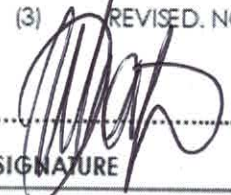


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1)	REPORTABLE: NO / YES
(2)	OF INTEREST TO OTHER JUDGES: NO / YES
(3)	REVISED: NO
	
SIGNATURE	DATE
	13 Dec 2019

Case No: 8977/2017

In the matter between:

ANTON FERREIRA N.O.
ELSIE ELIZABETH FERREIRA N.O.

FIRST PLAINTIFF
SECOND PLAINTIFF

and

VAN TONDER TRANSPORT
JEFFREY M SACK CC t/a SACKS PHARMACY
PARTY

DEFENDANT
THIRD

and the action by:

VAN TONDER TRANSPORT

PLAINTIFF

and

JEFFREY M SACK CC t/a SACKS PHARMACY

DEFENDANT

and the action by:

ROBERT McCULLOCH

PLAINTIFF

and

JEFFEREY M SACK CC t/a SACKS PHARMACY

DEFENDANT

JUDGMENT

MTATI AJ

Introduction

[1] The action before Court is a consolidated matter of three actions arising out of a motor vehicle accident that took place on 26 May 2014 on the N3 Westbound near the Shongweni off-ramp between a Scania truck with the registration number NDE 20904, towing two trailers bearing registration numbers NDE 15724 and NDE 14773 on the one hand, and another truck bearing registration number 038 ANNC also towing two trailers with the following registration numbers, BTW 907NC and BTW 906NC.

[2] Van Tonder Transport instituted an action against Sacks Pharmacy under case number 38067/15 in this Division (South Gauteng).

[3] An action was instated by the Ferreira Trust against Van Tonder Transport in case number 1949/2015 in the High Court of South Africa, Kwa Zulu Natal Division, Pietermaritzburg.

[4] An action was instituted by Robert McCulloch against Sacks Pharmacy under case number 17754/2017 in this Division. All these actions have been consolidated. The parties have agreed to separate the issues of merits and quantum. Accordingly, this judgment only focuses on the issue of negligence.

Background facts

[5] In the early hours of the 26th May 2014, around 4 am, Mr Van Tonder drove his Scania truck from Durban on his to Johannesburg driving through the N3 freeway. As he approached Marianhill Toll Plaza, he felt some hot flushes and he opened the window. He proceeded to drive after the toll gate and after approximately 3 km he collapsed and woke up whilst in hospital.

[6] It is not disputed that, in the midst of Mr Van Tonder's loss of consciousness, black out or sleep, an accident took place with another truck belonging to the Ferreiras'.

[7] There are a number of issues that require determination by the Court and, in my view, these require dissection in order for each to be fully ventilated. Before doing so, I will start by noting all concessions by the parties or issues that are common cause.

Facts that are not in dispute

[8] Below appears the facts that are not in dispute, alternatively, that I find not to be a subject of contestation:

8.1. The collision took place on 26 May 2014 on the N3 near the Shongweni off-ramp;

8.2. The Ferreira Trust alleges that the accident was caused by the negligent driving of Van Tonder's driver, being Mr McCulloch;

8.3. McCulloch had a spleen operation prior to this accident resulting in him being on chronic medication;

8.4. The medication he was taking was an antibiotic called Betapen;

8.5. Betapen and Betapam are two distinct medication with different symptoms;

8.6. Mr McCulloch approached Sacks Pharmacy with a prescription for Betapen and his script was misread/misunderstood to read Betapam;

8.7. Mr McCulloch was provided with a generic form of Betapam, being PAX5;

Facts in dispute

[9] In my view, the following issues are in dispute and the Court is required to make a determination thereon:

9.1. The *locus standi* of Van Tonder Transport to institute and defend the action is placed in dispute;

9.2. It is in dispute that Van Tonder Transport is the owner of or bears an interest in the risk of loss in its vehicles;

