IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL, HIGH COURT, PIETERMARITZBURG

CASE NO: 3853/06

In the matter between:

NISHAL SINGH **PLAINTIFF**

vs

ROAD ACCIDEND FUND **DEFENDANT**

JUDGMENT

MADONDO J

[1] On 27 May 2003 at approximately 20h00 Nishal Singh (the plaintiff) and Karishma Maharaj, his ex girlfriend, were traveling in an Opel Corsa bearing registration letters and number LMS402GP on M4 from Durban to Tongaat. The plaintiff was a driver and Karishma a front seat passenger in the vehicle. Shortly after driving pass the off ramp to La' Mercy they noticed a truck hauling a V-deck shaped double trailer laden with logs on the slow lane at approximately 50m ahead of their vehicle and proceeding in the same direction as they were. All of a sudden they saw a log lying across their path of travel. There were no street lights and they solely dependent on the lights of their motor vehicle for the visibility. The log was covering part of the slow lane and almost the centre of the fast lane.

[2] On seeing the log they both screamed. The plaintiff slammed on brakes and swerved to the right in an attempt to avoid collision with the log. However, realizing that the vehicle would nevertheless collide with the log he veered the vehicle to the left. In the process the vehicle collided with the log and as a result the plaintiff lost control of the vehicle. It overturned until it came to rest in the bank on the left hand side of the road. At the time the vehicle was overturning and rolling downwards the plaintiff was flung out of the vehicle and fell on the side of the road with half of his body on the tarmac out the carriageway.

[3] During this mishap the plaintiff sustained a fracture to the base of his head; fracture of the left hip; abrasions to the right hand side of his head and contusions of brain involving both the frontal lobes and left temporal area. Karishma sustained minor injuries to her face and ankles. After the accident she stood next to the road flagging down the passing vehicles and asking for assistance. However, the two motorists who came to the scene, shortly after the collision, could not render any assistance. The ambulance, police and the relatives of the plaintiff later arrived on the scene. The paramedics attended to the plaintiff and he was subsequently conveyed to hospital at Umhlanga Rocks.

[4] The plaintiff now sues the defendant, the Road Accident Fund, for damages arising out of a motor vehicle collision occurred on 27 May 2003, on the M4 highway, in the vicinity of La' Mercy off ramp, between the motor vehicle driven by the plaintiff and the log that allegedly fell off the truck/double trailer

combination bearing registration letters and numbers NPS51863, NPS28471 and NPS26034 respectively (the insured vehicle).

[5] In his Particulars of Claim the plaintiff has alleged that the defendant was the statutory insurer of the truck and double trailer bearing registration numbers NPS51863, NPS28471 and NPS526034 “the insured vehicles”. Alternatively, that the defendant was the statutory insurer of an unidentified motor vehicle or vehicles and that it was therefore obliged in terms of the Road Accident Fund Act, no. 56 of 1996 (the Act) to compensate the plaintiff for the damages he suffered.

[6] In its plea, the defendant has raised two points *in limine*. Firstly, that the plaintiff had failed to identify the owner or the driver of the unidentified motor vehicle and that accordingly the plaintiff’s claim falls to be decided in terms of section 17(1)(b) read with the regulations issued in terms of section 26 of the Act.

[7] Secondly, that the plaintiff’s claim has prescribed in that the plaintiff was allegedly injured in a car collision on 27 May 2003 and he only lodged his claim with the defendant on 1 June 2005. It has also been argued on behalf of the defendant that the plaintiff was required to lodge his claim within two (2) years from the date of the collision.

[8] However, at the commencement of the trial, the plaintiff abandoned its alternative claim that the defendant was statutory insurer of the unidentified motor vehicles. This has rendered the adjudication of the two points *in limine* unnecessary.

[9] There has been no direct evidence or eye witness who saw the log falling off the insured vehicle: however, a considerable amount of circumstantial and documentary evidence has been presented from which it could reasonably be inferred that the log fell from the insured vehicle on to the road way.

[10] It is common cause that the insured vehicle was on 27 May 2003 laden with pine logs from Ixopo to Sappi Mandini, and that it arrived at Sappi mill at 21h35. The issue is whether the log that caused the collision fell off the insured vehicle and whether on 27 May 2003 at the time of the collision the insured vehicle was traveling on M4 highway.

[11] At the commencement of the trial proceedings the parties agreed to separate the issues of liability and quantum. In consequence thereof this Court has only to decide the question of liability. Since the plaintiff is now suffering from retrograde amnesia due to the injuries he sustained during the collision he could not testify regarding the collision. However, in order to prove that the defendant is liable for the injuries he sustained during the collision, the plaintiff has called

several witnesses including Karishma Maharaj, who could give direct evidence as to how the collision occurred, and presented documentary evidence.

[12] The greater part of Karishma's testimony has been covered in the introductory part of this judgment. She is a Johannesburg based attorney attached to the firm of attorneys, Babi Rikhotso. At the time of the collision she was a law student at the University of KwaZulu-Natal, Durban, residing at Seatides Tongaat, and the girlfriend of the plaintiff. However, her love relationship with the plaintiff broke up during August 2006.

