

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION : MTHATHA

NOT REPORTABLE

CASE NO: 1078/2009

In the matter between :

SISA ZIHWELE

PLAINTIFF

and

MR V. V. NYINGWA & OTHERS

DEFENDANTS

JUDGMENT

DAWOOD J :

1. The plaintiff herein sued the driver, the Close Corporation and a Mr Mda for damages arising out of an accident whereby a Volvo Bus bearing registration letters and numbers DWX 379 EC, driven by the First Defendant, in which the Plaintiff was a passenger at the time, collided with the cutting on the edge of the road.
2.
 - a) The Plaintiff alleged that the Second Defendant, Mr Mda was the registered owner of the said Volvo Bus.
 - b) The Plaintiff alleged further that the First Defendant acted in the course and scope of his employment with the Second Defendant, alternatively the Third Defendant.

- c) That the collision was caused solely by the negligence of the First Defendant who was negligent in one or more of the following respects:-
 - i) he failed to exercise any and/or adequate control over the said vehicle;
 - ii) he failed to keep a proper and/or adequate lookout;
 - iii) he drove at an excessive speed in the prevailing circumstances;
 - iv) he failed to apply his brakes timeously, adequately or at all;
 - v) he failed to avoid an accident when by the exercise of reasonable care he could and should have done so.
- d) The Defendant pleaded that an accident occurred on the 22nd of December 2007 at or near the R61 Road between Beauford West and Aberdeen when the Volvo Bus driven by the First Defendant, experienced a sudden unforeseen tyre blow-out of the right front wheel which in turn caused the vehicle to overturn.
- e) The parties agreed at the pre-trial meeting held on the 2nd of November 2011 that:-
 - i) The First and Second Plaintiff have *locus standi* to bring the action;
 - ii) The actions of the First and Second Plaintiff had ben properly consolidated;
 - iii) The First Defendant is an adult male bus driver in the employ of the Third Defendant;
 - iv) The Third Defendant Romans Transport CC carries on business with the name and style of Romans Coaches.
 - v) The Volvo belonging to the Third Defendant and driven by the First Defendant veered of the road and collided with a rock face in a cutting.
 - vi) After the accident the right front tyre of the bus appeared shredded and utterly destroyed.
 - vii) The parties further agreed that the issues to be determined by the court were:-

- 1) whether or not the accident occurred as a result of an unforeseen tyre blowout of the right front wheel which caused the bus to overturn as alleged by the Defendant; or
- 2) Whether or not the accident was caused by the negligence of the driver, the First Defendant in that:-
 - i) he failed to exercise any and/or adequate control over the bus;
 - ii) he failed to keep a proper lookout;
 - iii) he drove at an excessive speed in the prevailing circumstances;
 - iv) he failed to apply brakes timeously, adequately or at all;
 - v) he failed to avoid the accident when by the exercise of reasonable care he could and should have done so.
3. The parties applied for a separation of the merits from quantum and the matter proceeded on the merits only.

4. EVIDENCE LED

4.1 The Plaintiff Sisa Zihwele testified as follows:-

- i) he is a 23 year old male who was 17 years of age at the time of the collision. He had passed grade 7 and was returning home from Cape Town to Tsolo;
- ii) he was travelling on the bus with his brother, sister-in-law and his 11 year old nephew
- iii) he was seated on the second last seat on the left hand side of the bus and the collision occurred between 12 noon and 1pm.
- iv) He did not notice anything about how the bus was being driven but his brother prior to the collision remarked that the driver was driving at a fast speed and that the way he was driving the bus he could overturn the bus and he agreed with his brother.
- v) Immediately prior to the accident he observed that that bus was driving all over the road swaying from right to left to right. He became afraid and lost consciousness and when he regained consciousness he was down in a

valley without realizing how he got there. He was unable to move because the vehicle's differential, which he later corrected under cross examination to say it was in fact the rim, that pinned him down and had landed on the back of his waist and his leg and he could not move away by himself. He was taken to hospital in George.

