

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 44350/2012

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED

Date:

WHG VAN DER LINDE

In the matter between:

Intercape Ferreira Mainliner (Pty) Limited

(Registration number 1997/011763/07)

Plaintiff

And

Pro-Haul Transport Africa CC

(Registration number CK2000/033162/23)

First Defendant

LB Ntuli Plant Hire and Civil Engineering CC

(Registration number CK2006/126857/23)

Second Defendant

JUDGMENT

Van der Linde, J:

Introduction: the issues

- [1] The plaintiff sues the two defendants for the material damage caused to its luxury passenger bus when a collision occurred on the N3 highway outside Johannesburg. The collision involved the plaintiff's passenger bus, the first defendant's horse, trailer and pup combination, and the second defendant's water tanker. They were all travelling in the same direction, roughly from south east to North West, at 05h38 in the morning, on a Thursday, 30 September, 2010. The bus was behind the water tanker and the combination was stationary in the left lane of a three-lane highway, facing North West. The tanker, travelling in the left lane, first collided with the rear right of the combination vehicle and one second later the bus, also travelling in the left lane but in the process of moving over to the middle lane, in turn collided with the rear right of the tanker.
- [2] The plaintiff bus owner says the collision was caused by the owner of the combination vehicle in having left its vehicle on the road at night without any warning lights on, and without the regulation warning triangles. Alternatively, it says that the tanker driver was to blame for, amongst others, suddenly moving his vehicle into the lane in which the plaintiff's bus was travelling. Alternatively, the plaintiff says both were to blame for a combination of these reasons.
- [3] The first defendant, owner of the combination vehicle, says that the driver of the water tanker and the bus driver were to blame. The first defendant blames the tanker driver for the same things the plaintiff blames him; and blames the bus driver for amongst other things failing to keep a safe following distance between the bus and the water tanker.
- [4] The second defendant, owner of the water tanker, does not expressly blame anyone, but denies that its driver was to blame for the collision. The plaintiff's allegations of negligence concerning the second defendant's driver are placed in dispute, but there is no joining of issue with the first defendant.

- [5] Negligence was the only issue in dispute in the trial, the plaintiff's damages having been settled at R472 700.41. Since there are no counterclaims, there is no potential of the plaintiff becoming liable to the defendants; but there is the potential of the defendants' liability, if any, to the plaintiff being reduced; and there is the potential of a division between the defendants of liability for the plaintiff's damages. All that is ultimately dependant on how the negligence cake is sliced, if it is sliced.

The evidence

- [6] The plaintiff called three witnesses, the first defendant none, and the second defendant one, being its driver. The plaintiff's driver has since deceased and could for that reason not be called. The person responsible for the first defendant's vehicle was not called.
- [7] The plaintiff's first witness was an expert, Mr Bezuidenhout, who proved the video recording that was made. That went in as exhibit A, with stills as exhibits B and C. The recorder was mounted in the middle of the front windscreen of the bus, just underneath the rear-view mirror. The camera thus recorded to the front, the view said to be 180% from the position of the camera, and not precisely what the driver would have observed, although close to it. It was also slightly higher than the driver.
- [8] The point really about this evidence was that if the video were to show anything sticking out to the left of the water tanker in front of the bus, which might have reflected a part of the combination vehicle of the first defendant, then it did not follow that the bus driver would actually have been able to observe it. The video reflected what the bus driver would have observed looking forward (nothing that was visible to the bus driver in his rear-view mirror was visible on the camera), but from a perspective in the middle of the bus, whereas the driver's perspective was from right of the middle, the bus being right hand drive.
- [9] The second witness for the plaintiff was also an expert, Mr Fourie, described as a "*collision reconstructionist*". He was called to and did give evidence about how in his view the collision

occurred, having regard to the video that he had been given to observe. This was the same video that Mr Bezuidenhout had proved.

[10] Much of Mr Fourie's evidence went to the very issue that the court had to decide, and was thus inadmissible.¹ The point is, simply put, that no witness can give his or her opinion on the very issue that the court has to decide. In a collision case, such as this, no witness can be called to say that driver A was negligent, and driver B was not; or give evidence to that effect.

