

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO.: 17646/2013

In the matter between:

ANDRIES BAREND KRUGER

First Plaintiff

ELAINE JANE BLANCKENBERG

Second Plaintiff

v

**THE PREMIER OF THE WESTERN CAPE
PROVINCIAL GOVERNMENT**

First Defendant

**THE HEAD: WESTERN CAPE PROVINCIAL
DEPARTMENT OF TRANSPORT AND
PUBLIC WORKS**

Second Defendant

and

ROAD ACCIDENT FUND

Third Party

JUDGMENT DELIVERED ON 10 SEPTEMBER 2025

LE ROUX, AJ:

[1] In this matter Plaintiffs claim damages from Defendants following a motorcycle accident which occurred in the afternoon on 29 October 2010 on the

R43 roadway between Villiersdorp and Worcester, also known as the Rooihoogte Pass ("Rooihoogte Road") and particularly the part of the R43 roadway at a sharp horizontal curve approximately 6,2km outside Villiersdorp in the direction of Worcester. First plaintiff drove a Suzuki motorcycle ('the motorcycle') when the accident occurred and on which Second Plaintiff, his wife, was being conveyed as a passenger. Both Plaintiffs sustained serious injuries in the accident. The issues of liability and quantum have been separated in terms of Rule 33(4). Accordingly the issue of quantum is held over for later determination and only the issue of liability came before me and is to be decided upon.

[2] Plaintiffs based their claim on the allegations that Defendants had a legal duty of care towards the public in general and Plaintiffs in particular ('the legal duty of care'):

- i. to ensure that adequate and effective signs warning road users of the presence of sharp bends on the roadway were placed next to the roadway;
- ii. to ensure that an appropriate speed limit for the design of the roadway was in force on the roadway;
- iii. to sure that the design of the roadway was in accordance with the requirements of the "Geometric Design Manual" of the Second Defendant;
- iv. to ensure the road surface would not endanger any person driving on the road surface;
- v. to ensure the safety of any person driving on the roadway;

- vi. to take all reasonable steps to avoid incidents like such as the one which gave rise to this action;
- vii. to ensure that any person or entity employed, alternatively contract, to carry out any of the duties referred to hereinbefore, would do you so speedily, properly and effectively.

[3] Plaintiffs based their claim further on the allegations that the incident was caused solely by the breach of the legal duty of care of Defendants, alternatively the incident was caused solely by the casual negligence of Defendants, in that the Defendants acting as aforesaid;

- i. failed to ensure that adequate and effective signs warning road users of the presence of the sharp curve of the roadway were placed next to the roadway;
- ii. failed to ensure that an appropriate speed limit for the design of the roadway was in force on the roadway and at the curve. In this regard, the speed limit in force on the roadway and at the curve at the time of the incident was 100 km/h, while an appropriate speed for the curve of the roadway would have been 80km/h.;
- iii. failed to ensure that the design of the roadway was in accordance with the requirements of the "Geometric Design Manual" of Second Defendant;
- iv. failed to ensure that the road surface would not be a danger to any person driving on the road surface;

- v. failed to ensure the safety of persons driving on the roadway;
- vi. failed to take all reasonable steps to avoid incidents like such as the one which gave rise to this action;
- vii. failed to ensure that any person or entity employed, alternatively contracted, to carry out any of the duties referred to hereinabove, would do so speedily, properly and effectively.

[4] Defendants admitted that they were at the time of the accident responsible for and in control of the R43 roadway on which the incident occurred and the First and Second Defendants are represented by their employees acting in the course and scope of their employment with First and Second Defendant but denied that the curve is a sharp curve as referred to by Plaintiffs. Defendants further denied the allegations by Plaintiffs as set out. In addition Defendants pleaded that if this Court should find that Defendants are causally negligent, that then in that event, that the incident was caused partly as a result of the negligence of First and/or Second Plaintiff who were negligent in one or more of the respects as set out in their plea to Plaintiffs particulars of claim. As stated, the trial only dealt with the issue of liability of Defendants.

[5] On the first day of the trial after Plaintiffs' opening address on request of Defendants' an inspection *in loco* were held at the R43 Villiersdorp (direction Worcester), at the crest curve relevant in this action and which is about 6,5km outside the town centre of Villiersdorp at the start of the Rooihoogte Road. A minute of the inspection *in loco* as jointly prepared by the parties and which

correctly reflect the details in regard to the said inspection *in loco* were admitted as exhibit in the trial. It was also common cause that at the time of the accident about 120m before the curve where the accident took place a Winding Road sign was in place and that the warning signs were subsequently changed after the accident in 2010/2011. These signs that were changed were also placed further from the curve than what it had been at the time of the accident. The Winding Road sign which was there at the time of the accident were changed to a Winding Road sign on a high visibility background with supplementary advisory speed of 80 km/h. In addition the Winding Road sign was followed by a Gentle Curve Winding road sign. It should also be mentioned that at the time of the inspection, 9 Chevron signs were present, adjacent to the left-hand side of the tar road, the first of which is at a point prior to the commencement of the curve, thus on the straight part of the road. Dr Joubert, Defendants' expert pointed out the vegetation which is adjacent to the roadway on the left-hand side. The approximate place of the lone Chevron sign depicted on the photograph taken about four months after the accident was pointed out by Plaintiff's expert, Dr Roodt with reference to those present at the time and which position was in the region of the second last and last Chevron approaching from the Villiersdorp side of the crest. The area where First Plaintiff's motorcycle left the roadway, was also pointed out by Dr Roodt with reference to a plan that was furnished by him, which is in the vicinity of where the penultimate and third last Chevrons were situated. The presence of a memorial sign (a cross) on the scene was also pointed out and which is also depicted in one

of the photographs that formed part of the photograph bundle that was admitted as an exhibit.

[6] After the leading of evidence in the trial has commenced in front of me on 6 September 2021 and after the evidence of eye-witnesses relied upon by Plaintiffs, excluding the evidence of lay-witnesses and expert evidence, has already been led and finalised, Plaintiff filed a notice of intention to amend their particulars of claim. Defendants opposed the amendment in addition filing a conditional counter-application to join the Third Party, which culminated in the matter being argued in front of me at which time counsel for the Road Accident Fund ('the RAF'), as interested party, also extended argument in the matter.

[7] As stated Defendants also filed a conditional counter-application for leave to institute proceedings against the RAF, as the Third Party, for the recovery from it of a contribution in respect of its liability for the damages sustained by Second Plaintiff.

[8] Although, Plaintiffs dragged their proverbial feet in the bringing of the application to amend their particulars of claim, which, caused finalisation of the trial to be even further delayed than what it already has due to Plaintiff's delay in bringing the application for amendment and for the reasons as set out in the judgement delivered by myself on 2 June 2023, I made the following order:

"1. Plaintiffs' application for the amendment of their particulars of claim by the deletion of paragraphs 56 and 57 thereof is granted."

2. *Plaintiffs shall pay the costs of the application.*
3. *Leave is granted to the defendants to institute proceedings against the Road Accident Fund, as the third party, for the recovery from it of a contribution in respect of its liability for the damages sustained by second plaintiff in such amount as the Court may deem just and equitable having regard to the degree to which first plaintiff was at fault, and for alternative and ancillary relief.*
4. *Respondents shall file the necessary third party notice within 20 (twenty) days from date of this order.*
5. *The costs of respondents' counter-application shall stand over for later determination."*

[9] Accordingly when the trial proceeding in front of me again on 15 May 2024 whereafter, for various reasons, the trial was postponed on two occasions until its conclusion. It was thereafter postponed for purposes of the filing of heads of argument on behalf of all the parties and for the hearing of argument on behalf of all the parties. I shall now turn to trial.

[10] In substance, Plaintiffs' claims are based on delictual liability arising from the alleged wrongful and negligent failure by First and Second Defendants to take reasonable steps to avoid the accident which led to the injuries sustained by Plaintiffs.

[11] As stated, it is not in dispute that, at all relevant times, Defendants were responsible for and in control of the R43 roadway. The primary questions for determination, however, are whether Defendants acted in breach of their duty of care and whether they acted negligently. For Plaintiffs to be successful, two separate requirements should be met, namely that the actions (or omissions) alleged by Plaintiffs should be wrongful (i.e. the existence of a legal duty owed to users of the road) and negligent. Regarding the issue of negligence, this involves a two-fold enquiry. The first is: was the harm reasonably foreseeable? The second is: would a reasonable person have taken reasonable steps to guard against such occurrence and did Defendants fail to take such steps? Ultimately what is to be determined is the reasonableness or otherwise of Defendants' conduct. See *McIntosh v Premier, KwaZulu-Natal & Another* 2008 (6) SA 1 (SCA), para [11] – [14].

[12] In assessing both questions (i.e. wrongfulness and negligence), each case must be determined on its own facts. See *Minister of Transport NO & Another v Du Toit & Another* 2007 (1) SA 322 (SCA)

[13] In summary thus, the legal issues are whether Defendants wrongfully failed to erect and maintain adequate and effective warning signs regarding the presence of the obscured horizontal curve, and to implement an appropriate speed limit for that road; whether such wrongful failure was negligent; and whether such wrongful and negligent conduct causally contributed to the accident. If these are answered affirmatively, there remains the further question as to whether First Plaintiff was contributorily negligent.