- vi) Under cross examination he confirmed that the conversation between his brother and himself regarding the driving of the bus occurred approximately 10 minutes after they left Beaufort West and prior to the bus "zig zagging".
- vii) The bus was zig zagging on the road and at times facing on-coming traffic. The bus went to the right and collided with the rock face and came back onto the road and he was scared and lost consciousness and when he woke up the bus was lying on its side.
- viii) The drivers version was then put to him being:-
 - a) That shortly before the vehicle swung to the right and struck the rock there was a loud noise like a gunshot. His response was that he was seated at the back of the vehicle and did not hear a sound like a gunshot and they were also conversing amongst themselves.
 - b) That concluded his testimony.

4.2 The Plaintiff thereafter called Luvuyo Zihwele the Plaintiff older brother. His testimony was briefly as follows:-

- i) He was also on the bus together with the Plaintiff, his wife and his nephew travelling to Tsolo;
- ii) He was seated in the Second last seat at the back and his brother was seated next to him.
- iii) Whilst they were travelling he remarked to his younger brother that he was scared of the way the bus was speeding because there was a possibility of it capsizing.
- iv) According to him the bus was driving at a very fast speed from Beaufort West to the spot where the accident occurred.

- v) The bus was facing on-coming traffic and he then saw the bus travelling to the extreme right side of the road and he assumed that it was trying to avoid oncoming traffic.
- vi) The bus then hit the rock face on the right side and he held onto the left hand side of his seat as he felt that the bus would fall on its right side.
- vii) He went outside and found his wife and nephew but the plaintiff was not amongst the people outside.
- viii) He then went to the back of the vehicle and saw the lady that had been sitting next to the Plaintiff and her skull had a wide gash and metal parts of the bus were pinning her down on her neck.
- ix) He then called out for the Plaintiff because he could not see him. The Plaintiff responded and when he looked he saw that the Plaintiff was beneath the grill and he had been pinned down by some metal on his leg.
- x) The emergency services managed to get the Plaintiff out and told him that they were taking the Plaintiff to George but refused to let him accompany the Plaintiff saying that they would only put a plaster of paris on.

5 under cross examination he confirmed:-

- 5.1 that a discussion regarding the speed of the vehicle occurred after they left Beaufort West;
- 5.2 According to him it was 30 minutes after they left whereas the Plaintiff stated it was 10 minutes. He indicated however that this was an estimate but that it was closer to 30 minutes but could even be 10 minutes.
- 5.3 According to him there was on-coming traffic when the bus went onto the incorrect side of the road and the driver then swerved to his extreme right, he assumes, so as to avoid hitting the vehicle, as their driver was driving on the incorrect side of the road.
- 5.4 The driver's version that there was a loud sound that sounded like a gunshot before the vehicle went to the right was denied by him. He stated that he did not hear any sound and he would definitely have heard it because he was not asleep and that the driver was lying.

5.5 It was put to him that the sound was a blowout of the right front tyre and he stated that he did not know because he did not see the wheel being punctured and he did not hear anything.

5.6 He indicated that he did not see any marks on the road but he would not dispute that it was in all probability caused by the burst of the right front tyre because he did not see the marks.

5.7 That concluded his testimony.

6 The Plaintiff next witness was Professor Dreyer.

7 During the course of his cross-examination he met with Mr Grobbelaar and they prepared a joint minute which reads as follows:-

