



**IN THE HIGH COURT OF SOUTH AFRICA  
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Appeal No: AR13/22

Case No: 2402/2019P

In the matter between:

**VDN CARRIERS AND LOGISTICS CC**

**APPELLANT**

**(REGISTRATION NUMBER: 2003/062867/23)**

and

**GENNAO LOGISTICS CC**

**FIRST RESPONDENT**

**(REGISTRATION NUMBER: 2011/052967/23)**

**KHUWA MAHAMBA**

**SECOND RESPONDENT**

**SUMTAS TRUCKING CC**

**THIRD RESPONDENT**

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**ORDER**

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**On appeal from:** The KwaZulu-Natal Division of the High Court, Pietermaritzburg  
(Mngadi J, sitting as court of first instance):

1. The appeal succeeds.
2. The order of absolution from the instance is set aside and is replaced with the following order:

'The first respondent is found to be 100% liable for the appellant's proven or agreed damages.'

3. The first respondent's conditional claim in reconvention is dismissed with costs;
4. The first respondent's third party proceedings are dismissed with costs;
5. The first respondent is directed to pay:
  - (a) the costs of the appeal;
  - (b) the costs of the appellant's application for leave to appeal; and
  - (c) the costs of the appellant's petition to the Supreme Court of Appeal.

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## JUDGMENT

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### **Mossop J (Madondo AJP and Bezuidenhout J concurring):**

[1] During the early morning hours of 31 August 2013, a truck was travelling north between Durban and Johannesburg on the N3. As it cleaved its way through the inky darkness engulfing the N3, it approached the Loskop off-ramp between Mooi River and Estcourt in KwaZulu-Natal. At that point it overturned (the overturned truck). Sometime later,<sup>1</sup> at around 02h00 on the same morning, the appellant's truck (the appellant's truck) was also Johannesburg bound from Durban on the N3 and came upon the area where the overturned truck was. As it was passing that area, it was struck on its left side by the first respondent's truck (the first respondent's truck), being driven by the second respondent, which moved from the left-hand lane into the right-hand lane occupied by the appellant's truck. As a consequence of the resulting collision, the appellant's truck was damaged beyond economical repair.

[2] The appellant instituted action against the first and second respondents, jointly and severally, for the value of its truck, it being alleged that the collision was occasioned by the negligent driving of the first respondent's truck by the second respondent. The first and second respondents defended the action and delivered a conditional claim in reconvention. In due course, the first and second respondents joined the owner of the overturned truck as a third party. The third party was referred

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<sup>1</sup> The shortest estimate of the time between the overturning of the third respondent's truck and the subsequent collision between the appellant's truck and the first respondent's truck is 45 minutes. The gap between the two incidents could, however, have been longer.

to at the trial (and in the amended pleadings) as 'the third respondent'. I prefer to refer to it as 'the third party'. The first and second respondents alleged that the collision between the appellant's truck and the first respondent's truck had been occasioned by the negligent driving of the third party's driver.

[3] At the commencement of the trial, the issues were consensually separated in terms of the provisions of Uniform rule 33(4) and only the issue of liability fell to be determined by the trial court. Each of the three drivers of the three trucks testified and after hearing that evidence, the trial court granted absolution from the instance.

[4] In its judgment,<sup>2</sup> the trial court found that no negligence had been proved on the part of any of the three drivers. Certainly, no negligence was established on the part of the appellant's driver and the third party's driver. The judgment appears to have found, although there was no express articulated finding in this regard, that the overturned truck was on the surface of the roadway and constituted an obstruction to the second respondent. That having been found, the trial court concluded that the second respondent had had no time to check for other traffic on the road before swerving from the left lane into the right lane. In fact, the court found that this was his only alternative and therefore it was of no significance that he did not look out for traffic before doing so. The court found that the evasive measures allegedly taken by the second respondent were accordingly reasonable.

[5] Dissatisfied with this reasoning and this finding, the appellant sought leave to appeal. This was refused by the trial court, apparently without any reasons being provided for such refusal. A petition to the President of the Supreme Court of Appeal by the appellant followed. It was successful and leave to appeal to a full court of this division was granted. It is consequent upon such leave being granted that we hear this appeal. The third party has not participated in the appeal.

[6] The N3 is a major arterial road between Durban and Johannesburg. At the area where the events in question occurred, the N3 has two carriageways, one running northward from Durban to Johannesburg and another running southward, in the opposite direction. The two carriageways are separated by a grass reservation.

