

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)5/8/15
CASE NO: 20093/2012

- | | |
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| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |

In the matter between:

NEW CENTURY TRANSPORT (PTY) LTD

PLAINTIFF

and

MEMBER OF THE EXECUTIVE COMMITTEE –
MPUMALANGA PROVINCIAL GOVERNMENT OF
PUBLIC WORKS, ROADS & TRANSPORT

DEFENDANT

and

EMALAHLENI LOCAL MUNICIPALITY

THIRD PARTY

J U D G M E N T

KUBUSHI, J

INTRODUCTION

1. The plaintiff is suing the defendant for damages to its motor vehicle arising from an accident in which the plaintiff's motor vehicle was damaged when it capsized.

2. The parties were in agreement that the issue of liability and *quantum* should be separated and the *quantum* postponed *sine die*. I as a result granted an order for the separation of the issues. The matter before me is only on the merits part of the claim and the damages claim is postponed *sine die*.

3. Six books of documents were presented in court, namely, the index – pleadings; index – expert reports; index – trial bundle; index – notices; index – discovery and index- pre-trial minutes. The book of index – trial bundle was marked as annexure “A” and consisted of the documents and correspondence which both parties intended to rely on during the trial.

4. The book of index – expert report consists of the report of Mr J P Verster (“Mr Verster”), a reconstruction specialist called to testify on behalf of the plaintiff. Seven photographs form part of the reconstruction report. Five of the photographs, that is, photographs on pages 7, 10 and 11, were taken by Mr Verster at the place where it is alleged the accident took place. The two photographs in page 7 depict the general layout of the road along which the accident is alleged to have occurred and in the directions of Witbank and Blackhill, respectively (Witbank and Blackhill are in opposite directions). There are two photographs on page 10: the photograph at the top of the page shows the length of the excavated portion of the road and the photograph at the bottom of the page shows the depth of the excavated portion of the road from the tarred surface to the ground level. On page 11 of the report, there is one photograph depicting a road sign indicating workers ahead.

5. The photographs on pages 8 and 9 were not taken by Mr Verster but were most probably taken by the police officer(s) who visited the accident site after the accident. The photograph on page 8 depicts the accident scene towards Witbank with the motor vehicle still lying where it is said to have capsized; and the photograph on page 9 shows the damage to the left side of the motor vehicle due to the roll over.

6. As *per* the pre-trial minutes, contained in the index – pre-trial minutes' bundle, the parties agreed that the documents included in the respective bundles are what they purport to be without thereby admitting the truthfulness of their contents. It was further agreed that the discovered documents will, without further proof, serve as evidence of what they purport to be and that copies of such discovered documents may be used at the trial of the action and will have the same evidentiary value as their originals, subject to any party's right to challenge the authenticity and validity of any specific document. It was furthermore agreed that if any party wishes to challenge the authenticity or validity of a document, such party should make all reasonable attempts to provide the other party with sufficient notice of its intention to challenge the authenticity and/or validity of any or all documents individually identified in such notification. The parties also agreed that only those documents referred to in evidence may be relied upon either by the court in its consideration of the dispute or the parties in argument.

PLEADINGS

7. The plaintiff alleges in its particulars of claim that on 21 November 2010 at approximately 02h50 and whilst travelling on the R544 Black Hill – Zaaihoek Road, Witbank, the plaintiff's motor vehicle was damaged when it capsized. The cause of the motor vehicle capsizing is stated as being due to the fact that part of the paved road surface on which the plaintiff's motor vehicle was travelling was excavated to a depth of approximately 800 mm; the excavation stretching away from the paved road

surface over some considerable distance presented a dangerous situation which previously did not exist.

8. The defendant is being sued in her or his official capacity as she or he was at all relevant times in terms of s 9 (1) of the Mpumalanga Roads Act 1 of 2008 the person responsible for the construction and maintenance of Provincial roads and any other work which is necessary for maintenance of Provincial roads. As the R544 where the accident in question is alleged to have happened is a Provincial road, it is the plaintiff's case that the defendant authorised and/or caused the works where the excavations were performed and as such the defendant had a legal duty to ensure that adequate precautionary measures were implemented and adequate warning signs erected to warn users of the road about the dangerous situation created by the excavations.