9.3. Negligence on the part of each of the drivers;

9.4. The negligence on the part of Sacks Pharmacy in respect of the script and the medicine dispensed;

9.5. Did Mr McCulloch ingest PAX5 on 26 May 2014 before the accident took place;

9.6. Should Mr McCulloch have known that he was not taking Betapen;

9.7. Does Betapam and/or PAX5 cause drowsiness under the circumstances where the correct dosage was taken; and

9.8. In light of the testimony of experts and their reports, can it be reasonably concluded that Mr McCulloch felt drowsy and suffered from impaired concentration, fell asleep and/or lost consciousness?

Evidence

[10] I do not intend to deal with all the evidence in the same order of testimony by the eight witnesses but in what I think is the chronological sequence of events. This case is based largely on the events that led to the motor vehicle accident and as such, I will commence with the evidence of Mr McCulloch followed by the remainder of other witnesses that testified.

[11] Mr McCulloch testified that sometime in 2011, he was involved in another motor vehicle accident which caused him to have a splenectomy. As a result of the splenectomy, he was placed on chronic medication called Betapen. His prescription for Betapen was renewed from time to time. He was getting his medication from a Government hospital or from Sacks Pharmacy. The medication was supplied for a period of two to three months as a result of the nature of his employment. He is employed as a truck driver and would be away for a period of about six weeks at a time.

[12] Prior to resuming employment with Van Tonder Transport, he was sent to Dr Greyling for an examination the purpose of which was to determine his fitness to drive heavy motor vehicles. Dr Greyling diagnosed him with high blood pressure and

in addition, on the request of Mr McCulloch, Dr Greyling issued a script for Betapen to be repeated six times at thirty tablets at a time.

[13] The script was taken to Sacks Pharmacy to source the medication. At Sacks Pharmacy he was assisted by a lady whose name he did not know. He gave the lady the script and she printed a label and pasted same on a bottle container (vial). She then went to the back and came later advising Mr McCulloch that Betapam was not in stock and they can provide him a generic form of Betapam, namely PAX5. I pause to mention that, according to Mr McCulloch, he understood the lady to be referring to a generic form of Betapen being PAX5. The lady went to the back again and later provided Mr McCulloch with what he understood to be a generic of Betapen, being PAX5.

[13] Mr McCulloch drove his truck towing two trailers to Durban harbour on Sunday the 25th May 2014. He arrived at the harbour at approximately 9 am and had to wait in a queue to await his turn to off-load his luggage. Whilst on the queue he slept for the better part of the day. He ate something during the day and slept again since he felt feverish. He was woken up at around 1 am the following morning as it was then his turn to off-load. After off-loading he rested again waking up early in the morning at around 3.45 am. He testified that he has a minimum of twenty years driving heavy duty trucks.

[14] In the morning, after waking up, he washed his face and reached for his medication which was contained in a bag. He felt that the container was empty whereafter he reached for his shaving bag, wherein he had placed the vial with medication dispensed by Sacks Pharmacy. He then took one capsule together with Enapco and Pharmapress medication, which were for his high blood pressure before

driving out of Durban harbour. He did not have sight of the medication he was taking as it was dark.

[15] He testified that he departed and made his way towards the Marian Hill Toll Plaza on the N3. As he stopped at the Toll Plaza and opened his window, he felt a hot flush but thought nothing of it. After driving some three kilometres, he just collapsed and cannot remember what happened next as he woke up at Entabeni hospital. He could not recall that the paramedics were attempting to take him out of the truck.

[16] A few months later, Mr McCulloch visited Sacks Pharmacy to obtain his script as he was facing a disciplinary enquiry at his work place. The reason for the request of the script was to prove to his employer that Sacks Pharmacy provided him with incorrect medication, namely, Betapam instead of Betapen.