[13] Amongst the relatives of the plaintiff that attended the scene of accident was there an uncle to the plaintiff, Ajesh Singh. On his arrival on the scene Ajesh approached her and enquired what had happened. She then related to him as to how the collision occurred and gave him the description of the truck from which she assumed that the log, with which the plaintiff's vehicle collided, had fallen off. Ajesh left the scene of accident in order to locate the truck in question. From the scene the plaintiff was taken to hospital.

[14] This finds corroboration in Ajesh's evidence who testified that on the night of 27 May 2003 a certain Maharaj reported to him that his nephew, Nishal Singh, was involved in a car accident. Following such a report he proceeded to the scene of accident. On his arrival there, he found paramedics attending to the plaintiff. He then approached Karishma and enquired how the accident occurred.

She informed him that the plaintiff's vehicle collided with a log that was lying across its lane of travel. She further told him that there was a truck laden with logs which was also proceeding in the northerly direction as the plaintiff's vehicle at a distance of 50 metres ahead of it. She did not see the log falling but she assumed that if fell from said truck.

[15] In search of such truck Ajesh got onto his vehicle and drove in the direction the truck had taken until he came to R102. He carried driving on R102 until he reached Mellville where he saw a truck laden with logs. On seeing the truck Ajesh flashed his lights indicating that the truck should stop but all was in vain. He then drove pass the truck. He pulled off on the side road sign posted Cranbrook. He alighted from his vehicle and stood on the side of the road. He once again flagged the truck down. However, the truck did not stop. At the time he managed to have a glance at the number plate of the truck and took its registration letters and numbers (NPS51863) down on his palm. It was a Mercedes Benz truck, cream in colour, hauling a V-deck shaped double trailer. Thereafter he proceeded to the hospital at Umhlanga Rocks where the plaintiff had been taken for treatment. Later on the same evening on his return to his home, he telephoned the weighbridge at Sappi Mandini in order to enquire whether the truck bearing registration letters and numbers he had jotted on his palm had arrived. It was confirmed at the weighbridge that such a truck had arrived. On the following day he gave the registration numbers of the truck in question to his cousin, plaintiff's father and Rohan.

[16] Under re-examination Ajesh Singh stated that he had at 16h00 on 27 May 2003 gone out to pick up his children and he drove through the spot which later became the scene of collision, there was no log lying there.

[17] Ravi Rohan, a resident of La' Mercy, was also on the night of 27 May 2003 involved in a collision with a log on M4 highway. The log was lying across the highway. He swerved in order to avoid a collision with it. However, in the process his vehicle was hit causing a puncture to the left front tyre and damage to the front of his car. He mended a puncture and proceeded home. On his way, he noticed another vehicle which was also involved in a collision with a log. Rohan did not see the log falling off the truck but he assumed that it must have fallen from it. On the following day, Ajesh Singh gave him the registration numbers of the vehicle that had allegedly dropped the log onto M4 highway as NPS51867. However, he conceded that he might have incorrectly recorded the last digit as 7 instead of 3, when Ajesh was dictating the truck registration numbers to him. Ajesh Singh according to Rohan had pursued the truck until Mandini weighbridge.

[18] David Johannes Marx, the chief security officer and the administrator of the weighbridge at Sappi Mandini, testified that the weighbridge system is computerized and it captures all data of the timber that comes into the saw mill and the products that leave the mill. His duties entail ensuring that every truck

that off loads or takes stuff out of the mill is logged onto the weighbridge system. There are only two kinds of timber Marx comes into contact with on daily basis, namely; gum and pine. Gum is debarked in the forest whereas pine is barked. Pine comes in 2.4 or 2.8 metres. The colour code “blue” means that timber comes from the inland. In the present case, timber had been felled at Ixopo on 21 May 2003 and the order number was 8263600115. The registration letters and numbers of the truck that had delivered pine logs at 21h35 on 27 May 2003 were NPS 51863. The registration numbers of the first trailer were NPS28471 and of the second trailer were NPS26034. The mass of its consignment was 53850kg. It was blue code indicating that it was coming from the inland. The truck that delivered timber was hauling a V-deck shaped trailer and its driver was Elson Zungu. It was off loaded and left the mill empty at 22h10. Under questioning for clarity Marx stated that if one or two logs had fallen from the truck he would not have noticed. The first truck that had delivered logs from Ixopo to Sappi Mandini had arrived at 15h07 on the same day.

[20] This finds corroboration in the evidence of Wayne Edwin Dickens who had contracted to Sappi mill to transport timber from Ixopo to Sappi Mandini under the name of WD Transport. SS Transport was sub contracted to him to deliver timber on his behalf from Ixopo to Sappi Mandini. According to Dickens on 27 May 2003 a Mercedes Benz truck trailer with registration letters and numbers NPS 51863 delivered pine logs from Ixopo to Sappi Mandini. Its docket number was 547155 and the weighbridge ticket number was 8263600115. The pine logs

were 2.4 metres in length and they were secured with 7 ton straps and ratchets. Back boards were not used for fear of the logs protruding through. The truck was pulling a superlink V-deck shaped double trailer, the property of SS Transport, and its driver was Elson Zungu. SS Transport had never used U-shaped deck trailers at all.

