrive at any conclusion based thereon that is inconsistent with the evidence. It should be borne in mind that the standard of care required of a party will depend upon the peculiar circumstances of each individual case. (*Flanders and Another v Trans Zambezi Express (Pty) Ltd and Another* 2009 (2) All SA 142

(SCA).) That said, the reasonable man is not imbued with the "personal idiosyncrasies, superstitions and intelligence of the actor". (R v Mbombela 1933 AD 269 at p 273-274; Harrington NO v Transnet NO Ltd t/a Metrorail 2010 (2) All SA 220 (SCA) at para E-G)

- [33] While it is true that a breach of certain statutory regulations may conclusively indicate negligence (Sand and Company Limited v SA Railways and Harbours [1948] 1 All SA 249 (W)) and further, that drivers are entitled to assume that, in the absence of an indication to the contrary, that others will obey the traffic signs, such a driver has a duty to adjust his behavior once it is clear that his assumption is incorrect. Thus, what amounts to reasonable care will depend upon the legitimate assumptions a person may be able to make.
- [34] Regulations 296 to 323 of the National Road Traffic Act 93 of 1996 are relevant here. Most especially, regulations 299(3), which states that where a road is divided into lanes, a driver may not turn across the lanes unless he can do so without endangering or obstructing other traffic, and regulation 302 that specifies that a driver must only turn when it is safe and opportune to do so with due care to the stream of traffic with which he is about to merge. The driver of a leading vehicle in a flow of traffic should signal his intention to reduce speed or to change direction and await an opportune moment to do so in a reasonable manner so as not to unreasonably cross the path of a following vehicle or cause it to have to reduce speed, change lanes to the left or right or come to a halt (Keuning N.O. v London and Scottish Assurance Corporation Ltd 1963 (3) SA 609 (D)).
- [35] Road users are obliged to keep a proper lookout and to use their rearview mirrors in a manner consistent with the circumstances.

Rodrigues v SA Mutual & General Insurance Co LTD 1981 (2) SA 274 (A); Kapp v Protea Assurance Co LTD 1981 (3) SA 168 (A); Butt v Van den Camp 1982 (3) SA 819 (A); Viriri v Wellesley Estate (PVT) Ltd 1982 (4) SA 308(ZSC)) The duty to keep a proper lookout may not be delegated by a driver to another, although there may be circumstances in which it may be prudent for a driver to rely upon the assistance of another responsible person, better placed than himself, to see. It should, however be stressed that such reliance does not absolve the driver of his duty. (See S v Vishnu 1970 (3) All SA 452 (N))

- [36] All road users are obliged to travel at a reasonable speed consistent with the circumstances. (See, inter alia Santam Versekeringsmaatskappy BPK v Strydom 1977 (4) SA 899 (A); Olivier NO v Randalia Versekeringsmaatskappy van SA BPK 1979 (3) SA 20 (A). Finally, the driver of a vehicle that is executing a turn must ensure that it is opportune and safe to do so, signal his intention timeously and ensure his signal has been observed. Most importantly, following Sierborger v South African Railways and Harbours 1961
- (1) SA 498 (A), a driver who sees another driver is intending to turn is under no duty to stop or slow down until it becomes apparent that the turn will be executed at an inopportune and dangerous moment. At this stage he must place himself in a position to avoid the collision.

[37] In the event that the It is the court's opinion that both drivers were to some degree negligent in causing the damage, it must

determine the respective degrees of negligence of each driver. This is assessed on the basis of the extent to which each deviated from the standard of the reasonable man. The applicable legislation here is the Apportionment of Damages Act 34 of 1956 (the Act). In terms of Section 1 (1) (a) of the Act, "Where any person suffers damage which is caused partly by his own fault and partly by the fault of the other person, a claim in respect of that damage shall not be defeated by reason of the fault of the claimant but the damages recoverable in respect thereof shall be reduced by the court to such an extent as the court may deem just and equitable having regard to the degree to which the claimant was at fault in relation to the damage".

[38] The applicable principles appear, inter alia, from *South British Insurance Co Ltd v Smit* 1962 (3) SA 826 (A); *Jones NO v Santam Bpk* 1965

(2) SA 542 (A); *AA Mutual Insurance Association Ltd v Nomeka* 1976 (3) SA 45 (A); *Santam Versekeringsmaatskappy v Letlojane* 1982 (3) SA 318 (A); *Manuel v SA Eagle Insurance Co Ltd* 1982 (4) SA 352 (C); *Goss v Crookes* 1998 (2) SA 946 (N); *Transnet Ltd and Another v Witter* 2009 (1) All SA 164 (SCA) 169 A-C.