[17] In cross-examination, on a question by Mr Osborne for the Ferreira Trust, if he had a stash of tablets to last him for a period of four months, he responded by stating that he had, at some instances, forgotten to take his high blood pressure tablets. It was also put to him that he just grabbed the first available tablets and ingested same. To this he replied by saying that the only tablets he had in his possession were the Enapco, Pharmapress and what he thought was Betapen or at least the generic form thereof.

[18] He was also confronted with the strength of the medication that he was taking and he responded by saying that he simply knew that he had to take one Betapen per day and was not aware of the milligrams involved as he is not a pharmacist. This part of his evidence varied somewhat to what he testified in the evidence in chief. In

his evidence in chief, upon being asked about the strength being 500mg, he changed from taking one tablet a day to twice a day.

[19] On being confronted with the fact that the medication extracted from the vial felt like a capsule, while PAX5 does not come in a capsule but is pre-orange bisected tablet, he shrugged his shoulders and said that what he took felt like a capsule. He said it was dark and could not see. On the question on why the vial that was picked up from the scene of the accident some few days later was empty, he testified that it was full before the accident. He could not explain was his Glasgow Coma Scale (GCS) test was 15 over 15 as taken at Hillcrest hospital except to say that he does not remember being at that hospital.

[20] On a statement by Mr Geyser, for the Sacks Pharmacy, that he did not see what caused the accident. To this he confirmed that he does not know what the cause of the accident was. When it was put to him that the pleadings seem to suggest that he was aware of the cause of the accident, he replied by saying that he passed out and that the veering of the truck to the left is what he was told. It was again put to him that the PAX5 tablet does not come in a capsule. To this he responded by saying that it felt like a capsule. It was further put to him that PAX5 comes in blister packs and that he was supplied with two boxes containing three strips of blister packs which he denied.

[21] On a question by the Court on who supplied him with medication in the past when his provision was finished, he responded by saying that his last supply lasted him until the day of the accident and he had received same from Yusuf Dadoo Hospital. He further stated that the reason he thought the medicine was a capsule was as a result of it being oblong rather than round. On a further question by the

Court if he saw the assistant pharmacist placing the tablets in a vial, to this his response was in the negative.

[22] The next witness I deal with in my preferred sequence is that of Mr Petrus Mngomezulu. Mr Mngomezulu testified through use of an interpreter and stated that on 26 May 2014 he was employed by Anton Ferreira Trust as a truck driver. On this day he was driving from Durban to Johannesburg on the N3. After the Marian Hill Toll Plaza, as he was approaching a bridge, he felt his truck pushed from behind. On checking his side mirror, this truck pushed him to the left hand side of the road, passed his truck and also drove to the left hand side of the road and hit a wall and almost got under the bridge. On the left side of the road there is an embankment and this other truck fell therein. He was driving between 60 and 80 km/h. The other truck was driving fast and on the middle part of the road.

[23] The testimony of Mr Mngomezulu was tested by both Counsel but more to clarify issues than to dispute same.

[24] The next testimony I deal with is that of Dr Promnitz. He is a Specialist Physician who has given a number of medico-legal opinions for approximately ten years. His qualifications and expertise were not challenged. His report was read into the record and I do not intend repeating same but for a few aspects that I find relevant in the matter at hand.

[25] He saw and examined Mr McCulloch on the 19th October 2017. He testified that Mr McCulloch had a significant brain injury in 2011 with significant cognitive dysfunction following the accident. He would have had difficulty in passing Mr McCulloch fit to drive heavy trucks because he would have been at risk for post traumatic epilepsy. Before passing him fit to drive heavy trucks, he would have

insisted on him having an EEG to exclude the possibility of post traumatic epilepsy. Dr Promnitz conceded however in cross-examination that it was highly unlikely that Mr McCulloch would have suffered seizures before the accident if none took place since 2011.