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<sup>2</sup> *VDN Carriers and Logistics CC v Gennao Logistics CC and others* [2021] ZAKZPHC 15.

Each carriageway has two lanes. The events in question occurred on the northern bound carriageway. Photographs handed in at the trial show that approaching the area where the overturned truck lay, the northbound carriageway descends slightly and curves gently to the left. Visibility is good. The collision between the appellant's truck and the first respondent's truck occurred just before the gentle curve to the left.

[7] The appellant pleaded in its particulars of claim that the collision between its truck and the first respondent's truck was caused by the negligent driving of the second respondent. It was always common cause that the second respondent was acting in the course and scope of his employment with the first respondent. The grounds of negligence pleaded by the appellant were the usual grounds to be expected in a matter of this nature. The appellant, inter alia, alleged of the second respondent that:

- '7.1 He failed to keep a proper lookout;
- 7.2 He failed to keep the motor vehicle he was driver [sic] under any or proper control;
- 7.3 He drove at an excessive speed under the circumstances;
- 7.4 He failed to apply his brakes timeously, adequately or at all;
- 7.5 He failed to avoid a collision when, through the exercise of reasonable care, he could and should have done so.
- 7.6 He collided into the side of the Plaintiff's vehicle;
- 7.7 He failed to keep a proper following distance from the vehicles in front of him;
- 7.8 He failed to take into consideration the rights of other road users, more specifically the rights of the Plaintiff.
- 7.9 He changed lanes at a time when it was unsafe and inopportune to do so.'

[8] The first and second respondents delivered a plea in which they pleaded, inter alia, that:

- '10.1 Prior to the collision between the plaintiff's vehicle and the defendant's vehicle, a truck of Sumtas Trucking CC<sup>3</sup> bearing registration number FZX 992 MP ("the Sumtas vehicle") had overturned creating an obstruction in the second defendant's lane of travel;
- 10.2 The first defendant's vehicle had no opportunity to avoid the accident, and consequently changed lanes in reaction to the sudden emergency created by the Sumtas vehicle;
- 10.3 Consequently the second defendant was not negligent as pleaded or at all.'

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<sup>3</sup> Sumtas Trucking CC is the third party.

[9] The issues before the trial court were thus crisp. It was required to determine whether the appellant had established the negligence of the first respondent's driver<sup>4</sup> and, if so, whether the first respondent's defence of sudden emergency could be relied upon by it to avoid liability for such negligence.<sup>5</sup>

[10] The scope of the defence of sudden emergency was dealt with in *Goode v SA Mutual Fire and General Insurance Co Ltd*,<sup>6</sup> where King J stated that:

'The other qualification to the rule is that the conduct of the person setting it up must, of course, be reasonable, for the principle that a person in the agony of a moment is not expected to act with the same judgment and skill as in normal circumstances must not be extended to excuse conduct which, even in a critical situation, is not reasonable (*vide, Van Staden v May* 1940 WLD 198). It is not, therefore, every error of judgment which is excusable as not amounting to negligence, but only one which a reasonably careful and skilled driver of a vehicle might commit. There can only be a moment of agony if the person whose conduct is in question had neither the time nor the opportunity to weigh the pros and cons of the situation in which he found himself.'

[11] It is settled law that sudden emergency cannot be relied upon if it was created by the negligence of the party raising it as a defence.<sup>7</sup>

[12] In considering this appeal, I do not lose sight of the fact that the trial court enjoyed the singular advantage of seeing and hearing the witnesses who testified and would consequently be in a better position to form a judgment of their value as witnesses. The trial court would also have been steeped in the atmosphere of the trial.<sup>8</sup> An appellate court is accordingly reluctant to disturb factual findings made by the trial court. That having been acknowledged, such advantages as the trial court

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<sup>4</sup> The appellant bore the onus in this regard: *Ntsala and others v Mutual & Federal Insurance Co Ltd* 1996 (2) SA 184 (T) at 190E–F.

<sup>5</sup> The first respondent bore the onus in this regard: *Moyo v Autopax Passenger Services (Pty) Ltd t/a City to City* [2005] ZAGPHC 219 at 3.

<sup>6</sup> *Goode v SA Mutual Fire and General Insurance Co Ltd* 1979 (4) SA 301 (W) at 306H–307B.

<sup>7</sup> *Mpete v Road Accident Fund* [2012] ZANWHC 38 para 15; *Qusu Logistics CC v Pohl NO* [2020] ZAFSHC 217 para 18.