[11] Since the matter was set out plainly in his judgment, I make no excuse for quoting liberally on this issue from the judgment of Bekker, J in *R v Heroldt and Others* (1):²

"Mr. Horwitz, on behalf of accused Tesanovic, objected to the question. He, in my view, correctly pointed out that the question whether or not the payment of £15,000 was met from funds created by certain of the deposits referred to was an issue in this case, and an issue which this Court would have to decide upon eventually. Counsel contended that it was not permissible, and, indeed, not proper for this witness to express or to be allowed to express an opinion on a very issue which the Court has to determine. He furthermore intimated that he sought a ruling as he intended objecting to all opinion evidence which the Crown might seek to extract from this witness on an issue which the Court would have to determine. Mr. Harwood, for the Crown, pointed out that Cox, as an expert, could not only be of great assistance in enabling this Court, through his evidence, to return findings on these issues, but said that the involved and complex nature of the accounts and record and the movement of monies required the services and evidence of a skilled accountant to unravel and reveal them in true colour, and that in these circumstances an expert's evidence not only becomes necessary but that he was entitled to express an opinion even though it be on a very issue which I have to determine.

¹ In *Commercial Union Insurance Co of SA Ltd v Wallace, NO; Santam Insurance Ltd v Afric Addressing (Pty) Ltd*, 2004 (1) SA 326 (SCA) at [74], this principle was referred to as if axiomatic.

² 1956 (2) SA 714 (W) at 715 to 717.

I have no doubt that Mr. Cox, with his training and his knowledge of the affairs of Hendon and the issues which have to be decided by this Court, could be of assistance. I also entertain the view that his opinion on the issues I have to determine could well be considered with advantage and that Mr. Harwood appears to be correct in his view that without the assistance of an accountant the Court may have considerable difficulty in coming to a conclusion, or a correct conclusion, in the absence of evidence which he seeks to place before the Court through this witness.

In any criminal case, and perhaps more so in the present one, involving innumerable books, entries and records, the movement of funds and corresponding entries and figures in banking and other accounts, I regard it as essential, if not obligatory, on the part of the Crown to direct the attention of the accused, and the Court, to every and any particular book, account, entry or figure therein appearing, on which it will seek to rely for a conviction on any particular charge. This would avoid a situation in which the accused person might be taken by surprise and would serve to acquaint the Court with those items at an early and convenient stage. The prosecutor might, of course, do so himself or he may conceivably do it more conveniently through a witness, such, for example, as Mr. Cox. But can he go further and invite an opinion from the witness on an issue which the Court has to decide?

In support of his contention that such a course would not only be improper but would tend to allow the introduction of inadmissible and irrelevant evidence Mr. Horwitz advanced a number of arguments and referred me to various authorities, from which, I think, it is clear that, as a general rule, it is for the Court to form an opinion or draw inferences from the relevant facts proved, and that it is not permissible for a witness to express an opinion upon any fact as to which the Court itself can form an opinion.

The reason for the rule is clear, and is crisply set out by Wigmore on Evidence (vol. 7 para. 1918, at p. 11). The learned author says:

'The rule endeavours to save time and avoid confusing testimony by telling the witness, 'The tribunal is on this subject in possession of the same materials of information as yourself. Thus, as you can add nothing to our materials for judgment, your further testimony is unnecessary and merely cumbers the proceedings'. It is this living principle which is, or ought to be, applied in each instance, and nothing more definite is there than the test involved by this principle'.

The fact that in a case such as the present the volume of documents, the accounts and the complexity of the entries may render the task of the Court more onerous and difficult in the absence of expert evidence and opinion does not, in my opinion, sanction any departure from nor constitute an exception to the general rule.

And, it is perhaps for this very reason, that one finds provision made in the Criminal Procedure Act of 1955, sec. 111, (which re-enacts earlier provisions), to the effect that in cases where facts may have to be considered, for the proper understanding of which an expert knowledge, inter alia, of bookkeeping and accounts may be necessary, that the Minister may direct that the trial should take place without a jury, thus enabling a Judge to summon to his assistance as an assessor, and constitute as a member of the Court, a person possessed of such expert knowledge.