[26] According to Dr Promnitz, Mr McCulloch stated to him that before he left Durban harbour, he took a dose of his medication *"...but he was unable to be 100% sure which bottle he used at the time."* Mr McCulloch also stated to him that he travelled up until Marian Hill Toll Plaza felt hot and flushed. After passing through the Toll Plaza he does not remember much thereafter on what happened. The cause of the hot flush could have been attributable to a change in body temperature; a fluctuation of blood pressure; or an infection said the witness. In his view, Mr McCulloch suffered from sleep deprivation which may have enhanced a seizure but upon being informed in cross-examination that Mr McCulloch slept for the better part of the day, he was then prepared to exclude a seizure as a cause of the accident.

[27] He testified that he had sight of the prescription and confirmed that the handwriting of the prescribing doctor is indistinct. He could see quite clearly why a mistake was made and in such a case, the prescribing doctor should have been called or clarity sought from Mr McCulloch. He stated further that Betapen is only available in 250 mg and the script could be read to be 500 mg or even 5 mg.

[28] The package insert of PAX5 was shown to him, in particular that the side-effects associated with PAX5 could lead to drowsiness or impaired concentration to which he agreed. Mr Osborne also put to the witness that PAX5 can also cause dizziness, light-headedness depression, fatigue, apathy, constipation, irritability etcetera to which Dr Promnitz conceded.

[29] Dr Promnitz further testified that the reading of 15 over 15 GCS at Hillcrest Hospital, meant that Mr McCulloch was fully conscious at the time. In cross-examination however, he conceded that the head injury to Mr McCulloch could have caused amnesia and therefore leading him not recalling that he was at Hillcrest Hospital.

[30] In cross-examination by Mr Geyser, Dr Promnitz was referred to the Accident and Emergency Unit report completed by Hillcrest Hospital. The question was in relation to the observation chart which reflected that Mr McCulloch's GCS reading was 15 over 15 for seven instances when he was observed. Mr Geyser sought a comment as to the meaning of these number of occurrences and whether those recordings could be a mistake. The response thereto was that it is highly unlikely that the recordings could be a mistake. Dr Promnitz also testified that it is highly unlikely that the patient could have more than thirty days supply of medication. In my view, nothing turns on this as it is common cause that Mr McCulloch had a supply of medicine lasting more than thirty days.

[31] The next testimony that I deal with is that of Dr Shaba, a Specialist Neurologist who testified that she examined Mr McCulloch on 11 October 2019. The Court will again not repeat the report since it was read into the record but merely highlight a few aspects of her evidence where it finds relevance in the matter before Court. She confirmed that Mr McCulloch informed her that he did not feel well upon his arrival at Durban. She also testified that Mr McCulloch is suffering from uncontrollable high blood pressure notwithstanding use of medication. She also agreed with Dr Promnitz that the hot flush may have been caused by an infection, hypertension or sleep deprivation. She conceded in cross-examination that if sleep deprivation is excluded, then the only remaining cause of falling asleep is Diazepam. She agreed that

Diazepam could be PAX5 or Betapam since they all fall under the same group of drugs.

[32] She testified further that the contradictions on whether or not Mr McCulloch ingested all three medications could have been resolved by a toxicology screen results which would have quantified the benzodiazepine level in his blood stream. She further testified during cross-examination that a hot flush would not lead to drowsiness. She confirmed that a GCS of 15 over 15 means a patient is awake, alert and orientated.

[33] Dr Shaba conceded that, although the package insert says the effects of Diazepam is more common on the elderly or debilitated persons, it does not exclude the possibility that it could affect normal persons. She also agreed with paragraph 5 of the joint minutes of Dr Rosman and Dr Wolberg which reads as follows:

"However we both agree that even if it can be shown that [McCulloch] did suffer from sleep apnoea, the addition of Pax would have had a significantly deleterious effect, increasing the likelihood that he would fall asleep unawares."

