

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE, PORT ELIZABETH)**

CASE NO: 1288/2010

Date Heard: 15 August 2012

Date Delivered: 30 August 2012

NOT / REPORTABLE

In the matter between:

FLEETAFRICA (EASTERN CAPE) (PTY) LTD

Plaintiff

and

**THE MEC FOR ROADS & PUBLIC WORKS,
EASTERN CAPE**

Defendant

JUDGMENT

GOOSEN, J:

- 1] This is an action for damages arising from the collision of two motor vehicles on the R330 Road between Humansdorp and St. Francis Bay. The plaintiff, as owner of a Toyota Hi-Ace Siyaya motor vehicle with registration letters and numbers 075 FAE EC, claims damages on the basis that the vehicle, which was leased to the Eastern Cape Provincial Government for use by the Department of Health as an ambulance, was damaged beyond economical repair in the collision. It is alleged that the collision was caused solely by the negligence of the driver of an Izuzu truck with registration letters and numbers GWP 452 EC which is owned by the defendant.
- 2] It is common cause that a collision occurred between these two vehicles on 20 March 2008 at the intersection between Ketse Road and the R330 on the outskirts of

Humansdorp. It is also common cause that the plaintiff's vehicle (hereinafter referred to as the ambulance) was being driven at the time by Joshua Nota, an employee of the Department of Health and that the Izuzu truck (hereinafter referred to as the truck) was driven by Fezile Gamede, an employee of the defendant. Both drivers were, at the time of the collision, driving the vehicles in the course and scope of their employment.

- 3] Certain features of the manner in which the collision occurred are not in dispute between the parties. A photograph album including a number of photographs depicting the scene of the collision taken shortly after the collision occurred was handed in and received as evidence by agreement between the parties. The album contains a sketch plan of the intersection on which is marked certain points of relevance as well as measurements. None of these points and measurements were in dispute.
- 4] The collision occurred during the afternoon of 20 March 2008. At the time the road surface, which is tarred, was dry and the visibility was good. The R330 in the vicinity of the intersection with Ketse Road extends in an East / West direction¹ and is straight for a considerable distance before the road curves to the South. The R330 consists of a single lane for traffic in either direction although there is, on either side of the road surface, a hard shoulder demarcated by a yellow line. The intersection with Ketse Road comprises a T-junction with Ketse Road extending to the South of the R330. The intersection is controlled from the Ketse Road side by a stop sign. Directly opposite the intersection, on the North side of the R330, there is, in addition

¹ The layout of the scene of the collision was common cause between the parties. The reference to compass directions is used for ease of description.

to the hard shoulder, a further hard surface stopping area at a bus shelter which is set back off the road.

5] The plaintiff's case was that the ambulance was proceeding in a westerly direction towards Humansdorp. The driver had earlier attended on an emergency at Oyster Bay where he had collected a patient who had suffered a stab wound to the head. He was travelling back to Humansdorp in order to transport the patient to the local hospital. Apart from the patient, who was in the rear of the ambulance, the driver was alone. The collision occurred when the driver of the truck, who was proceeding along the R330 in an easterly direction, executed a right hand turn into the intersection at Ketse Road across the line of travel of the ambulance.

6] The plaintiff's driver, Nota, testified that he was travelling between 70 and 80 kms per hour as he was proceeding along the R330. The ambulance had on its headlights and its flashing warning lights but not its siren. He said that when he was still some distance away from the intersection he noticed a yellow truck travelling in the opposite direction. It was approaching the intersection and it appeared that it intended to execute a turn into Ketse Road. He could not recall whether it had on its indicator light. When he saw the truck there were two vehicles travelling ahead of him in the same direction as him. They were approximately 100 to 150 metres ahead of his vehicle. The truck, he said, approached the intersection and came to a halt waiting for the oncoming traffic to pass. After the two vehicles which were travelling ahead of him passed the truck it did not initially move. When he was right at the intersection the truck unexpectedly commenced executing a turn across his path of travel into the intersection. He immediately applied brakes and then swerved

the ambulance to the right in an effort to avoid the collision. According to him he could not swerve to the left because that was the direction in which the truck was travelling and there were also pedestrians on that side of the road. The evasive action taken by him was unsuccessful and the left front of the ambulance struck the left rear of the truck. The ambulance overturned and came to a rest on its side on the left hand side of the road a short distance beyond the intersection. Both he and the patient who was in the back of the ambulance were injured in the collision. Nota explained that he was able to get out of the ambulance but had lost consciousness at some point and was transported from the scene for treatment. A fellow employee of the Department of Health who was also driving an emergency vehicle towards Humansdorp testified that he arrived at the scene of the collision shortly after it had occurred. He provided medical assistance to Nota and the patient before they were transported from the scene.