<sup>8</sup> *R v Dhlumayo and another* 1948 (2) SA 677 (A) at 697.

enjoyed must not be overstated, 'lest the appellant's right of appeal becomes illusory'.<sup>9</sup>

[13] Notwithstanding the advantages that the trial court undoubtedly has, it is the duty of an appellate court to overrule a conclusion of a trial court of first instance on a question of fact when the appellate court is convinced that the conclusion arrived at by the trial court is clearly incorrect.<sup>10</sup>

[14] Dealing firstly with the issue of the alleged negligence of the second respondent, in the often-cited matter of *Kruger v Coetzee*<sup>11</sup> the following was said on the test for negligence:

'For the purposes of liability culpa arises if –

- (a) a *diligens paterfamilias* in the position of the defendant -
  - (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
  - (ii) would take reasonable steps to guard against such occurrence; and
- (b) the defendant failed to take such steps.'

[15] In a trial, a plaintiff has the onus of proving negligence on the part of the defendant on a balance of probabilities. If it is able to prove an occurrence that gives rise to an inference of negligence, then the defendant 'must tell the remainder of the story, or take a risk that judgment be given against him'.<sup>12</sup>

[16] It is common cause that at the moment of the collision between the appellant's truck and the first respondent's truck, the appellant's truck was in the right-hand lane of the northbound carriageway of the N3. There was initially a dispute about whether the appellant's truck was ahead of the first respondent's truck or behind it. The appellant's driver stated that he was ahead of the first respondent's truck and then moved into the right-hand lane as he approached the area of the overturned truck. The second respondent indicated that he was travelling in the left-hand lane and

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<sup>9</sup> *Protea Assurance Co Ltd v Casey* 1970 (2) SA 643 (A) at 648E.

<sup>10</sup> *Mine Workers' Union v Brodrick* 1948 (4) SA 959 (A) at 970.

<sup>11</sup> *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E-F.

<sup>12</sup> *Ntsala and others v Mutual & Federal Insurance Co Ltd* 1996 (2) SA 184 (T) at 190F.

asserted that he was ahead of the appellant's truck. However, he later changed tack, as revealed in this exchange between the court and himself:

'COURT He might be slightly ahead, but he was on your right. But in any case, you said you did not check even the rear-view mirrors before you moved to the right, so you cannot deny that. – It is, yes, M'Lord.'

[17] On his own pleaded version, the second respondent changed lanes, and, in his evidence, he conceded that he did so without looking. On the face of it, that is negligent conduct on the part of the second respondent. To an extent, the appellant was assisted in establishing negligence by the very defence relied upon by the first and second respondents: the doctrine of sudden emergency applies where a person's conduct is prima facie negligent.<sup>13</sup>

[18] For the defence of sudden emergency to have a chance of prevailing, the trial court had to find that the overturned truck was on the road surface and constituted an unexpected impediment to vehicles travelling northwards on the N3. The position of the overturned truck is therefore critical to the success of the defence raised. The first and second respondents pleaded that the overturned truck, indeed, constituted an obstruction in the second respondent's lane of travel but did not specify which lane that was. The evidence of the second respondent clarified the plea: he testified that he was travelling in the left lane of the northbound carriageway of the N3 and that was the lane that he claimed was obstructed.

[19] Before considering the evidence of where the overturned truck lay, it is necessary to consider a photograph that was referred to at the trial as 'photograph 35'. I shall continue to refer to it in that fashion. It is a photograph of the scene taken after the collision between the appellant's truck and the first respondent's truck. It was apparently belatedly made available by the first and second respondents' legal representatives the day before the trial commenced. The photograph was extensively referred to at the trial and assumed some significance. It also attracted some criticism from the trial judge. It is therefore necessary to dwell on it for a moment.

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<sup>13</sup> *Van Staden v Stocks* 1936 AD 18 at 22.

[20] The trial judge found photograph 35 to be of poor quality. There is some substance to this finding. It appears that the photograph was taken at dawn on the day of the collision. Because of this, it is quite dark in its tone, but it is still possible to discern what it depicts. I do not share the trial judge's expressed view that it did not clarify the situation. Nor can I comprehend his comment that it 'resulted not showing objects depicted in the photo'.<sup>14</sup> The learned judge stated because of the perceived poor quality of photograph 35,

'and the absence of the evidence of the person who took the photograph, it may not be used in preference to the evidence of the witnesses.'<sup>15</sup>

An exhibit is either admissible, or it is not. The parties had agreed that it was admissible and made considerable reference to it during the trial. The absence of the photographer was accordingly of no moment. The restriction imposed upon the use thereof and the significance of the photograph was therefore inappropriate.