Mr. Harwood, however, made reference to a passage appearing in Wigmore (vol. 4, para. 1230) which is to the following effect:

'Where a fact could be ascertained only by the inspection of a large number of documents, made up from very numerous detailed statements as the net balance resulting from the year's vouchers of the treasurer or a year's accounts in a bank ledger, it is obvious that it would often be practically out of the question to apply the present principle by requiring the production of the entire mass of documents and entries to be perused by the jury or read aloud to them. The convenience of trial demands other evidence to be allowed to

be offered in the shape of testimony of a competent witness who has perused the entire mass and will state summarily the net result. Such a practice is well established to be proper'. The learned author points out that the most commonly recognised application of this principle is that by which the state of pecuniary accounts is allowed to be shown by a witness's schedule or summary, but it does not, in my view, serve as any authority for the proposition that the witness may go further and having stated the net result, to proceed to air his opinion, even though an expert one at that, on issues which the Court has to decide. In the net result I am satisfied that the objection is well-founded and that the witness Cox is not to be permitted to express his opinion on issues which this Court will have to determine. This renders it unnecessary for me to deal with the further arguments advanced by Mr. Horwitz in support of his contention."

[12] But any even brief reference to this topic would be incomplete without quoting from the *locus classicus* in our law on the admissibility of expert evidence on the very issue the court has to decide; that of Trollop, JA in *Gentiruco AG v Firestone SA (Pty) Ltd*:³

*"To advert to the question of admissibility of evidence to construe the specification, the question that arises is whether the evidence of a skilled, expert witness' opinion as to the meaning of any part of the specification, including the claims, is admissible. It arises because during the trial the parties' expert witnesses were freely asked, and they testified, about what they thought the relevant parts of the specification meant. The decisions of our Courts on the admissibility of expert opinion evidence on the very issue that the Court has itself to decide do not appear to be harmonious. The usual ground for urging or deciding on its exclusion is the usurpation by the witness or the abdication by the Court of the Court's function of adjudicating the particular issue (see, for example, *R. v Herholdt and Others*, 1956 (2) SA 714 (W)). Wigmore, who deals with the whole problem with his usual incisiveness in*

³ 1972 (1) SA 589 (A) at 616 to 617.

his work on *Evidence*, vol. VII, 3rd ed., paras. 1917 to 1929, pours scorn on this reason for exclusion in para. 1920:

'This phrase (about usurpation) is made to imply a moral impropriety or a tactical unfairness in the witness' expression of opinion. In this respect the phrase is so misleading, as well as unsound, that it should be entirely repudiated. It is a mere bit of empty rhetoric. There is no such reason for the rule, because the witness, in expressing his opinion, is not attempting to 'usurp' the (court's) function; nor could he if he desired.'

The reason given is that the Court is not bound by his opinion; it is still free to reject it and decide the issue for itself. In para. 1923 the learned author maintains that the true and practical test of the admissibility of the opinion of a skilled witness is whether or not the Court can receive 'appreciable help' from that witness on the particular issue; in other words,

'The test is a relative one, depending on the particular subject and the particular witness with reference to that subject'.

*Otherwise his evidence would be supererogatory and superfluous, and would possibly merely consume time, cumber the proceedings, or confuse the main issues, and should therefore not be admitted (para. 1918). The cogency of those views is manifest, and in certain cases our Courts seem to have admitted opinion evidence of that kind substantially for those reasons - see, for example, *Annama v Chetty*, 1946 AD 142 at pp. 155 - 6 (handwriting); *Rex v Morela*, 1947 (3) SA 147 (AD) at pp. 152 - 3 (fingerprints); *R. v Vilbro*, 1957 (3) SA 223 (AD) at pp. 228C to 229A (race classification), and *Ruto Flour Mills Ltd. v Adelson* (1), 1958 (4) SA 235 (T) and authorities there cited (accountancy). In the present case, the subject-matter of the specification being of a highly complex, scientific nature, the opinions of the parties' well qualified and experienced experts, as being representative of the skilled addressees of the specification, on the meaning of their understanding of its relevant parts, while not binding on the Court, might have been of appreciable help. However, I have arrived at the conclusion*

that the admission of their opinion evidence on that particular aspect is precluded by English authority rendered binding on the Commissioner's Court and us by our legislation."

