

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No: 3666/2011

In the matter between:

OBIE LOGISTICS (PTY) LTD

Plaintiff

and

SIKHOLWANGUYE MAXIM MNQAYANA

Defendant

CORAM: R. M. SEPATO, AJ

JUDGE: R. M. SEPATO, AJ

HEARD ON: 29 MAY 2013

DELIVERED ON: 25 JULY 2013

INTRODUCTION

[1] This is an action-for damages arising out of a collision between plaintiff's truck and defendant's stationery bus along the N5, between Kestell and Harrismith, on the 13th May 2011 at about 03h00 a.m.

The parties having agreed that the merits be separated from the quantum of damages, I agreed and the case accordingly proceeded on the merits only.

FACTS

[2] On the 12th May 2011 at about 14h00 – 15h00 p.m. the defendant's bus driver, Mr Lephote was travelling on the N5 towards the direction of Kestell – Harrismith. At about 8 km before reaching Harrismith, he experienced a mechanical problem with the bus to the extent he could not drive it further on. He then pulled off the road and parked the bus on the shoulder of the road. He contacted the defendant, being the owner of the bus who promised to attend the scene.

Mr Lephote then placed a triangle behind the bus and left the scene. The defendant Mr Mqayana testified also, essentially corroborating the driver as far as the above facts are concerned. He confirmed that upon his arrival at the scene the bus was parked off the road and a triangle had been placed behind it, about 45 metres away.

According to him, he left the bus at the scene at about 15h30 p.m, still daylight, with two young men to take care of it as there were some valuables inside it. He was satisfied that it was out of traffic's carriageway.

[3] He was later on awakened by a call at about 03h00 a.m. the following morning and informed that the bus had been involved in an accident. He got to the scene. There he found his bus having fallen onto its side on the left side of the road and was damaged. He further saw the plaintiff's truck that was also damaged, standing on the edge of the road and having further collided into the metal barriers that were there.

According to him, he was too traumatised and did not make any further observations there but left the scene. His driver never returned to the scene. The two young men had been inside the bus when the collision occurred, and did not witness it.

- [4] The plaintiff's truck driver, Mr Tladi testified that at about 03h00 a.m. on the 13th May 2011 he was travelling along the N5, on his way to Durban, from Namibia, transporting 21 ton of sheep carcasses for the export market. His truck consisted of the horse and a trailer with a refrigerator in which the carcasses were hanging on the roof thereof.
- [5] He had emerged from a slight bend and was travelling at 90 km per hour. According to him, he was familiar with the road, a single carriageway two - way road and was narrow. It was still dark and the road was unlit. It was generally a busy road, and was busy at that hour. As a result, he was travelling more to the left side of his lane towards the yellow line but was careful not to go over it as he knew he was prohibited from doing so. According to him, he was trying to allow oncoming trucks more space as they would be passing him.
- [6] At about 280m away from the scene of the accident, a vehicle travelling in the opposite direction emerged from the front with its head lights on bright. He immediately dipped his truck's lights with the hope that the other driver would do the same. However, the latter did not but kept on coming until the vehicles passed each other with the lights still on bright. These bright lights had a blinding effect on him. Immediately after the said vehicle had

passed him; he saw a chevron in front of him in his carriageway. He applied brakes but did not swerve as he feared that the weight of his load would overturn the truck. Unfortunately the said chevron was too near to be avoided as the truck slid and hit the bus on which the chevron was. Until then, he was not aware that there was a bus on the road.

- [7] According to Mr Tladi the rear right corner of the bus was in his lane, it had encroached over the yellow line of the tarmac. Besides the chevron, he had not seen any triangle nor any other warning before that there was a stationery bus protruding in his lane ahead of him. He was only about 40 metres away from the bus when he saw its chevron. His truck's left front corner had connected with the rear right corner of the bus, causing the bus to tip over and fall off further onto the veld on the left. His truck's left front wheel was damaged but the truck continued to slide until it was stopped by some barriers alongside the edge of the road, still on the left hand side. The refrigerator was also badly damaged with some of the carcasses thrown out. The bus was damaged at rear right corner.
- [8] The plaintiff further called a witness Mr Grobbelaar, a Forensic Engineer-Automotive, as an expert. He testified that during February 2013 he visited the scene of the accident with the view of reconstructing same. He had been placed in possession of certain photos taken sometime before, depicting the alleged scene, the vehicles involved in the collision, and some marks on the road surface. Mr Tladi was also present, who then made certain pointings to him, in particular in relation to where he was when he

first saw the bright lights of the incoming vehicle, where he was when he noticed the chevron and where he collided with the bus. Mr Grobbelaar then took measurements of the said points, made own observations, took photos and also used the other photos to draw a sketch plan and own conclusions.