9. The plaintiff holds the defendant in her or his official capacity negligent in that she or he failed to ensure that adequate precautionary measures were implemented and warning signs created or put out to warn users of the road against dangers created by the excavations. The plaintiff avers in its particulars of claim that there were neither warning signs created or put out to warn users of the road about the dangerous excavations nor were there any other precautionary measures implemented to warn the users of the road of the dangerous situation created by the excavations.

10. The defendant is defending the matter and in her or his plea denies that she or he was responsible for the excavations and in the event that it is found that she or he was responsible for the excavations, she or he pleaded that the positioning of the excavations was on the side of the road and not on the road itself and consequently posed no danger to motor vehicles keeping on the road. The defendant avers further that the accident occurred when the driver of the plaintiff's motor vehicle was attempting to avoid the oncoming traffic from the opposite direction. The defendant also denies negligence and avers that should it be found that she or he was

negligent, in that event, the driver of the plaintiff's motor vehicle contributed to the said negligence.

11. The defendant joined the Emalahleni Local Municipality as a third party to the proceedings. In the third party notice, the defendant avers that in the event that it is found that the cause of the plaintiff's motor vehicle capsizing was due to the aforementioned excavations, then the defendant pleads that the capsizing was caused by the negligence of the third party in that it failed to put proper warning signs for the users of the road. And, in such event, the third party is obliged to indemnify the defendant in respect of any damages which is found the plaintiff may have suffered.

12. The plaintiff led evidence and called four witnesses to testify on its behalf. The defendant closed its case without leading evidence.

THE PLAINTIFF'S TESTIMONY

Jacobus Pieter Verster

13. A reconstruction expert gave evidence in favour of the plaintiff. He prepared a report which he handed in court. According to the particulars of claim the incident occurred on 21 November 2010 but Mr Verster visited the scene of the accident on 25 November 2010. He took photographs of the scene of the accident; these photographs, as already said, are contained in pages 7, 10 and 11 of his report. Mr Verster confirmed that the photographs were taken post the accident and after the motor vehicle concerned had been removed. The road sign depicted in the photograph on page 11 of his report, was according to Mr Verster, approximately 2km away from the scene of the accident. This was the only visible road traffic sign indicating the road works. There were no other visible road traffic signs along the

side of the road to indicate any danger and/or excavations ahead. At the excavation itself, there were no barriers or danger road traffic signs to indicate danger.

14. The two photographs on page 10 of his report depicted the excavated portion of the tarred surface where the incident allegedly took place. He did not measure the depth of the excavation. He could not remember the length of the excavation but estimated it to be not more than 100m. Photograph 7 shows the excavation along the side of both roads. Under cross examination he conceded that as *per* the conclusion in his report he considered the road to be under the Local Municipality and not the Provincial Government.

Alfred Moriri

15. This witness was the driver of the plaintiff's motor vehicle that capsized on the road in question. He was travelling on the road in Blackhill near Witbank. He was travelling from Nyanga Exxaro Mine going to Blackhill. He was carrying a load of coal. There was only one lane for traffic travelling in one direction. An oncoming truck travelling more towards the middle of the road blinded him with its bright head lights and as he was trying to avoid the oncoming truck his truck fell into the excavated part of the road. The truck as well as the trailer that he was driving left the road because of the excavation and capsized. The incident happened in the early hours of the morning around 3h00. It was dark and there were no lights illuminating the road where he was travelling. The road was lit by the lights of on-coming traffic. There were no warning signs to warn road users about the road works. There were no road signs in the immediate vicinity of the excavation as well. He was shown photograph 7 and 10 depicting the scene of the incident and asked whether he recognised the scene. He could only recognise the scene as depicted on photograph 7. When the truck fell in the ditch he lost consciousness and only came to after about 10 minutes.