[13] The up to date position is collected by the Supreme Court of Appeal in *Representatives of Lloyds and Others v Classic Sailing Adventures (Pty) Ltd.*⁴ This does not mean that experts' assistance on matters such as stopping distance is not admissible; it usually is.⁵

[14] The difficulty for me however with Mr Fourie's evidence was that it was interspersed with personal opinions about the drivers' duties in law in given circumstances. It was also not in a field that is foreign to any motorist of some experience. His evidence about the time it takes to cover a fixed distance if one travels at a certain speed, is a matter of simple arithmetic.

[15] I accept that his evidence about how long it would take the vehicles concerned to come to a complete stop, assuming certain speeds, is a matter in respect of which he could be, and was, of assistance to the court. That is arithmetic that cannot be performed without input of the mass of the vehicles concerned, their braking efficiency, and the appropriate mathematical formulae to apply. But on the whole, his evidence should be scrutinised to ensure that he was not usurping the function of the court, and thereby – completely innocently – inhibiting the court in coming to its own conclusion on matters that really involve everyday common sense matters.

[16] The plaintiff's third witness was Mr Nortje, an employee of the plaintiff. He visited the scene of the collision soon after it had occurred and spoke to the bus driver, who gave him his version. He also proved the bus driver's contemporaneous written version of the collision. It was:

"I, Andries Matseke, I was following the truck in front of me for 10 minutes. When I was following that truck, I was driving +- 50 kmpu.

⁴ 2010 (5) SA 90 (SCA) at [60]. Compare *Van Eck v Santam Insurance C Ltd*, 1996 (4) SA 1226 (C) at 1229 H – 1230 B.

⁵ *Seti v Multilateral Motor Vehicle Accidents Fund*, 1999 (1) SA 1035 (SE) at 1040 in fin.

I was trying to change the lane because I saw the space on the right side. The front one tried to change the lane. He was late to change because there was a truck in front of him having break down (stuck).

The front truck crashed the stuck truck at the back and the rear part of the front truck came in front of me.

I try to swerve the bus. The space was too small. Then crashed the corner of that truck which I was travelling to the same direction with.

In your opinion, who was to blame? The stationary truck.

Why? No triangle. No hazard. Under the bridge and too dark. No light."

[17] Finally, Mr Ntuli, the driver of the second defendant's water tanker, testified. He explained that he was travelling in the left hand lane at about 50 – 55 kph. At some distance away he saw the combination vehicle. He could not make out whether it was moving or stationary. There were no warning triangles placed out in the road, and no operative lights at the rear of the combination. He first applied his brakes once. He could then see that the combination vehicle was stationary.

[18] Mr Ntuli observed the bus behind him, travelling faster than he was, also in the left lane. He observed too a large low bed truck with a container fixed on it to his right in the middle lane, also approaching him from behind. He was thus twixt the triple horns of a dilemma: the stationary combination vehicle ahead of him, in the same lane; the bus behind him, encroaching on him, in the same lane; and the third truck in the middle lane, behind him, but also encroaching on him. Ahead was the danger of hitting the stationary combination vehicle; he could not move to the right, because the third truck was occupying that lane and was catching up on him, so that he could not go into that lane; and he couldn't stop, because the bus driver was behind him, approaching him, and would slam into him.

Following distance

[19] Much in this case turns on the duties of a driver when leaving a vehicle stationary on a highway; but that s/he must ensure that in those circumstances it should be visible to other road users is not contested. This is not surprising, as the old case of *SAR & H v Estate Saunders*⁶ authoritatively established that a driver who parks a vehicle at night is duty bound to display proper lights and/or signs so as to warn other road-users of the vehicle's presence.⁷

[20] There is also express provision in regulation 214 of the National Road Traffic Regulations, 2000, made under s.75 of the National Road Traffic Act 93 of 1996 ("the regulations"), for retro-reflective fluorescent triangular warning signs to be posted 45 meters away from such a stationary vehicle in the direction of the on-coming traffic.

[21] What was however a point of contestation, by the plaintiff, was the suggestion that a driver must keep a following distance behind the vehicle in front of him/her, such that if that vehicle were by sudden emergency required to stop in its tracks, the following vehicle could do so without colliding with the leading vehicle.