[14] Plaintiffs presented the evidence of seven lay- and eye-witnesses, namely that of Hendrik Jacobus Kok ("Kok"); Andries Barend Kruger (First Plaintiff); Elaine Jane Blanckenberg (Second Plaintiff); Donovan Barry Loesch ("Loesch"); Isaak Abraham Johannes Malherbe ("Malherbe"); Sgt Adrian Evan Conradie ("Sgt Conradie"); and Christopher John Marwood Notley ("Notley"). Plaintiffs also presented the evidence of Dr Louis De Villiers Roodt, a civil engineer and an expert in road design and traffic engineering ("Dr Roodt"). Defendants called Dr Herman Stefanus Joubert, a transportation engineer ("Dr Joubert").

[15] The Third Party presented no evidence. However, when the trial resumed on 18 July 2024, I ruled (by agreement) that the affidavit deposed to by Second Plaintiff's attorney, Ms Kirstie Haslam, will be accepted as evidence, confirmed by Second Plaintiff as if she has given *viva voce* evidence. In this regard, it should be pointed out that Second Plaintiff in her confirmatory affidavit dated 3 December 2021 in the opposed Amendment Application confirmed Ms Haslam's founding and replying affidavits under oath. I shall now turn to the evidence lead and the legal principles applicable.

[16] On the relevant day Plaintiffs were travelling via Rooihoogte Road with their friends to a motorcycle rally in Worcester. The weather was good and visibility clear. First Plaintiff with Second Plaintiff as pillion were driving in the front with their friends, Kok and his fiancé, following about three car lengths (approximately 9 meters) behind them, both travelling at approximately 100km/h. Both First Plaintiff and his friend, Kok, are experienced motorcycle riders who at the time of the

incident have been both been driving motorcycles on a regular basis for decades. Kok's fiancé was riding as pillion with him on his motorcycle. Both Kok and First Plaintiff testified that they have not driven the road towards the scene of the accident and that, that part of the road were unfamiliar to both of them.

KOK

[17] Kok, who was 50 years old at the time of the accident was called as the first witness on behalf of Plaintiffs. Kok impressed as a witness who testified with condour. His evidence was consistent, coherent and clear. He testified the Rooihoogte Road, was at the time unfamiliar to him and that the road goes straight as it goes uphill and suddenly there was a turn. Just prior to the accident he drove behind First Plaintiff with this fiancé riding pillion and she was very nervous about riding on a motorcycle. He testified that as he drove up behind First Plaintiff with him in his sight, First Plaintiff suddenly just disappeared, and he immediately noticed that First Plaintiff had left the road on the left-hand side. He immediately tried to stop and landed up stopping on the gravel as he himself also nearly left the road. He testified that if it was not for First Plaintiff leaving the road as he did, he himself would have left the road and gone down the embankment on the left-hand side, where First Plaintiff went down.

[18] According to Kok one did not see anything indicating that a driver can expect such a sudden turn to the right. According to him there were no Chevrons. He also testified that he considers it to be a very dangerous turn and that he thinks that 100 km/h is too fast to drive on that road for that turn. When he got down to where

First and Second Plaintiffs were, he found First Plaintiff in the field, unconscious in a kneeling position about 15 metres from First Plaintiff, and the motorcycle was in close proximity to where First Plaintiff was. What shocked Kok was the fact of how many motorcycle fairings of other motorcycles were lying around there exactly where he found First Plaintiff. Kok's fiancé was so petrified that she refused to continue the journey with Kok to the rally and has never gotten onto a motorcycle since. Kok testified that at no time prior to the curve did they reduce speed because they did not even see the curve as it was invisible until you are in the curve already. Until in the curve the road actually looks straight.

[19] During cross examination it was put to him that the following distance of approximately 9 metres is too short, but according to Kok, that was a safe following distance for motorcycles travelling together. Kok testified that he thought that the road was proceeding straight, and he was then referred to the Winding Road sign on the left side of the road. When he was asked what the sign convey to him, he testified that it does not show to him that it is a dangerous road because it does not show that there is a sharp curve in the road ahead.

[20] In addition, he testified when confronted with the issue of a Winding Road sign up at the time which shows a winding road for the next 2km, that the sign does not tell him that there is such an invisible sharp curve immediately ahead. When confronted under cross-examination with a photograph of the road commencing into the curve and that the cutting on the left of the road should also have shown them that the road is turning to the right, he denied that it looked like that on the day. He testified that the cutting of the road was not as broad on the day as

depicted on the photograph and that it has since clearly been cleared very nicely and broadened and that the gravel next to the tar road have been cleaned up nicely since. Even when confronted with the fact that the experts are in agreement that on the probabilities on the day of the incident there were probably two Chevrons signs up immediately before the accident and one immediately after the accident, Kok denied that they were there and insisted that he did not recall it being there.

[21] When a photograph of the R43 road at the commencement of the Rooihoogte Road were shown to him, thus of the scene of the relevant area, it seemed completely unfamiliar to Kok. The question was then posed to him that the road cutting on the left confirms that they have been told by the sign that the road is curving to the right. He replied that when you're on a motorcycle you don't really look around all the time you focus on the road ahead of you. Kok vehemently denied under cross-examination that the curve was a gentle curve. Kok also insisted that there were no Chevron signs at the time of the accident and if there were visible Chevron signs it would've warned them to slow down going into the curve. It later emanated that the vegetation on the left side of the road were cleared away quite a bit and the cutting of the road were broadened or cleared since the time of the accident and that this is why the scene depicted in the photographs shown to him during cross-examination seemed completely unfamiliar. Kok denied that there was a Winding Road sign depicting a winding road on the left side of the road about 120m before the curve or that there were any Chevron signs up at the time and insisted that if it was not there at the time he did not see it.

FIRST PLAINTIFF

[22] First Plaintiff, who was 48 years old at the time of the accident testified that he initially could not remember very much of the accident although some of his memory returned over a period of time. He testified that some things came back to him and some things did not. He testified that it was only when he came over the rise, that he saw the sharp turn to the right. He was very surprised by the turn and attempted to go into the turn but could not make it because it came upon him too soon. All he can remember is while attempting to take the turn the bike left the road onto the gravel whereafter he initially remembered nothing until waking up in hospital about three days later. He testified that he relayed to Dr Roodt that riding towards the crest of the curve he observed the road as a straight line on a constant gradient. He also testified that he thought as he approached the curve that the road still looked straight. When confronted with a photograph taken in September 2010 (thus about at least a month before the accident) of the road as it approaches the Rooihoogte Road and the fact that both experts proceeded based on the photographs, he accepted it. The relevant photograph shows a Winding Road sign which is approximately 120km before the commencement of the curve. Pictures taken by Second Plaintiff during February 2011 also depicting the said road sign were also shown to First Plaintiff. Despite this he testified that he has no recollection of seeing the relevant sign. He testified that normally if you see a sign like that and there is a sharp curve like that one you will see Chevron signs which he would have been looking for.

[23] He testified that if you see a Chevron from a distance, obviously it is a very sharp turn, and then you slow down, because you are cautioned and would be looking to where turn is. He I did didn't see any Chevrons and that it is important for a motorcyclist to see a Chevron because you need to calculate your turn.

[24] During cross-examination he was asked about his memory of the events and he said that he doesn't have a clear recollection of the events around the accident, but, according to him, the events came back to him after the accident, piece-by-piece.

[25] Under cross-examination he agreed that if he did see the Winding Road sign the appropriate reaction would have been to reduce speed and that the only time that he knew there was a sudden curve was when he saw the first Chevron he was already in the curve. He however also testified under cross-examination that he probably did slow down to 80km/h and that he never testified that he was going 100km/h all the time. But even if he did not, he would have been looking out from that point for Chevrons signs, which were not there.

[26] When confronted with the photographs and the statement that the vegetation on the side of the road has a rightwards incline which should have been an additional sign to him to be on the lookout, he did not agree with it. When confronted with the fact that the experts agreed that on the probabilities there were two Chevrons, one before and one after the accident he agreed that there was then only one Chevron but that he cannot remember driving into one. He testified that if he had seen the Chevron earlier and not right in the curve he would have slowed

down but at the time there was nothing that warned him of the sharp curve until he was in it.

[27] Finally, he was asked to comment on a basis for blaming the road authority for what happened, and he replied that according to him coming over the rise, where that turn was, if he had seen Chevrons earlier and not right on the curve itself it would have been a different story. He testified that the Chevrons that one sees there is right in the curve and that there is nothing that warns you before the time. When it was put to him under cross-examination that the accident was caused due to his negligence because he failed to keep a proper lookout in that he did not see any of the signs or the cutting/vegetation, he disagreed.

[28] I interrupt myself at this stage by mentioning that all the evidence presented by Plaintiffs, including the evidence of Dr Roodt (and the Joint Minute with Dr Joubert), is not that there were two Chevrons up at the time of the accident. The two experts merely agreed that on the probabilities there must have been two Chevrons up at the time of the accident, one before and one after the accident. However not much turns on this having regard to the fact that it was clearly not visible until in the turn which is also supported by all the evidence before the Court, I do not find it necessary to rule on the issue as to whether there were one or two Chevrons at the time.

SECOND PLAINTIFF

[29] Second Plaintiff testified that she was riding pillion with First Plaintiff at the time of the incident and that they were just enjoying the cruise towards Worcester

and that Second Plaintiff would never ride very fast with her on the back of his motorcycle. At the time of the accident she was also unfamiliar with the road. All that she can remember of the accident was hitting the gravel and the railing on the left side of the road and that she was also unconscious for a while but regained consciousness while laying down on the ground. She could not remember much of the scene after the accident either as she was drifting in and out of consciousness.