“

- (1) *The experts agree that in the event of the right front tyre of the coach undergoing a sudden deflation (blow-out), the steering would pull strongly to the right and the coach would move to the right.*
- (2) *The experts agree that the onset of the pull to the right of the steering and the movement to the right by the coach would probably happen shortly after the blow-out and likely in the order of 1s to 2s after the burst.*
- (3) *The experts agree that the pull to the right on the steering of the bus, after the tyre had burst and the pull to the right had manifested, would have been difficult to correct by the driver.*
- (4) *The experts agree that the wavy tyre mark as is visible in police photograph 1 (and also indicated on the police sketch plan) was probably caused by the deflated right front tyre of the coach.*
- (5) *The experts agree that the dip in the gravel shoulder of the road after the impact point D was probably the cause for the overturning of the coach on its right hand side with the result that the roof came into contact with the rocks of the cutting on the right hand side of the road.*
- (6) *The experts agree with the value of an average visualization, perception and reaction time of 1.5s for a visual stimulus in daylight. They however disagree on the time required for an audible and/or movement stimulus, with Prof. Dreyer of the opinion that this would shorten the time, required whereas Mr Grobbelaar is of the opinion that this would lengthen the time..*
- (7) *The experts agree that the rolling resistance of a typical bus tyre, such as the tyre under consideration, would be between approximately 0.013 and 0.017 for a fully inflated tyre whereas it would be approximately 0.15 for a fully deflated tyre.*
- (8) *The experts agree that the sliding friction coefficient a typical bus tyre, such as the tyre under consideration, would be between approximately 0.4 and 0.6 for a fully inflated tyre. For a tyre being braked with ABS, the lower value would probably increase to approximately 0.55.*

- (9) *The experts agree that under braking, with a fully deflated right tyre on the coach, the steering of the coach would pull to the left and bus would move to the left. The severity of the pull would be dependant on the level of braking applied.*
- (10) *The experts disagree on the use of 0.4 for a mild brake application, where Prof. Dreyer is of the opinion that this is a mild application whereas Mr Grobbelaar is of the opinion that this value is far too high and 0.1 to 0.2 would be more appropriate for such an application.*
- (11) *The experts disagree as to whether it could have been expected of the driver of the coach to have braked under the circumstances, with Prof. Dreyer of the opinion that braking should have been applied whereas Mr. Grobbelaar is of the opinion that braking should have been avoided under the circumstances.”*

8 Professor Dreyer’s testimony was as follows:-

- a. he had not visited the accident site but relied upon photographs of the scene, the A R Form of the accident completed by Constable Bruwer, the police plan with key and distances prepared by constable Mitchell, the affidavit by constable Jean-Jacques Bruwer, the affidavit by Johan Kruger, the warning statement by Vincent Vuyani Nyingwa (the driver) and the affidavit by the Plaintiff and the RAF form and particulars of the bus.
- b. According to the police report the driver had stated that the right front tyre had burst after which he lost control and the bus overturned on its right side and collided with a rock face and he had been driving at approximately 95km/h.
- c. The police noted in the A R further that it was daylight, the weather conditions were clear and the tarmac surface was dry. The road was straight and uphill. The speed limit was 120km/h.
- d. Apart from the shattered windshield and the area around the right front wheel, there seemed to be no impact damage to the roof showing that the bus slid on its right hand side before coming to rest. There is no impact damage to the left hand side of the bus. The bus had an impact on the right front corner and then overturned and slid on its right hand side while the roof was still in contact with the cliff face.
- e. According to him the tyre mark shown on the police plan was probably caused by the flat right front wheel since a braking action would normally leave more than one tyre mark. This means that the bus at least did not do any hard braking otherwise there would have been more tyre marks on the road.