- 7] The plaintiff also presented the evidence of a loss adjustor in order to quantify its loss. I shall return to the discussion of this evidence hereunder. At the conclusion of the plaintiff's case the defendant applied for absolution from the instance upon the basis that the evidence adduced by the plaintiff in relation to the loss suffered by it was not such as would entitle a court to make an award of damages in favour of the plaintiff. After considering the application I refused it and gave my reasons for doing so immediately. I do not intend to repeat those here save to state that I was satisfied that, in the event of finding that the defendant had negligently caused the plaintiff to suffer loss, there was indeed evidence upon which a court, applying its mind reasonably to the evidence, might find for the plaintiff (see *Paarlberg Motors (Pty) Ltd t/a Paarlberg BMW v Henning* 2000(1) SA 981 (C) at 985G).

8] The defendant's driver, Mr Gamede, testified that he was travelling along the R330 from Humansdorp in the direction of Ketse Road where he intended to make a right turn. As he approached the intersection he signalled his intention to turn right. He saw the ambulance approaching from the opposite direction some distance away. According to him it did not have on any lights. He noted that it was travelling at high speed. As he approached the intersection but before he reached it, he noted that the ambulance was travelling with its right wheels on the white middle line of the road surface. On making this observation Gamede concluded that the ambulance was travelling towards his vehicle on a collision course. He was unable to give an estimate of the distance between his vehicle and the ambulance when he made this observation. He decided to execute a turn to the right towards the intersection in order to get out of the path of travel of the ambulance and thereby avoid a collision. He said he could not turn to the left because he was aware of vehicles which were travelling behind his vehicle and which were intending or in the process of passing his vehicle on the left hand side because he had signalled that he was turning right. The evasive action he took was not successful and the collision occurred as described.

9] The ambulance struck the left rear of the truck in the vicinity of or immediately behind the left rear wheel. The damage to the ambulance indicates that the left front of the ambulance came into contact with the truck almost directly over the left front wheel of the ambulance. The photographs depict a single brake mark on the road surface which was measured to be approximately 11.75 metres in length. The brake mark commences at a point which is between the centre of the lane and the white

centre line dividing the road surface and at a point almost directly opposite the Eastern edge of the intersection with Ketse Road. The brake mark extends diagonally across the road surface and ends at a point which is closer to the white centre line on the road and at a point which is almost directly opposite the Western edge of the intersection.

10] In argument it was suggested, on behalf of the defendant, that given the nature of the damage to the ambulance and the position of the end point of the brake mark, that the brake mark can only have been caused by the left hand side wheel or wheels of the ambulance. If, as was contended by the plaintiff, the brake mark was caused by the right hand side wheels of the ambulance then the point of impact would necessarily have been further away from the white centre line on the road surface. The end point of the brake mark, it was suggested indicates on the probabilities, the point of impact between the two vehicles. Defendant's counsel pointed to a very faint mark on the road surface, captured on the photographs, and sought to suggest that this indicated the left hand side brake mark of the ambulance. The argument however is speculative since there is no evidence that the faint mark seen on the photograph is a brake mark or, if it is, that it is relevant to the collision at all.

11] In my view, the probabilities point strongly to the fact that the brake mark was indeed caused by the left hand side wheel or wheels of the ambulance and that the end point of the brake mark indicates the point of impact between the ambulance and the truck. A few important things flow from this. Firstly the point at which the brake mark commences is close to the centre of the lane of travel of the ambulance. No

measurements of the distance between the commencement point and the centre line were provided, nor is there any evidence as to the width of the ambulance. Accordingly it cannot be inferred with certainty that the ambulance was, at the point at which the braking commenced, driving with its right hand side wheel already across the white middle line. Even if it may be so inferred, it cannot be inferred that it was travelling along such a path of travel prior to the braking commencing. The other aspect is that the brake mark is diagonal to the centre white line indicating that whilst the ambulance was braking it was travelling in a direction which would have carried it across the centre white line. The third aspect is that it is apparent that the point of collision is at a position on the edge of the intersection and is indicative that the truck, which was struck at a point above or behind its rear wheel, had crossed some distance across the path of travel of the ambulance before the collision occurred and that it did so prior to reaching the intersection.