[21] The photograph was taken with the photographer pointing the camera towards Johannesburg. The photograph records the appellant's truck, marked on the photograph as 'A', on the right of the photograph on the grass median between the two carriageways of the N3. On the left side of the photograph is the overturned truck, lying to the left of the two lanes that comprise the northbound carriageway. It is lying on its side with its wheels in the air. It is possible to determine that no part of the overturned truck is in contact with the road surface. The overturned truck is marked on the photograph with the letter 'B'. It is possible that a small portion of the rear of the truck may overhang the emergency lane on the left shoulder of the road.

[22] On the issue of the position of the overturned truck, the appellant's driver expressed himself as follows in response to a question from the appellant's counsel, and with reference to the position of the overturned truck in photograph 35:

'MR ENDER ... was that resting position that you observed when your collision happened --- Yes.

Has the truck been moved from there? --- No. That was the position it was before.'

That evidence was never challenged.

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<sup>14</sup> Para 10.

<sup>15</sup> Para 11.



[23] Questioned by counsel for the third party, the appellant's driver further answered as follows regarding the image captured in photograph 35:

MS VAN JAARVELD As the Court pleases. So am I then correct to say between the time that you first saw the vehicle and the time that this picture was taken, that vehicle that is depicted as or marked with the letter B did not move? --- Yes, it did not move.'

The vehicle marked with the letter 'B', as stated above, is the overturned truck.

[24] The appellant's driver further confirmed that he had been travelling in the left lane but had been given warning of the presence of the overturned truck by someone who was standing in that lane waving something at him. He moved the appellant's truck from that lane into the right lane, not because his path of travel was blocked by the overturned truck, but because he was exercising caution.

[25] When he testified, the third party's driver corroborated the appellant's driver's evidence as to where the overturned truck lay. He further denied that the left-hand lane of the northbound carriageway was obstructed by the overturned truck. He testified that there was no other vehicle involved when his truck overturned. The only source of a possible obstruction was thus his truck.

[26] The third party's driver was injured when his truck overturned and had to be taken to hospital. He estimated that he lay at the scene for approximately 45 minutes before he was evacuated by ambulance for medical attention. He confirmed that his truck was transporting a container but that when it overturned, the container had remained attached to the trailer upon which it was being transported and had not become separated from it. As it rested on its side, the container was thus supporting the trailer which was above it. His evidence on this point was also not challenged.

[27] By the time that the third party's driver was removed from the scene, the collision between the appellant's truck and the first respondent's truck had not yet occurred. The third party's driver accordingly had nothing of significance to contribute as to how the collision occurred. But that notwithstanding, he did contribute some important information regarding the position of the overturned truck at the time it overturned and at the time that he was taken away by ambulance. With

specific reference to photograph 35, the following interaction occurred between the trial judge and the third respondent's driver:

'MNGADI J You have told us where the truck landed and where it was facing now when you left and you were taken away was it still in that position? --- I left it in the same position.'

The thrust of this testimony was that the position that the overturned truck was in when the third party's driver departed the scene is the position depicted in photograph 35.

[28] Under cross-examination, the third party's driver adhered to his version that 'the truck had not closed the road'. He explained this further by stating that there were other trucks from the third respondent following behind him and they had not stopped to see what had happened to him because, in his opinion, '... they didn't see me because my truck had all fallen outside of the road.'

[29] That would mean that the overturned truck could not have been obstructing the left-hand lane of the N3 because it is not depicted in photograph 35 as touching the road surface. While it is readily acknowledged that a photograph is a two-dimensional image of a three-dimensional scene, it is evident from the photograph that the overturned truck is completely off the road surface.

[30] The second respondent's evidence on the obstruction that he claimed existed was equivocal, at best, confused and untrue at worst. He initially testified that he: '... saw a container that was lying, striding over my lane which is the left lane.'

He went on to say that:

'... I saw that this container was lying shutting my left lane; it also reached the right lane.'

Later, he stated that:

'M'Lord, the truck itself was not visible. What was visible though was the container, because the truck has gone on to the other side of the road and thus it was not visible from where I was. It was merely the trailer that was visible.'

Finally, he stated:

'He failed and thus collided with my vehicle after my vehicle had already collided with part of this vehicle that was lying in or the container that was lying on the road.'