[30] She testified after the accident they were living in Villiersdorp with her mother who was looking after them until they recovered. For a period of about four months, she was travelling between Villiersdorp and Worcester once a week to the hospital and she rode past the accident site all the time. During that entire time there was always only one Chevron sign up. Some months after the accident, during February 2011, she went back to the scene to take photographs, which photographs formed part of the evidence. When confronted under cross-examination with reference to the photographs, that one Chevron is depicted in one of the photographs and that the experts are in agreement that on the probabilities there were two Chevrons at the time of the accident, she testified that she doubts that there were two. She further testified that if there were one, you could not see it until you get to the top of the rise and until you are on top of it in the curve.

[31] She testified that she went to the local authorities on the way to Kleinmond and that she spoke to a gentleman there and told him that she felt that a speed limit of 100km/h around that bend is crazy and that many more people are going to

have accidents there. She also told him that the road signs they had are insufficient in that it does not show that a dangerous hair bend or sharp curve is ahead and not only gentle curves. She also denied that the curve is gentle or visible prior to when one is actually in the curve. She accepted that the experts were in agreement that there were at least one Chevron up at the time of the accident. She also testified that the local authority whom she approached later did listen to her and changed the road signs.

[32] She also testified that, after she heard that there were many accidents at the relevant curve, she was really concerned and went to the ambulance department and ask them for a record of the number of accidents that happened on that road between 2010 and 2011, and they gave her the record. She personally spoke to Mr McFarlane and obtained a letter from him in this regard.

[33] I shall now proceed to deal with the evidence of the lay-witnesses, the members of the Villiersdorp community, namely, Loesch, Malherbe, Notley and Sgt. Conradie.

LOESCH

[34] Loesch resides in Villiersdorp and at the time when he testified, had been living there for the past approximately 28 years. He testified that he owns a used motor car dealership and at some stage owned the Toyota agency and also owned the petrol station in Villiersdorp. He was the chairman of the Chamber of Commerce and served on the Golf Committee for some years.

[35] Loesch testified that he was on the scene of the accident on 29 October 2010 after it happened. The ambulance was there when he arrived. He testified that, before and after the accident, there were a number of accidents on that curve where this accident occurred.

[36] When asked what he did about the accident situation, he testified that he believes that it is definitely ineffective signage, which they also discussed when he was chairman of the Chamber of Commerce. He testified that the Chamber of Commerce have discussed the dangerous curve in their meetings and that they also mentioned to the municipal traffic officer, one Sampson, who was also a motorcyclist that they must please advise Provincial about this corner and the fact that they also did warn people as well. Accordingly, to him that curve was an absolute dangerous corner.

[37] When he was asked about how people were warned and if it was him personally, he explained that he does a lot of test drives with clients, with the vehicles. They then usually, if the clients elected to do their test drive on the Rooihogte Road towards Worcester, warn them about the curve. He also testified that apart from for motorvehicles, for a motorcyclist it is absolutely more dangerous and that they accordingly also warned the motorcyclists at the petrol station about the corner. He testified that if he saw motorcyclist at the garage they used to warn the people to be careful of that corner. Loesch testified that he warned them about it because the only sign that was there was the Winding Road sign that was not really significant signage and that they also warned them because it is an absolutely blind corner. He testified that you get on top of the hill, all of a sudden it

turns to the right and that it was a dangerous corner. The sign that Loesch referred to, is the Winding Road sign that was there at the time of the accident, as could be seen on one of the photographs presented in evidence. According to him, the sign was too close to the dangerous bend in the road.

[38] When referred to photographs depicting the Chevrons around the curve, he testified that his experience regarding the Chevrons is that there were Chevrons present but that at one stage there were no Chevrons. He testified that he drives the relevant road quite often to Worcester. And that is why they complained to the Municipality regarding the shortage especially regarding the Chevron signs itself and there was at one stage no Chevrons on the relevant curve.

[39] During cross-examination it was put to Loesch that the curve is not a sharp curve and he was asked whether he disagreed. He testified that he disagreed and that one does not actually see the curve and that as soon as you get up the hill, all of a sudden you go into the turn and if you do not know the turn and you have not been on that road it is dangerous. And that if you are a motorcyclist you have got to be careful because if it is about 120m from where the Winding Road sign is, but if you get to the top all of a sudden you are suddenly faced with that curve it is on you. He testified that it is definitely a dangerous curve.

[40] It was then posed to Loesch that regarding the Winding Road sign, the experts inter alia agreed that "you must slow down". His reaction was to agree with what was put to him, but he still testified that it still remains a dangerous curve. He

further responded *"I mean why will you have so many accidents on that corner if it was not dangerous? I mean it is facts."*

[41] When it was put to him that from the point of view of the Province's expert it is not a dangerous curve. It is a gentle curve and there are warnings of the turn to the right, he disagreed.

[42] When cross-examined on his personal knowledge of the other accidents that he referred to, he testified that he was on three or four of the accidents' scene so he knows about the accidents that is on the relevant curve and that he is in Villiersdorp and most of the accidents happen during the course of the day.

MALHERBE

[43] Malherbe is a practising attorney with, at the time of testifying, a 40-year-old practice in Villiersdorp and had been living in Villiersdorp for approximately 28 years. He testified that he regularly drove the Rooihoogte Road where the accident occurred, and that he on occasion visited the site with a client, one Kloppers, who requested him to write to the Road Authority, asking them to put up signs to make it obvious that it is a dangerous turn. He said that he personally thought that something could be done to make it clear that there is a very dangerous turn on Rooihoogte Road. He testified that the mentioned client's farms is right next to the road, and their house is right on the road. His client requested him to write the letter because he has had numerous problems with people coming down to him if there has been an accident, a motorcycle accident or a car accident, on that turn.

The accidents usually happened where the road turns on Rooihoogte where the accident in this matter occurred.

[44] Malherbe did write to the authorities on 18 November 2010, and, inter alia made the following request to the authorities: *“Mnr Kloppers het my versoek om hierdie skrywe aan u te rig aangesien daar op die kruin van Rooihoogte in die rigting van Worcester geen gevaartekens aangedui word vir die skerp draai wat daar volg na regs nie en was daar die afgelope tyd verskeie ernstige motorfiets-ongelukke aldaar.”*

[45] When Malherbe under cross-examination was confronted that this amounts to hearsay evidence, he testified that he wants to point out that it was not only due to the fact that he got the instructions, but that it is a well-known fact in Villiersdorp, that there were numerous accidents there. So, it was not just on the fact that Kloppers instructed him and that he said to him that something must be done about it as he could no longer take people coming down to him with off arms and this and that but also the fact that he (Malherbe) personally knew about it and according to him also just about everybody in Villiersdorp knew at that stage that it was a problem.

[46] Malherbe was cross-examined with reference to a part of the sentence in his letter that states that no danger signs are indicated that he made statements to the effect that there were no warning signs, yet at the same time he agreed that the Winding Road sign was there at the time, that he accordingly made an incorrect statement in the letter and later that he made a false statement. Malherbe then testified that it might appear so but that his recollection when he wrote the letter is

that he was probably referring to it that on that curve there were no Chevrons there at the time.

[47] I pause to mention that the part of the sentence in the letter that was criticised does not only refer to no danger signs being present, but the sentence goes further to specify that it is in reference to the sharp turn which follows there to the right. It is thus clear that the letter in fact refers to warning signs regarding the sharp curve, thus the Chevron signs.

[48] Four days later, on 22 November 2010, Malherbe wrote another letter to the authorities in which he stated that on 20 November 2010 there were once again a serious accident on the relevant curve and that according to what he heard that earlier in that same week there were also another fatal motorcycle accident at the same place and that he can refer them to the person who has to remove the damaged motorcycles which can be confirmed by the formal statistics.

[49] When asked why he wrote to the authorities that the matter is a case of extreme urgency, he testified that he regarded it as such because in a question of two or three weeks after the accident in this matter occurred there were two other accidents there. Further due to the fact that one of the accidents he referred to was fatal he just felt that he had an obligation to try and make it clear to the roads administration that they must please come and inspect and make sure that they have the necessary signage up there, that could perhaps prevent further accidents.

[50] He testified that his letters were eventually answered by one Piet Stofberg of the Authorities informing him that the technical staff of his office will visit the road

during that week for purposes of inspecting the road in order to determine if the road signs complied to prescriptions. Stofberg further stated that it will also be determined if extra road signs over and above the prescribed ones should be erected in order to make it safer for road users and if so, the necessary signs will be order and erected along the road. According to Malherbe, a couple of months after Stofberg's communication, the Authority did the inspection and put up the extra road signs, as promised.

SGT CONRADIE

[51] Sgt Conradie is a member of the South African Police with fifteen years of experience. He is familiar with the Rooihoogte Road and compiled an accident statistics document from the official police documents, reflecting reported accidents on the Rooihoogte Road. He also referred to the Accident Report Form filled in by a member of the South African Police in regard to this accident. He stated that there was however no information in their archive regarding accidents that happened prior to 2010. Although I do find this last fact strange, nothing was made about it during his evidence.

NOTLEY

[52] Notley is a 75-year-old farmer, residing in the Bossieveld Valley off the R43 on the road called Koppies on an Alpaca farm called Helderstroom, which they have established since they came from Zimbabwe in 2002.

[53] Having looked at the relevant photographs, he testified that he could state with total clarity that he is intimately aware of the road, having travelled it almost five

times a week for the last 22 years (at the time of giving his evidence). Their farm is situated on the Worcester side of Villiersdorp, but closer to Villiersdorp and about 10 km from Villiersdorp, and 40 km from Worcester. He testified that he himself has been a motorcyclist since 1966 and that he continues to be one, and that he travelled the road regularly and particularly at weekends.