[21] Dickens stated that SS Transport used M4 route when transporting timber to Sappi Mandini. From Ixopo the SS Transport driver used to get onto N2 traveled until Verulam and branched off to M4. They used this route in order to minimize costs since it is shorter and there were no toll gates and weighbridges on the route. This concludes the evidence of the plaintiff.

[22] At the conclusion of the plaintiff's case Mr Choudree for the defendant applied for the absolution from the instance on the grounds that the evidence of Karishma Maharaj and Ajesh Singh could not establish the identity of the vehicle that had caused the accident. Nor had they seen the log falling off. In which event, he submitted that the plaintiff's claim had prescribed. Choudree argued further that the plaintiff was required to lodge its claim within two (2) years after the accident. In the present case, the collision occurred on 27 May 2003 and the plaintiff lodged its claim on 1 June 2005. Such a period was more than two (2) years. In this regard he referred me to the decided cases of *Mbatha V Multilateral Motor Vehicle Accidents Fund 1997(3) SA 713 (SCA)* and *Hlongwane V Multilaterale Motorvoertuigongelukke Fonds 2000(1) SA 570 TPD.*

In both cases the allegations in the particulars of claim that the plaintiff had been unable to ascertain the identity of the owner or driver of the vehicle he or she had collided with had given rise to a special plea that he had failed to comply with the time limit set out in Regulation 3(2) (a) (i) and (ii) of the regulations issued in terms of section 6 of the Multilateral Motor Vehicle Accidents Fund Act 93 of 1989, which provides that where a claim arises out of the negligence of a driver of a motor vehicle of which the identity of neither the owner nor the driver can be ascertained, the claim prescribes. After two years after the date on which the claim arose, irrespective of whether the claimant or third party is subject to any disability.

[23] After careful consideration of the evidence and the argument presented before me, I refused the application for an absolution from the instance. The reason for refusal has been that Karishma Maharaj and Ajesh Singh had identified the vehicle, the identity and the ownership of which could positively be established from the transaction records of Dickens and of the weighbridge, Sappi Mandini, handed herein as documentary evidence. With regard to the falling off of the log, ample circumstantial evidence from which it can reasonably be inferred that the log fell from the insured vehicle has been adduced. In, my view, these facts can be inferred with as much practical certainty as if they had actually been observed. In order to establish whether or not the log had fallen from the insured vehicle, direct evidence is not only a requirement. The strong circumstantial evidence consistent with the proved facts will suffice. In which

event, decided cases Mr Choudree has referred me to above do not find application in the present case.

[24] The defendant then called Vinesh Maharaj as a witness. On 27 May 2003 Maharaj was resident at 47 Beach Road La' Mercy village in the evening of the day in question he was at his home watching television. His wife and daughter had gone to the temple at Tongaat. At 20h30, he heard a loud bang and a crash. He then thought that his wife was involved in an accident. When he got outside the house, Maharaj saw his wife's motor vehicle parked on the yard.

[25] When Maharaj telephoned his wife, she told him that they were involved in the car accident. He then rushed to the M4 highway. On his way to the scene, he called the paramedics and the police on his cellular phone. On his arrival he saw a young lady who was standing on the side of the road and crying. A young man was lying on the tarmac. He could not see any vehicles there. When he enquired from the young woman as to where the vehicle was, she pointed in the bush. Maharaj saw a tail light of one vehicle and when he asked where the other vehicle was, the lady said that there was no other vehicle. There were also another two gentlemen standing on the scene.

[26] Maharaj told the young lady that the paramedics and the police were on their way to the scene of accident. He then proceeded to where his wife was. He found that only the front rim of the vehicle his wife and her relations were

traveling, had been damaged. He went home to fetch the blanket and the pillow. On his return he found paramedics on the scene. There he put a blanket on the young man where he was lying on the tarmac, Maharaj realized that it was Nishal Singh. It then occurred to him that he was a fast driver who had written off many vehicles.

[27] Singh's relatives came to the scene, Maharaj went back with those relatives to the complex. Few weeks later, Maharaj met up with Ajesh Singh who was resident at the same complex and when he enquired after plaintiff's health (Ajesh) told him that the plaintiff was not the driver of the vehicle but his girlfriend, Karishma Maharaj, was.

[28] A few days later, Dev Maharaj telephoned Vinesh Maharaj and requested him to relate to him what happened on the scene of the accident. He then told him that there was something dubious about the whole claim. Ajesh Singh had arrived on the scene forty five minutes or an hour later. (Some months later Singh told him that he was looking for a truck that had dropped the log on the M4 but he could not tell whether or not he found it.)

[29] Under cross-examination Vinesh Maharaj could not explain why it was not put to Karishma Maharaj when she testified that she was the driver of the vehicle. However, when a document indicating that Karishma had been issued with a driver's licence on 4 October 2001, be correct that was so. Nor could he explain

why it was not put to Ajesh Singh, when he testified, that he did not pursue the insured vehicle at all. Maharaj said that the plaintiff was travelling at a great speed and that the claim is too high. However, he admitted that he did not see the vehicle while it was travelling on the road. Nor did he have any basis for stating that the plaintiff's claim is too high.

