

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No. : A27/2014

In the appeal between:-

PH CORVER Appellant

And

YELLOW JERSEY LOGISTICS Respondent

CORAM: KRUGER et NAIDOO, JJ et MOENG, AJ

JUDGMENT BY: KRUGER, J

HEARD ON: 1 DECEMBER 2014

DELIVERED ON: 4 DECEMBER 2014

- [1] This is an appeal and cross-appeal against the judgment of Moloi J in which he found absolution of the instance and ordered each party to pay their own costs. As is usual in motor collision cases, there was a claim and a counter claim. The trial dealt only with the issue of negligence. The case arises from a collision on the N3 freeway between Harrismith and Warden on 20 April 2012 wherein a tractor and trailer driven by appellant's driver was hit from behind by a large truck driven by respondent's driver. The only issue in dispute at the trial was the respective negligence of the drivers. Appellant's driver, who drove the tractor, was decapitated when the truck driven by defendant's driver went over the trailer and tractor. Defendant's driver died about two

weeks after the collision from tuberculosis, apparently unrelated to the collision. The trial court gave leave to appeal.

- [2] The two vehicles involved in the collision were travelling in the same direction, from Harrismith to Warden. The collision occurred at about 13h00, on a clear day on a straight and level road which has two tarred lanes for travel in each direction, separated by a solid line. There is a downward incline about two comma one kilometres before the point of impact, but the road is straight for about four and a half kilometres from the end of the incline. There is a strip left of the yellow barrier line at the point of impact, and that strip narrows after the scene of the collision.
- [3] Only one eye witness testified, Mrs Wessels, a teacher, who was driving behind the truck, (a horse and trailer) also in the direction of Warden. She had her young son with her. There was a white motor car between her and the truck. She wanted to overtake the truck, but it was going too fast, she would have to exceed the 120km per hour speed limit if she overtook the truck, and she was aware of a speed camera a little distance ahead. She slowed down and kept her following distance, about 100 metres behind the white car ahead of her and 200 metres behind the truck. There were no vehicles in the right-hand lane. There were also no vehicles left of the yellow lane on the shoulder of the road. She did not see the tractor before the collision and believed that was because the truck obscured her view for vehicles in front of the truck. She was driving at about 110 kilometres per hour. She looked at her speedometer when she fell back after trying to overtake the truck and thought to herself that the truck was driving quite fast. She glanced down at her son to see if he was alright and the next moment she saw pieces of debris flying. The car ahead of her put on its hazards and moved to the right-hand lane. She also put on her hazards went to the right-hand lane and pulled off the road about next to where the truck had come to a standstill.
- [4] In cross-examination the statement Mrs Wessels had made after the collision was put to her. She agreed that in her statement there was no mention of a white car between her and the truck. She said when she wrote the statement she did not think it was important

to refer to the white car. She wrote the statement for Mr Rassie Erasmus, who had asked her for a statement. She responded that the statement does say “Twee ander persone wat ook agter die trok was het ook afgetrek”. In re-examination she said those two persons were the persons who were travelling in the white car ahead of her. She said she was 70 metres behind the white car. She said a person would not be able to see a tractor if it was directly in front of the truck from where she was behind the truck. She said it was a clear day, she would be able to see what was left and right of the truck. The warning statement of the driver of the truck was put to her wherein he says that there was a truck in the right-hand lane and the tractor was left of the yellow line. Mrs Wessels disagreed with both those statements.

She said:

“Daar was geen voertuie in die regterbaan nie en ek is doodseker daarvan.”

About her following distances no-one can say what the exact following distance was. She denied that the tractor was driving on the shoulder of the road left of the left-hand lane and suddenly drove in front of the truck. Asked what would have prevented the truck driver from seeing the tractor and trailer directly ahead of him, she said perhaps if the truck driver was very tired because he was permanently on the road, driving to and fro. She said she just surmised that, she had never seen the truck driver before, it was a possibility. She agreed that it did not make sense that the truck driver hit the tractor from behind. She did however say it was not improbable, because it happened.

She said:

“Daardie dag het ek besef dat iemand net so roekeloos bo-oor ‘n trekker kan ry. En vir my as getuie was dit ‘n baie onaangename ervaring en ek het daardie dag besef dat dit kan gebeur.”