[54] He testified that he himself has more than once been involved in the clearing up after some fatal accidents at the relevant place. According to him, the pass was ready for a “makeover”, and that it ironically started to happen in 2010 and extending over a period of about two years. After that, he said, the pass has retained a much better record for both two- and four-wheel drivers. He further testified that until the last approximately five to six years that, that part of the road was regarded as something of an accident “black spot”. He testified that he came across accidents on irregular timings, predominantly at weekends when there is much more traffic with motorcyclists in their free time.

[55] When questioned regarding the Chevrons which appear on the crest of the road, he testified that he has knowledge of seeing them on occasions when they have been down to literally 1 of the 8 to 9 when they are fully placed and not disturbed. And in the earlier days between 2003 till 2010 that was often the case that the Chevrons were missing, and they would be missing for considerable periods of time.

[56] When further prompted about this he testified that they have recently been privileged to have between seven and eight almost on a regular basis in place and it is also noticeable as a resident that lives there that the road authorities have been

very quick to repair when they have been damaged when they have been broken down and that the full set are normally now in existence.

[57] During cross-examination he conceded that, apart from having been an eye-witness to a specific accident in the past, he came across other accidents in the Rooihogte Road after they happened.

[58] Notley conceded that the Winding Road sign was there at the time of the accident. Regarding the Chevrons he testified that at the time it was there on an intermittent basis depending on the occurrence of accidents by both cars and by motorcycles that took place.

[59] When he was asked under cross-examination about the Chevrons he said that lately the provincial authorities were quick to repair them when they have been driven over. Notley replied that, that was post 2010, post the revamping of the pass itself which was from the base of Kloppers' farm right up and coming down from Draaifontein Farm on the other side on the Villiersdorp side. But that prior to that there would be times when the signs would be down to one or two.

[60] When asked by the court that from what he observed, if despite the fact of the Chevrons being up, accidents still occurred, he said that the number of accidents pre 2010 were many more than subsequent to the major improvement of the road surface and that from then on the relevant authorities to made sure that when the Chevrons were not knocked down, they went back up again fairly quickly again.

[61] I shall now turn to the expert witnesses who testified on behalf of Plaintiffs (Dr Roodt) and behalf of Defendants (Dr Joubert). From the outset I should make it clear

that Dr Joubert did not impress as a witness *inter alia* in terms of his condour, demeanour in the witness box, internal contradictions in his evidence and the manner of dealing with questions posed to him during cross-examination. Dr Joubert continuously avoided answering questions directly and seemed more interested in entering into a debate before answering a question when he seemed to be uncomfortable with the effect that his answer might have, even after he was warned by the Court to answer questions posed to him. In addition this also caused his evidence to be unnecessarily protracted and left the impression that his objectivity is questionable. Dr Roodt on the other hand, impressed as a witness. He answered questions directly and to the point and made concessions where necessary.

[62] Dr Roodt testified that the respective reports contain a lot of theoretical discussions, and that it was agreed between the experts that the focus should rather be on the cause of the accident. Accordingly, the evidence of the two expert witnesses set out below will predominantly only focus on the evidence regarding the cause of the accident.

DR ROODT

[63] Dr Roodt testified that, on approaching the hill the road looks straight, and the curve then surprises the driver and that it is a dangerous blind rise. The horizontal curve starts within the vertical curve, and it is therefore hidden. He testified that one first must go on top of it to actually see where the road is going. Both the photographs and the evidence of the witnesses is consistent with this description given by Dr Roodt.

[64] Dr Roodt also testified that there were two Chevrons standing in September 2010 and only one in February 2011. He said that nobody can say whether the one Chevron was knocked out before or after the accident. What is notable regarding this evidence of Dr Roodt is that from the evidence lead by the various witnesses, about the situation during the aforesaid period, are the fact that apart from the accident relevant in this case, there were no less than three other accidents that occurred there as well.

[65] According to Dr Roodt, the purpose of the Chevrons is to give positive guidance to drivers to pick up the curve, and they are there to guide the driver through the blind rise and right curve. This approach is consistent with the case law and legal principles referred to below.

[66] Regarding the last standing one or two Chevrons at the time of the accident, Dr Roodt said that it could be one or two but that the fact is that the hazard – the sharp curve Chevrons, are typically taken out from the beginning and as this progresses, there is no guidance coming into the curve, so what remains at the back is totally useless. Accordingly, it would have made no difference whether there was one or two left.

[67] During cross-examination he testified that the two Chevrons were probably the very last two. In this regard I need to mention that the photographs taken in February 2011 depicted one Chevron and one that was knocked down. Dr Roordt testified that in his opinion that they at that stage, or in leading up to the curve and having to anticipate the curve, they were not visible and they played no role. He

also testified that there were initially six, and later seven and later on ten Chevrons which start on the straight.

[68] He further testified that they have value in guidance in the beginning as it then gives a continuity, but to expect the very last two Chevrons to be sufficient in guiding one into the curve, he does not agree with.

[69] Later during cross-examination he also testified that the other thing that he disagrees with, is that the Winding Road sign only was appropriate. And that the two Chevron signs which was right at the end and not visible to guide the driver, so they were irrelevant for this accident.

[70] Regarding the issue of the cutting giving guidance to the driver provided by the vegetation or the cutting on the side of the road, it was described in the Joint Minute of the experts as follows:

“5. DRIVER GUIDANCE

Dr Roodt disputed the assertion by Dr Joubert that the roadside features assist a driver in the driving task, particularly the side of the cutting visible on the left-hand side of the road, indicating to the driver that the road curves to the right. Dr Roodt is of the opinion that the roadside features have no value to the driver.”

[71] In this regard Dr Roodt testified that there is no way that this cutting, which he opined was maybe used for material to build the road, could have constituted a guiding line. He testified that there is some vegetation visible in the back, which he didn't mention in his report, but afterwards thought when looking at the

photographs, that the vegetation actually leads his eye to think that the road goes much straighter than it actually turns. Dr Roodt opined that the vegetation played no role and shouldn't play a role in the assessment of whether the road is safe or not because one makes a road safe with engineering measures. He further testified that no amount of driver training will tell one to look at the vegetation, shrubbery, especially in a rural area.

[72] Dr Roodt testified that Dr Joubert was quite adamant that they should not come to a conclusion of what the Road Authority should have done without knowing what caused the accident. In Dr Roodt's opinion it was due to the lack of signage. Whereas Dr Joubert opined that the previous sign was adequate, because there's a warning and one should have adapted speed etc and that one should have looked at the shrubbery.

[73] During cross-examination it was suggested to him that already from the distance as judged by the photograph shown to him, you can see the alignment of the road to the right because of the cutting on the left-hand side which inclines towards the right. Dr Roodt replied to that he already in evidence-in-chief put it very strongly that that cutting does not give adequate guidance and that it could actually be interpreted that the cutting is much further away, and that it is not a road element on which road engineers design as part of their function or role as roads designers. He testified that although he agrees that after progressing past the sign and closer to the curve it does become more visible but not in his opinion as a guiding element for the driver.

[74] In his evidence under cross-examination in stating that he disagree very strongly regarding the cutting issue. He testified as follows: *"If we look at that Chevron and we know that the preceding Chevrons that should have been in place, and the position where they were, that was the line that would have guided the driver. Some vegetation in the distance of which you cannot even estimate how far it is away, does not guide."*

[75] Finally he testified that he and Dr Joubert should just agree to disagree and that his reasons remains that in order to read the curve and to go into the curve with a motorcycle and plan it, one would need more time, needed more sight distance and needed more guidance.

[76] Regarding the signage issue, Dr Roodt, during cross-examination, stated that the changes in signage detected in 2012 are what should be there, and it gives more information, and more specific information. He testified that it was the right thing to do, and the question is this: "If it was not required, why did they do it?" In this regard it should be noted that Dr Joubert during his evidence testified that he decided not to contact the authorities' Roads Engineer and/or the technical personnel.

[77] This then leaves me to deal with Dr Joubert's evidence, also being the last witness who testified in the trial.

DR JOUBERT

[78] Dr Joubert and/or his colleague assisting him, when he did the site visit during October 2017 when he decided that the cuttings on the left-hand side could

serve as a guidance to a driver in regard to the hidden curve, took a photograph which formed part of his report. This however was not of much assistance. As it is common cause that the photograph was taken in 2017. The accident occurred in 2010, and this Court does not know what the cutting looked like in 2010, seven years earlier. The evidence of Kok was in fact that it looks substantially different than what it did at the time of the accident. In fact Kok hardly recognized the scene from the photographs taken years later.

[79] At this juncture it is also necessary to refer to some of the pleadings in this matter and more specifically Plaintiffs' Request for Further Particulars during 2015 and Defendants' Reply thereto which contained relevant replies by the Roads Engineer and the technical staff.

[80] The relevant replies by the Roads Engineer and the technical staff to Plaintiffs' Request for Further Particulars. Plaintiffs' Request for Further Particulars for Trial Purposes is dated 12 June 2015 and the Reply by Defendants is dated 7 October 2015. Defendants' Reply states that the following signage was in place at the time of the accident:

- i. the Winding Road warning sign (W208);
- II. the Sharp Curve Chevrons "which were in place at the time of the accident...the Chevrons helped to communicate that a curve starts near the crest of the hill from further away and is warranted for this reason";

- iii. the advance warning signs were changed in 2010/11 to a Winding Road warning sign on a high visibility background with Supplementary Advisory Speed – 80km/h; and
- iv. the Winding Road warning sign was followed by a Gentle Curve warning sign;
- v. it also states that the signs were erected during 2010/11 (according to the Roads Engineer); and that the technical staff took the decision to upgrade the signage;
- vi. it is stated that the Roads Engineer could change warning signs by *inter alia* employing engineering judgment; and “safety aspects on the roadway were considered and improvements were effected”;
- vii. the Chevrons signs referred to in the Reply are those depicted in the annexed photographs, showing a set of about six Chevrons, starting on the hill. It doesn’t refer to the last standing one or two Chevrons at the time of the accident.
- viii. the Reply was one of three documents furnished to Dr Joubert as part of his brief. He had the Reply, the report of Dr Roodt, and the Particulars of Claim.

