

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION. PRETORIA

Case Number: 73765/2010

In the matter between:

D..... A..... M..... obo K..... M.....)

PLAINTIFF

And

THE ROAD ACCIDENT FUND
JUDGMENT

DEFENDANT

LEPHOKO AJ

[1] The plaintiff sued the defendant for damages arising out of a motor vehicle collision that occurred on 24 September 2008. The plaintiff sued for loss of support in her representative capacity as the mother and guardian of her minor child, K..... M.....

[2] The following facts are, among others, common cause, namely:

2.1 The applicant has the necessary *locus standi*;

2.3 On 24 September 2014 2008 at 19h00 a collision occurred between a motor vehicle with

registration SLX 0..... GP driven by the deceased and a bus with registration WLF 9..... GP;

2.4 On the day of the collision, the deceased had a passenger who was epileptic. The passenger

had a seizure which interfered with the deceased's driving that in turn led to the deceased

losing control of the vehicle he was driving;

2.5 The deceased died as a result of injuries sustained in the aforementioned collision.

[3] The merits and quantum were separated in terms of rule 33(4). The matter proceeded only

in respect of the merits and the determination of the quantum was postponed *sine-die*. The only

issue for determination by this court is whether the negligence of the insured driver was the cause

of the accident.

THE PLAINTIFF'S CASE

[4] The plaintiff called two witnesses. The two witnesses are the police officers who attended

the scene of the accident but had not witnessed the collision.

[5] Constable Jacob Mosako (Mosako) testified that on 24 September 2008 at about 19h30 he

and Warrant Officer Moloisane attended the scene of the accident on the main road at the

Mabopane Industrial Site. It was dark and the street lights were not functioning. The road is a

tarred double-carriage way with two lanes in each direction of travel. They found that the

deceased's vehicle, a Ford Icon sedan had been involved in the accident and had hit a stationary

bus at the back. He used his torch to check the position of the cars. He observed that the bus was

parked in the emergency lane with its right side wheels slightly over the yellow line and protruding

slightly onto the outer left lane. No warning signs were placed in the vicinity of where the bus was

parked to warn other road users of the potential danger posed by the parked bus. The driver of the bus was not at the scene. There were three injured people in the car and two of them were dead.

[6] During cross examination it was put to Constable Mosako that: there is a bus depot in the vicinity of where the bus was parked; due to renovations there was no space for the buses to park at the railway station where they were normally parked; buses that could not be accommodated in the depot were often parked on the left side of the road around the area where the accident occurred. Mosako was unable to dispute this allegation but stated that whenever he patrolled the area he saw buses parked inside the depot. He confirmed that there was a reflector fitted across the back of the body of the bus.

[7] Mr Levy Moloisane who is no longer in the employ of the South African Police service confirmed that he accompanied Mosako to the scene of accident. He confirmed Mosako's version in material respects and where their evidence differed the variations were insignificant and of no consequence. He testified that he completed the accident report and later that day

personally wrote his own statement concerning his attendance at the scene of the accident. He confirmed the contents of his statement. His cross examination did not take his evidence any further.

DEFENDANTS CASE

[8] Kagiso Mputle was called as an independent witness who witnessed the accident. He testified that he was a taxi driver at the time and knew the area well as he drove on that road very often. It was common for buses to park along the road next to the garage which is situated on the side of the road near the bus depot. Buses were normally parked there during the day and during the evening as the Mabopane station was under renovation. The accident occurred in the area where the buses were often parked.

[9] On the night in question he was driving on that road when he noticed the deceased's car drive past him at high speed. The bus which was involved in the accident with the deceased's car was parked in the vicinity of the garage with part of the bus directly on the road. Shortly before the accident the deceased lost control of his car which then veered completely off the road and drove on the shoulder of the road causing a lot of dust. The car collided with the back of the bus. He stated that the deceased's car never returned to the road. The deceased's car drove very fast and did not appear to slow down. There were no other cars between him and deceased's car. He could not say if the deceased applied brakes or reduced speed as he kept at a distance due to poor visibility caused by the dust. He observed that the right side wheels of the bus were protruding slightly onto the left lane. His impression was that the deceased would have been able to pass on either the right or the left side of the bus. He did not remember how long he had observed the deceased's car and did not know how long the bus had been parked there.

TOTALITY OF THE EVIDENCE

[10] The evidence of the plaintiff and the defendant puts it beyond any doubt that the bus was parked in the emergency lane and its right side wheels protruded slightly over the yellow line and were on the left lane. It is estimated that the protrusion was about one metre at most. The photos taken at the scene of the accident reveal that the deceased's car struck the bus with the whole of its front portion. The point of impact was more to the left of the back centre of the bus. The back of the bus was fitted with a reflector although the distance from which it was noticeable was not ascertained. Shortly before the accident the deceased's car went completely off the road but was inside the emergency lane at the time of impact. The defendant admitted that there were no warning triangles or any warning signs placed on the road to warn other road users of the potential danger posed by the bus. It is the defendant's undisputed evidence that it was customary for buses to be parked around the area where the insured bus was parked.

[11] The issue that remains to be determined is whether the insured driver was negligent in parking the bus in the emergency lane without placing warning signs on the road or taking reasonable steps to ensure that the bus did not pose a danger to other road users.