[22] Perhaps this discussion should start with the position of the leading vehicle in those circumstances. Generally, the approach in our law has been that when a driver, who is confronted with a sudden emergency which is not of his/her own making, takes steps to avoid a collision, but fails to avoid the collision, it is impermissible afterwards to argue that s/he should have taken different steps which would in fact have avoided the collision.⁸

⁶ 1931 AD 276, discussed at page 15 in *WE Cooper, Motor Law, Juta & Co, Ltd, 1987, Vol 2.*

⁷ *Cooper, op cit*, page 16, footnote 65.

⁸ *Cooper, op cit*, page 90 ff.

[23] In *Road Accident Fund v Grobler*⁹ the majority of the Supreme Court of Appeal (per Hancke, AJA) put the matter as follows: “[12] *When a person is confronted with a sudden emergency not of his own doing, it is, in my view, wrong to examine meticulously the options taken by him to avoid the accident, in the light of after-acquired knowledge, and to hold that because he took the wrong option, he was negligent. The test is whether the conduct of the respondent fell short of what a reasonable person would have done in the same circumstances.*”

[24] Concerning following distance, regulation 308 provides (emphasis supplied):

“308 General duties of driver or passenger of vehicle on public road

(1) No person driving or having a vehicle on a public road shall-

(a) ...

(b) follow another vehicle more closely than is **reasonable and prudent** having regard to the speed of such other vehicle and the traffic on and the condition of the roadway, or more closely than is prescribed in these Regulations;...”

[25] What is reasonable and prudent still does not, of course, expressly say that the following driver must be able to stop without colliding with the leading driver if the leading driver had to stop abruptly for a sudden emergency. But older cases that have taken the trouble to examine the duties of drivers in those circumstances have indeed produced *dicta* to that effect. In *Abdool v Slade*¹⁰ it was held that the following driver ought to adjust both his/her speed and the intervening space between his/her vehicle and the leading vehicle so that s/he is able to pull up or swerve in the event of a sudden stoppage of the leading vehicle.¹¹

⁹ 2007 (6) SA 230 (SCA).

¹⁰ 1931 NPD 4, quoted in MacIntosh & Scoble, *Negligence in Delict*, Juta & Co, Ltd, 1970, 5th ed, at page 456 ff.

¹¹ Kuper, J in *Reemers v AA Insurance Association*, 1962 (3) SA 823 (W) at 825 expressly adopted this approach, which is consequently binding on this court unless I can find that it is clearly wrong. The subsequent case of *Coleman v Mabuza*, 1963 (2) SA 498 (T) is a two judge (Ludorf, Kuper JJ) Full Bench of the then Transvaal Provincial Division, which binds me even if I considered that it was clearly wrong.

[26] A more recent decision is that of *Murphy v Commercial Union Assurance Co Ltd* in 1983.¹² Burger, J referred to the National Road Safety Council's apparent advice that the following vehicle should be at least two seconds behind the leading vehicle. This concept of two seconds is also picked in current internet searches as a sort of rule of thumb, and it is said to allow both for reaction time (as Burger, J held) and evasive action.

[27] Burger, J himself held that the following distance must be enough *"...to deal either with a sudden stoppage of the bakkie in front, or any development on the side of the road caused by the passing bakkie, ie a cyclist upset by the passing wind drag, a drunken pedestrian losing his balance because of the bakkie passing and falling into the road or an animal on the side of the road upset by the passing bakkie, or children playing next to the road who could possibly run into the road and of course traffic which may enter from the side."*¹³

[28] It seems reasonably clear then that the following driver must keep such a distance as would enable him/her either to stop, or to swerve, but at all events to avoid, colliding with the leading vehicle if the leading vehicle were to stop immediately as a result of a sudden emergency.

[29] It is necessary to flag here the notion of "swerve" in this context. The description of the rule in the previous paragraph assumes, of course, a vehicle that is able to swerve without in that process endangering yet more people. So one has in mind the generic sedan or, in modern parlance, a SUV, which would be comfortable in executing the swerve without thereby actually causing yet further collisions.

Basic factual findings

¹² 1983 (3) SA 487 (C) at 488, 489.

¹³ At page 489.

[30] Here now follow some basic factual findings. The more contentious factual inferences are drawn below in the discussion part of this judgment. In each instance I indicate the source or reasoning that led to the finding concerned.