[30] En route to where his wife was, Maharaj saw another two accidents. Asked if he stopped and enquired, he said that the accidents were not serious since no damage had been caused to the vehicles. Maharaj stated that M4 is a very busy road and hitting a log does constitute negligence.

[31] Maharaj later conceded that Karishma Maharaj had a driver's licence at the time and that it was not true that Nishal Singh had written off many vehicles. Karishma was a total stranger to the witness.

[32] D.J.Marx was recalled for the purposes of cross-examination and under cross-examination he stated that at some stage he came to know that someone telephoned the weighbridge and enquired about the truck that had dropped a log on the free way. This concludes the evidence of the plaintiff.

[33] Ram Sewnarayan testified that he runs and manages a Hibberdene based family business, SS Transport CC. He had been so involved with such business for a period of more than 20 years. The business consists of trucks and trailers

(transporting timber, sugar cane and fertilizers). All its trailers in 2003 were U-deck shaped and they used spiller boards for both timber and sugar cane. Straps were also used to secure logs. The nets were also used at the rear end to secure the loads.

[34] In 2003 SS Transport CC was sub-contracted to WD Trans and its drivers were virtually under control of Dickens. SS Transport CC found it more advantageous using Wartburg via Tongaat Mandini route then N2 and M4 route.

[35] The horse and two trailer bearing registration letters and numbers NPS 51863, NPS 28471 and NPS 26034 respectively which delivered timber at Sappi mill, Mandini at 22h35 on 27 May 2003, belonged to SS Transport. Sewnarayan did not receive any report that such trailer has ever been on M4 highway.

[36] Under cross-examination it transpired that the route arrangements had been made between Dickens and the witness's deceased brother. The witness did not have any personal knowledge thereof. He conceded that the M4 route is shorter than the Wartburg route.

[37] Under questioning for clarity it became apparent that Sewnarayan had no personal knowledge of the route the trailer used to deliver timber to Sappi mill on 27 May 2003.

[38] On 11 and 12 June 2008 the defendant instructed Mrs Wilna Badenhorst, a road accident construction specialist, to reconstruct the scene of accident, in order to establish the distance from the area of impact to Mandini Sappi Depot and to indicate on the balance of probabilities the most likely route to be taken for a truck traveling from Ixopo to Sappi Mandini. In her report she considered the evidence of the witnesses that testified and the route that was suggested by them. She also considered the route suggested by Sewnarayan and established that this route was in fact longer in distance then the route suggested by Mr Dickens. The route referred to by Sewnarayan was measured at 281km and the route referred to by Dickens was 242km.

[39] In order to establish the distance from the area of impact to Mandini Sappi depot Badenhorst conducted a survey and she established a distance of 72km. She did this in a Volkswagen Golf at the average speed of 58kph. During such survey it was also established that the distance of 72km was travelled in 1 hour 15 minutes.

[40] Badenhorst concluded that it was highly unlikely that the MB – combination would have travelled the distance of 72km from the area of impact to Mandini Sappi Depot at an average speed of 58km/h. She continued to state that when considering a more realistic average speed of 40 km/h for the MB-combination, it would have taken the combination in the order of 1 hour 48 minutes to reach the Mandini Sappi Depot. She accordingly concluded that it was

highly unlikely that the MB-combination was in the vicinity of the collision scene on the M4 freeway when the Opel Corsa was involved in the collision with the log.

[41] She also concluded that it is more probable that the collision occurred at approximately 20h30 rather then 20h00. The driver of the Corsa swerved to the left upon noticing the log on the road. She further stated that the tyre marks made by the Corsa were indication that the Corsa left the road surface whilst still moving on its wheels, and did not “summersault” upon hitting the log as Karishma indicated. The route suggested by Dickens was 40km shorter then the route suggested by Sewnarayan.

[42] Under cross- examination Badenhorst conceded that the accident could have taken place between 20h00 and 20h15. She accepted that during the night time the road is quieter and one may drive at a greater speed. She also concede that it was not known at what speed the truck was traveling. It later transpired that when measuring a distance she did not in fact drive the Volkswagen Golf as she claimed but the defendants attorney did, nor did she keep notes of the speed the defendants attorney was doing. Badenhorst testified that if the accident occurred at 20h15 and the truck arrived at Sappi Mandini at 21h35, the truck would have been travelling at a speed of 46kph.

[43] Under questinong for clarity she testified that it would have taken the driver one hour from the area of impact to Mandini. She stated that it could be possible that the accident happened earlier than 20h30. She did not interview the insured driver. Nor did she know at what speed the insured driver was travelling. Badenhorst stated that had the collision occurred at 20h00 the truck could have arrived at Mandini by 21h30. This concludes the evidence of the defendant.