[9] The salient points of which are as follows:

- Mr Tladi first saw the bright lights of the oncoming vehicle at about 282m away from point of impact; and that just after 23m of passing that vehicle he then saw a chevron, which was only about 40m away in his carriageway.
- He was still driving at about 90km/h.
- He therefore had only 0.1 seconds available to avoid the collision whilst in average, he needed about 1.6 seconds.
- The emergency lane where the bus had stopped was only about 1.9m whilst the width of the bus was about 2.5m.
- That therefore, if the bus was parked off the road with its left wheels on the left edge of the road, its right side would have projected into the truck's carriageway by approximately 0.6m.

[10] Under cross-examination Mr Grobbelaar then added that given the width of the bus, there was no way it could not have encroached over the yellow line into the truck's carriageway, because the gravel part after the edge of the tar was only 1 metre and there was a steep embankment which would have caused the bus to tip off onto its side. He referred to a photo showing Mr Tladi standing in some grass on the left side of the road with only his knees

visible to show the depth or steep of the embankment. That is photo 8 taken by himself, attached to his affidavit.

[11] According to him, he could not determine the exact point of collision because he found Mr Tladi's version thereon to be inconsistent with his own observations and conclusions, in particular, based on certain marks and/or debris he saw on photo 30, which was apparently taken after the accident. His final conclusion was that, Mr Tladi, after being blinded by the oncoming vehicle, operating that kind of truck with its load could not have been able to manoeuvre a safe swerve to the right to avoid hitting the bus which was only 40 metres away driving at 90 km/h, but that he needed more time than he had.

[12] Lastly, he stated that had a warning triangle been placed at about 45 metre away from the bus, the truck's headlights could have illuminated its reflective indicators at least at about 40 metre away and Mr Tladi would have been able to apprehend the danger ahead of him and thus avert the collision.

THE ISSUES

[13] The plaintiff alleged that the defendant was negligent in that the bus, as it was left, caused an obstruction in the road and was left without any proper warning to other road users and that, whether there was a triangle placed behind it or not, the defendant was reasonably required to have done more than that, for instance, by putting on the hazards of the bus, having a person with reflectors

on or a torch warning other road users of the obstruction, especially because it was still dark and the road was unlit.

- [14] According to the plaintiff, the defendant should be held solely liable for the accident and consequent damages and that no apportionment of liability should apply.

An extensive reference to case law was made by the plaintiff and availed copies thereof to the court, for which am thankful.

- [15] The defendant's case is firstly that the bus was completely off the road, no portion thereof had encroached onto the truck's carriageway as its right rear wheels were just next to the yellow line on the left and not over it.

- [16] Secondly, that Mr Tladi was the negligent party in that he failed to reduce speed from 90 km/h despite being blinded by the bright lights of the oncoming vehicle and also despite the fact that he must have been tired after long hours of driving, without having had a proper sleep, except at intervals only.

Thirdly, that consequently, he had ventured too much to the left, out of the yellow line without keeping a proper lookout and hit the bus which had not been in his way despite a triangle having been placed there.

Fourthly that, should the court find that the bus had protruded too much onto the truck's carriageway, that would be 50/50 contributory negligence resulting in the apportionment of liability.

THE LAW

[17] It is trite law that liability based on negligence arises if:

- “(a) a *diligens paterfamilias* 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.”

As per Holmes JA: **Kruger v Coetzee** 1966 (2) SA 428 (A) at 430E – G.

[18] The question therefore arises whether a reasonable man in the defendant's situation should have foreseen that leaving the bus in the position it was would cause possible injury and patrimonial loss to another person or not. The plaintiff alleged that the bus constituted a hazard or obstruction to other road users because its right rear wheels had encroached over the yellow line into the truck's carriageway. The two defendant's witnesses denied this, but admitted that the road was not lit, neither was the bus lit and that it had no hazard lights on, nor was there someone there with a reflector to make it visible. Of significance the defendant argued that the bus had been at the same spot for about 12 hours and it was an area which was frequently passed by both the police and traffic officials and that they could not have left it parked like that for all that time, had it constituted an obstruction.