[34] The next witness whose testimony is now dealt with is that of Mr Danie van Tonder. He testified that he is a director of Flip van Tonder and Sons (Pty) Ltd trading as Van Tonder Transport. He also stated that the owner of the vehicles is Newline Investments 110 (Pty) Ltd (Newline), which vehicles are rented by Van Tonder Transport. These vehicles conduct business of transportation. He further testified that there is another company called Twoline Trading 350 (Pty) Ltd which is the owner of the building where the transport business is conducted from.

[35] He testified that Van Tonder Transport is the entity that is in physical possession of the vehicles, it maintains, pays the insurance premiums for the vehicles and is also responsible for any loss suffered as a result of damage sustained by the vehicles in the conduct of the business. Mr Van Tonder testified that the rental agreement for the vehicles is an oral one.

[36] Upon being asked in cross-examination about the schedule of insurance being concluded between Newline Investments trading as Van Tonder Transport, his response was that same was an error common between the parties. He was asked about the resolution to institute and defend these proceedings and his response was that he communicated with his co-directors through the telephone and all consented that he signs the resolution.

[37] The next testimony for consideration is that of Dr Wolberg, a Neurologist. He testified that the effect of PAX/Diazepam would be to induce sleep or at the very least significant drowsiness, particularly in a naïve subject. He testified that, even if it can be shown that Mr McCulloch did suffer from sleep apnoea, the addition of PAX would have a significantly deleterious effect, increasing that he would fall asleep unawares.

[38] He was of the opinion that even if Mr McCulloch was well rested, the ingestion of PAX5 may still have caused him to fall asleep before the accident. The possibility that Mr McCulloch had seizure is speculative and has no basis in fact, he testified. In his opinion, the ingestion of PAX5 5mg caused him to fall asleep and consequently triggered the accident.

[39] His explanation of the GCS of 15 over 15 is that, whilst Diazepam causes drowsiness and sleep, the pain may lead to alertness. Dr Wolberg does not believe

that Mr McCulloch was unconscious. He conceded that if Mr McCulloch ingested a capsule and not PAX5, then his report would be different. He admitted that a possibility exists that Mr McCulloch ingested something else.

[40] The next witness was Ms Anna Christina Madden. She testified that she is employed at Sacks Pharmacy as an Assistant Pharmacist. She admitted having received a script from Mr McCulloch and she is the person who ultimately dispensed the medication. She read the script to be Betapam and not Betapen. After receiving the script she placed the label on the vial and proceeded to the back to fetch the medication only to establish that they did not have Betapam in stock. She then approached Mr McCulloch to advise him that they do not have the prescribed medication in stock but can provide a generic form thereof which was PAX5.

[41] Her testimony was further that PAX5 was contained in a box, containing three blister packs of ten each and she provided Mr McCulloch two boxes as he had requested a supply of sixty tablets. The supply of the medication has to be signed-off by a Pharmacist on duty. She testified that the empty container with the Betapam label attached to it was no longer useful to them and she gave it to Mr McCulloch. She also testified that she explained to Mr McCulloch, as it is standard practice that the tranquilizer (PAX5) may make him drowsy.

[42] In cross-examination she could not remember why she would have given Mr McCulloch the empty vial. She thought he may have asked for it. She also testified that PAX5 only comes in blister packs and upon being informed that it also comes in securitainers, she responded by saying she has never seen it in that form. Upon being confronted with the script from Dr Greyling indicating that they dispensed wrong medication, her response was that she did nothing wrong as the medication

was signed-off and approved by the pharmacist. On a question by the Court on the person who assisted Mr McCulloch first between her and Mr Cliff, she could not recall.

[43] The last testimony was that of Mr Jeffrey Sack. He testified that he is the owner of Sacks Pharmacy. He was presented with the trailer labels and he confirmed that the signature that appears thereon was his. He also admitted that he has seen the script and he was happy that it reflected Betapam 5 mg. He also stated that if he was in doubt with the script he would have called the prescribing doctor.

[44] In cross-examination he conceded that they dispensed an incorrect medication. On being confronted with the evidence of Dr Promnitz that they should have called the prescribing doctor, he responded by stating that he did not see the need as he was happy with the script and if he was in doubt would have called the doctor.