[31] It is common cause that the lighting was poor. It was early yet, and although clear blue skies, still dusky. The video reflects that vehicles were travelling with their headlights turned on, corroborating the as yet poor visibility.

[32] The position under the bridge where the combination vehicle had been brought to a standstill, contributed to obscuring the presence of that vehicle, in its stationary position, to the view of traffic in the same direction. This is borne out by the photographs and the video, and the contemporaneous witness statement of the bus driver.

[33] There were lights switched on at the rear of the combination vehicle. Mr Ntuli said that there were no lights switched on, but photographs B10.1 – B10.3 are against him.¹⁴

[34] No triangles as prescribed had however been put out. This was the direct evidence of Mr Ntuli, and it was corroborated by Messrs Bezuidenhout and Nortje, who could find no evidence after the collision of triangles having been put out. Although these witnesses were generally challenged by the first defendant, no contrary version was put to them on this point. In particular, it was not put that triangles had been put out.

[35] In these circumstances the inference is that the position of the combination vehicle, at that time, in that place, created a danger to other relevant road users. Whether this fact was causally connected to the collision between the bus and the water tanker is another matter, dealt with below.

[36] The water tanker was travelling ahead of the bus in the same left lane, but at a slower speed. This is shown by the video and the bus catching up on the water tanker. It was also the observation (of the video) of Mr Fourie. Mr Nortje also said that Mr Matseke had told him that in the approach to the collision area, the tanker would overtake the bus on the

¹⁴ This reference is shorthand for “Exhibit B, page ten, third photograph”. It may of course be that these lights had the converse effect, of conveying a sense of normalcy, whereas the true position was the opposite.

downhill, and the bus would overtake the tanker on the incline. In that area, the road is at an incline. That was the evidence of Mr Ntuli, and he was not challenged on it, despite the plaintiff's witnesses being familiar with the area.

[37] The bus reached a stage, in this catching up process, where if the water tanker were to stop immediately, the bus would run into the back of the water tanker. This conclusion was justified by the evidence of Mr Fourie. The bus was travelling between 2 and 2,5 seconds behind the water tanker, he said. Mr Fourie said however, that even if the bus driver had applied his brakes fully at 4.74 seconds before the collision, it would have required 77 metres for the bus stop.¹⁵ There was not this amount of space between the bus and the water tanker.

[38] This timing, 4.75 seconds before the collision, is taken from B5.2. That is the moment the water tanker applies its brakes not for the first but for the second time.¹⁶ The bus driver in fact did not apply brakes then; Mr Matseke last applied brakes at 5.25 and 5 seconds before the collision.¹⁷

[39] The third truck, the low bed with the container, was travelling faster than the bus, and was travelling faster than the water tanker. It was however travelling in the middle lane, and it was in the process of overtaking first the bus and thereafter the water tanker.

[40] In its position and with its speed at the time the third truck was an obstacle to both the bus and the water tanker accessing the middle lane at times when in each instance it would have enabled them to avoid the danger that was caused by the presence of the first defendant's combination vehicle on the road. This conclusion is justified by observation of the video.

[41] That the third truck was an obstacle to the water tanker is uncontentious; that it was also an obstacle to the bus appears from the fact that when the water tanker first braked, Mr

¹⁵ The two second rule clearly could not be applied to this bus with its trailer because of its size and mass.

¹⁶ The first time is at B2.3.

¹⁷ Photographs B4.3 and B5.1.

Matseke had not yet activated his indicator;¹⁸ this he did for the first time when the water tanker had already started braking for the second time.¹⁹ Since 0.25 seconds later one sees the back of the third truck, with Mr Matseke still with his hand on the indicator, it seems very probable that Mr Matseke was biding his time for the third truck to pass.

Discussion

[42] Against the background of these factual findings it is possible now to discuss the actions of the two drivers. Viewing first the position of Mr Ntuli: he was confronted by the sudden emergency of the stationary combination vehicle. His options were to stop completely, as Mr Fourie suggested he should have done. For reasons already given I do not accept Mr Fourie's evidence on this score; which is not to say that the court cannot itself reach that conclusion. But it should not be because it was Mr Fourie's evidence.

[43] Mr Ntuli considered that option, but he was concerned that the bus would slam into him, he said. He wanted to get out of the way; which is why he bided his time to move to the right, all the while slowing down, and switching on his right indicator light.

