IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**/NO**
Of Interest to other Judges:	**/NO**
Circulate to Magistrates:	**/NO**

Case number: A35/2019

In the matter between:

ZENTNER BOERDERY CC First Appellant

GARETH HAMBLY Second Appellant

and

WJ VAN DER MESCHT Respondent

HEARD ON: 07 OCTOBER 2019

CORAM: VAN ZYL, J *et* JORDAAN, J *et* RAMLAL,

DELIVERED ON: 24 OCTOBER 2019

JUDGMENT BY: JORDAAN, J

[1] The respondent, as plaintiff, issued summons against the appellants in which he claimed damages resulting from injuries he sustained during an incident where a bale of hay, commonly known as a big pack and weighing approximately 900 kg, was tipped over with a forklift driven by the second appellant and fell on his leg, causing the injuries.

[2] The incident and resultant injuries were allegedly caused by the negligence of the second appellant who was at the time employed by the first appellant and acting in the course of his employment as such. The appellants, as defendants, denied negligence on the side of the second appellant and alternatively pleaded that the negligence of the respondent contributed to the incident and resultant injuries. They therefore prayed for the claim to be dismissed, alternatively an order apportioning blame and reducing respondent's claim for damages accordingly.

[3] The issues were separated to the extent that only the question as to the negligence of the second appellant and the contributory negligence of the respondent were to be decided.

[4] After hearing evidence the trial court found the appellants to be liable for payment of 100% of the respondent's damages and that no apportionment of blame is justified. The appellants appeal these findings and orders with leave obtained from the Supreme Court of appeal.

THE FACTUAL MATRIX.

[5] There are no material disputes pertaining to the events leading up to the incident in which the respondent was injured. For the

purposes of the appeal the appellants accepted the credibility findings of the trial court.

[6] On the day of the incident, 25 January 2016, the respondent as a technician, accompanied by an assistant technician, visited the farm of the first appellant in order to attend to a problem allegedly experienced with a bale fork attached to a John Deere tractor in that it was unable to lift a big pack bale.

[7] On their arrival at the farm the respondent parked their light delivery vehicle in front of the open door of the shed. At a stage they needed a bale to enable them to test the bale fork of the tractor. The respondent and his assistant saw a bale positioned on its side near the wall of the shed and attempted to tip the bale onto its flat side so that the bale could be lifted and taken to the tractor with a forklift. Due to the weight of the bale they were unable to tip the bale and obtained the assistance of a labourer and the second appellant. The bale was then tipped over onto its flat side, lifted and transported to the front of the tractor with the forklift operated by the second appellant.

[8] According to the estimates of the second appellant the bale which was rectangular in shape was approximately 2.5 m in length, 1.3 m in width and 1.2 m thick. The bale was positioned in front of the bale fork attached to the tractor and the forklift on the opposite side of the bale, facing the tractor. The bale was then positioned onto its side again so that the bale fork of the tractor could be pushed into the bale in an attempt to lift it. For that purpose the forklift on the opposite side was used to support the bale to prevent it from shifting or tipping over while the bale fork of the tractor is inserted. When the attempt to lift the bale with the tractor was unsuccessful,

the tractor was reversed to extract the bale fork from the bale. The forklift was left idling on the opposite side of the bale whilst the technicians worked on the bale fork.

[9] Being unable to solve the problem, at about 1 pm, the respondent told the second appellant and the farmer's son that they, the technicians are going to return to town to ascertain what the capacity and specifications of the forklift were. They took their tools, greeted the second appellant and the farmer's son, left the shed and went to their vehicle.

[10] Since it was lunchtime, all the labourers who worked in the shed mixing fodder in another part of the shed also left the shed for lunch. The second appellant and the farmer's son had a short conversation, still in the shed, after which the farmer's son also left for lunch leaving the second appellant apparently alone in the shed. During this conversation the second appellant stood with his back towards the door of the shed. Unbeknown to him, the respondent returned to the shed and the tractor to obtain and write down the serial number of the bale fork. For that purpose the respondent knelt in front of the bale fork, cleaned the plate containing the serial number and started to write it down.

[11] In the meantime the second appellant went to the fodder mixer to ascertain whether sufficient fodder have been mixed whereafter he went to the forklift to return the bale to its original position. To be able to load the bale onto the forklift he had to tip it over onto its flat side. He approached the bale with the forklift, not noticing the respondent on the other side of the bale and with the forklift, tipped the bale over. It fell onto the leg of the respondent, seriously injuring him.