[81] During cross-examination he stated that he did not think that it would have been a good idea for him to meet the Roads Engineer; it was not important for him

to meet the Roads Engineer; he had no intention to find out why the upgrades of signage were affected; and he had his own view.

[82] Dr Joubert was confronted during cross-examination that the purpose of the Chevrons as formulated in the Reply, is consistent with the evidence of Dr Roodt. Dr Joubert's reaction thereto was that he realised that, but that the Reply reads and refers to the Chevrons "in place", which does not mean that the Reply is that all the Chevrons were in place. In other words, the Reply could have referred to the last standing one or two Chevrons. It was clear that Dr Joubert was uncomfortable in his reply in this regard. I find his evidence in this regard as unconvincing and clearly another attempt to avoid answering the actual question. When asked whether he agreed with the Reply in this regard, he said that he does not know what the Reply means.

[83] It was clear from his evidence and his conduct in the witness stand that Dr Joubert was in any event not interested in finding out what it meant. He eventually said this: "... it is my evidence that that remaining Chevrons did assist the driver, so that is my evidence" ... and then: *"The vegetation played a sufficient role to assist the driver even in the absence of those first Chevrons"*.

[84] Dr Joubert eventually stated that there was sufficient information available on that day to guide First Plaintiff through the curve. I in any event find that this is at least some concession that it was necessary for road signs to guide a driver through a dangerous or obscured curve.

[85] Dr Joubert eventually testified that he does not dispute that Chevrons do assist a driver. He said that the information provided by the vegetation was adequate. I find this difficult to accept both due to the fact that it is unclear as to what the vegetation looked like at the time of the accident and especially having regard to the evidence of Kok who clearly testified that it looks much different than what it did at the time of the accident. In fact, it looked so different that he could not from the photograph taken much later, recognize that it was in fact the scene of the accident.

[86] It is clear from the cross-examination of Dr Joubert that he was not interested at all to establish what motivated the Roads Engineer and the technical staff to erect the full set of Chevrons and the new Winding Road sign which was then also on a high visibility background with an advisory speed of 80km/h together with the additional Gentle Curve sign in addition to placing the new signage further forward on the straight than what it was before, or why they failed to maintain the Chevrons when it mattered. His view was the only view, according to him which was clearly predominantly that the vegetation should have guided First Plaintiff even in the absence of the Chevrons.

[87] Clearly Dr Joubert decided that this Court should be deprived of hearing the view of the Roads Engineer and the technical personnel. Defendants also failed to call the Roads Engineer or any member of the technical personnel who could have answered and explain these questions. There is no evidence that these witnesses were not available. A negative inference is therefore to be drawn from this failure. On the probabilities, Defendants' witness(es) would have had to concede the

purpose of the Chevrons and a positive motivation for the erection of the new signage after the accident. The witness(es) would have had to explain why the knocked over Chevrons were not replaced at all relevant times.

[88] The failure to produce a witness who is available and who is clearly able to give relevant evidence may lead to an adverse inference. See: *SOS Kinderdorf International v Effie Lentin Architects* 1993 (2) SA 481 (NM) at 489I – J

[89] In addition, Plaintiffs produced evidence that correspondence was sent to the Provincial Administration informing them of the risks relating to the roadway on more than one occasion. This was followed up by telephone calls to the Provincial Department. The District Roads Engineer, Mr Stofberg, was mentioned in the Plaintiffs' evidence, more so his written reply to the correspondence referred to and the undertaking that a technical team would be sent to investigate the road to establish whether the signage was sufficient and whether further signage was required. Thereupon further signage was erected along the roadway as set out herein. It should however be mentioned that despite Mr Stofberg's undertaking in his letter in response to the attorney's letter (Malherbe) that they would inspect the road the following week this eventually only happened a couple of months later.

[90] I find it is questionable why Defendants refrained to call any witnesses to verify:

- i. why the decision was taken to install further signage, especially in the manner it was done both in regard to visibility of the sign itself, additional advisory speed, additional signage and positioning of the signage; and

ii. apart from why the Chevrons signs were not regularly replaced at the time and how often Chevrons were replaced after 2011.

[91] Dr Joubert criticised Dr Roodt's assertion that the Chevrons have been run over on a regular basis and testified that this assertion is not supported by any evidence. The answer to this piece of criticism (one of many) is that Dr Roodt's evidence is supported by the evidence of Notley. In this regard I accept the evidence of Dr Roodt, who clearly testified that vegetation played no role and shouldn't play a role in the assessment of whether the road is safe or not because one makes a road safe with engineering measures. In addition to this he testified that no amount of driver training will tell one to look at the vegetation.

[92] The effect of the additional signage erected by Defendants' Roads Engineer and the technical team, is also questioned by Dr Joubert. He said that, statistically speaking it cannot be said that it made a difference as there is no supportive information. In this regard Dr Roodt testified that since the erection of the additional signage, the gaps between the times in which the Chevrons were run over, became longer. This observation by Dr Roodt was also criticised by Dr Joubert on the basis that there is no statistical relationship between the additional signage and the accidents. According to Dr Joubert, there is no proof that the additional signage resulted in a reduction of "the accident signs". He also criticised the additional signage on the basis of his issue with a duplication of road signs.

[93] If I have proper regard to the evidence of Dr Joubert in this regard, I come to the conclusion that he effectively says that the Roads Engineer and his technical team ("Defendants' technical team") acted inappropriately when they decided to

erect additional signage. Dr Joubert did not afford Defendants' technical team the opportunity to be heard on his criticism in this regard and this is part of the issue with Defendants' failure to call the Roads Engineer or a member of the technical team to testify.

[94] When the Court enquired from him if he is saying that more signs at the time of the accident would not have made any difference, he once again did not give an immediate answer, once again explained the nature of the additional signage, and eventually came up with this answer: "The driver had a sign clearly visible ... to warn him of the curve. And nothing more than that is required." The only inference is that, according to Dr Joubert, even the Chevrons would not have made a difference.

[95] Dr Joubert also criticised Dr Roodt's qualification in the Joint Minute of the expected reaction of a driver to a Winding Road sign, i.e. you first look for confirmation. Dr Joubert reacted as follows: *"From the moment you pass that sign, you've got four seconds at 100 in this case. And there is no time then to look for cues and as it stated, to observe the road for confirmation of the curve."* This is just another example of how Dr Joubert attempts to manipulate facts to suit his clients' case. According to Dr Joubert, the driver has no time to look for cues, but to suit his cutting or rather vegetation point, he implies that the driver should have enough time to look for guidance indicated by vegetation next to the road (cutting). I find thus contradictory based on his own evidence. Based on Dr Joubert's evidence it emanates that he asserts that First Plaintiff in the four seconds from passing the Winding Road sign, without having the assistance of any visible

Chevron signs, First Plaintiff should've have rather been guided by the vegetation and even so if there were visible Chevron signs. I cannot accept this as a logical conclusion based on his expertise and the evidence place before the court.

[96] In this regard I accept Dr Roodt's evidence to that of Dr Joubert for *inter alia*, for the following reasons:

i. Dr Joubert in his report, with reference to the speed limit, after referring to the SADC Road Traffic signs Manual (1999, p2.4.1) which reads as follows: *"it is not generally recommended that signs indicating reduced speed limits be displayed for short sections of roadway. If a local condition requires reduced speed the use of supplementary information plate giving an advisory speed, combined with an appropriate warning sign, is recommended."*, concludes that it would not be appropriate to reduce speed limits to address local conditions on the road and that warning signs should be used to address such conditions. He opined that is important that drivers must realise that it is not necessarily safe to drive at the speed limit under all conditions and that they must reduce speed according to the conditions and for specific circumstances and that he therefore disputes Dr Roodt's report. He then stated in his report that *"in this particular case, an appropriate W208 Winding Road warning sign, as well as at least one but probably two W405 Sharp Curve Chevron signs, was present and clearly visible and the crash occurred on a horizontal curve described in the Roodt Report (Paragraph 31) as a gentle curve with a design speed of 90 km/h. Other downstream curves are irrelevant as far as the cause of the subject crash is concerned."* In this regard it is clear from all the evidence and was also clear during the inspection *in loco* that the last two

Chevron signs (even if there were indeed two Chevron signs at the time of accident) that it would have made no difference because the last two Chevron signs are clearly not visible until once one is in the curve. I therefore cannot agree with this conclusion of Dr Joubert that there were two clearly visible Chevron signs at the time of the accident.

ii. Dr Joubert refers to three categories of curves: a gentle curve; a sharp curve; and a hairpin curve but did not include the Winding Road signs;

ii. Dr Joubert reported on the Road Signs Manual that recommends that curve warning signs (the three categories referred to by him) should be used in situations where a curve is both obscured and where a reduction in speed is required to negotiate a curve comfortably.