[45] He testified further that he does not recall ever stocking PAX5 in securitainers but conceded that it is also provided in that form. He said that they only stocked PAX5 only in 5 mg and 10 mg in thirty blister packs.

Evaluation of evidence

[46] In evaluating the evidence, I propose to commence and dispose the challenge raised on the *locus standi* of Van Tonder Transport. The submissions by Mr Geyser were that Mr Van Tonder is not properly before Court. The basis of his argument was as a result of a resolution signed only by Mr Van Tonder. Mr Van Tonder testified that he spoke with his co-directors and was provided permission to sign the resolution. I do not know why they all did not sign at once. This could have been as a result of availability; urgency within which the resolution was required or any other

reason. I do not intend speculating on the precise reasons, suffice to say Mr Van Tonder testified under oath that he was authorised.

[47] Mr Van Tonder, having full authority to institute and defend the action, shall be bound by the decision of the Court. The Courts are often warned to avoid being overly technical but dispense justice as best they can. I am sufficiently persuaded that Mr Van Tonder has the authority to institute and defend these proceedings.

[48] The next submission raised by Mr Geyser relates to the ownership of the vehicles and the company that suffers the risk of loss. This challenge was necessitated by the testimony of Mr Van Tonder. In his testimony, he mentioned that the vehicles are owned by Newline and rented by Van Tonder Transport when the schedule of insurance reflects and gives the impression that Newline is trading as Van Tonder Transport.

[49] In clarification, Mr Van Tonder testified that this was an error common between the parties and that factually Van Tonder Transport carries the risk of loss and it is Van Tonder Transport that pays the insurance premiums. Throughout the evidence, there was no mention of a company called Newline Investments 110 (Pty) Ltd trading as Van Tonder Transport. The Court has no reason to doubt the testimony of Mr Van Tonder in the light of there being no company called Newline Investments 110 (Pty) Ltd trading as Van Tonder Transport. In the case of **Rondalia v Hanekom 1972 (2) SA (CPD) 114** at 117, Colman J had the following to say:

"The only authority which casts doubt upon the owner's rights in these circumstances is a line of cases of which Spolander v Ward, 1940 CPD 24 is the leading one. I should point out at once that in none of those cases was it held that the owner, in circumstances like the present ones, was disentitled to

recover. But it was held in Spolander's case, and uncritically accepted in some subsequent cases, that a person who has been placed in possession of someone's property, and has undertaken to be responsible for any damage to it, has a right of action in his own name, and without cession of action from the owner, against one who has wrongfully damaged the property."

[50] In my view, there is no dispute whatsoever about the wrong medication being dispensed to Mr McCulloch. Mr Sacks conceded both during the pleadings process and during his *via voce* evidence that a mistake has been done in dispensing the medication. What needs to be considered though is whether Mr McCulloch ingested PAX5 or he ingested something else, if at all he took any medication.

[51] The evidence of Mr McCulloch cannot go unchallenged. There a number of apparent inconsistencies that require scrutiny by the Court. The material one, in my view, relates to what is it exactly that he ingested in the morning hours of 26 May 2014. In his testimony, he said that he ingested a capsule. It is common cause that PAX5 is not presented in a capsular form. In fact, the package insert identifies PAX5 5 mg as follows: *"Pale orange bisected tablets, engraved with the Lennon logo (mortar and pestle)"*. It is clear to the Court that Mr McCulloch is acutely aware of the distinction between a tablet and a capsule. This is evident from his examination in chief when he said: *"... I popped the lid open and took out a capsule. Normally the medicine that I take is a Betapen tablet."* It is only during cross-examination when he was confronted with the identity of the tablet that he changed and said that it felt like a capsule.

