



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: **4943/2018**

In the matter between:

WM PRETORIUS VERVOER CC

Plaintiff

and

LIME LITE LOGISTICS CC

First Respondent

PHIWANKOSI GIKIMA SIBIYA

Second Respondent

HEARD ON: 3 AUGUST 2018

CORAM: P MOLITSOANE, J

JUDGMENT BY: P MOLITSOANE, J

DELIVERED ON: 1 NOVEMBER 2018

- [1] This is an action for damages arising out of the collision of two trucks along the R70 provincial road between Hennenman and Ventersburg the night of the 28th August 2014. The combination

truck of the plaintiff, bearing registration number 006 WMP FS, at the material time driven by Mr Japie Shabangu (Shabangu) collided with a truck driven at the material time by Mr Phiwayinkosi Gikima Sibiya (Sibiya), who was at the material time acting in his scope of duty and employment with the first defendant.

- [2] The trial proceeded on the merits only as the issue of quantum was separated in terms of Rule 37 procedure read with Rule 33(4) .
- [3] The undisputed or common cause issues are the following:
- The citations and details of the parties;
 - The jurisdiction of this Court;
 - The details of the accident as pleaded excluding the details of the driver of the plaintiff ;
 - The fact that the 2nd defendant was the driver of the truck of the 1st defendant and also that he (2nd defendant) drove same in his scope of employment with the 1st defendant.
- [4] Upon perusal of the pleadings it appears that the only issues for adjudication are the questions of *locus standi* of the plaintiff and the negligence of the second defendant. Plaintiff had pleaded the issue of subrogation which was denied by the defendants. This issue of subrogation was not pursued during the trial. It became clear that the claim of the plaintiff was based on negligence and as such the issue of subrogation was irrelevant to determine negligence.
- [5] In support of its case plaintiff called two eye witnesses and a collision expert. The version of the plaintiff is as follows:

Mr Shabangu testified that he had been in the employment of the plaintiff as a truck driver for the plaintiff for fourteen years. On the 28th August 2014 he was the driver of a truck bearing registration number 006 WMP FS. He was travelling from Kuruman to the harbour in Durban. At the material time he was following a truck driven by his colleague and fellow employee, one Mr Noko. Both of them were *en route* from Kuruman to the harbour in Durban. He was travelling on a tar road. The road surface was clear and the road was flat with no ascends or descends.

[6] He testified that while travelling he saw a truck approaching from the opposite direction. This truck was travelling on the gravel next to the tarmac. He immediately applied his brakes and brought his truck to a standstill. The oncoming truck passed the truck driven by Mr Noko and veered into the road and collided with his stationary truck. The truck he was driving was damaged on the left front side. He testified that the truck he was driving belonged to MW Pretorius Vervoer.

[7] Mr Noko also took the stand and testified that he was driving a truck in front of the truck driven by Mr Shabangu. He testified that an oncoming truck left the road and drove on the gravel. This oncoming truck passed him and collided with the truck driven by Shabangu.

[8] A collision expert, Mr Lotter then testified. For the reasons which will become apparent below, I will deal with his testimony later.

[9] The 2nd defendant testified that while driving he saw a truck driven by Mr Noko followed by one of Mr Shabangu. Both were travelling

from the opposite direction. He saw a vehicle exit the back of the truck driven by Mr Shabangu and proceed to overtake it. He thought that the overtaking vehicle was going to return to its lane between the two trucks driven by the Plaintiff's employees. When the vehicle was 15 metres away from the truck driven by him and at that stage overtaking the truck driven by Mr Noko, he realised that the vehicle was not going to take its place between the two trucks. He swerved the truck he was driving to the left hand side and drove on the gravel leaving the tarmac. Whilst on the gravel he hit a bump which caused his truck to veer to the right in between the two trucks driven by the two employees of the plaintiff and collided with the truck driven by Mr Shabangu.