iii. When he was confronted with this during cross-examination, he added that the Winding Road sign [W 208] has the same function. This raises the question as to why this sign is not mentioned by the Manual, and also why Defendants' technical team considered it necessary to erect the Gentle Curve sign [W 202] in addition to the Winding Road sign now on a high visibility background in addition to a notice of an advisory speed of 80km/h and also placing the 'new' sign further down on the straight before reaching the curve where the accident happened. In addition to this from the undisputed evidence placed before the court, that Defendants since then also started to regularly replace knocked down Chevron signs and that this was not the case prior to that. Second Plaintiff testified that during the four months that she drove past the scene once a week there was

always only the one Chevron there. This evidence of hers is also supported by the other evidence that prior to the changing of the signage knocked down Chevrons were missing for considerable periods of time. In this regard I also keep in mind that, which is also common cause between the parties, that prior to the accident there were no signs indicating a decrease of speed below the 100km/h applicable whereas after the accident the road authorities did change the signage to indicate an advisory speed of 80km/h.

iv. When asked during cross-examination about the set of photographs that illustrates road signs on the left where the driver observing the sign could see the curve ahead in the road at the same time, he said that the point he wanted to make was that a Winding Road sign does not only apply to hidden curves. He said that it is a warning to the driver that there is a sharp curve ahead and that the driver must slow down. When asked what on the sign gives an indication that it is a sharp curve ahead, he then corrected himself. He was then confronted with a document on Learners Driving which refers to the Winding Road sign and states that the driver's response should be "...approach with caution. Slow down as necessary. Obey any other road signs and comply with any speed advisory plates". Dr Joubert replied to this that he could see that, but that he would like to comment on it. He then proceeded to give the Court another "lecture" on advisory speeds, etc., save for an answer on what he makes of the reference to "as necessary".

v. After intervention by the Court to warn the witness to answer the questions, he is again asked to comment on the reference to "as necessary", which supports Dr Roodt's view. It was put to him that the document does not say that you must

automatically slow down, but only if it is necessary, and as necessary. Dr Joubert then eventually agreed with what the document states.

vi. When Dr Joubert was confronted with the fact that the Chevrons were in place even before the accident, and that Defendants' technical team replied that it was there to warn the driver of a dangerous curve ahead to the right, and when it was put to him that the Chevrons were there for a purpose, he conceded that, but he explained his concession as follows: "That was not my instruction to investigate that". When asked what his instructions were, he answered that he had to report on the contributing factors that caused the accident.

vii. Dr Joubert was also confronted with the evidence of Notley that there were less problems on that curve when the authorities upgraded the road signs and maintained the Chevrons properly. Dr Joubert's answer was that he cannot say anything about Notley's perception, as he did not give statistics to support his evidence. Notley was only a lay witness who lives in the area and drives the road on a regular basis and had knowledge of accidents that happens on the curve to such an extent that he warned people who took cars for test drives or motorcyclists at the garage about the curve, so it could not be expected of him to produce statistics for what he personally observed over time. The statistics are one thing, and the direct credible evidence by witnesses, another thing.

viii. During cross-examination on his evidence regarding the cutting as an informal source of information to a road user, he answered that "...*The informal information, namely the cutting, in my view, did assist the driver, could have*

assisted the driver ...". Dr Joubert's evidence, knowing that the set of Chevrons was not in place at the time of the accident, is thus effectively predominantly based on his vegetation-point as a form of guidance to a road user regarding the obscured curve just over the hill at Rooihogte. He was also asked whether his "observations" referred to in his conclusion, referred to those observations during his site inspection in October 2017. On this Dr Joubert, once again, avoided giving a direct answer to a simple question like he did on more than one occasion. Accordingly, it is also still not clear whether Dr Joubert or Van As took the photograph during that inspection, which is annexed to his report.

ix. I do not find Dr Joubert's answers to questions in regard to the "judgment" that he employed during the October 2017 site visit and the whole cutting-issue are as convincing.

x. Dr Joubert agreed that if First Plaintiff paid attention to the cutting at the point 86m from the start of the curve, he had 3 seconds to perceive and to react. He also conceded that the vegetation issue plays a role in his opinion and conclusion regarding the cause of the accident. This makes his version regarding the guidance by the vegetation, improbable.

xi. Regarding the speed limit, Dr Roodt expressed the view that the speed limit of 100 km/h that prevailed at the time of the accident, was inappropriately high, and his view is supported by the eye-witnesses referred to above. Dr Joubert disagreed. This despite what is set out in the SADC Road Traffic Signs Manual to which he referred in his report coming to his conclusion.

xii. In this regard, having regard to all the evidence placed before the Court it is clear that the conditions on the Rooihoogte Road required reduced speed in addition to the use of some supplementary information plate giving advisory speed, combined with warning signs were and that it was indeed necessary including the swift replacement of Chevron signs, especially the ones prior to the curve. The Court did not have the opportunity to hear the evidence of Defendants to contradict this. I am accordingly left with the only conclusion namely that, that is indeed the reason why Defendants changed the signage as set out above.

[97] Before dealing with the evidence and the legal principles regarding the issue of wrongfulness, negligence and causation, I find it necessary to refer to the legal principles applicable to the role of an expert witness.

[98] In assessing the role of an expert, Davis J in *Schneider NO v AA and Another* 2010 (5) SA 203 (WCC) at 211 E-I, with reference to the English judgment of *National Justice Compania Naviera SA v Prudential Assurance Company Limited* (‘The Ikarian Reefer’) [1993] 2 Lloyd’s Rep 68 at 81 set out (*inter alia*) the following duties of an expert witness:

- “1. *Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.*
2. *An expert witness should provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within his expertise An expert witness should never assume the role of an advocate.*

3. *An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion."*

[99] Davis J, with reference to the above, then states the following at 211J-212B:

"In short, an expert comes to court to give the court the benefit of his or her expertise. Agreed, an expert is called by a particular party, presumably because the conclusion of the expert, using his or her expertise, is in favour of the line of argument of the particular party. But that does not absolve the expert from providing the court with as objective and unbiased opinion, based on his or her expertise, as possible. An expert is not a hired gun who dispenses his or her expertise for the purposes of a particular case. An expert does not assume the role of an advocate, nor gives evidence which goes beyond the logic which is dictated by the scientific knowledge which that expert claims to possess."

[100] Wallis JA, having relied on *The Ikarian Reefer*, in *PriceWaterhouseCoopers Inc. v National Potato Co-op Limited & Another* [2015] 2 All SA 403 at [97] – [98], also references Wessels JA in *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft Für Schädlingsbekämpfung mbH* 1976 (3) SA 352 (A) at 371F – H:

"... An expert's opinion represents his recent conclusion based on certain facts or data, which are either common cause, or established by his own evidence or that of some other competent witness. Except possibly where it is not controverted, an expert's bold statement of his opinion is not of any real assistance. Proper evaluation of the opinion can only be undertaken if the process of reasoning which

led to the conclusion, including the premise on which the reason proceeds, are disclosed by the expert.”

[101] Wallis JA at [99], when dealing with the approach to an expert witness, found the following passage from the judgment of Justice Marie St-Pierre in *White v Widdrington* (Succession de) 2013 QCCA 1187 (Can Lii) helpful:

“Legal principles and tools to assess credibility and reliability

[326] *“Before any weight can be given to an expert’s opinion, the facts upon which the opinion is based must be found to exist”.*

[327] *“As long as there is some admissible evidence on which the expert’s testimony is based it cannot be ignored; but it follows that the more an expert relies on facts not in evidence, the weight given to his opinion will diminish”.*

[328] *An opinion based on facts not in evidence has no value for the Court.*

[329] *With respect to its probative value, the testimony of an expert is considered in the same manner as the testimony of an ordinary witness. The Court is not bound by the expert witness’s opinion.*

[330] *An expert witness’s objectivity and the credibility of his opinions may be called into question, namely, where he or she:*

- *accepts to perform his or her mandate in a restricted manner;*
- *presents a product influenced as to form or content by the exigencies of litigation;*
- *shows a lack of independence or a bias;*

- *has an interest in the outcome of the litigation, either because of a relationship with the party that retained his or her services or otherwise;*
- *advocates the position of a party that retained his or her services; or*
- *selectively examines only the evidence that supports his or her conclusions or accepts to examine only the evidence provided by the party that retained his or her services.”*

[102] The role of an expert and how their evidence is to be approached was reiterated in AM & Another v MEC for Health 2021 (3) SA 337 (SCA) at 348A-349B where Wallis JA stated (inter alia) as follows:

“[21] The opinions of expert witnesses involve the drawing of inferences from facts. The inferences must be reasonably capable of being drawn from those facts. If they are tenuous, or far-fetched, they cannot form the foundation for the court to make any finding of fact. Furthermore, in any process of reasoning the drawing of inferences from the facts must be based on admitted or proven facts and not matters of speculation. As Lord Wright said in his speech in Caswell v Powell Duffryn Associated Collieries Ltd:

“Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish.

....

But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.”

[103] Having regard to the above legal principles and what is already set out above I find that Dr Roodt's evidence are in concurrence with the evidence placed before the court and his opinion is based on facts placed in evidence. On the other hand Dr Joubert's evidence does not fully align with the evidence placed before the court.

[104] In addition, I am also having regard to the fact that despite the information that Defendants' Roads Engineer and his technical staff supplied in their Reply to Plaintiffs' Request for Further Particulars, he did not deem it important at all to consult with them and help the stance that his opinion is sufficient, which, apart from in his evidence is also clear from his report, where he states in his conclusion that: *"...In fact, my observations have shown that with the benefit of warning signs and other visible features, the available sight distance at the site should have been sufficient for the Plaintiff to perceive the gentle horizontal curve and to react appropriately to the presence of the horizontal curve and to steer his motorcycle through the curve..."*

[105] In addition, Dr Joubert, on his own version also clearly accepted to perform his mandate in a restricted manner, namely to only report on the contributing factors that caused the accident. He testified that he did not think it was necessary nor important to meet with the Roads Engineer as he had no intention to find out why the upgrades of the signage were affected. Dr Joubert, in fact, effectively criticised it as a duplication of signs.