NEGLIGENCE

[12] For the purpose of liability negligence arises if- (a) a reasonable person in the position of the defendant- (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and (ii) would take reasonable steps to guard against such occurrence; and (b) the defendant failed to take such steps.¹ The negligence required to establish liability in civil actions is determined by a simple test, namely the standard of care and skill which would be observed by the reasonable man. *The standard will, of course, depend on the peculiar circumstances of each individual case.*² (my emphasis).

[13] The defendant relied on the case of *Flanders v Trans Zambezi Express (Pty) Ltd*³ for its argument that the deceased ought to have reasonably foreseen that there might be obstructions on the road ahead. In *Flanders* the accident occurred at night where the insured bus collided with a truck parked on the left side of the road with part of the truck protruding onto the left lane of the road and causing an obstruction to traffic moving in the left lane. The extent of the obstruction was such that the bus would not have been able to pass the truck without the bus moving onto the incorrect side of the road. The left front of the bus collided with the protruding right rear corner of the truck, which caused the whole of the left side of the bus to be cut open.

[14] In *Flanders* the insured driver drove whilst his vision was seriously impaired by the bright headlights of an approaching vehicle and did not brake or reduce his speed. The court

¹ *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E-F.

² *Flanders v Trans Zambezi Express (Pty) Ltd* 2009 (4) SA 192 (SCA) at 197 par a 13.

³ *Flanders v Trans Zambezi Express (Pty) Ltd* (supra.)

held that in these circumstances, and given the foreseeability of unlighted obstructions on the road ahead, the duty resting on the insured driver was not merely to slow down, but to reduce his speed by braking immediately so as to be able to stop within the range of his vision. His failure to stop or to slow down was held to be a "crucial factor" in holding that he was negligent.

[15] My view is that the case of Flanders is distinguishable from the present case. In Flanders the collision happened in the left lane of the road and not in the emergency lane as it did in the present case. The negligence of a driver who collides with an unlit obstruction at night is judged using the reasonable foreseeability and preventability test, that is, if an obstacle is foreseeable by a reasonable driver, he is required to prevent a collision.⁴ A motorist driving on the road ought reasonably to foresee that there would be traffic ahead of him and that that traffic may cause an obstruction to other road users although he may not reasonably foresee that vehicles would habitually use the emergency lane for routine parking.

[16] In *Road Accident Fund v Odendaal*⁵ an appeal court dealt with a collision involving a vehicle parked in the emergency lane and its findings were summarized by Van Niekerk J in *Moseng v Road Accident Fund*⁵ as follows: "An emergency lane, while it does not enjoy any particular definition or recognition in terms of the Road Traffic Act 29 of 1989, is 'resorted to by motorists in situations of an emergency.' (see *Road Accident Fund v Odendaal* 2004 (1) SA 585 (WLD)). A motorist does not necessarily act unlawfully by stopping in an emergency lane; it is not generally used as a thoroughfare but generally speaking a motorist that is stationary in the emergency lane ought reasonably to foresee that the vehicle may constitute a danger or obstruction to other possible

⁴ *Sebate v Road Accident Fund* ZANWHC 77 (8 December 2011) at para 35.

⁵ *Maseng v Road accident Fund* ZAGPJHC (5 March 2015) at para 15.

users of the emergency lane. Guarding against that harm would require reasonable steps to be taken to ensure that other motorists were alerted to the hazard represented by the stationary vehicle. For example, by the use of reflective triangles and hazard lights [*Road Accident Fund v Odendoal* (supra) at paragraph 15.]

[17] Motorists are entitled to expect that the emergency lane will be kept clear for their intended purpose; i.e. use by emergency vehicles or in other circumstances of emergency/ No evidence was placed before this court to suggest that on the night of the accident there were other obstacles in the emergency lane that would have caused the accident even if the bus had not been parked there.

[18] Mputle's evidence that the deceased's car went completely off the road and drove on the shoulder of the road is undisputed. A reasonable inference to be drawn from this evidence is that the deceased had regained control of his car and managed to put it in the emergency lane possibly to allow him time to re-enter the road. The probabilities are that had warning signs been placed on the road to alert other road users of the parked bus the deceased would possibly have had

sufficient time to react to the danger posed by the stationary bus and taken

⁷ *Maseng v Road Accident Fund supra* at para 19.

evasive action. In the light of the totality of the evidence and the balance of probabilities I am of the view that the insured driver's negligence was the cause of the accident.

I the circumstances, it is ordered that:

1. The insured driver's negligence was the cause of the accident that took place on 24 September 2008.
2. The Defendant is liable to pay 100% of the plaintiffs proven or agreed damages.
3. The defendant is liable to pay the plaintiffs costs in respect of the merits of the plaintiffs claim.

(ACTING JUDGE OF THE HIGH COURT)

Heard on: 03 June 2015.

Judgment delivered on: 26 June 2015

For the Plaintiff: Adv. T L Mahasha Instructed by: Mamokgalake Chuene Attorney

For the Defendant: Adv. P J Vermeulen Instructed by: Iqbal Mahommed Attorneys

^b Road Accident Fund v Odendaal 2004 (1) SA 585 (WLD).