[10] Defendants took issue with the *locus standi* of the plaintiff. In the particulars of claim plaintiff pleaded that:

"At all material times hereto:

- 1. The plaintiff was the owner of a Volvo Strado FH13 480 combination truck, with registration number 006 WMP FS;*
- 2. alternatively...,plaintiff was the bona fide possessor of the said vehicle and bore all risk in relation thereto;*
- 3. alternatively..... plaintiff was the credit receiver in terms of a credit agreement, the risk in and to the said motor vehicle having passed to the plaintiff."*

[11] Mr Shabangu testified that he was employed by the plaintiff as a truck driver. He confirmed that the truck he was driving belonged to the plaintiff. He confirmed a registration certificate which was handed in evidence as an exhibit. This registration certificate depicts plaintiff as the owner. According to the National Road Traffic Act 93 of 1996 a vehicle is registered in the name of an

owner and 'title holder.' No other evidence was tendered to the contrary and the attack on *locus standi* stands to be rejected.

- [12] In order for plaintiff to succeed in its claim it will have to prove that that the conduct of the 2nd defendant is wrongful and culpable. It will in addition also have to prove that such conduct of 2nd defendant caused plaintiff patrimonial loss. [See **Natal Fresh Produce Growers Association and others v Agroserve (Pty) Ltd and others** 1990 (4) SA 749 (N) at 756 I – 756A]. With regard to negligence, the issue is whether a reasonable driver in the position of the defendant would foresee the reasonable possibility of his conduct colliding with the plaintiff's vehicle and causing him patrimonial loss; and whether he would take reasonable steps to guard against such an occurrence and lastly, whether the defendant failed to take such steps. [See **Kruger v Coetzee** 1966(2) 428(A) at 430 E-F]
- [13] In its particulars of claim, plaintiff alleges that the sole cause of the collision is attributable to the negligence of the 2nd defendant in that he was driving on the wrong side of the road and attempted to swerve right, thereby colliding with the Plaintiff's truck.
- [14] The defendants deny the allegations and plead that the sole cause of the collision was the negligent driving by the driver of an unidentified vehicle who was negligent in one or more of the following respects:
1. He overtook the plaintiff's vehicle and another truck when it was unsafe to do so;

2. He went into the lane of the defendant's vehicle when it was unsafe to do so;
3. He caused the collision between the 1st defendant's and the plaintiff's vehicles when the 2nd defendant tried to avoid a collision with the unidentified overtaking vehicle.

The defendants further aver that the cause of the collision was a sudden emergency caused by an unidentified vehicle, alternatively the negligent driving by the driver of the plaintiff's vehicle.

[15] In motor vehicle collisions the existence of a sudden emergency is considered to be a factor which precludes negligence. A driver who is suddenly confronted with an unexpected danger may and will probably act differently from a driver who does not have to act without much time to make a decision on the spur of the moment. [See **Moses v Autopax Passenger Services (Pty) Ltd t/a City to City** [2005] JOL 15213(T)]. There are, however, limitations to the defence of sudden emergency.

[16] For the defence of sudden emergency to succeed the following requirements must be complied with:

1. The emergency must be unexpected and sudden;
2. Notwithstanding the emergency, the wrongdoer must, after encountering an emergency, still act with reasonable care and skill under the circumstances. [See **Klopper: Law of Collisions in South Africa, 7th ed** at p 108.]

[17] A defendant who raises a legal justification or excuse bears the onus to prove on a balance of probabilities that excuse. [See **Mabaso v Felix** 1981(3) SA 865(A)]. *In casu*, the defendants raise

the excuse in the form of sudden emergency and they thus bear the onus of proving it.

[18] It is not in dispute that a collision occurred between a truck driven by Shabangu and the 2nd defendant. It is also not in dispute that the truck of the plaintiff was damaged on its left hand side. The plaintiff relied, inter alia, on the evidence of a collision reconstruction expert in support of its case. During the trial an objection was raised regarding the said expert giving testimony. The crux of the objection was based on the fact that most of the source documents on which the report was compiled and conclusions made were all based on inadmissible hearsay evidence.

[19] The plaintiff gave a notice in terms of Rule 36 (9) (a) and (b) of the Uniform Rules of this court of his intention to call an accident Reconstruction Specialist, Mr Konrad Walter Lotter. The said notice summarised his evidence as follows:

That he was a technical/accident investigation expert and reconstructionist, Managing Director at DU MeTIER Technical Investigations and Consultants (Pty) Ltd. He is on daily basis involved in the activities of his expertise and he submits he is an expert in the investigation and reconstruction of accidents. He investigated a collision which occurred between a Volvo truck and a Freightliner truck. This collision occurred on the R70 between Hennenman and Venterburg. He indicates that having studied the photos of the scene, photos, police report, investigators report, sketch plan and versions of the parties he opined that the version of Mr Shabangu was more probable.