[44] The first question for decision is whether the insured vehicle was on 27 May 2003 in the vicinity of the scene of the accident at the time the plaintiff's vehicle collided with a log, which was strewn across its path of travel on M4 highway. Karishma testified that immediately prior the collision the plaintiff's vehicle was following a truck laden with logs. After the collision she gave Ajesh Singh the description of the truck and Ajesh pursued the said truck until he reached it at Melville. He tried in vain to stop it but he managed to jot its registration letters and numbers onto his palm. The description of the truck and its trailer fit that of the insured vehicle. It bears the same registration numbers as those Ajesh had written on his palm.

[45] Badenhorst has concluded that it was highly improbable that MB-combination was in the vicinity of the scene of collision, M4 highway, when the plaintiff's vehicle collided with a log. It is not in dispute that the expert witness Badenhorst, possesses the necessary qualifications and competence to carry out

the reconstruction of the scene of accident and to interpret the result thereof. See *S v Williams en Ander 1985(1)SA750 (C)*.

[46] Badenhorst based her conclusion, that it was highly unlikely that the MB-combination was in the vicinity of the scene of collision, on the estimation of the distance the MB combination travelling at an average speed of 40 kph would have covered from the scene of accident to Sappi Mandini within the time frame of 1 hour 15 minutes.

[47] The calculations that it would have taken the MB-combination 1 hour 15 minutes to travel a distance of 72km from the scene of collision to Sappi Mandini, were based on an average speed of 58 kph the defendant's attorney did in his motor vehicle when measuring such distance.

[48] Mr Moodley for the plaintiff has argued, correctly so, that there was no factual basis whatsoever for assuming that the insured driver on the day in question drove the insured vehicle as an ideal driver would have done. The calculation of an average speed of 58kpm with a Golf vehicle was based entirely on the defendants attorney's own driving mannerism. Nor did she know the out put of the engine of the insured vehicle. She did not know whether or not the truck engine had been overhauled.

[49] It transpired under cross-examination that in fact Badenhorst did not drive the Golf on the route M4 from the area of impact to Mandini at 58kph but the defendants attorney did. Nor did she keep notes of the speed the defendant attorney did. In which event, the probative value of the statement relating to the distance from the area of impact to Mandini as 72km, was entirely dependent on the credibility of the defendant attorney who did not testify. It therefore follows that the evidence relating to the distance between the scene of accident and Sappi Mandini and to the time frame within which the insured vehicle could have covered such distance constitutes as hearsay. Nor has any application been made in terms of section 3 of the Law of Evidence Amendment Act 45 of 1988 for the acceptance of such evidence. In the premises, the certainty and the accuracy of the measurements made cannot be guaranteed.

[50] Before coming to this conclusion Badenhorst had not interviewed the insured driver. Nor had she seen the insured vehicle at all. The insured driver despite his availability at home (according to Dickens) he was not called as a witness. In consequence thereof it is not known at what speed he was driving on the day in question and what his mannerisms were.

[51] Also agree with Moodley's submission that Badenhorst did not lay any factual basis for her conclusion that the insured vehicle travelled at an average speed of 40 km from the scene of the accident to Sappi Mandini. For the expert opinion to be accepted it must have logical basis. However, it is the function of

the Court in the light of the evidence as a whole to determine whether the evidence of an expert witness itself is acceptable or not. Unless it is linked with the facts put before the Court, the expert witness's opinion is an abstract theory. See *S V Mngomezulu 1972 (1) SA 797(A).* No logical basis of her conclusion has been found in this regard.

[52] Badenhorst has also concluded that it was more probable that the collision occurred at 20h30 and 21h00 as opposed to between 20h00 and 20h15. She apparently based this conclusion on the evidence of Vinesh Maharaj that he heard a loud bang at 20h30. That the accident occurred at 21h00 might have sprung from the fact that in the accident report as well as in the Particulars of Claim the time of the collision is recorded as 21h00. Govender, a police official, who attended the scene of accident in his statement states that he received a report of a motor collision at 21h00. This evidence does not take into account the time elapsed between the collision and the arrival of the police and paramedics on the scene. After the collision, Karishma stood for sometime on the side of the road asking for assistance from the passing motor vehicles. Vinesh Maharaj testified that police and paramedics were summoned by him when he was on his way to the scene of accident.

[53] To say that the collision occurred at 20h30, Badenhorst must have attempted to dove tail her evidence with that of Vinesh Maharaj. The evidence of Karishma has been simple and straight forward that the collision occurred

between 20h00 and 20h15 and it was not challenged. However, under cross-examination Badenhorst conceded that the collision could have taken place at 20h00. She apparently abandoned her earlier conclusion on the issue. Under questioning for clarity she testified that if the accident had occurred at 20h00 and the truck could have arrived at Sappi Mandini by 21h30. She also stated that it could take a truck an hour to travel from the scene of collision to Sappi Mandini, whereas earlier she said it could take the truck 1 hour 15 minutes. The insured vehicle arrived at Sappi Mandini at 21h35. When this is viewed against the evidence of Karishma the probabilities are such that the insured motor vehicle was at the time of the collision in the vicinity of the scene of accident. The time the truck arrived at Sappi Mandini is more consistent with the version that the collision occurred between 20h00 and 20h15. It is also more probable that the insured driver was driving at a great speed regard being had to that he was conversant with the route and that as it was at night the road was quiet in terms of vehicle traffic.