[44] Was Mr Ntuli's judgment that to stop would have the bus slam into him wrong? On reflection, probably not. But more importantly, was it reasonable? Mr Fourie thought that given the bus's distance from the water tanker and its speed, the bus would have hit the water tanker unless the bus will by then have moved completely into the middle lane, as he was entitled to do.

[45] But there are problems for this argument. First, Mr Ntuli was not under the impression that the bus had moved completely into the middle lane. To the contrary, the middle lane was where he, Mr Ntuli, was in fact waiting to slot into, because he considered that staying in the left lane left him vulnerable from both the front, the combination vehicle, and the back, the bus.

¹⁸ Photographs C2.3; C3.1.

¹⁹ Photograph C5.3.

[46] Mr Ntuli found himself in an impossible position. His patent inability to estimate distances (he said the bus was one meter behind him) did not in my view without more disqualify him from being a reasonable driver. Witnesses are often bad judges of distance, but that does not make them bad judges of dangers on the road. Mr Ntuli impressed me as an honest witness, who was doing his best to relay what he had observed nearly six years ago. After all, why volunteer readily to initially fleeing the scene of the accident?

[47] Mr Ntuli's assessment of his situation at those critical moments, particularly to move into the middle lane, accordingly cannot on the basis of the authorities referred to above now be questioned.

[48] Mr Ntuli was confronted by a sudden emergency not created by himself. The stationary combination vehicle was at least partially obscured, on any version; and the probabilities are, one must accept, that had it been equipped with warning lights and the required triangle, its visibility would likely have been considerably enhanced. Thus, the need to take avoiding action, and the potential danger posed by the approaching bus, was not of Mr Ntuli's making.

[49] Returning to the argument then that the bus driver did not actually need to be able to stop in time behind the water tanker, because the bus driver followed the second option, of moving into the middle lane: there are two answers to this. First, there was in fact no space in the middle lane, objectively speaking, because that is precisely where the water tanker was going, as Mr Matseke would have been able to observe; and it was the only place it could go.

[50] It avails not to say that the bus driver was not aware of the emergency that was unfolding in front of the water tanker. The law does not require of him to have been. His duty was to keep a sufficient distance to enable to stop in time to avoid a collision with the leading vehicle, whatever it was that caused the leading vehicle to stop immediately.

[51] One might say that what is sauce for the goose is sauce for the gander: that if Mr Ntuli's conduct cannot be challenged, nor can that of Mr Matseke. But Mr Matseke was not acting in a sudden emergency. On the evidence, he thought that he could simply overtake the water tanker by moving to the middle lane. He was quite oblivious to any emergency evolving in front of him.²⁰ Objectively, he was of course wrong, because the water tanker was in a sudden emergency.

[52] But there is a second answer to the proposition. It flows from the first answer: Mr Matseke was not swerving to avoid colliding with the water tanker. He was not swerving at all. In fact, Mr Fourie opined that Mr Maseke would not have been able to swerve in this sense, because with his trailer, and heavily massed vehicle, a consequential jack-knife action was a real danger of a swerve and brake.

[53] The conclusion is therefore indicated that Mr Matseke's following distance fell short of the standard required of him; he could not stop in time to avoid colliding with the water tanker, because there was not enough space; and swerving to the right to avoid such a collision was not on, not with that vehicle, because that implied jack-knife dangers and injury to others.

[54] In my view it follows that Mr Matseke was causally negligent in relation to the collision with the water tanker.

[55] It is necessary now finally to consider the position of the driver of the stationary vehicle combination, from the point of view of causative negligence. Here the argument for the second defendant was that even if the vehicle combination should and could have been lit up better, the fact is that the reason why Mr Ntuli could not stop in time was the immediacy of the approaching bus. That being so, the cause of the collision was not the unlit vehicle, but the approaching bus.

[56] But that cannot be so. The entire catastrophic scenario would not have eventuated were it not for the stationary combination vehicle which in bad light had no warning that it was

²⁰ In the evidence there was reference to the relaxed attitude evidenced in Mr Matseke's body language in the video frames.

stationary, and likely conveyed the opposite, obscuring practically the entire left lane on a busy highway.²¹ The pat application of the but-for test for establishing factual causation is a handy tool; but it is just a tool, not a principle of law.