12] The point of impact and the position of the truck at the point of collision accords with the evidence of Gamede who said that he commenced executing the turn before he got to the intersection and that he had not stopped at the intersection to wait for oncoming vehicles to pass.

13] The fundamental issue to be determined is whether the truck driver, Gamede, was in any manner negligent in executing a turn across the line of travel of the oncoming ambulance by way of taking appropriate evasive action to avoid a collision.

14] To execute a turn across the line of travel of oncoming vehicles is an inherently dangerous manoeuvre. A party who intends to do so must satisfy himself that it is in

fact safe to do so (*AA Mutual Insurance Association Ltd v Momela* 1976 (3) SA 45 (A) at 52 (E)).

15] In this instance it is clear from the evidence of Gamede that he only executed the turn to the right in order to avoid what he considered to be an imminent and certain collision. The execution of the turn across the path of travel of the ambulance was not therefore a manoeuvre executed because it was safe to do so. Indeed he made it clear that he had seen the ambulance approaching; that he knew that he could not execute a turn at that point; and that he would not have done so but for the sudden emergency created by the manner in which the ambulance was being driven.

16] The question then is whether the evidence of Gamede is to be accepted that the circumstances in which the ambulance was driven created the emergency and whether the action taken by Gamede was reasonable and appropriate in the circumstances. Nota denied that he had driven the ambulance in such a manner that the right hand wheels of the ambulance were across the white centre line on the road surface. It was put to him in cross-examination that Gamede would testify that the ambulance was “straddling” the white line, suggesting that the right hand side wheels of the ambulance were completely across the white centre line on the road surface. This was denied. When Gamede testified his evidence in chief was that shortly before his truck got to the intersection he noticed that the ambulance was travelling towards him with its right wheels on the white centre line on the road surface. When it was pointed out that it had been put to the ambulance driver that the ambulance was “straddling” the white line, Gamede equivocated somewhat suggesting that immediately before the collision he saw the ambulance cross the

white line. Although his evidence in this respect was not entirely satisfactory I did not gain the impression that he was attempting to exaggerate the circumstances which confronted him. To the contrary, he said that the left wheels of the ambulance were on the white line and given that path of travel he believed that an collision would occur. The objective evidence as to the position of the commencement of the break mark indicates that right hand side wheels of the ambulance as it entered the intersection must have been very close to or even on the white centre line. The position of the vehicles at the point of impact too is consistent with Gamede's version that he began to execute a turn into the intersection even before reaching the intersection and that the collision occurred as he was attempting to drive the truck into the intersection and out of the path of the oncoming ambulance in order to avoid a collision.

17] Although there was a sharp dispute in respect of whether the ambulance had been driven across the centre line and into the path of travel of the truck, it was not suggested that the ambulance driver was a dishonest witness whose version fell to be rejected. He conceded readily that he was driving his ambulance at a speed which was in excess of the speed limit. He said that he had on his emergency lights since he was in the process of transporting a patient to the hospital for treatment. When he was approaching the intersection he saw the truck approaching the intersection from the opposite direction, at that stage there were two vehicles ahead of him, it appeared that the truck driver waited for the two vehicles that were ahead of the ambulance to pass and only thereafter executed a sudden and unexpected turn into the intersection, when this occurred he was already at the intersection and immediately applied brakes and swerved the ambulance to the right in order to avoid

the collision. Although the position of the point of impact does not support a finding that the truck came to a stop at the intersection before executing a turn, there is nothing to suggest that Nota was not giving an honest, although mistaken account of the collision.

18] Even if I accept that Gamede *bona fide* considered that the ambulance was approaching fast and that there was a risk of collision, because the ambulance was driving with its right hand wheels on the white middle line, his actions, in swerving across the path of travel of the oncoming ambulance indicates an error of judgement. There was no evidence as to any other actions taken by him to draw the attention of the driver of the ambulance to the presence of his truck and the risk of a collision. The evidence does not establish that a swerve across the line of travel of the oncoming ambulance was imperatively required in order to attempt to avoid the collision. Gamede's evidence does not establish that there was, as a matter of fact, a vehicle to his left which would have rendered it impossible to move in that direction. He says only that he was aware that there were vehicles approaching from behind which would have passed the truck to its left. It is also so that the road has a hard shoulder demarcated by a yellow line and that there was additional space to the left created by the hard surface stopping area at the bus shelter. Although no measurements of these surfaces were adduced in evidence it is apparent from the photographs that this additional space is sufficient to enable a vehicle to pass. The fact that the ambulance was driving with its right side wheels on the white centre line must also indicate that the largest portion of the lane in which the truck was travelling was not obstructed by the oncoming ambulance.