[31] It is therefore difficult to comprehend what precisely blocked his lane of travel: was it a truck, as pleaded, or a container, as testified to, or a trailer (which may or may not have had a container on it)?

[32] What was testified to by the second respondent was entirely at odds with what was pleaded by the first and second respondents. The plea made it clear that what blocked the forward progression of the first respondent's truck was the overturned truck, not a container or the trailer of the overturned truck. The fact of the matter is that there was only one overturned truck and it was only transporting one container. That container is depicted in photograph 35 and it at all times remained attached to the overturned truck. It could not therefore have stood alone on the road surface.

[33] The clarity of the first and second respondents' defence of sudden emergency was further undermined by the second respondent claiming that the first respondent's truck had actually collided with the container. He explained it thus: 'M'Lord, as I said, as this container was lying in the road I tried to avoid it and in my swerve towards my right, the right wheel of my vehicle collided with the container.'

[34] This collision had not been pleaded by the first and second respondents. A version that included a collision with an obstruction had, however, been put to the appellant's driver in cross-examination by counsel representing the first and second respondents. It was not the same version advanced by the second respondent when he later testified. What was put was that the overturned truck itself was struck by the first respondent's truck, not the later revelation by the second respondent that his truck had struck a container. It must be remembered that the third respondent's truck was lying on its side with its container still attached to the trailer on which it was being transported. It is not clear what container could thus have caused the alleged obstruction.

[35] The putting of the version that incorporated the collision with the overturned truck by the first and second respondents' counsel drew an objection from counsel for the appellant, who correctly pointed out that this version had not been pleaded by the first and second respondents. The objection received short shrift from the trial

judge, who stated that 'you don't plead all the details'. He proceeded to allow the unpleaded version to be put and later allowed evidence on this issue.

[36] A pleading must contain all material facts relied upon by the pleader.<sup>16</sup> A pleading will have sufficient particularity if it identifies and defines issues in such a way that it allows the other party to comprehend what they are.<sup>17</sup> It is trite that the parties to an action are bound by the pleadings. A party cannot be allowed at trial to raise a different case to that pleaded without due amendment to the pleading properly being sought, granted and effected. The court itself, no less, is also bound by the pleadings. The court does not determine the issues or the terms of reference that are to be utilised to determine those issues: this the parties do in their respective pleadings. In *South African Breweries (Pty) Ltd v Louw*,<sup>18</sup> the court stated:

'The norm of a fair trial means each side being given unambiguous warning of the case they are to meet. Moreover, these requirements are not mere civilities as between adversaries; the court too, is dependent upon the fruits of clarity and certainty to know what question is to be decided and to be presented only with admissible evidence that is relevant to that question. Making up one's case as you go along is an anathema to orderly litigation and cannot be tolerated by a court. Counsel's duty of diligence demands an approach to litigation which best assists a court to decide questions and no compromise is appropriate.'

[37] At the commencement of the trial, the appellant would have been entirely unaware that this was now to be the version advanced by the first and second respondents. It can only have been taken by surprise by this development. The prejudice to it is obvious.

[38] A prior collision that occurred earlier in time to the collision being considered by the trial court was a material fact in the context of a plea of sudden emergency and ought to have been pleaded by the first and second respondents. The trial court erred in permitting an unpleaded version to be put in cross-examination, and in later hearing evidence on that unpleaded version. The objection ought to have been upheld and the evidence excluded in the circumstances.

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<sup>16</sup> Uniform rule 18(4).

<sup>17</sup> *Nasionale Aartappel Kooperasie Bpk v Price Waterhouse Coopers Ing en andere* 2001 (2) SA 790 (T) at 798F-799J.

<sup>18</sup> *South African Breweries (Pty) Ltd v Louw* [2017] ZALAC 63; (2018) 39 ILJ 189 (LAC) para 4.

[39] On the evidence adduced by all those who testified, the trial court ought to have found that there was no obstruction on the road surface that confronted the second respondent. The trial court did not come to that conclusion.