[12] Various photographs depicting the tractor, bale and forklift as well as a reconstruction of the scene were admitted in evidence. The height of the respondent kneeling with his body upright was measured in court to be 1.3 m, the same height as the bale lying on its side as it was before the incident occurred.

NEGLIGENCE OF SECOND APPELLANT.

[13] The basis upon which the trial court found the appellants liable, based on the negligence of the second appellant is summarised in paragraph 28 of the judgement which reads as follows:

> "It is patently clear that based on this version it is incorrect to say that the second defendant did not see the plaintiff. He did not look around him. He had many opportunities to see him if he had kept a proper lookout. On mounting the forklift he was in an elevated position but he only looked at the dashboard and nothing else. He should have looked around. On setting the forklift in motion and approaching the bale (on his version) for approximately four meters, he should have seen the plaintiff who was kneeling writing the serial number of the equipment. Given the measurements that were accepted by both parties, the plaintiff should have been clearly visible."

[14] I have read the record repeatedly. I was unable to find a shred of evidence to the effect that the second appellant looked at the dashboard of the forklift at all. Neither could I find any evidence to the effect that he looked at nothing else. Evidently he had to look at the bale and the front of the forklift to enable him to secure the blades of the forklift in the correct position so as to be able to tip the bale.

[15] It is certainly correct that he proceeded with the exercise without ensuring that there is no one hidden on the other side of the bale. To require of him to do that would mean that he was in the

circumstances required to keep a specific lookout instead of a general appraisal of his surroundings. On the evidence it can be accepted that the second appellant was under the bona fide impression that everyone else left the shed and he was alone. On the other hand the respondent's vehicle was still parked in front of the open door of the shed and must have been clearly visible to the second appellant whilst he walked towards the forklift and while he started operating the forklift. He should have realised that the respondent has not left the farm yet. That in itself does not imply that he should have realised that the respondent re-entered the shed. To his knowledge the respondent has finished his business in the shed, greeted and intended to return to town. In the circumstances I am not convinced that the second appellant should have foreseen, as a reasonable possibility, that someone may be hidden behind the bale, requiring him to specifically ensure that no one is behind the bale before tipping the bale.

[16] The finding that, given the measurements taken or estimated, the respondent should have been clearly visible is in my view also not substantiated by the evidence. The respondent himself testified that he is unsure whether he would have been visible for someone sitting on the forklift in the position of the second appellant. He went so far as to concede that someone kneeling between the bale and the tractor would not be visible. This concession was made repeatedly. He also agreed that, when the reconstruction of the scene was done, the second appellant sitting on the forklift was unable to see whether someone kneeled between the bale and the tractor. Later on he opined that someone in that position would have been difficult to see.

[17] Relying on estimates and measurements for concluding that the respondent was clearly visible appears to me to be somewhat of an armchair approach based on hindsight. I am not convinced that the trial court's findings based on the aforesaid can be sustained.

[18] In my view a finding of negligence on the part of the second appellant can be more appropriately substantiated with reference to his own evidence. During cross examination he conceded that when he was sitting on the forklift his eye level exceeded the height of the bale whilst the head of the respondent kneeling a short distance from the bale on the other side would have been approximately level with the top of the bale and would have been visible to him. His explanation for not observing the respondent in those circumstances was that pillars and iron bars on the front of the forklift must have hidden or obscured the view. He knew that tipping a bale of that magnitude and weight is an inherently dangerous exercise. In my view he should not have proceeded without ensuring that he has a clear and unobstructed view of what is in front of him. The second appellant himself conceded that in the aforesaid circumstances he did not keep a proper lookout.

[19] In the aforesaid circumstances I am satisfied that a finding of negligence on the side of the second appellant on the last mentioned basis is justified.

CONTRIBUTORY NEGLIGENCE.

[20] In this regard trial court found that, "Giving (sic) the prevailing circumstances, there can be no talk of the apportionment of blame."