19]Gamede also testified that he gave consideration to what he should do in the face of the oncoming vehicle and that he decided that it would not be safe to turn his vehicle to the left apparently because there were vehicles behind him waiting to pass on the left.

20]In *Kleinhans v African Guarantee and Indemnity Company Ltd* 1959 (2) SA 619 (E) the following is stated (at 624F – 625G):

A move by a motorist to his incorrect side is one which should not be resorted to if it can possibly be avoided. In *Pienaar's* case Jones, J., says:

‘As a last resort he (defendant) took the exceptional course of leaving his proper side and crossed to his right.’

In *Williams v Nel*, 1939 W.L.D 188 at p.196, Schreiner, J (as he then was), remarks:

‘Now, going to the wrong side of the road when another vehicle is approaching on its wrong side is to my mind a dangerous course which the circumstances may justify but which nevertheless should not be lightly resorted to. If other satisfactory means are available for avoiding the accident then that course should not be taken, because there is always the risk that the other party may come back to his correct side. He may not previously have observed the other vehicle and would then instinctively, on seeing it, turn back to the correct side of his road. It is not good practice to go over to the wrong side of the road unless the circumstances imperatively require it.’

21]The approach in *Williams* set out above was endorsed in *President Insurance Company Limited v Tshabalala and Another* 1981(1) SA 1016 (A) at 1020C. In my view the requirement that crossing onto the incorrect side of the road should be imperatively indicated by the circumstances applies with even greater force in circumstances where, as in this instance, the oncoming vehicle is not in fact wholly on its incorrect side of the road.

22]The *Kleinhans* judgment goes on to consider an error of judgment in circumstances of a sudden emergency and concludes that the actions of a driver, though acting in a sudden emergency, must nevertheless be reasonable in the circumstances. See also *Ntsala and Others v Mutual and Federal Insurance Company Limited* 1996 (2)

SA 184 (T) at 192G.

23] In my view this is such a case. Gamede, even if it is accepted that he was faced with a sudden emergency, decided on a course of action without satisfying himself that the more reasonable and less dangerous course of steering his vehicle to the left was not in fact available to him. In the circumstances his decision to steer his vehicle across the line of travel of the oncoming ambulance in an endeavour to reach the safety of the intersection was not reasonable in the circumstances. Accordingly in so doing he acted negligently and thereby caused the collision between the two vehicles. It accordingly follows that the plaintiff has established that the defendant is liable to it for the loss caused to its vehicle in the collision.

24] The defendant disputed the damage suffered by the plaintiff and the plaintiff was required to prove its damages. In this regard the plaintiff led the evidence of a loss adjustor, Mr Bragalia. Bragalia, whose expertise and experience as a loss adjustor and prior experience as a qualified panel beater, was not challenged, testified that he had inspected the plaintiff's vehicle after the collision. He confirmed, with reference to the photographs, the nature and extent of the damage and explained that in his opinion the vehicle was not capable of economic repair. In cross-examination it was suggested that in order to properly determine that the vehicle was not capable of economic repair it would be necessary to obtain estimates of the costs of repair and having done so then determine with reference to the value of the vehicle whether it was capable of being economically repaired. Bragalia countered this suggestion by pointing out that the vehicle had sustained significant structural damage. He pointed out that the vehicle's chassis is a mono-chassis construction

and that this meant that the damage bodywork could not be removed and replaced. In a vehicle of such a construction it is, according to him, almost impossible to straighten the chassis and therefore to repair the type of structural damage sustained by the vehicle in the collision. On this basis he did not deem it necessary to obtain quotations for repair work since that would, in his view, "be a waste of time".

25] I accept this evidence which was in the main not challenged. Accordingly I accept that the evidence properly establishes that the vehicle was not capable of economic repair. Plaintiff's evidence was that in order to assess the pre-accident value reference was made to the standard industry utilised book value in order to determine its reasonable resale value, this was assessed at an amount of R123,300.00. To this amount was added the actual cost of converting the vehicle for use as an ambulance, an amount of R46,721.40 which Bragalia testified he ascertained by considering the actual cost expended as reflected on an invoice supplied by the plaintiff. The invoice was not however produced in evidence. Mr *Wolmerans* contended that this evidence accordingly is inadmissible since it constitutes hearsay evidence. For this reason, it was suggested, the total pre-accident value was not in fact established in the evidence.