[52] The evidence of Ms Madden was that the medication that was dispensed to Mr McCulloch was in blister packs and not contained in a vial. This information was

confirmed by Mr Sack when he testified that he does not remember that they ever stocked this medication in securitainers. It is true that the evidence of Ms Madden was riddled with uncertainties but, notwithstanding, I did not observe that she was deliberately deceiving the Court. She had an opportunity to go all the way to support her employer but she did not. The Court noted this when she absolved herself from blame and said that her employer signed-off the medication. Her evidence that Mr McCulloch was warned about the symptoms of PAX5 was not challenged.

[53] The empty vial that was found on the scene of the accident cannot, in my view, be demonstrable of the manner in which the medication was dispensed. I am not persuaded that by being on the scene then same should be interpreted to mean Ms Madden popped out all the blister packs and inserted the tablets therein. Another probability could just be that Mr McCulloch requested the vial with the intention to pop out the tablets from the blister pack for his own convenience. I make no finding on this except to note probabilities.

[54] Furthermore, he said to Dr Promnitz he was not 100% sure of the medication that he took or the bottle out of which he extracted the medication. He does not remember being at Hillcrest hospital but the numerous occasions when he was observed, the hospital records recorded that he was awake, alert and oriented. There is no reason why the Dr Promnitz would second guess his report except that it is Mr McCulloch who provided the information. Same with the hospital staff that recorded his GCS level.

[55] Whilst Mr McCulloch was calm and focussed when answering questions at the commencement of cross-examination, he became argumentative when confronted

with the identification of PAX5. The Court noted that in one instance he shrugged his shoulders on a question by Counsel.

[56] It appears to me that if PAX5 is taken moderately as prescribed, it should not cause any side effects. Mr Den Hartog sought confirmation from all the specialist doctors who testified that there may be exceptional cases to different people. I agree with this submission except that there is no evidence that Mr McCulloch could fall under the exceptional cases. All the expert reports filed of record, suggest that Mr McCulloch was a normal person who could not be classified as elderly. The uncontrollable high blood pressure was ruled out to can be the cause of his black-out.

[57] The Court has also noted, through the evidence of Mr McCulloch that he was not feeling well on his arrival at Durban. As a driver of over 20 years, one would have expected that he ensures that he is ready to drive a long distance back to Johannesburg. Alternatively, upon getting the hot-flush at the Marian Hill Toll Plaza, he could have parked on the side to ensure that he is fit to proceed.

[58] I am not persuaded that Mr McCulloch, on the evidence before me, ingested PAX5.

[59] The evidence of Mr Mngomezulu stands uncontroverted. The truck he was driving belonging to Anton Ferreira Trust was involved in a motor vehicle accident with another vehicle driven by Mr McCulloch belonging to Van Tonder Trust as a result of which the truck belonging to Anton Ferreira Trust was damaged.

[60] The Plaintiff has proven their case on a balance of probabilities. Accordingly, the Court finds that Mr McCulloch was negligent and as result thereof, he was the sole cause of the accident.

[61] In the result, I make the following order:

Order

1. *The Plaintiff's (Anton Ferreira Trust) claim under case number 1949/2014 (Pietermaritzburg) succeeds;*
2. *The claim by Van Tonder Transport under case number 38067/15 is dismissed with costs;*
3. *The claim by Robert McCulloch under case number 17754/2017 is dismissed with costs.*



T. MTATI

**Acting Judge of the High
Court, Gauteng Division,
Johannesburg**

APPEARANCES

ON BEHALF OF A.FERREIRA N.O.: ADV B.S. OSBORNE

INSTRUCTED BY: BOTHA & OLIVIER INC

ON BEHALF OF VAN TONDER: ADV A.P. DEN HARTOG

INSTRUCTED BY: HARVEY NOSSEL ATTORNEYS

ON BEHALF OF J. SACKS: ADV W.W. GEYSER

INSTRUCTED BY: RIC MARTIN INC

DATE OF HEARING: 28 – 31 OCTOBER 2019

DATE OF JUDGMENT: 13 DECEMBER 2019