[19] Mr Grobbelaar disputed the alleged point of impact which was pointed out by Mr Tladi, the only witness to the accident. This then raises the question whether the bus right rear wheels were positioned as Mr Tladi alleged they were; that is in his carriageway

thereby constituting an obstruction. This I pose because the point of impact could only have been where the bus was found stationary before the collision. The paginated index contains photos A – J and 1 – 8 none of which is capable of showing the actual point of impact at all.

[20] Both the defendant's witnesses made indications of the positioning of the right rear wheels of the bus on the photos as having been on the tarmac but definitely not beyond the yellow line. They however differed as to the actual distance thereof, with one placing the wheels just on the edge of the tarmac, the other placing them a bit further in the tarmac, yet not beyond the yellow line.

[21] For that reason, the plaintiff's counsel argued that both were unreliable witnesses, either one being dishonest whilst the other could have been mistaken. He asked me to prefer the plaintiff's driver's version over theirs.

The defendant's counsel argued that, the accident having occurred two years ago, it was possible that the witnesses could be mistaken in their recollection and reconstruction of the scene, and that I should not necessarily dismiss their version as argued.

[22] Mr Grobbelaar repeatedly referred to photos 30 and 31 which according to him, show marks, arguably caused by the truck's damaged front left wheel as it slid after colliding with the bus. According to him, these marks start a bit way beyond a piece of a metal panel apparently belonging to the bus, on the right side of the yellow line, thereby suggesting that the collision must have

occurred beyond the yellow line in the truck's carriageway and way behind where the bus is depicted to have fallen after the impact.

- [23] The said photos do show some colourations or colour variations. However, I fully agree with Mr Heymans for the defendant that they are as a matter of fact, not of such a good quality to can clearly depict whether the colourations therein are scratch marks, oil or soil debris or even colouration from the lens of the camera for that matter. Mr Tladi testified that he was not present when those photos were taken and that he therefore cannot verify what exactly those colourations represent as he could not remember observing any such after the collision before he went to hospital. As a result we are left to speculate thereabout.

REASONS AND FINDINGS

- [24] The defendant admitted that the bus had encroached onto the tarmac, albeit only in the emergency lane. Both parties having admitted that slow moving or heavy vehicles like the plaintiff's truck do often drive or move in the emergency lane especially at night or in times of heavy traffic flow, I find that a diligens paterfamilias in the defendant's circumstances, ought to have reasonably foreseen that leaving the bus parked in that manner would constitute a hazard and cause patrimonial loss to other road users who may have had to use the said emergency lane like the plaintiff's truck driver .
- [25] The second leg of the inquiry then kicks in, that is whether the defendant having realised that harm might ensue, took any

reasonable steps to avert it. Almost all of the decided cases which the plaintiff referred me to and sought to rely on, illustrate various scenarios of a vehicle colliding into a stationary one with or without proper prior warning measures put in place for other motorists, be they oncoming or from behind, during the day or at night, as well as the various courts' decisions therein which are also different.

- [26] Remarkably, all these decisions revolve around one and the same firmly-rooted legal principle which has since been set out in Kruger's case referred to above , namely that the question 'whether a diligens paterfamilias in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend upon the circumstances of each case. No hard and fast basis can be laid down. Hence the futility, in general, of seeking guidance from the facts and results of other cases.'
- [27] Having said that, I proceed herein. The defendant's bus broke down at about 14h00 pm and was left at the scene until the following morning at 03h00 am when the collision occurred, with only a triangle as a warning to other road users. According to the defendant, Mr Mnqayana, he only knew that the law required him to place a triangle behind a broken vehicle when it is being left on the road, nothing further.
- [28] On the same breath, he was adamant that his bus did not pose any danger to other road users at all especially because no accident occurred there in the 12 hours it had been parked until the one caused by Mr Tladi, and further because it had been

parked in an area which was frequently passed or patrolled by the police and traffic officials who would certainly have taken steps about it in the event it had obstructed traffic.

[29] If Mr Mnqayana and his driver are to be believed that they had placed a triangle behind the bus at 15h00 pm when they left the scene, then it can safely be assumed that they did appreciate that there was a need to warn other road users of the stationery bus ahead in their way. The said triangle was only about 60cm high and could, admittedly be ran or knocked over by vehicles. Yet that was all they did.

[30] Perhaps that was because it was still daylight then, without implying that that would have been sufficient warning then, but leaving the bus there the whole winter's night without any further and effective warning was negligence on their part. They admitted under cross examination that they could have put and left the bus' hazard lights on but said that would have flattened its battery. On the same breath, Mr Mnqayana further admitted that he could have ran the engine to keep the battery charged or even provided the two lads he left in the bus with some form of reflectors including a torch, to stand outside the bus and waive same in warning to other road users coming on. All he could say was that he did not know that he was supposed to do so.