26] It must be accepted that the evidence as to the actual cost of converting the vehicle for use as an ambulance was notionally available to the plaintiff. Why it was not produced is not clear. It is also not clear whether the conversion costs referred to in the evidence included the costs of fitting the vehicle out for use as an ambulance or whether it was confined to the structural or physical conversion of the vehicle.

27]A further aspect raised by the defendant was the effect of the vehicle's odometer reading upon the assessment of its reasonable resale value. Bragalia testified that in determining the value this was not taken into account and that had it been the effect would be to reduce the resale value. Based on this concession Mr *Wolmerans* argued that the evidence does not permit a calculation of the pre-accident value of the vehicle and accordingly it is not possible to determine the *quantum* of any loss suffered by the plaintiff. This difficulty was compounded, so it was argued, by the fact that the post-accident value, the so-called salvage value of the vehicle, was not properly assessed. On the pleadings the plaintiff pleaded that it had sold the damaged vehicle for R10,000.00. This figure, Bragalia conceded, was substantially less than what would ordinarily be assessed as the salvage value. Bragalia stated that ordinarily the salvage value could be assessed as being between 25% and 33% of the pre-accident value. In his estimate, having regard to the nature of the damage and its extent, an amount of 20% of the pre-accident value would be a fair assessment of the vehicle's salvage value.

28]The fact that the plaintiff does not establish in definitive terms the *quantum* of the loss that it has suffered is not a bar to an award of damages. In *Hersman v Shapiro & Co.* 1926 (TPD) 367 at 379 it is stated that:

"Monetary damage having been suffered, it is necessary for the court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the court is very little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the court is bound to award damages. It is not so bound in a case where evidence is available to the plaintiff which he has not produced; in those circumstances the court is justified in giving, and does give, absolution from the instance. But where the best evidence available has been produced, though it is not entirely of a conclusive character and does not permit of a mathematical calculation of the damage suffered, still, if it is the best evidence available, the court must use it and arrive at a conclusion based upon it."

29]In this instance the plaintiff has indeed adduced evidence which is the best available

to it. I accept, as was argued by Mr *Wolmerans*, that the evidence is not such as permits of a mathematical calculation of the damages suffered. However having found that pecuniary loss has indeed been suffered in consequence of the collision caused by the negligence of the defendant's driver, I am duty bound to assess the damages suffered by the plaintiff in the best way possible on the available evidence. This evidence, I accept, establishes that the pre-accident value of the plaintiff's vehicle excluding its conversion for use as an ambulance, is an amount of approximately R123,300.00. There can of course be no doubt that the vehicle was indeed converted for use as an ambulance, however, the actual cost of such conversion has not been established by the plaintiff upon acceptable and reliable evidence and accordingly the extent to which the resale value may have been increased by the cost of the conversion has not been adequately established by the plaintiff. I accordingly accept that a fair and reasonable estimate of the pre-accident value of the vehicle is an amount of R123,300.00. From this pre-accident value falls to be deducted the reasonable salvage value of the vehicle. The plaintiff, quite properly conceded, in the light of the evidence tendered, that the amount of R10,000.00 which it recovered on the sale of the damaged vehicle was not reasonable in the circumstances and that a more appropriate and reasonable salvage value is an amount equivalent to 20% of the estimated pre-accident value. Bragalia testified that a guideline figure of between 25 and 33% is one that is usually applied in circumstances such as this. This figure would necessarily be effected by the nature and extent of the damage as well as the nature of the vehicle being assessed. Bragalia's evidence was that a fair assessment would be in the region of 20%. This was based upon his consideration of the extent of the structural damage to the vehicle. Although I accept that he was fair in presenting this view and that it

was founded upon his view that very little other than the rear tailgate and rear differential would likely be salvageable, I nevertheless consider that a figure of 25% of the pre-accident value should be applied. In the result it is possible to make an assessment of the loss suffered by the plaintiff.

30] In the circumstances I make the following order:

1. The defendant is ordered to pay to the plaintiff the sum of R92,475.00, together with interest thereon from date of judgment to date of payment thereof;
2. The defendant is ordered to pay the plaintiff's costs of suit.

G GOOSEN
JUDGE OF THE HIGH COURT

APPEARANCES:

For plaintiff:

Adv Marais, instructed by
Goldberg & De Villiers Inc.

For defendant:

Adv Wolmerans, instructed by
The State Attorney, Port Elizabeth