- [5] The other witness called by the appellant was Mr Corver, the plaintiff and the owner of the tractor and trailer, and employer of the deceased driver. He phoned his driver, who told him that he had just left and was on his way to where Corver was. Corver and his

wife then drove towards Harrismith. He saw his tractor and trailer and deceased driver. A person was regulating the traffic. He took his wife back because she could not handle the situation, and returned again, but at that stage the other person had left. Corver testified that the deceased was one of his top drivers who had been working for him for about 11 years. Corver only used his top drivers on the N3 because they know it is a high-risk road. Corver said the deceased did not drink or smoke. Corver's standing instruction to his drivers is never to drive in the yellow strip, because for 95% of the road that strip is only one metre wide, and then the tractor has to move back into the lane without being able to see behind him. Thus his instruction is that they should drive with their left wheels on the strip left of the yellow line. The tractor was red and the trailer beige, with sides about two and a half metres off the ground. The horse and trailer collided with the tractor and trailer. The horse was yellow and the trailer had a red container. According to Corver's observation at the scene the truck hit the trailer from behind. Corver said it was clear that the truck drove into the back of the trailer. The tractor broke in two as a result of the collision. The driver was decapitated by the trailer that went over the tractor. Looking at the photographs Corver said the two marks on the left lane of the road were caused by the suspension of the rear axle of the trailer being forced into the tar to a depth of about 100mm. Corver spoke to the driver of the truck, probably about three-quarters of an hour after the collision, but got no reaction out of him. His impression was that the driver had fallen asleep behind the steering wheel.

- [6] In cross-examination Corver said his instruction to his driver was to drive directly left of the yellow line. Corver testified that from the photographs he took on the scene it was clear to him that the deceased had driven where Corver had told him to drive, directly left of the yellow line. Corver agreed that the point of impact was in the left lane. The warning statement of the driver of the truck was put to Corver. Corver said that the full front part of the truck hit the full part of the rear of the trailer. It was not a glancing blow. He pointed out with reference to the photographs that anyone can see that the full front part of the truck was damaged, not only the left side or portion thereof. With reference to the driver's warning statement where the driver said:

“When I was about to pass the tractor I just heard...”

Corver found it unacceptable that a person could “just hear” something if that object is directly in front of you and you have hit it. He found that sentence in the warning statement strange and suspicious. Corver said the road there is extremely dangerous, life-threateningly dangerous. He said the driver had to stay on the yellow line, not more in and out, because the driver cannot see behind him, it is a high trailer. There were no brake marks.

[7] It was put to Corver that the owner of the truck, Freek van Tonder would come to testify that drivers who go to Durban sleep the whole night and only depart early the next morning. Freek would say that the truck driver had slept for about eight hours the evening before the collision. At the end of proceedings the first day, at twenty to three, the legal representative of the defendant requested that the matter stand over to the next day because Van Tonder was not at court because he had not thought the case would proceed so quickly. The legal representative said that Van Tonder was a crucially important witness for him. The next day when the case commenced plaintiff’s counsel argued. Not a word was said about Van Tonder. In argument Mr De Wet requested the court to draw a negative inference from the non-calling of Van Tonder, who was by all accounts available. Mr De Wet said the inference had to be drawn that Van Tonder could not support defendant’s case, and that was why he was not called. The trial court did not make such inference, or say anything about the non-calling of Van Tonder.

[8] The respondent called a collision reconstruction expert, Ms Badenhorst. She said on what she saw during her visit to the scene of the collision and looking at the photographs she could not reject the version of the driver of the truck as contained in his warning statement. In cross-examination she said she could not reject the plaintiff’s version that the tractor was in the middle of the left lane and that the truck hit it from behind. She saw no brake marks on the scene. It was put to her that the tractor was not hit on its right-hand side and she responded that everything indicates that it was hit from behind. She could say with reasonable certainty that the trailer was hit at the back. The

tractor and trailer were ahead of the truck in the slow lane when the impact occurred. If the tractor turned in front of the truck the truck driver must have seen it. She agreed that the truck driver must have seen the tractor and the trailer. She could not say where the tractor was before the collision:

“My getuienis is dat ek weet nie waar het die trekker en die sleepwa gery nie. Ek kan nie sê die trekker en sleepwa het in die stadige baan gery die heeltid nie, ek kan ook nie sê die trekker en sleepwa het in die noodbaan gery en toe in die stadige baan inbeweeg nie. Ek kan nie sê watter een van die twee scenarios is die mees waarskynlikste nie.”

(p 147 lines 6-11).

She could not say what the speed of the truck was, but only said that the recording did not indicate speeds above 100 kilometres per hour.

- [9] The respondent handed in the warning statement of the truck driver. It was hearsay evidence, but the trial judge allowed it:

“I was from Durban to Gauteng on my way after passing Harrismith town on N3 road. I had an accident. I was driving a frontliner truck with registration number BV 49 BH GP. On the way I was driving on the slow lane. In front I noticed a tractor moving on the yellow lane outside the road and the other truck was moving on the fast lane parallel to the truck I was driving.

I did not notice what happened. When I was about to pass the tractor I just heard a sound or something hitting. I then tried to break the truck but I went dizzy and I noticed my truck jackknifing and the dust came into the truck through the window that was opened and I did not see what happened after that. I only felt people taking me out of the truck and noticed that the truck is no longer inside the road. It was at the field. The yellow lane was not clear.

The road surface was dry, it was during the day and the road signs were clear and the visibility was clear.”