- [20] Mr Lotter is an engineer by profession holding a degree B.Eng. (Mech.) from the University of Pretoria. He is registered as such in terms of the Engineering Council of South Africa Act 114 of 1990. He has attended the following courses, tyre technology, basic training presented by the South African Police Services, Internal safety Course and an Officers Course also presented by the South African Police Services. He has presented the following courses, etch process, vehicle examiners course, accident investigation course and advanced accident investigation. In his line of function he completed over 1550 reports for court purposes and was involved in the investigation and formulation of final reports for courts. He is without doubt an expert in his field of speciality. The defendants do not hold otherwise.
- [21] The evidence of this expert is, however, largely based on hearsay. The reason that I allowed same to be led was that both witnesses for the plaintiff as well as the second defendant testified. Their evidence could hardly be labelled hearsay. Their statements also formed part of the source documents upon which the report of Mr Lotter was compiled. It is because of this reason that I was of the view that the interests of justice demanded that I allow the expert to testify.
- [22] It is important to note that the expert in this case was given certain information and was asked to consider the versions and discuss the probable actions of the drivers in relation to the events which unfolded at the time. It is apparent from his report that he also did not attend the scene of this incident.

- [23] The accident happened on the 26th August 2014. He was asked to investigate same on the 6th June 2018, about three years and nine months later. It is axiomatic that the scene would not be static. Much may have changed from the time of the collision until at the time of the investigation. Even if he would have attended the scene in 2018, the integrity of such a scene would have been circumspect.
- [24] When all is set and done, the report and conclusions reached by the expert are based on both admissible and inadmissible evidence. The admissible evidence would be constituted by the versions of the three eye witnesses who testified and the rest of the inadmissible evidence is constituted by all other evidence not proven or admitted.
- [25] It has been argued on behalf the plaintiff that an expert may give testimony on facts not yet proven or on facts contested by the opposing party. Mr Steytler submits that the opinion of the expert is based on a hypothesis. It should, however, been borne in mind that an expert should give testimony on matters calling for his specialised skill and knowledge. The court in **Holtzhausen v Roodt** 1997(4) SA 766 at C-E said the following:
- “Evidence of opinion on matters which do not call for specialised skill or knowledge is excluded because it does not help the court. At best it is superfluous and, at worst, it could be a cause of confusion:
- ‘If on the proven facts a judge or jury can form their own conclusion without help then the opinion of the facts is unnecessary.’*
- (See *R v Turner* [1975] QB 834 (CA) at 841[1975] 1 All ER 70 at 74d-e.)”

[26] Much as it is submitted that the evidence of the expert is based on hypothesis, it is clear that what the expert sought to achieve in this report is to opine whose version was more probable. This court is in a position to make that finding without reference to the evidence of the expert.’ In **National Employers General Insurance Co Ltd v Jagers** 1984(4) SA 437(E) “An expert’s view of what might probably have occurred in a collision must, in my view, give way to the assertions of the direct and credible evidence of an eye witness. It is only where such direct evidence is so improbable that its very credibility is impugned, that an expert opinion as to what may or may not have occurred can persuade the Court to his view(*cf Mapota v Santam Versekeringsmaatskappy Bpk* 1977(4) SA at 527-8 and *Madumise v Motorvoertuigassuransiefonds* 1983(4)SA 207(O) at 209).” I am of the considered view that much of the report of the expert called by the plaintiff was largely based on hearsay and also that it deals with issues which this court should deal and adjudicate upon, it is superfluous and unhelpful to the court. I will accordingly not consider it in my adjudication of this matter.

[27] The versions of the parties’ are mutually destructive and are irreconcilable with regard to whether there was an unidentified vehicle which overtook two trucks in the face of the approaching truck driven by the 2nd defendant. The approach in dealing with mutually destructive versions has been set out as follows in **National Employers General Insurance Co Ltd v Jagers** (*supra*) at 440 at E-G:

“.....where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the court will weigh up and test the plaintiff’s allegations against the general probabilities. The estimate of the

credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of the probabilities favours the plaintiff, then the court will accept his version as being probably true, if however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant, the plaintiff can only succeed if the court nevertheless believes and is satisfied that his evidence is true and that the defendant's version is false."

