

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No.: 3827/2012

In the matter between:

PH CORVER

Plaintiff

and

YELLOW YERSEY LOGISTICS

Defendant

CORAM:

MOLOI, J

HEARD ON:

26 November 2013

DELIVERED ON:

12 December 2013

MOLOI, J

- [1] In this matter the plaintiff issued summons against the defendant claiming damages occasioned by a motor collision between his tractor and trailer and the truck belonging to the defendant. The defendant counter-claimed for the damages caused to his truck. The collision took place on the N3 main road between Warden and Harrismith on 20 April 2012.
- [2] One VP Ntshingila (Ntshingila) was the driver of the plaintiff's tractor with registration letters and numbers D[...] towing a

trailer (the tractor). One VV Zwane was the driver of the defendant's mechanical horse and trailer with registration letters and numbers B[...]. (the truck) Both the drivers were acting within the scope of their duties as employees of the plaintiff and the defendant, respectively.

- [3] At the commencement of the trial and by agreement between the parties, the merits were separated from the quantum and this judgment relates to the merits alone. The ownership of the respective motor vehicles was admitted to confirm the *locus standi* of the parties.
- [4] The plaintiff, Mr Corver, testified personally as Ntshingila had died in the said collision. His evidence was based largely on his observations at the scene of the collision and the vehicles concerned. He arrived on the scene shortly after the collision. It was a clear day and the tarmac was dry and visibility was good. Both the tractor and the truck were moving from south to north on the N3 main road from Harrismith towards Warden. The front of the truck had hit the rear left of the trailer and pushed it over the tractor and decapitated the driver of the tractor whose body was found lying on the side of the road. The tractor broke into two parts. The collision happened on the left lane of the two lane north bound carriage way. The road at that point had two lanes in each direction with a double painted barrier line in the middle. There were no brake marks on the roadway but there were collision drag marks in the centre of the left lane

and the tarred portion (the shoulder of the road or the emergency lane) outside the left lane.

Ntshingila had worked for the plaintiff for eleven (11) years and was not drinking alcohol nor smoking tobacco. The plaintiff had instructed Ntshingila never to drive a tractor left of the yellow line in the so called “emergency lane”. Ntshingila would never disobey the instructions the plaintiff gave. Ntshingila could not see behind him as the tractor had high sides making it impossible to see what was coming from behind. The driver of the truck (Zwane) was trapped inside the cabin of the truck. The maximum speed of the tractor was 35 km/h.

- [5] Mrs Mangareta Getruida Wessels was driving her motor car behind the truck in the direction from Harrismith towards Warden where she lived. At a point she wanted to overtake the truck but realised she would have to exceed the speed limit of 120 km/h to do so. Knowing the place well she was aware that there could be speed traps at that point. She then decided to keep driving behind the truck in the left lane. There was a white motor car moving in the right hand lane towards Warden, slightly in front of her. She looked momentarily at her odometer and also at her child who was seated on the left seat next to her. She suddenly saw debris flying all over the place as the truck hit what she later recognised as a tractor pulling a trailer. She had not seen the tractor before the collision. The tractor could not have moved beyond the yellow line (that is in the emergency lane)

on her left as she would have seen it. She confirmed it was a bright day with no obstructions to the view.

As she was driving she kept a distance of approximately 200m behind the truck though in her statement she stated that she was moving approximately between 70 and 100 meters behind the truck. She was driving at approximately 110 km/h. There was no other truck moving in the right hand lane of the northbound half of the road.

- [6] The defence version was put to both witnesses during the cross-examination and the plaintiff conceded that the collision could have happened in that way, but Mrs Wessels disputed it happened that way. The defence version was contained in a warning statement made by Zwane, the driver of the truck. Zwane had since passed away. According to the warning statement Zwane made to the police he was driving the truck on the N3 main road between Harrismith and Warden and kept on the left lane. He noticed a tractor and trailer (the tractor) moving ahead of him in the same direction on the yellow line outside the carriageway, i.e. in the emergency lane. There was another truck moving on the right hand lane in the same direction parallel to his truck. He did not notice what happened but as he was about to pass the tractor he heard a bang ("heard a sound of something hitting"). He tried to apply the brakes but went dizzy and noticed his truck "jack-knifing" and there was dust. He did

not see what happened. He felt people taking him out of the truck and the truck had left the road.