16. Under cross examination he stated that his shift started at 18h00 the day before the incident as he would be driving at night. He travelled that road frequently, at least four times in a day. He knew the road very well but he knew that there were excavations along that road but there was no work taking place there. Even though he travelled the road during the day, but at night, he could not ascertain where the excavations were on the road. He had been working day and night shifts at the mine for eight months at the time of the incident in question. His further evidence was that he could have missed to see the excavations because of the long grass that grows along the side of the road during November month that changes the topography of the road.

17. At the time he was blinded by the bright lights of the oncoming truck his lights were not on bright but the on-coming truck set its light on bright when it was about 50m from him. The other truck was driving at a very high speed and he was travelling at about 70 to 80 km/h a speed which he had maintain at all times. He applied breaks slightly.

18. It was put to him that the story of the other truck driver putting on bright lights was a fabrication and that there must be a reason why he drove the truck into the ditch which reason he was not prepared to disclose. It was put further to him that there is no evidence of another truck.

Petrus Jacobus Knotze

19. A civil engineer employed by NKP as a consultant around the time of the incident. NKP was doing work along that road but finished on 13 November 2009. He was not aware of any other project in the vicinity where NKP was working and he did not visit the site after the project was completed. His work did not entail excavations

Liziwe Kama

20. The witness was employed by the Emalahleni Local Municipality as head of the Department: Roads and Transport. The Local Municipality was doing work at a four ways stop of which they had received approval from the Provincial Government. They later applied for traffic circles and were still awaiting approval when they were ordered by the Provincial Government to stop any further work. The works done by the Local Municipality were finalised on 13 November 2009. The Provincial Government wrote them a letter informing them they were taking over the works. The Provincial Government did not have to grant them a way leave because when approval is granted the Local Municipality creates their own way leave. The municipality created the excavation but the Provincial Government took over the responsibility to finish the work.

21. According to the witness, the Local Municipality had created the dangerous situation and had placed warning signs on the site. When the municipality left the site it left those warning signs there. She was however not sure where the accident happened but was adamant that it could not have been at the site where they had been doing work before they were stopped by the Provincial Government because, according to her, at that site there were enough warning signs. She was certain that there were warning signs at the site where the Local Municipality worked before they were stopped because she had visited the site and saw the warning signs. The signs would have been about 100km from the excavation site.

ANALYSIS OF EVIDENCE

22. The defendant's counsel raised various points *in limine* which ought to be dealt with before the merits of the case can be determined.

23. The first point raised by the defendant's counsel is that the evidence presented by the plaintiff does not accord with the case pleaded in the particulars of claim. According to counsel, the purpose of pleadings is to define the issues so as to enable the other party to know what case she or he has to meet. Counsel's further submission is that while a pleader's first duty is to allege the facts upon which she or he relies, her or his second duty is to plead the conclusions of law she or he claims follow from the pleaded facts. The parties are limited to their pleadings, so he argued. In this regard counsel relied in the judgment in *Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (A) at 107C – E; *Erasmus: Superior Court Practice Service* 35 (2010) at B1 – 130A; *Benson & Simpson v Robinson* 1917 WLD 126 at 130 and *Beck: Theory and Principles of Pleading in Civil Actions* p3 at 45.

24. I am in agreement with this point as raised by the defendant's counsel although for different grounds as raised by him in his heads of argument.

25. The plaintiff's allegation in its particulars of claim is that the cause of the motor vehicle capsizing is because the paved road surface on which the motor vehicle was travelling was excavated to the depth of 800 mm. And, that the excavation stretched away from the tarred road surface over a considerable distance. However, the oral evidence presented in court through the evidence of Mr Moriri, is to the effect that the cause of the motor vehicle capsizing was as a result of the driver of the motor vehicle (Mr Moriri) being blinded by the bright head lights of an on-coming truck which was travelling more or less in the middle of the road. When trying to avoid crashing with the truck, the motor vehicle fell into a ditch (excavation) and capsized.