[106] I shall now turn to the legal principles applicable in this matter. The issues requiring determination, as they appear from the pleadings, relate to the liability of the parties. The principal issues are the following:

- i. whether the accident was caused by a breach of a legal duty of care on the part for the defendants and by the negligence of the defendants;
- ii. if so, whether the accident was caused by the contributory negligence of First Plaintiff;
- iii. if so, whether, in respect of any damages sustained by the Second Plaintiff, Defendants are entitled to the payment of the contribution by the Third Party.

[107] Both parties referred me to *Minister of Transport NO and Another v Du Toit and Another supra*. Defendants, although admitting that the decision by the Supreme Court of Appeal in the matter is particularly instructive in respect of the type of facts which arise in the matter, are of the opinion that the circumstances are far removed from this case.

[108] In the aforesaid matter the Court held (and the parties were agreed) that the Defendant was obliged to erect such road signs or provide such other facilities as were reasonable in order to guard against reasonably foreseeable harm do users of the road. Moreover, a driver of a motor vehicle is obliged to maintain a proper look out. In respect of road signs, it was held that it was imperative, particularly in unlit areas, for warning and other signs to be clear, unambiguous and appropriately positioned. It was found that the road sign in question was in a poor condition, with

its reflective paint badly faded and, in places, worn off entirely. Moreover, a further sign was located at the inappropriate position.

[109] Scott JA, who gave the judgment *inter alia* pointed out in the judgment that the experts criticised the absence at the intersection of a stop sign on the left side of the road, where a motorist would expect it to be. Subsequent to the accident, a number of changes to the signage were brought about which have largely remedied the defects which formed the basis of the criticism by the expert witness.

[110] Scott JA (with reference to relevant case law) also prior to dealing with the issue of the negligence of the defendant in the matter, stated the following:

“Before turning to this issue it is necessary to make two observations. The first is that it is for the Court, not a witness, to decide the issue. While regard may be had to Lötter’s evidence as to the adequacies or otherwise of the various road signs, the extent to which the opinions advanced by him are to be accepted will depend upon whether, in judgement of the Court, those opinions are founded on logical reasoning or otherwise valid. ...Second, the fact that changes were effected to the signage subsequent to the accident does not necessarily give rise to the inference that the pre-existing signage was in adequate.”

[111] The following remarks by Scott JA are also of particular relevance to the circumstances of this case:

“[17] The parties were agreed that the first appellant was obliged to erect such road signs or provide such other facilities as were reasonable in order to guard

against reasonably foreseeable harm to users of the road. On behalf of both appellants it was contended, however, that whether in any particular circumstances the steps taken by the first appellant were reasonable or not had to be determined with reference to the manner of driving of 'a reasonably competent and cautious driver'. If by this is meant that the authority responsible for erecting road signs and other warnings is entitled to assume that a driver will read and, if necessary, react to every sign regardless of its nature, size and positioning, I cannot agree. A driver of a motor vehicle is obliged to maintain a proper look-out. He (or she) must pay attention to what is happening around him; but most important of all, he must as far as possible keep his eyes on the road, particularly at night when his vision is limited. Depending on the state of the traffic, the nature of the road and the speed at which he is travelling, the opportunity which a motorist has to read and comprehend the import of each sign may be extremely limited. Indeed, it is not uncommon for even a competent and cautious driver to misread or fail to react to a road sign. For this reason it is imperative, particularly in unlit areas, for warning and other signs to be clear, unambiguous and appropriately positioned so that if necessary they may be read and comprehended at a glance. This is all the more so where there is a potentially dangerous situation ahead such as an unusually sharp bend or, for that matter, an unlit T-junction which would otherwise not be anticipated by a driver who is unfamiliar with the road."

[112] In this matter First Plaintiff had, due to the absence of the Chevron signs less than 4 seconds, after the Winding Road sign to react and even if regard is had to the evidence of Dr Joubert, that he had 3 seconds to react if he had regard to the

vegetation. From the evidence lead it is clear that, on approaching the hill the road looks straight, and the curve then surprises the driver and that it is a dangerous blind rise. The horizontal curve starts within the vertical curve, and it is therefore hidden. One must first go on top of it to actually see where the road is going. Accordingly First Plaintiff effectively had less than three seconds to react appropriately when he entered the relevant curve which is a blind curve. He testified that when he came to the top of the rise and saw the curve for the first time he attempted to take the turn but the bike still left the road onto the gravel. The fact that there was a Winding Road sign 4 seconds in time prior to that without any visible Chevron signs for which he on his own version would have been looking out, cannot be laid at the feet of First Plaintiff. The evidence is clear that the one or two Chevron boards could not have been of any assistance to First Plaintiff prior to entering the curve.

[113] From the evidence placed before the Court this was indeed a dangerous or hazardous curve if regard is had to the history of accidents that occurred there prior to the signage being upgraded and regularly maintained. Various members of the community testified in regard to the amount of accidents that occurred at the curve both in regard to motor vehicles and motorcycles. In addition the evidence regarding all the steps taken by various people in the community in addition to the steps taken by Second Plaintiff post the accident in order to get Defendants to attend to the issue of the dangerous curve and to upgrade the signage in order to make the road safe for road users. This was however not done until months after

they were eventually confronted by a warning letter from an attorney (Malherbe) and the omission of Defendants in this regard was therefor wrongful.

[114] In *Schultz v MEC for Public Works, Roads & Transport and Another* [2014] ZAGPPHC 651 (19 August 2014) the Court made the following remarks that are particularly relevant for purposes of this case:

“[64] The first respondent was obliged to erect road signs and provide road markings in order to guard against reasonable foreseeable harm to road users. It is common cause that high visibility signs next to the road at 300 metres, 200 metres and 100 metres for traffic travelling in a northern direction were there already prior to the date of the accident. However, they do not guide motorists through the diversion. They only indicate there is a diversion further on in the road. ... a single sign in the median where the diversion is, does not provide a line of continuity. This line of continuity is important, because after the diversion to the left, the road is quite hazardous. There is an “S” curve which the driver must follow and that requires a high level of signage. ...

[66] A reasonable person would not only have foreseen this danger, but would also have guarded against it by putting adequate signage and by properly marking the verge of the road as well as the painted island. There is no evidence that it was not possible for employees of the first defendant to have done so. It should therefore be inferred that these employees either did not frequently inspect the road, or, if inspections were held, they simply ignored the dangerous situation. ... employees of the first defendant, acting in the course and scope of their

employment, were negligent by failing to provide and maintain proper signage and road markings to guide motorists safely through a dangerous section of the road.”

See also: *Richard Alexander Yeomans v MEC for Roads and Public Works (unreported)* (Eastern Cape Division, Grahamstown Case No 3889/2015, judgment delivered on 14 July 2020) which was unanimously upheld on appeal in *MEC for Roads and Public Works, Eastern Cape v Yeomans* 2022 JDS 1649 (ECMA)

[115] The facts that there were at the most two Chevron signs, which were only visible once in the curve, erected on the approach to the curve and that it was difficult to anticipate or notice the curve prior to effectively being on top of it, and that a number of accidents had occurred at the curve prior to that and after that until more effective signage were put up by Defendants were clear from the evidence before this Court.

[116] The reasonable motorcyclist, travelling on a level tar road approaching a hill while the road looks straight, without any expectation or proper warning of a sharp curve ahead, would concentrate on keeping his motorcycle in the road surface. From the evidence it was also apparent that Defendants prior to the accident made no real effort, despite all the accidents that occurred there, the complaints by the reliable community members, for years failed to even maintain the Chevron signs which started on the straight prior to the curve. One would have expected, especially in view of also all the complaints by the community in addition to the many fatal accidents that occurred at the curve prior to 2011 and the way in which the signage was replaced that the Roads Engineer responsible for the maintenance of the road to have testified as to why this has been done and why it was not done

earlier. From the evidence it was on a balance of probabilities clearly established that these factors were the effective and approximate cause of the accident.

[117] In conclusion, in addition to the aforesaid, First Plaintiff's evidence regarding the importance of having the Chevron signs in addition to the Winding Road sign and that one would normally, if you see the Winding Road sign start to look out for Chevron signs if there were such a sharp invisible curve, which evidence is also supported by all the other evidence placed before this Court both by the various witnesses and by Dr Roodt there was virtually nothing that he could do to avoid the accident. In the circumstances I find that Defendants had failed to establish any contributory negligence on the part of First Plaintiff and/or Second Plaintiff for that matter.

THIRD PARTY

[118] This brings me to the liability of the Third Party against Second Plaintiff and/or Defendants, including the cost that stood over for later determination in regard to Defendants' counter-application to institute proceedings against the Third Party for the recovery from it of a contribution in respect of its liability for the damages sustained by Second Plaintiff in such amount as the Court may deem just and equitable having regard to the degree to which First Plaintiff was at fault, and for alternative and ancillary relief.

[119] In regard to the Defendants' claim against the Third Party for the recovery of a contribution in respect of its liability against the damages claimed by Second Plaintiff, I want to make it clear from the outset, that the fact that such leave was

granted in no manner holds that it is settled that Defendants' indeed has such a right and neither that if Defendants' did have such a right, that it would automatically be successful. Further I also need to make mention of the fact that at the time of argument in regard to the applicant by Defendants to join the RAF as Third Party the issue of the applicability of the judgment in *Maphosa v Wilke en Andere* 1990 (3) SA 798 (T) were not raised and neither were the judgment of the Full Court in this Division in *Ninham Shand (Pty) Ltd t/a Ninham Shand and Others v Faber* (A111/2011) [2012] ZAWCHC 18 (14 March 2012) referred to nor any argument raised in respect thereof or in respect of *Maphosa supra*.