[40] In summarising the evidence of the witnesses, the learned trial judge indicated that the appellant's driver had testified that the overturned truck was 'obstructing his lane of travel'.<sup>19</sup> That, unfortunately, was not the evidence of the appellant's driver. He never testified to that effect. His evidence was that the overturned truck was in the position depicted in photograph 35, namely off the road surface, with a small portion thereof blocking the emergency lane. The learned judge also stated on several occasions that the appellant's driver had 'swerved' his truck to the right to avoid colliding with the overturned truck. That, too, was never his evidence. This is partly because of what is stated above regarding the position of the overturned truck which did not create an obstruction, and partly because the appellant's driver indicated that he 'moved', and had not 'swerved', his truck over from the left lane to the right lane. The inescapable inference is that it was a controlled manoeuvre. The first and second respondents' counsel even suggested to the appellant's driver that he had 'gently' moved his truck from the left lane to right lane. That proposition accorded with the appellant's driver's evidence. The appellant's driver indicated further that at the time of the collision he estimated the speed of his truck at 10 kmph. That evidence was never disputed. The finding that he had swerved, implying a frantic, desperate manoeuvre to avoid an obstacle, was incorrect and did not accord with the undisputed evidence led at trial.

[41] The learned trial judge did find that the second respondent's evidence could be seriously criticised in a number of areas. Such criticism, so it was reasoned, could justify an inference that he had sufficient opportunity to view the overturned truck at a reasonable distance if he had been keeping a proper look out and if he was driving at a reasonable speed. The learned judge also mentioned that it would appear that the second respondent misjudged the position of the obstruction. In my view, the learned judge was correct in all these respects, save for his reference to an obstruction. That is what he ought to have found proved. The learned judge, however, went on to find that the evidence of the second respondent could not be

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<sup>19</sup> Para 14.

looked at in isolation. He found that the second respondent's evidence was corroborated by the evidence of the appellant's driver and the third party's driver, who allegedly testified that it appeared that an object was blocking the roadway. As pointed out above, that was not the evidence of the appellant's driver, nor was it the evidence of the third party's driver.

[42] The acceptable evidence led at the trial established that the overturned truck did not obstruct the road surface at any time and certainly not immediately prior to the collision between the appellant's truck and the first respondent's truck. The trial court incorrectly found that this had occurred. The evidence of the second respondent was that his headlights shone ahead of his truck for approximately 500 metres. The layout of the road and the power of the headlights on the first respondent's truck meant that the second respondent would have had ample time to observe what lay ahead of him. The fact that he reacted as he did as he approached the area where the overturned truck lay inexorably leads to the conclusion that he was not keeping a proper lookout, alternatively that he was driving too fast, alternatively that he changed lanes when it was not safe for him to do so. In the appellant's particulars of claim, all three of these grounds of negligence were pleaded.

[43] In driving the first respondent's truck as he did and in turning into the lane occupied by the appellant's truck without looking, the second respondent was clearly negligent, and the trial court should have found that.

[44] The defence of sudden emergency was accordingly not established. The difference between the version pleaded and the version testified to by the second respondent undermined that plea. The trial court ought to have found that the overturned truck did not constitute an obstacle to the progress of the first respondent's truck as it proceeded in the direction of Johannesburg, nor was there any collision with such obstacle. Without the obstruction, there could be no sudden emergency. There being no sudden emergency, it is not necessary to consider whether the second respondent acted reasonably in the circumstances.

[45] There was a conditional claim in reconvention delivered by the first respondent that appears to have escaped the attention of the learned trial judge. The claim in reconvention was conditional upon the court finding that the second respondent was negligent and that the third party's driver was not the sole cause of the collision. By virtue of the finding that the second respondent was negligent and there being no evidence that the third party's driver was negligent insofar as the facts of this matter are concerned, that conditional claim in reconvention must fail. It also follows that the third party proceedings brought by the first defendant against the third party must likewise fail.

[46] The order of absolution from the instance granted by the trial court was incorrectly granted. Judgment ought to have been entered in favour of the appellant on the issue of liability. It follows that the appeal must succeed. The following order is accordingly granted:

1. The appeal succeeds.
  2. The order of absolution from the instance is set aside and is replaced with the following order:

'The first respondent is found to be 100% liable for the appellant's proven or agreed damages.'
  3. The first respondent's conditional claim in reconvention is dismissed with costs;
  4. The first respondent's third party proceedings are dismissed with costs;
  5. The first respondent is directed to pay:
    - (a) the costs of the appeal;
    - (b) the costs of the appellant's application for leave to appeal; and
    - (c) the costs of the appellant's petition to the Supreme Court of Appeal.
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**MOSSOP J**



**MADONDO AJP**



**BEZUIDENHOUT J**



**APPEARANCES**

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Date of Hearing : 28 October 2022

Date of Judgment : 18 November 2022