- [10] Mr Wessels, for the respondent in this court (the truck) stressed the fact that in her statement Mrs Wessels made no reference to the motor vehicle between her and the truck ahead of her. He said this indicated her unreliability. The question arises why she would invent the car ahead of her now. There was no other evidence about the presence or absence of a car between her and the truck. She gained nothing by testifying that there was a car between her and the truck. There is no foundation in the evidence to suggest, as Mr Wessels did in argument, that she did not pay attention to the tractor, although she had seen it, because it posed no threat to her seeing that the tractor was left of the yellow line. Mr Wessels says the recording of the speeds of the truck showed that the truck drove at a relatively constant speed. As Mr De Wet pointed out in reply, the speed recordings are only made every three minutes. The last moving speed of the truck was recorded at the crest of the hill, about two and a half kilometres from the point of impact. The truck would probably have increased speed on the downhill, one does not know. The point is one does not know what the speed of the truck was the split-second before the collision.
- [11] In a criminal case the question is, generally speaking, whether the commission of the act has been proved. In a civil case, on the other hand, the question is, what is the most plausible and natural inference to be drawn from the acceptable evidence. The latter approach is particularly appropriate in a motor-collision case like the present with a claim and counter-claim, where both parties have an onus.
- [12] There was no basis for the court to reject the evidence of Mrs Wessels, the independent witness. The fact that she did not mention the white car in her statement was fully explained by her in evidence. That car was not important. She did say in re-examination that the occupants of that car stopped at the scene. She was adamant that there was no truck in the right hand lane. She also said she did not see the tractor and trailer because they were directly in front of the truck. She would have seen the tractor and trailer if they had been left of the yellow line.

- [13] The court should have drawn a negative inference from the non-calling of Freek van Tonder, especially after it had been put specifically that he would testify that the truck driver had slept well the previous night, especially in the light of Corver's evidence that he got the impression that the truck driver had fallen asleep.
- [14] When dealing with hearsay evidence the court must carefully assess the probative value of the evidence, taking all the factors into account (Makhathini v Road Accident Fund 2002 (1) SA 511 (SCA) at 521ff pars [27]-[33]) and decide what weight to attach to the evidence. The trial judge did not attach sufficient importance to the fact that the hearsay statement of the truck driver was a warning statement, wherein he had to excuse his driving, and for that reason possibly had to put a vehicle in the right hand lane. This is in direct conflict with the acceptable evidence of Mrs Wessels that there was no such truck. Just as direct evidence is to be preferred over expert reconstruction evidence (Representative of Lloyds v Classic Sailing Adventures (Pty) Ltd 2010 (5) SA 90 (SCA) par [60]), so the evidence of a witness who was at the scene of the collision is to be preferred over a hearsay statement handed in.
- [15] The tractor was traveling at about 30 kilometres per hour, and there was the evidence of Mrs Wessels (undisputed) that the truck was traveling at such a speed that she could not overtake it without going over the 120 km per hour speed limit. Thus the truck would have approached the tractor and trailer from behind at a high speed. If the truck driver was not very alert, he could easily drive into the back of the trailer as he did.
- [16] It is significant that in the warning statement the truck driver says that the first thing he knew about a collision was that he heard a sound as he was about to pass the tractor. This would mean that the tractor drove into his vehicle. It is common cause that the truck hit the trailer from behind. The tractor or its trailer did not hit the truck. This statement by the truck driver indicates that he was not keeping a proper look-out and is solely to blame for the collision

- [17] A driver who hits another vehicle is on the horns of a dilemma – either he was travelling at an excessive speed or he was not keeping a proper look-out (Kruger v Van der Merwe and Another 1966 (2) SA 266 (A) at 270D-271B). There is no foundation in the evidence to find, as the trial judge did, that the truck driver was possibly faced with a sudden emergency by virtue of the tractor turning in front of him (Palm v Elsley 1974 (2) SA 382 (C) at 383H). The most plausible version on the probabilities is that the defendant's driver was driving too fast or not keeping a proper look-out. (Govan v Skidmore 1952 (1) SA 732 (N) 734 C-D; Ocean Accident and Guarantee Corporation Ltd v Koch 1963 (4) SA 147 (A) 159C - D; AA Onderlinge Assuransie-Assosiasie Bpk v De Beer 1982 (2) SA 603 (A) 614G – 615B).

ORDER

1. The appeal succeeds with costs.
2. The cross appeal is dismissed with costs.
3. The order of the court a quo is replaced with the following:
 - “1. Plaintiff's claim succeeds. It is found that the defendant's truck driver was 100% negligent and that defendant is liable for such damage as the plaintiff may prove.
 2. Defendant is directed to pay the plaintiff's costs.
 3. The counterclaim is dismissed with costs.”

A. KRUGER, J

I agree.

S. NAIDOO, J

I agree.

L.B.J. MOENG, AJ

On behalf of appellant:

Adv P.J.T. de Wet
Instructed by:
Symington & De Kok
BLOEMFONTEIN

On behalf of the respondent:

Adv E Wessels
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