[39] In the first of these cases, it was stated that the determination of the plaintiff's degree of negligence will automatically determine the degree of negligence of the defendant. The second of these cases, however stated that the degrees of negligence of each party should be determined independently in order to determine the degree to which he/ she deviated from the standard of the reasonable person and then the two compared to determine their respective degrees of fault in relation to the damage. These are however, both simply approaches that may be used and the approach in *Smit* above has been more consistently followed by the South African Courts.

[40] In the current case, the court determined that, in the event of both drivers being found to have been negligent, the degree of negligence of each driver will be assessed independently, compared to that of the other driver and the degrees of negligence expressed as a percentage.

The finding

[41] The plaintiff argued that Mr. Troskie was driving in the lane to the immediate left of the Link at approximately 30-40 kilometers per hour when the link moved across his path. The vehicle in which he was travelling was struck by the toolbox on the first trailer of the Link and was dragged a short distance before coming to rest on the pavement. Photographs of both the damage to the right side of the plaintiff's vehicle and the final resting positions of the vehicles support this view. The testimony of Mr. Troskie was consistent under cross-examination. Mr. Troskie was a calm, confident and compelling witness and his testimony was supported by the second witness for the plaintiff whose testimony was also consistent under cross-examination.

[42] Mr. Ndamane testified that he had indicated his intention to turn left in advance of his maneuver. That, although his Link had crossed the solid white line barrier between the lane in which he was travelling and the lane to its left, this was necessitated by the fact that the Link needs a wide turn to take the corner. Ndamane stated that he was travelling slowly. This was corroborated by one other witness for the defense and those for the plaintiff. He stated that he carefully checked his mirrors and that he had a clear and unobstructed view behind and to the sides of his vehicle. He did not ask his passenger for assistance in checking for possible hazards. He indicated that he moved left and was already in the slipway to Parfitt Avenue when the Link was struck by the plaintiff's vehicle. He indicated that he had not seen the plaintiff's vehicle until he alighted from the cab after the collision had taken place. He only became aware of the impact when he felt the Link driving as if it was on the pavement. Mr. Ndamane was a credible and honest witness who admitted that he had not seen the plaintiff's vehicle prior to the collision and could thus not state with certainty where it had been before the accident or at what speed it had been travelling. Mr. Ndamane was emphatic in stating that there was damage to the toolbox of the second trailer of the Link as a consequence of the collision. His testimony withstood cross-examination without any meaningful inconsistencies.

[43] The second witness for the defense corroborated that the Link was already in the slipway to Parfitt Avenue, with the second

trailer extending into the lane from which the Link had maneuvered and that it was travelling slowly when the collision occurred. Mr. Thekiso also confirmed that he was not asked to assist Mr. Ndamane in assessing whether or not it was safe to cross into the extreme left-hand lane. He indicated that he glanced back to check the position of the trailers in time to see plaintiff's vehicle approximately 2 to 3 meters from the back of the second trailer. He estimated that the vehicle was travelling at a speed of approximately

40-60 kilometers per hour when it attempted to pass to the left of the Link and collided, nose first, with the toolbox of the second

trailer. On cross-examination the witness remained resolute in what he believed he had seen and emphasized that although Mr. Ndamane

could not see the plaintiff's vehicle his mirror immediately before impact., Mr. Thekiso could see it as he had a different vantage

point. As Mr. Thekiso has no driver's license and, based on his own testimony, he only had a second or two to form an opinion on the speed of the BMW, his testimony on this is unreliable.

- [44] The final witness for the defense addressed only the quotation for the damage to the toolbox on the second trailer. As the quotation was allegedly incorrectly dated and, as this witness was not present when the collision took place, the quotation cannot be relied upon to support either version of events. Furthermore; the author of the document was not asked to testify regarding when it was issued.
- [45] The relative position of the vehicles on the road after the accident, together with the nature of the damage to the plaintiff's vehicle support the view that the BMW was travelling on the left of the Link and that it was caught up and dragged by the toolbox on the first trailer of the Link (not the second as alleged by the defendant) when it turned left across the plaintiff's vehicle's path of travel. Furthermore, the manner in which the metal of the car has been bent forward by the impact, as clearly seen from the photographic evidence submitted, supports the view that the trailer hit the car rather than that the car hit the trailer. It is also apparent from the photographs presented to the court that the impact appears to have been from the rear right of the plaintiff's vehicle moving forward rather than from the front moving back.
- [46] Finally, the broken glass portrayed on the roadway in the photographs indicates that the Link moved more than 2 or 3 meters after the impact took place. Expert evidence on this would have been welcome. Although expert evidence is not regarded as carrying greater weight than direct evidence of credible witnesses (*Motor Vehicle Assurance Fund v Kenny* 1984
- (4) SA 432 (E), it would have been of some value in guiding the court.
- [47] By his own testimony, it appears the driver of the plaintiff's vehicle was alongside the Link when approaching the intersection near which the collision took place. In order to access the extreme left-hand lane, the driver must have been behind the Link and moved to its left when the left lane opened up. The driver of the plaintiff's vehicle was thus aware of the Link and remained so throughout. The driver admits that his vehicle was travelling faster than the Link and that when the Link began to make its turn his vehicle was alongside the front of the first trailer. The plaintiff should thus have observed the truck beginning to move to the left and should, immediately have used the hooter to alert the driver of the Link to his presence on the left. He failed to do this. The court is of the opinion that a reasonable person driving in a lane between a 22m truck and a sidewalk, approaching a turn, would have remained vigilant regarding the truck's movements. It is not uncommon for large trucks to take a wide turn around a corner so as to avoid the trailer mounting the sidewalk and causing damage or injury. Thus, despite the fact that the Link was in the second lane from the left approaching the corner and despite the fact that the Link was in a go straight only lane when it made its turn, at or just after the start of a solid white barrier line, it was not reasonable of the plaintiff to assume that the truck would go straight and not turn. He was not obliged to take avoiding action based on the mere possibility that the Link would turn but, having noted that it was turning towards him, he should have taken all reasonable steps to avoid the damage. He should have kept a proper lookout and reacted immediately