[120] The point is that any claim Second Plaintiff might have had against the Third Party resulting from the negligence of First Plaintiff, in law, no longer exists against Third Party, and/or Defendants – whether extinguished by waiver, prescription, or non-compliance with formalities, and any claim for damages is one which the Second Plaintiff cannot herself recover from the Third Party.

[121] There is therefore no basis upon which Defendants could have a claim for an indemnification in respect thereof had it been so found. Any claim that Second Plaintiff might have had against the Third Party, following the finding of causative negligence, had been extinguished, either by way of prescription, or non-compliance with the formalities in terms of the RAF Act.

[122] The granting of any relief sought by the Defendants, in *casu*, would be to concede a right against the Third Party, which does not, in law, exist, either against Defendants and/or against the Third Party.

[123] The purpose of the RAF Act is the compensation of victims of motor vehicle collisions arising out of death or bodily injury. Heher J in a unanimous decision by the SCA in *Smith v Road Accident Fund* 2006 (4) SA 590 (SCA) at 595 D to G found as follows:

"[7]...As I understood it, the argument ran like this: The Apportionment of Damages Act 34 of 1956 confers a right upon a wrongdoer, sued delictually, to claim an apportionment from a joint wrongdoer; the unknown driver is a joint wrongdoer as against the third party. If the third party had instituted action relying on the negligence of the unknown driver, the Fund would have stepped into the shoes of that driver; by joining the Fund, the defendant is merely doing what the third party could have done. Thereby enabling the Court to determine who should pay compensation to the third party, the determination which is consistent with the purpose of the Act and the objects of the Fund; indemnification is merely "the flip side" (counsel's phrase) of compensation. Thus, so the argument ran, the relief which the appellant claimed, was inherent in the Act and necessary to ensure that its objects were not frustrated.

[8] Alternatively, so counsel submitted, his client's entitlement to an indemnification flowed from the clear wording of Section 2(1) of the Apportionment of Damages Act.

[9] In my view, the submissions are contrived and untenable. I have drawn attention to the substance of s 17 of the Act, versus the compensation for victims of road accidents arising out of death or bodily injury. The appellant is not a victim and the loss against which he seeks indemnification is purely pecuniary in nature.

The designated beneficiary of the Fund is not the uninjured negligent driver but the victim of his driving. The Act and regulations manifest a clear and consistent intention in this regard. To imply the existence of a right in such a person to sue the Fund for a contribution or indemnity would fly in the face of reason and be contrary to the express terms of the Act...”

[124] In *Mosholi v Putco (Pty) Ltd* 2011 (5) SA 38 (GNP) Van Den Heever AJ held that the reasoning in *Smith supra* would apply whether the identity of the negligent driver was known or not. In either case, per Van den Heever AJ, the liability of the Fund is statutory and not delictual.

[125] Accordingly, in my view the Third Partys’s liability is statutory, and in the event of the Second Plaintiff not having a right in law to claim against the Defendants, no such claim lies against the Third Party. In any event the *Maphosa*, *Mosholi* and *Smith supra* are judgments which were handed down prior to the Road Accident Amendment Act 19 of 2005 (‘the Amendment Act”) being proclaimed. The common law claims to sue the driver or owner in terms of section 21 of the Amendment Act had now been abolished.

[126] Section 21 of the Amendment Act provides as follows:

“21. Abolition of certain common law claims

(1) *No claim for compensation in respect of loss or damage resulting from bodily injury do or the death of any person caused by or arising from the driving of a motor vehicle shall lie _*

(a) *against the owner or driver of the motor-vehicle; or*

(b) *against the employer of the driver.*

(2) *Subsection (1) does not apply –*

(a) *if the Fund or an agent is unable to pay any compensation; or*

(b) *to an action for compensation in respect of loss or damage resulting from emotional shock sustained by a person, other than a third party, when that person witnessed or observed or was informed of the bodily injury or the death of another person as a result of the driving of a motor-vehicle.”*

[127] Other than the two exceptions set out in section 21(1), no common law right exists to sue the owner or driver. In addition to the fact that *Mosholi* and *Smith supra* do not support *Maphosa supra*, the Amendment Act, having abolished the common law right to sue the owner or driver (underpinning *Maphosa supra*), would result in the issue being differently decided.

[128] In this regard I agree with Binns-Ward J where he in the Full Court in this Division, *albeit* as per *obiter* in *Ninham Shand supra*, he articulates as follows:

“It is in any event questionable whether, notwithstanding the provisions of s3 of the Apportionment of Damages Act, the Road Accident Fund qualifies as a joint wrongdoer liable under the Act to make a contribution inter se to another wrongdoer who is severally liable for the damages in question; see Smith v Road Accident Fund 2006(4) SA 590 (SCA), especially at para 10, and Mosholi v Putco (Pty) Ltd 2011 (5) SA 38 (GNP), at 41 I - 47E; and contrast Maphosa v Wilke & Andere 1990(3) SA 789 (T) at 797 I - 799D. The issue has been the subject of

debate because the Fund's liability arises statutorily and therefore, arguably, not 'in delict within the meaning of that term in s 2(1) of Act 34 of 1956.'

[129] I am also of the view that the principles enunciated in *Ninham Shand supra* are echoed in *Smith supra*.

[130] In the circumstances I accordingly, conclude that firstly, Second Plaintiff failed and elected not to institute an action in terms of the RAF Act, and in the absence of any statutory liability on the part of the RAF, there can be no legally enforceable claim against the Defendants; secondly, Defendants ought to have taken the point *in limine* that, in the event of causative contributory negligence being proven, then Second Plaintiff has, in law, no claim against the Defendants; lastly, that, in law, the Third Party proceedings were clearly not in accordance with the amended RAF Act, following the abolition of the common law right to sue the driver or owner in that no indemnification and/or contribution could be claimed pursuant to the provisions of Rule 13, as sought by the Defendants.

[131] I agree with the argument advanced on behalf of the Third Party namely that rather than bringing the counter-application the Defendants should have taken a point *in limine*, that in the event of a one-percenter being proven, the Second Plaintiff's claim lies against the RAF. Defendants contend that the Defendants, with reference to the pleadings filed, as well as the evidence adduced during trial, that in the event of the Court finding contributory negligence on the part of the First Plaintiff and Defendants, the RAF "... *would be a joint wrongdoer in respect of the second applicant's claim.*" This contention in law is erroneous and as stated above, wrong in law. In addition Defendants contention that the RAF can be joined as a

wrongdoer, flies in the face of the RAF Act (see affidavit of Flip Selwyn Goosen, which by agreement formed part of the record as if the evidence was lead in open court), who made it plain that: *"The provisions of the Apportionment Act do not provide a basis on which the fund may be joined as a joint wrongdoer in delict, by either the first plaintiff or the defendants, in the circumstances."* Furthermore, the above contention accords with the Third Party's Plea that in the event of contributory causative negligence on the part of the First Plaintiff being established, this, in law, would not attract any liability on the part of the Third Party.

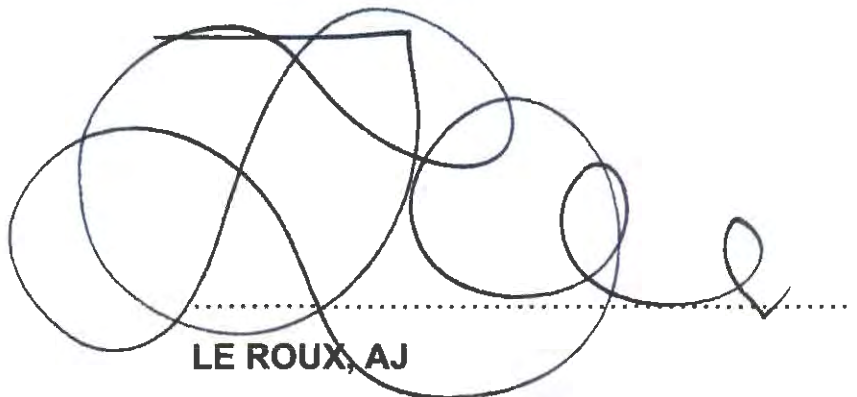
[132] This then brings me to the issue of costs both regarding the costs that stood over for later determination in regard to Defendants' counter-application to institute proceedings against the Third Party and Defendants' claim against the Third Party. Defendants clearly have no right in law to seek a contribution or indemnity following the joinder being ordered, and for the reasons set out hereinabove, on the merits, their claim for such a contribution falls to be dismissed with costs, including the costs of two Counsel on Scale B both regarding the counter-application and Defendant's claim against the Third Party.

ORDER

The following order is made:

- (1) Defendants are ordered to pay the Third Party's costs on Scale B regarding their counter-application to join the Third Party, such costs to include the cost occasioned by the employment of two counsel, where applicable;
- (2) Defendants claim against the Third Party is dismissed;

- (3) Defendants are ordered to pay the Third Party's costs on Scale B regarding Defendants' claim against the Third Party, such costs to include the cost occasioned by the employment of two counsel, where applicable
- (4) Defendants are ordered to pay Plaintiffs' damages as may be agreed or proved.
- (5) Defendants are ordered to pay Plaintiff's costs on Scale A, such costs to include:
 - i. the costs occasioned by the employment of two counsel;
 - ii. the qualifying expenses of Dr Roodt;
- (6) The matter is postponed *sine die* for the determination of the quantum of Plaintiffs' damages.



LE ROUX, AJ
ACTING JUDGE OF THE HIGH COURT