- [28] Both witnesses for the plaintiff testified in a chronological manner about how the incident unfolded. They were in agreement about the scene and how the collision occurred. They both confirmed that the incident happened on the road that had one lane travelling in one direction. They both confirmed that they were following each other with Mr Noko in front. They were travelling in trucks of 22 metres in length. The distance between them was approximately 2-3 trucks length. Mr Noko testified that as he was approaching a slight bend in the road he encountered a truck and he noticed that one side of the wheels were off the tarmac. He flickered his lights to warn the truck in an to warn the driver of that truck to correct his behaviour. According to Mr Noko the said truck attempted to get back onto the road. It however passed him and collided with the truck driven by Mr Shabangu. Except a contradiction as to whether both wheels of the truck driven by the 2nd defendant were off the road or if only one side of wheels were off the road they corroborated each other in material respect.
- [29] The 2nd defendant also testified in a chronological and logical manner. He did not contradict himself although he was subjected to rigorous cross examination. He testified that he had to swerve in

order to avoid colliding with an unidentified vehicle and in the process he collided with the plaintiff's truck. He denies that he was negligent.

[30] It is important to note that after the collision the 2nd defendant went to Shabangu in order to ascertain if Shabangu sustained any injuries. The evidence reveal that at that stage the 2nd defendant already indicated to both Shabangu and Noko that the cause of the accident was an unidentified vehicle. This is confirmed by the witnesses for the plaintiff. Of further importance is that both Shabangu and Noko also denied at that stage that there was any other unidentified vehicle which passed them. According to the versions by both parties it is apparent that both made contemporaneous statements about the presence or absence of an unidentified vehicle. In all fairness to both parties it cannot be said that what they alleged in court about whether there was an unidentified vehicle or not cannot be construed as 'recent' fabrication.

[31] The 2nd defendant conceded that he was tired and he lost concentration now and then. He confirmed that he was looking for a place to sleep. He denied that he mistook the flashing lights of the truck of Noko as those of another vehicle. He was adamant as to how the accident occurred and further stuck to his version that there was an unidentified vehicle. It is my considered view that the probabilities of both parties are evenly balanced in that they do not favour the plaintiff's case any more than they do the defendant.

[32] As alluded above, for the defence of sudden emergency to succeed, the emergency must be unexpected and the driver faced

with sudden emergency must act with reasonable care and he must use reasonable skill to avoid the imminent danger. It is the testimony of the 2nd defendant that when he first observed the unidentified vehicle it was behind the truck of Noko undertaking an overtaking manoeuvre. At that stage that unidentified vehicle was about 120 to 130 metres away. He did observe it overtaking the truck driven by Shabangu. It has to be borne in mind that the space between the two trucks could accommodate two to three trucks. He testified that he was under the impression that the unidentified truck would take its position behind the truck of Noko but that did not eventuate. In spite of seeing that the unidentified truck was not taking its position in its rightful lane he continued to drive on. In cross examination when he was why he did not do anything despite being aware of the speeding vehicle he merely said he assumed it will return into its rightful lane behind the two trucks. He observed when the unidentified truck overtook the truck in front driven by Noko. He also testified that he saw that the vehicle was speeding. He did not even flicker the lights or attempt to hit his brakes as Shabangu did. According to him he only reacted when the unidentified truck was about 15 metres away. He was unable to explain why he did not react earlier when he noticed that the vehicle was not going to take its place between the two trucks. On his own version it cannot be said that the emergency was sudden as he had ample time to react in order to avoid a collision. He confirmed that no negligence whatsoever could be attributed to Shabangu. It is my view that he failed to act as expected from a reasonable driver in the circumstances and he was accordingly negligent.

[33] I cannot find a reason to depart from the general rule that the costs follow a successful party. I accordingly make the following order.

ORDER

1. The defendants are ordered, jointly and severally the one to pay and the other to be absolved, to pay the quantified damages of the plaintiff.
2. The defendants are ordered to pay plaintiff's costs, jointly and severally the one to pay the other to be absolved.

P.E. MOLITSOANE, J

On behalf of Applicant:

Adv. S. Stadler

Instructed by:

Hill McHardy and Herbst

Bloemfontein

On behalf of defendants:

Adv. A Sander

Instructed by:

Graham Attorneys

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