the slow-moving truck started to move towards him. The driver failed to

hit the hooter in the car at all, leaving it to his passenger to do so. The driver was not aware that the Link had moved into his lane until his vehicle was struck by the trailer of the link. He stated he could not have avoided the accident by slowing down or by speeding up as the trailer was behind him and the horse was in front of him. Had the driver been alert to the Link's movements, he may well have been able, given the power of the vehicle to have moved it out of danger.

[48] The driver admits that he was not focused on the Link but rather on the lane in front of him, which lane he avers was free of traffic. A reasonable person with basic driving skills and experience would have remained focused on all the traffic around him, not just on that immediately in front of him in the lane in which he was travelling. Even though the Link was in a lane that became a travel straight only lane, the reasonable driver in the position of the plaintiff's driver would not simply have assumed that the Link would continue driving straight. The lane in which the Link was travelling was demarcated from the extreme left-hand lane by a broken white line almost to the point at which the slipway began. Thus, an assumption that the Link would not change lanes was not entirely reasonable in the circumstances.

[49] Furthermore, as both drivers agreed that the Link was travelling very slowly as it began to maneuver, it was not reasonable for the plaintiff's driver to remain oblivious to the change in the Link's direction into his path. Had he been alert, the accident may have been avoided by the simple expedient of his pressing his hooter to alert the driver of the Link to his presence on his left. Given the relative speed of the two vehicle, as testified to by the witnesses, Mr. Troskie may have been able to accelerate out of danger or to have stopped and let the truck pass, had he become aware of the Link's movement immediately it started to change direction. The plaintiff did none of these things. Thus it may be concluded that the plaintiff was negligent with regards to the collision.

[50] The driver of defendant's car was negligent in so far as, it would have been impossible for the BMW simply to have appeared without, at some point, having been visible in the mirrors of the truck. The driver of the truck, having the benefit of an extra pair of eyes in the form of his assistant should have asked his assistant to take a look to the left and behind the Link to ensure the Link's passage was not obstructed by a vehicle he had not seen himself. A driver is neither obliged to seek assistance from his passenger in assessing whether or not there were obstructions in his path nor absolved of his responsibility to check himself should he request such assistance. However, as the driver was aware, given the role of his assistant, that his passenger had a better vantage point when looking down the side of the vehicle, this would have been the prudent course of action for the reasonable driver in his circumstances.

- [51] Mr. Ndamane was negligent in moving his car across the path of travel of the plaintiff's vehicle without ensuring that it was safe and opportune to do so. There was a duty on him to keep a proper lookout and to ensure that he did not cause following traffic to have to suddenly reduce speed, stop or move to its left or right. In this instance, had Mr. Ndamane kept a proper lookout and made use of the resource in the form of the driver's assistant, he may have been able to avoid the collision.
- [52] Mr. Troskie did not strike the court as the type of person who would attempt to speed down the inside of the Link in an attempt to pass a vehicle that was entirely blocking the slipway he intended to enter. There was no credible evidence that the plaintiff's vehicle was being driven at high speed at the time of the accident. The totality of the evidence presented and the balance of probabilities favours the plaintiff's version of events regarding how the collision occurred. For this reason the court finds that the driver of the plaintiff's vehicle, Mr. Troskie, was 20% negligent in relation to the damage and the defendant's driver, Mr. Ndamane, was 80% negligent in relation to the damage.
- [53] Costs of this hearing to be paid by the defendant on an attorney and client scale.

C. NICHOLSON, AJ

On behalf of the plaintiff: Adv. Van Aswegen

Instructed by: Phatshoane Henney

BLOEMFONTEIN

On behalf of the defendant: Adv. Steenkamp

Instructed by: Blair Attorneys

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