[54] As the evidence of Badenhorst, the expert witness, is based on the reconstruction, it cannot reasonably bear the same weight as direct, eye witness, testimony of the event in question. See *Van Eck V Santam Insurance Co. Ltd 1996 (4) SA 1226(C).*

[55] In this regard, Eksteen J in *Motor Vehicle Assurance Fund V Tammy 1984(1) SA 432(E) at 436H-I* had the following to say:

> "Direct or credible evidence of what happened in a collision, must, to my mind, generally carry greater weight than the opinion of an expert, however experienced he may be, seeking to reconstruct the events from his experience and scientific training… Unless the opinion is either uncontroverted or incontrovertible one should look first at the evidence of the eye witnesses, if any."

See also *Puzier V Union and South West Africa Insurance Co. LTD* (1973 *Eastern Cape Division*, unreported)

[56] This case was cited with approval and applied in *Transkei Blue Line Business Service (Pty) Ltd v Minister of Police (1982, Eastern Cape Division,* unreported). However, Mullins J emphasized that in the final result a decision must be reached on the evidence as a whole. He went on to say:

> "an expert's view of what might probably have occurred in a collision must in my view, give way to the assertion of the direct and credible evidence of an eye witness. It is only where such direct evidence is so improbable that its credibility, is impugned that an expert's opinion as to what may or may not have occurred can persuade the court to his view."

However, the expertise of the witness should not be elevated to such heights that sight is lost of the Court's own capabilities and responsibilities in drawing inference from the evidence. See *Holtzhauzen* V Roodt 1997(4) SA 766 (W) 772(E).

[57] The evidence Karishma and of Ajesh Singh that the insured vehicle was on 27 May 2003 in the evening travelling on M4 route is more probable and plausible when compared to the expert evidence adduced by Badenhorst in this case. The possibility of an error on the part of both Karishma and Ajesh Singh in

identifying the vehicle was far too remote. The truck fitting the description of the vehicle spotted on the M4 laden with logs delivered logs at Sappi Mandini, an hour after the collision. No other truck had been spotted on this route at this particular time in point.

[58] Sewnarayan's testimony that the drivers of SS Transport from Ixopo to Mandini used Wartburg via Tongaat route was based on the information he had received from his brother, who could not testify due to the fact that he was then deceased. Sewnarayan had no general knowledge of the route the drivers of SS Transport used when transporting timber to Mandini. Mr Dickens who was virtually in control of SS Transport drivers at the time testified that they used N2 and M4 route to Sappi Mandini because it was advantageous to use than the Wartburg Tongaat route. It was shorter and there were not toll gates and weighbridges on this route. This finds corroboration in the evidence of Badenhorst that N2 and M4 route is 42km shorter than the Wartburg via Tongaat, Mandini route. In the premises, it was more probable than not that the SS Transport drivers used N2 M4 route.

[59] It has been argued on behalf of the defendant that Ajesh Singh did not see the insured vehicle at all but he merely telephoned the Mandini weighbridge and made enquires on the following morning. If this could be accepted as true it cannot be explained how Karishma came to know that the insured vehicle with V-deck shaped double trailer was on the day in question on M4 highway laden with

pine logs, regard being had to the fact that no other truck from Ixopo delivered logs at Sappi Mandini on the night of 27 May 2003. Secondly, she could not have sucked the presence of the truck on M4 highway at the particular time in point and its apt description from her thumb.

[60] She immediately after the collision described the vehicle as a truck with V-deck shaped trailer laden with logs. Such a description and identity of the alleged truck was later verified by Ajesh Singh who pursued the truck up to Mellville where he recorded its registration letters and number on his palm. Such letters and number correspondent with the registration letters and number of the insured vehicle that delivered logs at Sappi mill on the night in question.

[61] The second question to decide is whether the log in question fell off the insured vehicle. The plaintiff's eye witness, Karishma, did not claim to have seen the log falling from the insured vehicle but she presented positive facts and circumstances from which it can reasonably be inferred that it fell off the insured vehicle. There were no street lights on this road and for visibility the plaintiff and the witness's solely relied on the lights of their vehicle. The possibility cannot be excluded that the log dropped from the insured vehicle unnoticed onto the roadway, regard being to the fact that the plaintiff's vehicle was following the insured vehicle at a distance of 50m.

[62] Mr Marx recorded the consignment of the insured vehicle delivered at 21h35 on 27 May 2003 as pine logs, 2.4m in length, from the inland. Mr Dickens confirmed that a Mercedes Benz truck trailer bearing registration letters and numbers NPS51863 with V-deck shaped double trailer was on 27 May 2003 transporting timber (pine logs 2.4m in length) from Ixopo to Sappi Mandini. According to Dickens the truck took the M4 route. After the collision a pine log 2.4 in length was found still embedded in the undercarriage of the plaintiff's vehicle. It could not, in my view, be a sheer coincidence that the log found underneath the plaintiff's vehicle fitted the description of the logs the insured vehicle was carrying on the day in question in all material respect. Taking into account also that the SS Transport drivers found it more advantageous to use M4 route to Mandini than Wartburg route, it is more probable that the insured vehicle was on the night in question travelling on M4 highway laden with logs.