- [7] Ms Wilma Badenhorst, an accident reconstruction specialist was called by the defendant. It was agreed that she qualified as an expert. She testified that from the damage caused to the truck and the trailer pulled by the tractor she concluded that the truck collided from behind against the tractor on the left hand, northbound lane. That the version of the truck driver namely that the tractor was moving in the areas outside the yellow line commonly referred to as the “shoulder” of the road or the emergency lane and that the tractor suddenly moved towards the left lane when the truck was too near to take any evasive action and caused the collision, could not be ruled out as impossible in the causation of the collision. The truck’s last recorded speed before the collision was 74km/h. She could not say what led to the collision between the truck and the tractor. The reaction time of the truck driver when the tractor suddenly moved in front of it would be 5,5 seconds and insufficient to take any evasive action. There were no brake marks on the road surface. It was put to her that the driver of the truck must have seen the tractor suddenly veering in front of him and not merely heard the bang to can take evasive action. To this she responded that truck driver would have reacted if he had sufficient time.

- [8] Photographs of the scene of the collision depicted the road as consisting of two lanes on each of the two halves of the

road. The Harrismith – Warden side (northbound) and two lanes on the Warden – Harrismith side (southbound). The two sides of the road are separated by the zebra painted island in the middle. The two lanes on the northbound side are demarcated by a broken line that separates them. There is a yellow line indicating the end of the carriageway on the left. On the left of the yellow line there is a tarred part wide enough to allow a vehicle to move on. This strip is the so-called shoulder of the road or emergency lane. Near the point of impact the shoulder/emergency lane narrows significantly towards the yellow line leaving grass and stones on its left. The marks left by the vehicles at the point of impact are visible from roughly the centre of the left lane and across the yellow line on the shoulder of the road/emergency lane.

- [9] It is common cause that the collision took place on a bright sunny day on a straight and flat northbound side of the road; that the road surface is tarred and was dry; that nothing could impair visibility where the collision occurred though there was an incline further back approximately 1½km as the truck and the tractor were moving; that each side of the road had two lanes separated by a broken line in the middle; where the collision occurred there was a tarred shoulder of the road/emergency lane that narrowed; the point of impact between the two vehicles was in the middle of the left lane; the trailer was collided with at the rear left corner; the trailer was pushed forward over the tractor and it decapitated the driver of the tractor; the tractor's maximum speed was

35 km/h; the driver of the tractor was experienced and had been given instructions not to drive on the shoulder or the emergency lane as he could not see behind him at all; the tractor was red and its trailer had reflectors at the back. There were no brake marks on the road surface.

- [10] Before I evaluate the evidence before me, it is crucial that a decision be made regarding the admissibility of the statement forming the basis of the defence version. This is so as the version depends wholly on the warning statement made in the course of investigation of a possible criminal charge against the driver of the truck, Mr Zwane and would thus constitute hearsay. The said statement in the nature of things was not sworn to and the person who made it did not testify, nor could he, as he had died in the meanwhile. Mr De Wet who represented the plaintiff argued against the admission of the statement as evidence on the grounds of being untested and not qualifying to be admitted under the provisions of Section 3 of the Law of Evidence Amendment Act No 45 of 1988 as an exception to the hearsay rule. On the other hand, Mr Venter, representing the defendant argued that the statement ought to be admitted in the interest of justice having met the requirements listed under section 3 (1)(e) of the said Act. Those requirements which the court is enjoined to have regard to are the nature of the proceedings, the nature of the evidence, the purpose for which the evidence is tendered, the probative value of the evidence, the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends, any prejudice to a party which the

admission of such evidence might entail and any other factor which should in the opinion of the court be taken into account.

[11] It immediately becomes clear that the various factors to be considered by the court before admitting hearsay evidence in the interest of justice overlap. It is therefore important to take global view of those factors other than deal with each one separately in determining the admissibility: **S v Shaik and Others** 2007 (1) SA 240 (SCA) at para 170; **Makhathini v Road Accident Fund** 2002 (1) SA 511 (SCA) at 522 C-D. In **S v Cekiso and Another** 1990 (4) SA 20 (e) it was held that the courts should not invoke the exception lightly contrary to the view had in **Metedad v National Employers' General Insurance Co. Ltd** 1992 (1) SA 494 (W) at 499 where it was held that the legislature intended the courts, particularly in civil trials to exercise a wide discretion when so required by the interest of justice.

[12] When I consider the enumerated factors in order to exercise that discretion I have in terms of the provisions of section 3 of the Law of Evidence Amendment Act no 45 of 1988 it becomes imperative to take into account the evidence placed before me. The long and the short of the plaintiffs' evidence is that Ntshingila was a competent tractor driver who had been instructed by the employer not to drive on the shoulder of the road or the so-called emergency lane, was driving in the left hand lane of the northbound half of the road in a straight course. That Zwane, an equally competent

driver of the truck who used the same road often and even knew the spots where speed trapping would be possible, drove his truck straight into the back of the tractor (tractor's trailer) when there was nothing at all causing him to do so and in broad daylight when nothing impaired visibility at all. Zwane took no evasive action at all, least of all, apply the brakes of the truck. All the people using that road are warned about the presence of slow moving tractors by road signs outside the carriage way. All the users of that road know that piece of road is prone to accidents and is dangerous. There is no suggestion that Zwane was under the influence of anything that would affect his driving capacity or that he was drowsy while driving and so caused the collision with the tractor (and its trailer). Zwane was not charged with any offence. This version is to a large extent corroborated by the evidence of Ms Wessels who was driving behind the truck driven by Zwane.