[21] The reasoning behind this finding is summarised in paragraph 34 of the judgment as follows:

> "The version of the plaintiff that he knelt in order to write down the serial number is unchallenged. He knew exactly where this was written and returned into the shed for that purpose. He walked a short distance of a few metres and from the bakkie to the front loader. It was safe for him to do so. Although the forklift was idling there was no one in control of it. He was entitled to conclude that any person who would operate it will first observe and ensure that it was safe before doing so. His version that everything happened in a blink of eye is more probable. It did not present him with an opportunity to avert any danger."

[22] It is trite that in considering the question of negligence, the specific circumstances in which the incident occurred should be taken into consideration and viewed holistically. From the evidence, largely that of the respondent, the following are evident:

[23] The respondent knew that the bale was extremely heavy. He knew that the bale could only be loaded by a forklift when tipped onto its flat side. He noticed that the forklift was idling at the stage that he went back to the tractor to obtain the serial number. He conceded that one can hear the sound of the hydraulics of a forklift being engaged. He knew that he greeted and told the second appellant that he was leaving and indeed left the shed. He knew that he did not tell anyone that he was returning to the tractor. He conceded that it was reasonable for the second appellant to accept that there was no one else remaining in the shed at the time. He conceded that the bale would pose a risk if someone would attempt to load it with a forklift and is tipped over. He knew that the bale was moved to that position for the sole purpose of testing the bale fork of the tractor and would be taken back with the forklift once the tests were completed. That the forklift was still idling and not switched

off clearly indicated that it was intended to be used at any moment within a short period of time.

[24] Notwithstanding the aforesaid, he chose to kneel in front of the bale fork of the tractor, largely hidden from view of someone operating the forklift. He did not alert anyone to the fact that he was returning to the tractor. He could easily have avoided any risk by simply announcing his return. Although the actual tipping of the bale occurred within seconds, his presence at the tractor lasted considerably longer. He first had to kneel in front of the tractor, clean the serial number plate and then start noting the number before the incident happened. On probabilities he must have heard the forklift being engaged and the hydraulics activated. The second appellant's evidence that he revved the engine and hydraulically adjusted the blades of the forklift appears to be highly probable. He could easily have reacted to those sounds by simply standing up.

[25] In the aforesaid circumstances I have no doubt that the respondent acted negligently.

APPORTIONMENT.

[26] As far as the second appellant's negligence is concerned, the possibility of someone being behind the bale was slight and in the circumstances of this matter not reasonably foreseeable. His negligence consists of the fact that his view was obscured by the pillars and steel bars in the front of the forklift, to his knowledge and experience in operating the forklift. He admitted that at least part of the respondent would have been visible had he kept a proper lookout. He proceeded without doing so without ensuring

that the pillars and steel bars do not obscure his view. However, in view of his knowledge and the circumstances, the risk of harm was remote.

[27] To a reasonable person in the position of the respondent, knowing that the second appellant could reasonably have accepted that he left and no one remained in the shed, knowing that the bale was to be returned to its original position at any moment and knowing that he did not announce his return to the shed, the risk of harm was real and imminent.

[28] In my view the respondent's negligence contributing to his injuries substantially exceeds the contribution of the second appellant's negligence to the respondent's injuries. The respondent could have avoided any risk of harm by simply announcing his return. He could also have done so by heeding to the sound of the forklift and reacting thereto.

[29] In my view the respondent's contributory negligence contributed to his injuries to an extent of 70%.

COSTS.

[30] As a result of the aforesaid I am of the view that the appeal should succeed to the extent that the appellants should only be held liable for 30% of the respondent's damages. The appellants are therefore substantially successful in the appeal. There is no reason why they should not be entitled to their costs of appeal.

CONCLUSION.

[31] In conclusion I am of the view that the under mentioned orders should be granted and if agreed to by my learned colleagues, will be the orders granted.

I propose the following orders:

1. The order granted by the court a quo is set aside and replaced with the following:

1.1 The defendants are ordered, jointly and severally, one paying the other to be absolved, to compensate the plaintiff for 30% of his proven or agreed damages, with costs.

2. The respondent is ordered to pay the costs of the appeal.

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A.F.JORDAAN, J

I concur and the orders are granted. _____

C. v ZYL, J

I concur _____

A.K. RAMLAL, AJ

On behalf of the appellants: Adv. DJ van der Walt SC
Instructed by: Phatshoane Henney Inc.
Bloemfontein

On behalf of the respondent: Adv. JG van der Merwe
Instructed by: Gert Nel Inc.
C/O Attorneys: McIntyre & van der Post.
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