[63] It has also been suggested on behalf of the defendant that the log in question could have fallen off the truck that had delivered logs at Sappi Mandini at 15h07 on 27 May 2003. The logical analysis of the facts and probabilities shows that it was highly improbable that the log could have been lying on such a busy road , M4 highway, for more than four hours without causing any damage or hinderance to the vehicles using such road. The other collision also with logs also occurred at night. Both Ajesh Singh and Vinesh Maharaj testified earlier on that in the afternoon at approximately 16h00, they had been on this route and they saw no logs lying on it.

[64] It also stands to reason that had the log been lying on the road when the insured vehicle drove past that spot, it would reasonably be expected to have taken an evasive action or veered from its path of travel in order to avoid a collision with the log which was allegedly strewn on its path of travel, the slow lane, when driving past the spot where the log was.

[65] The evidence the plaintiff presented as to the falling off of the log onto M4 highway is entirely circumstantial. The determination of the identity of the vehicle that caused collision is a matter of inference from a number of circumstances. In *R V Blom 1939 AD 188 at 202 – 203, Watermeyer JA* (as he then was, said:

> "In the reasoning by inference there are two cardinal rules of logic which cannot be ignored:
>
> (1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn;
>
> (2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct."

[66] I now turn to consider whether it can reasonably be inferred from the evidence in this case that the log fell off the insured vehicle. In *AA Ondelinge Assuransie Bpk v De Beer 1982(2) SA 603(A),* it was held that it is not necessary for a plaintiff invoking circumstantial evidence in a civil case to prove that the inference which he asks the Court to make is the only reasonable inference. He will discharge the onus which rests on him if he can convince the Court that the

inference he advocates is the most readily apparent and acceptable inference from a number of possible inferences.

In Santam Bpk v Potgieter 1997(3) SA 415 (O) at 423 A-C, it was stated that in a civil matter, the plaintiff will discharge the onus which rests on him if he can convince the Court that the inference which he contends for is the most evident and acceptable inference of a number of possible inferences.

[67] In *casu*, there are sufficient positive proved facts from which an inference can reasonably be drawn. The fact that at the time of the collision the plaintiff's vehicle was following a truck laden with logs at a distance of 50 metres away, the absence of any other truck laden with logs in the vicinity at the particular time in point and the absence of the log or logs on the road in question prior to 20h00 render a strong support to the inference that the log fell off the insured vehicle. These facts, in my view, can be inferred with as much practical certainty as if they had been actually observed. See *S v Essack and another 1974(1) SA 1 (A) at 16D.*

[68] In *Vegoedingskimmissior's v Multilateale Motorvoertuig Ongeluke Fonds [1998] 3 All SA 146146(N),* it was held that it was trite law that direct and credible evidence regarding what occurred during an accident carried greater weight then the opinion of an expert, irrespective of his or her experience… The Court must first look at the evidence of the eye witnesses and make a provisional

assessment of which of the versions is acceptable on the balance of probabilities. Having provisionally accepted one or other version, the Court must then consider the expert evidence and decide whether that evidence displaces the provisional findings made.

[69] In *casu*, there is no direct evidence as to the identity of the truck from which the log fell off. However, there are proved facts and circumstances from which it can reasonably be inferred that the log fell off the insured vehicle as out lined above. The facts that the insured vehicle had left the loading site at Ixopo on the same day laden with pine logs, the drivers of SS Transport which subcontracted to Dickens to transport timber to Sappi Mandini found it advantageous and cost effective to use M4 route and that according to the transaction record of Sappi Mills. The insured vehicle was the only truck from Ixopo that delivered 2.4m pine logs at 21h35 on 27 May 2003, strongly support the conclusion that the log in question fell off the insured vehicle.

[70] The other question for decision is whether a collision between the plaintiff's vehicle and the log occurred. Badenhorst's conclusion that the plaintiff's vehicle did not somersault upon hitting the log is suggestive of that the collision did not take place at all. Badenhorst has been adamant that the vehicle upon hitting the log did not somersault as Kerishma described. She based her conclusion on the tyre marks made by the vehicle. She concluded that the presence of such tyre marks was an indication that when the plaintiff's vehicle left

the road it was still moving on its wheels. This conclusion is in sharp contrast with the finding of the log still embedded in the under carriage of the plaintiff's vehicle after collision. It is highly improbable that a small vehicle like that of the plaintiff with a 2.4m log embedded in its front undercarriage would still have been on its wheels when it left the road surface.

[71] Mr Vinesh Maharaj also testified that when he arrived on the scene he found the vehicle in the bank on the left hand side of the road. Had it not somersaulted what could have thrown it there. Further, the plaintiff could not have been flung out of the vehicle onto the carriage way. Badenhorst's opinion in this regard does not, in my view, withstand logical analysis and it therefore follows that it is not reasonable. No weight can be attached thereto. See *Michael and Another V Links Field Park Clinic (PTY) Ltd and Another 2001(3) SA 1188 (SCA) at 1201 A*.