- [13] It was submitted and correctly so that the burden of rebutting negligence on the part of the driver, following another vehicle becomes heavier where one collided with a vehicle from behind. Proof that a following vehicle collided with the rear of the vehicle travelling ahead is *prima facie* evidence of negligence: **Kruger v Van der Merwe** 1966 (2) SA 266 (A). Hence there is a "safe distance rule" requiring that the driver of a following vehicle is under a duty to regulate his speed and distance from the vehicle ahead so as to be able to avoid colliding with it should the vehicle ahead make a sudden stop or reduce speed: **UNISWA v Bezuidenhout** 1982 (3) SA 957 (A) 965 B-C; **Cavnavon Bus Service v**

Haile 1930 (2) PH Jig (c); **Goldstein v Jacksous Pari Service** 1954 (4) SA 14 (N).

Should the defendant fail to negate or rebut this inference of negligence, the plaintiff must succeed *Kruger v Van der Merwe, supra*. The driver of the following vehicle will escape liability if he was faced with sudden emergency: **Coleman v Mabuza** 1963 (2) SA 498 (T) and **Goode v SA Mutual Fire & General Insurance** 1979 (4) SA 301 (W) at 307 A where it was stated that the emergency must occur suddenly and unexpectedly. The crises must be so unexpected that *“in the agony of the moment, the person whose conduct is in question had neither the time nor the opportunity to weigh the pros and the cons of the situation in which he found himself”* If he had ample time and warning to decide on an appropriate action to take he cannot avail himself of the defence of sudden emergency: **R v Philips** 1949 (2) SA 676 (O) at 677; **Minister of Justice v World Auxitionary Insurance** 1963 (1) PH 021 (D).

- [14] The statement of Zwane sets out a sudden emergency that he was faced with to gainsay an inference of negligence on his part. According to the statement Zwane was driving behind the tractor driven by Ntshingila on the said road. His truck was moving in the left hand lane northwards. The tractor was moving in the emergency lane outside the yellow line. When he came close to the tractor it suddenly and without warning swerved in front of him. He could not move to the right hand lane as there was another truck moving there. He immediately heard the crash of the vehicles and did not have

time to apply the brakes. He was trapped in the truck and had to be helped out.

- [15] Crucial evidence is the statement is that he saw the tractor ahead of him and that it was moving in the emergency lane. When the tractor moved into the left lane there was no warning given and no time allowed to take evasive action. The collision occurred. There was no evidence that before Zwane made a statement he had visited the scene of the collision and noted that the emergency lane was narrowing further on which would have forced Nshingila to move to his right. Ms Wessels denial of having seen the tractor at all and her insistence that if it was moving on the emergency lane, she would have seen it, becomes hard to swallow. According to her she wanted to overtake the truck. There was only a white car in the right hand lane and this was moving ahead of her. She remained behind the truck only because she knew that was the spot where speed trapping could take place, meaning that once she was past the spot of the speed trapping she would proceed to overtake the truck. For her to do that she would keep to the right of the left lane and focus on the traffic that would be in the right lane so she could overtake the truck. It was contended that the angle at which she was behind the truck would make it possible for her to see the tractor if it was moving in the emergency lane. What that angle was, was not explained. Why would she focus on her left when she intended overtaking on the right?

[16] I accordingly find that it is in the interest of justice to rule the statement of Zwane to be admissible as it provides some explanation of a possible way the collision would have occurred. This is more so in the absence of any reason why Zwane would be suicidal as the plaintiffs' version suggests. Zwane was not charged with any offence, no evidence was led that his faculties were impaired nor was he speeding excessively so as to drive straight into the back of a moving object he saw on a clear day as was described in the circumstance. The plaintiff, Mr Corver and Ms Badenhorst agreed the collision could have happened as described by Zwane in his statement. Both versions are according to my judgment plausible. It is unfortunate that both the drivers died and could thus not throw more light on this quandary. I am not persuaded to prefer one version above the other and make accordingly the following order:

ORDER:

Absolution from the instance is hereby granted and it is ordered that each party pay own costs.

K. J. MOLOI, J

On behalf of the applicants: Adv. P. J. H. de Wet
Instructed by:
L Strating
Symington & de Kok
BLOEMFONTEIN

On behalf of respondents: Adv. J Venter
Instructed by:
Mnr Albert
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