26. On the other hand, Mr Vester testified that the excavations, as also depicted in the photographs on page 10, were on both sites of the road. This evidence shows that the excavations could not have been on the paved road surface as alleged in the particulars of claim.

27. Secondly, it is alleged in the particulars of claim that the excavations presented a dangerous situation which was never there before. But, Ms Kama in her testimony was adamant that the excavations did not present a dangerous situation because there were adequate precautionary measures taken and road signs put up warning the users of the road about the excavations. She testified that the road signs were about 100 m away from the excavations.

28. Thirdly, in the particulars of claim an allegation is made that there were neither precautionary measures taken nor road signs put up to warn road users about the excavations. Yet the evidence of Mr Verster is that there was a road sign indicating workers ahead about 2 km from the excavations. And, Ms Kama, as already stated in paragraph 22 above, was adamant that there were road signs about 100 m away from the excavations warning road users about the excavations. In fact, Ms Kama's testimony is that there were adequate precautionary measures in place and warning signs along the road to warn the road users about the excavations.

29. Fourthly, another allegation in the particulars of claim is that the defendant is sued in terms of s 9 (1) of the Mpumalanga Road Act 1 of 2008 and it is thus alleged in the particulars of claim that he or she is as such responsible for the construction and maintenance of Provincial roads – R544 is one such road. On that basis it is alleged that the defendant authorised and/or caused the works where the excavations were performed. This is contrary to the evidence of Ms Kama that even though the Provincial Government had undertaken to repair the excavations, the Local Municipality is the one that performed the excavations and was, therefore, responsible to set up the precautionary measures and the warning signs.

30. The second point *in limine* raised by the defendant's counsel is that the plaintiff's matter is premised on s 9 (1) of the Mpumalanga Roads Act 1 of 2008 which has not been promulgated. The submission being that the underlying substratum of the plaintiff's case is absent. The claim not being premised on either

the common law or some other statutory duty should therefore be dismissed out of hand. I agree with the counsel's submission to the extent that the Act has not been promulgated, however, the plaintiff raised the issue of negligence in its particulars of claim which would have sustained the plaintiff's claim. Unfortunately the plaintiff failed to prove any negligence on the part of the defendant. There is no evidence before me which establishes negligence on the part of the defendant. In order to have proved negligence the plaintiff ought to have established that the defendant should have foreseen the danger and taken steps to guard against such danger. That is, he or she should have foreseen that the excavations were a danger to the road users and that a driver might be blinded by the bright lights of an on-coming motor vehicle and fall into the excavations.

31. In the third instance, the defendant's counsel submitted that, on the evidence presented in court, no court would ever be able to find that the plaintiff has proved its case on a balance of probabilities. And, he is correct.

32. Firstly, the plaintiff failed to demonstrate the place where the accident occurred. The only specific place pointed out as a possible place where the accident occurred, is the one pointed out by Ms Kama as to the place where the municipality performed the excavations. But, it is not the plaintiff's case that the accident occurred there. This place, according to Ms Kama, was well demarcated and visible. There were warning signs put up about 100m from the excavations and precautionary measures set up near the excavations warning road users about the excavations. Ms Kama could, however, not say it was the same place the accident took place. Mr Verster's evidence, to the contrary, is that he visited the alleged scene of the accident after the motor vehicle was removed and could not say for sure that the photographs he took set out the place where the accident occurred with certainty. According to Mr Verster where the accident occurred, that is, at the place where he took the photographs, in particular the photographs on page 10, there were no warning signs or any precautionary measures warning motorists of the excavations. The only warning sign he saw was about 2 km from the scene of the accident. Mr Verster visited the scene after the motor vehicle had been removed.

From his report, it appears that the site where the accident occurred was indicated to him by one Heindrich from Imperial Tipper Resources, but the said Heinrich was not called to testify.