[72] Vinesh Maharaj's inferences that when he put a blanket on a young man, who was lying on the road outside the carriage way he realised that it was Nishal Singh, a fast driver who had written off many cars, betrayed him as being malicious. It is common cause that the plaintiff was flung out of the vehicle and came to lie on the tarmac outside the carriageway. The paramedics attended to him on the scene and that he was thereafter conveyed to hospital. There was therefore no doubt that the plaintiff was injured. The statement that the plaintiff's claim for injuries he sustained was dubious, was in my view, not founded.

Maharaj seemed to have assumed the role of an expert. Vinesh did not see the vehicle whilst it was still travelling and he therefore did not have any basis for saying that the plaintiff was driving at a great speed prior to the accident.

[73] It also transpired that Karishma had at the time have a driver's licence. Maharaj claimed that the plaintiff was not a driver but Karishma was. The plaintiff was said to be a driver because Karishma did not have a drivers licence. Maharaj conceded under cross-examination that it was not true that the plaintiff had written off many vehicles. Maharaj's evidence failed to show that the collision did not take place but the plaintiff simply overturned the vehicle. Further, that the plaintiff was at fault and that he was not a driver when the accident occurred. In my opinion such evidence did not take defendant's case any further. The plaintiff has succeeded to prove the casual connection between the fall of the log from the insured vehicle and the subsequent collision between his vehicle and the log in question.

[74] The inquiry at the conclusion of the present case remains whether the plaintiff has on the balance of probabilities discharged the onus of establishing that the collision was caused by negligence attributed to the defendant. In deciding the question whether the plaintiff has discharged the onus resting on them, I have to consider the evidence presented before me in its totality. See *New Zealand Construction (Pty) Ltd v Carpet Craft 1976(1) SA 345(N).* In *Maritime and General Insurance Co. v Sky Unit Engineering 1989(1) SA 867(T),*

it was stated that in analyzing the evidence in order to determine whether or not the party on whom the onus rests has proved his case on a balance of probabilities, there are no variable or specific degrees of probability required but all that is required is testimony such as carrying conviction to the reasonable mind. See also *Gates v Gates 1939AD 150 at 154-5*.

[75] On weighing the probabilities of this case as established by the evidence presented by both parties including documentary and expert evidence as set out above, I find that the balance of probabilities favour the plaintiff.

The insured driver was negligent in the following respects:

(a) He failed to safely and properly secure the logs onto the insured vehicle;

(b) He drove the insured vehicle in a manner that caused the logs to become dislodged and fall onto the roadway on M4 highway;

(c) He failed to take all reasonable steps to guard against the possibility of the logs falling off the insured vehicle whilst travelling along M4 highway and causing harm to other road users.

(d) He failed to keep a proper lookout and as a result he failed to see the log falling off the insured vehicle onto the road, M4 highway;

(e) He was negligent in driving the insured vehicle when he was aware or ought to have been aware that the log had fallen off the insured vehicle or that the logs were falling onto the roadway and that they would

constitute danger to other road users. From his conduct, ignoring Ajesh Singh when stopping him in order to alert him to the falling of the log onto the road, it can be inferred that he was fully aware of the falling off of the logs from the insured vehicle.

(f) He failed to clear the roadway of the log(s) that had fallen off the insured vehicle.

(g) He failed to warn the other road users of the presence of log(s) on the M4 highway.

[76] As the insured driver was in control of the insured vehicle that had dislodged the log(s) on to the road way he was therefore to under a legal duty to remove it or alert other road users of its presence on the M4 highway and his failure to do so had in the circumstances rendered the defendant liable to the plaintiff. See *SAR&H v Est Sanders 1931 AD 276* and *Blose v Standard General Ins 1972(2) SA 89(O).* The real ground for holding the defendant liable is that the insured driver's omission constituted a breach of a legal duty to act.

[77] It has been argued on behalf of the defendant that the plaintiff and the witness, Karishma Maharaj, contributed to the cause of the collision by failing to wear seat belts. Ordinarily a passenger who fails to wear a safety belt is negligent, however, before the Court may have regard to the passengers' omission the defendant must prove that it contributed causally to the damage. In *casu*, the defendant has failed to show in which manner it is alleged that the

plaintiff and his passenger contributed to the collision. The failure to wear seat belts maybe relevant to the determination of the quantum of damages.

[78] The evidence advanced by the plaintiff has, in my view, satisfactorily established that the log in question fell off the insured vehicle. In the result, I find that the plaintiff has succeeded in discharging the onus resting upon it to prove that the collision was caused by the negligence of the insured driver. The defendant is therefore liable to the plaintiff for damages he suffered as a result of the collision between his vehicle and the log on 27 May 2003. Accordingly, the judgment is entered in favour of the plaintiff on the question of liability with costs.

Date reserved on: 18 December 2008

Date delivered on: 9 June 2009

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