[57] Put differently, in this case it could potentially be permissible to think away the unacceptable and unlawful proximity of the approaching bus, and then to ask whether the collision would still have occurred. On Mr Ntuli's evidence, the collision could have been avoided, because he would then have been able to stop in time in the left lane behind the combination vehicle without colliding with it.

[58] He may have been right, but even applying the but-for test, the unlawful conduct of the bus driver is not a *novus actus interveniens*, and it does not immunise the unlawful conduct of the first defendant. More importantly, in our law the question of factual causation is ultimately a probability exercise: is the alleged unlawful conduct more probably than not the cause of the plaintiff's harm? This was authoritatively restated by the majority of the Constitutional Court in *Lee v Minister for Correctional Services*.²²

[59] Nkabinde, J, for the majority put it simply:²³ “[55] *There was thus nothing in our law that prevented the high court from approaching the question of causation simply by asking whether the factual conditions of Mr Lee's incarceration were a more probable cause of his tuberculosis, than that which would have been the case had he not been incarcerated in those conditions. That is what the high court did and there was no reason, based on our law, to interfere with that finding.*”

[60] The stationary combination vehicle was a considerable obstruction. It was comprised of three parts: the mechanical horse, its trailer, and the pup. It obstructed the rump of the left lane. This was on a busy highway; on a bend in the road to the left; when it was dusky; under a bridge; and with no warning lights or trinkets to convey that it was stationary and

²¹ The photograph at trial bundle page 54 is a good example of this.

²² 2013 (2) SA 144 (CC).

²³ At [55].

obviously a danger for road users. Such lights as there were likely conveyed that, to the contrary, the vehicle was in normal mode, and was this moving.

[61] One is not dealing here with a remote cause; the combination vehicle was right there in the thick of things, immediately relevant to the two vehicles which were damaged in the collision that occurred not at some distant location, but right into it. One must also bear in mind that the collision combination is not separable; the water tanker collided with the combination vehicle, but had that not occurred, and had the water tanker been able to stop in time behind the combination vehicle, *a fortiori* the bus would also not have collided with the water tanker, because the bus would on this hypothesis have kept an appropriate following distance.

[62] In my view the probability is that had the stationary combination vehicle adequately and visibly identified itself as stationary, its status as such would have registered with Mr Ntuli much sooner; and that would have meant more time for him, and for Mr Matseke, to have taken consequential and sequential evasive action.

[63] It follows that the first defendant was also causally negligent in relation to the plaintiff's damages. In apportioning the respective degrees of blameworthiness of the first defendant and the plaintiff relative to the collision, I take into account that the first defendant had much more time to arrange and control its conduct than did the plaintiff. I also take into account that the first defendant's remissness was more brazen, in the sense that it endangered many more people, and over a longer period of time. An apportionment of 25/75 in favour of the plaintiff best captures my assessment.

[64] In the circumstances of this case, including the absence of management explanation on the part of the first defendant of how the combination had come to be stationary where it was and without any warning apparatus, I considered whether it would be appropriate that the first defendant should carry the costs of the second defendant.

[65] I have come to the conclusion that it would not. Not only did the second defendant not claim costs from the first defendant, but throughout the trial the plaintiff made no bones about it that it regarded the second defendant as having been causally negligent in relation to its damages.

[66] I believe it is fair that the interest rate should follow the statutory fluctuations.

Conclusion

[67] In the result I make the following order:

- (a) The plaintiff's claims against the second defendant are dismissed with costs.
- (b) Judgment is entered in favour of the plaintiff against the first defendant for R354 525,31 plus costs.
- (c) The plaintiff's costs are to include the expert fees, including qualifying fees, of Messrs Bezuidenhout and Fourie.
- (d) Interest runs on the judgment debt owed to the plaintiff at 15,5% p.a from 13 April 2013 to 31 July 2014; at 9% p.a. from 1 August 2014 to 29 February 2016; and at 10.25% p.a. from 1 March 2016 to date of payment.

WHG van der Linde
Judge, High Court
Johannesburg

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Date of hearing: 26, 27, 30, 31 May 2016, and 1 June 2016.
Date of judgment: 3 June 2016.