33. Secondly, the testimony of the plaintiff's witnesses is contradictory and does not sustain the plaintiff's claim. The evidence of Mr Verster is that the road sign depicted on page 11 of his report, that was approximately 2km away from the scene of the accident, was the only visible road traffic sign indicating the road works. There were no other visible road traffic signs along the side of the road to indicate any danger and/or excavations ahead. At the excavation itself, there were no barriers or danger road traffic signs to indicate danger. To the contrary, Ms Kama's testimony is that where they had excavated there were visible warning signs about 100 m from the excavations and precautionary measures were put up where the excavations were created. The warning signs and precautionary measures could not be missed, so she testified.

34. Mr Verster at paragraph 13.1 of his report states the following:

"13.1 The road

1. . . .
2. . . .
3. The road is a tarred road surface.
4. The road is a single carriage way in both directions.
5. The road is a dual carriage way on both sides. The two directions travel lanes are separated by an island.
7. The outlay of the road makes provision for turning lanes at the intersection.
8. The north and southbound carriage ways are separated by a large island."

This explanation of the road by Mr Verster is not depicted in the photographs taken by him of the scene of the accident, in particular the photographs on pages 7 and 10 of his reconstruction report.

35. Mr Moriri's evidence is that he could have missed to see the excavations because of the long grass that grows along the side of the road during the November month that changes the topography of the road. There is, however, no evidence of any grass which might have obscured Mr Moriri's vision of the excavations because from the photographs taken there are no signs of grass growing around the accident scene. If Mr Moriri's evidence, that there was grass where the accident happened, is accepted as correct, then, in that event, the place depicted in the photographs cannot be the scene of the accident. If the evidence of the photographs is to be taken as depicting the scene of the accident, then in that event, Mr Moriri's evidence should be rejected.

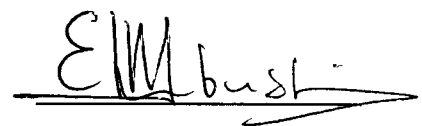
36. According to Ms Kama the excavations created by the Local Municipality were at a four ways stop. It does not appear that it could be the place where the plaintiff's motor vehicle capsized. Mr Moriri's evidence is that the accident occurred when a truck coming at the opposite direction, travelling at a very high speed, blinded him. It is not probable that if the accident occurred at a four ways stop, the truck that blinded Mr Moriri could have been travelling at the speed at which Mr Moriri alleges it was. Coming from a stop sign at the four ways stop, the truck would have just started accelerating. In any way, there is no evidence of how far off the four ways stop was from the place where the accident is said to have occurred. The converse is Mr Moriri could also not have been travelling at the speed at which he say he was travelling at, which he had maintain for a considerable time, because when approaching the four ways stop he would have reduced speed. Mr Moriri should also have testified that the accident happened at a four ways stop, which he did not say. He was specifically cross examined about the place where the accident happened and was even shown photographs which Mr Verster alleged were taken at the place where the accident occurred. The photographs to not show a four ways stop.

37. Most importantly, it is not clear from the evidence, who was responsible for the road at the time in question. The plaintiff's claim is against the defendant in her or his capacity as the MEC of public works, roads and transport. According to Mr Verster, even though he knew that the R544 road was a Provincial road, he however, concluded in his reconstruction report that 'the local authority should have taken the necessary precaution to secure the safety of road users on the road.'

38. I am therefore satisfied that the plaintiff has failed to put any evidence on which a reasonable court could find that the defendant can be held liable for damages suffered by the plaintiff. In the circumstances, I have to conclude that the defendant is entitled to absolution from the instance.

39. It is trite that a party who succeeds on absolution is considered to be the successful party and is as such entitled to costs.

40. In the premises the defendant is granted absolution from the instance with costs.



E. M. KUBUSHI

JUDGE OF THE HIGH COURT

APPEARANCES

HEARD ON THE	: 04 JUNE 2015
DATE OF JUDGMENT	: 05 AUGUST 2015
PLAINTIFF'S COUNSEL	: ADV. W. W. GEYSER
PLAINTIFF'S ATTORNEY	: DAYSON INCORPORATED
DEFENDANT'S COUNSEL	: ADV. T. P. KRUGER
DEFENDANT'S ATTORNEY	: STATE ATTORNEY, PRETORIA