[31] Based on all the above, I find that the defendant herein ought to have taken more steps than the one he took in order to avert the harm that eventually ensued as a result of the obstruction he had created on the road .

- [32] On the other hand, the plaintiff cannot be said to be without any fault herein. Mr Tladi emerged from a bend driving a heavy laden truck at 90km/h, at night or in the darkness of the early morning. For some time, at least for more than 250m he was blinded by the lights of an oncoming vehicle but, he conscientiously failed to reduce speed because he felt he could see the road clearly, instead he kept more to the left to give more way to other oncoming trucks.
- [33] He admitted that the maximum speed limit for his truck was 80km/h but added that he was allowed a grace of a further 10km/h. He had been a truck driver for at least twenty years then. He said he was well rested and on the alert as he had slept a total of eight hours in the past 24hours. He knew that road very well as he frequently used it, a busy and a narrow one.
- [34] Both parties agreed that the collision occurred on a straight and flat tarmac road, which was dry and unlit. The photos at the least confirm this. Driving a heavy laden truck at 90km/h in the dark, on a busy road, certainly amounts to negligence, especially emerging from a bend. There is nothing regarding the built of the road, to suggest what would have caused the truck to automatically reduce its speed on its own, progressively so as Mr Tladi casually suggested under cross examination, if he himself did not apply the brakes upon being blinded. For him to have further continued at that speed despite being blinded by oncoming bright lights, knowing that there could be hazards on the road only increases Mr Tladi's blameworthiness.

- [35] The photos, even though not so clear, do however give an idea of the extent of the damage to the vehicles, particularly the truck. The bus was allegedly hit on its rear right corner by the truck. The photos depict the bus lying on its right hand side, after the impact. Even though one cannot see the damages thereto, page one of the trial bundle handed into record, is a quotation on the repairs of the bus in the amount of R351 234 OO. So it was damaged.
- [36] Regarding the truck, there are ample photos that clearly show how badly the truck's head itself that is the horse, as well as its trailer and the refrigerator were damaged. Photos one - four in bundle B on record show the left front sides of the horse and trailer as completely crashed with the horse tipping onto its right side. Photos five, thirteen and others show further damages to the right side of the truck as well as the refrigerator and sheep carcasses lying outside.
- [37] The fact is, the plaintiff's truck was more damaged than the bus, and the plaintiff has not been able to prove that all the damages to the truck were solely caused upon its connection with the bus. Instead, Mr Tladi testified that upon seeing the chevron he applied the brakes but the truck slid and hit the bus, it then continued sliding until it hit and was stopped by the metal barriers further on, on the side of the road. That simply shows how strong the impact was and how unmanageable the truck was for Mr Tladi.

[38] On the basis of above, I find that Mr Tladi ought to have reasonably foreseen that in the event of any emergency such as the one he eventually found himself in, the particular truck would not easily come to a halt when brakes were applied, nor would he easily be able to manoeuvre the truck into a safe and swift swerve so as to avert harming the other road users too. Further that he should have therefore driven at a lower speed or actively reduced the speed upon being blinded. Accordingly, I find that Mr Tladi acted negligently and therefore contributed to the collision and the damages suffered.

[39] This brings in the question of the extent of the apportionment of the liability of the two drivers . Even though the defendant had left the obstruction on the scene for about twelve hours without proper warning to others, I find that Mr Tladi also, given his vast experience particularly as a licensed truck driver, equally contributed to the accident taking place. He actually created the emergency himself by choosing to drive at a relatively high speed of 90km/h when he fully knew the operating mechanisms of a truck under those circumstances. I cannot find any of the two drivers to have displayed any greater degree of negligence than the other. I therefore apportion their liability equally, that is on a 50/50 % basis, each.

[40] It is common cause that the respective drivers of the bus and the truck were the employees of the parties as cited herein and were acting within the scope of their employment at the time relevant to the occurrence of the collision and that the vehicles belonged to the parties too.

Both counsel further addressed me on their respective prayers for costs. I will however not dwell into same in view of the above findings.

[41] THE ORDER

Accordingly, I order that:

- (1) Both the plaintiff's and defendant's drivers are found to have been equally negligent in causing the collision.
- (2) Each party shall pay own costs.



R.M. SEPATO, AJ

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