- f. The tyre mark on the tar shows that the bus was gradually moving over to the right hand side of the road. It was not a sudden swerve to the right, it is a very gradual line that the tyre mark shows on the road.
- g. The dip in the gravel shoulder of the road after the impact point D was probably the cause of the overturning of the bus on its right hand side with the result that the roof came into contact with the rocks of the cutting.
- h. According to the police plan the distance from the start of the tyre mark to the impact point was 132,2 meters
- i. The driver of the bus indicated that his speed was 95km per hour and no mention is made of any braking action.
- j. According to him if perception reaction time of 1, 5 seconds is taken, the bus would travel 39,6 meters at 95km/h.
- k. If the driver started to brake mildly at a braking co-efficient of 0.4 the bus would stop in 90.6metres which gives a total of 130,2 meters.
- l. He stated that since the tyre burst would occur some distance prior to point B on the police plan and the noise would immediately warn the driver, the driver probably could have stopped before the impact point D, if the bus was travelling at 95km/h and the driver kept a proper look-out.
- m. According to him the additional distance from point D after the impact shows that the bus was most probably travelling much faster than 95km/hr and/or the driver was not wide awake when the tyre burst, because that was quite a distance for the bus to slide on its side while the roof is still in contact with the cutting and still retarding, it gave him the impression that the bus must have hit point D at quite a speed.
- n. He concluded:-
 - i) that the reconstruction shows the driver probably could have stopped if he had braked immediately;
 - ii) that the bus was probably travelling faster than 95km/h; and
 - iii) The driver did not react immediately or that the driver took an abnormally long perception – reaction time.

- o. Under cross examination he conceded that he knew nothing about braking systems and was an applied mathematician, not an expert on braking systems of any vehicle. He is not a mechanical engineer.
- p. According to him if he heard the bang before he saw the burst tyre then he would have had a greater braking distance.
- q. The driver did not react immediately or took an abnormally long perception reaction time.
- r. He agreed with Mr Grobbelaar's summary that upon a sudden deflation of the front tyre the steering geometry of the vehicle changes, he just took issue with the term drastically but stated that he would agree that that axle will drop and that the radius of the one wheel will decrease because of the deflated tyre.
- s. He also agreed that the dropping of the axle has the effect of increasing the steering offset, thereby increasing the moment arm about the king pin axis of the front steering seemingly in a clockwise direction.
- t. He agreed that you would have a pull on the steering wheel to the right and that the bus would strongly pull to the right.
- u. He disagreed that the steering wheel would have to be pulled towards the left to at least 90 degrees to get the bus back on track because he had not seen the bus but it would need to be pulled in an anti-clockwise direction to correct the pull towards the right.
- v. He also agreed that the bigger the load the bigger the force on the steering demands on the right would be.
- w. He agrees with Mr Grobbelaar that the front tyre of the coach probably burst or deflated suddenly just prior to a point at least 177 metres prior to the point where the coach came to rest.
- x. He stated that the marks were not visible on the photographs but agreed that the bespoke time mark displays a wavy pattern and the curve typically left by a loaded deflated right front tyre of a coach in motion.
- y. He agreed with Mr Grobbelaar that the driver would have experienced a strong pull to the right but disagreed that it would be difficult to correct since these buses all

have power assisted steering so he has no idea why Mr Grobbelaar would say it would be so difficult.

- z. It was put to him that Mr Grobbelaar made no mention of braking in his report.
- aa. His view was that with having a distance of at least 130 metres one would certainly try to slow the speed to get the vehicle to a standstill so he does not understand why he does not consider the effect of braking.
- bb. The driver also did not make any mention of braking in his statement.
- cc. Mr Grobbelaar was of the view that the 1,5 seconds reaction time should be greater or longer in circumstances where there is an audible stimulus or a movement stimulus, that is the bus sagging to one side.
- dd. Professor Dreyer disagreed saying that in a visual situation you must first observe, then perceive it as a danger, then make a decision what you must do and then you react. So quite a bit of time to see it and to identify it as a danger. Whereas if you have a sound right underneath you and the movement you do not have to look at it, it is there and you react almost immediately to it and it would therefore be shorter.
- ee. He is however unaware of any tests made for this type of situation where you hear a sound and then you react, so this is merely his opinion.
- ff. He agreed with Mr Grobbelaar that where there is a sudden deflation of the right front tyre there is an increase in rolling resistance and a pull to the right.
- gg. He agreed that the braking effect on a flat tyre will be less effective than on the other tyres and there would be a sudden imbalance in the braking ability between the two sides of the front axle and that the moment you brake due to the bigger wheels the vehicle veers left.
- hh. He agreed that if you have an over-application of the brakes the vehicle will swerve or veer to the left because you have introduced a situation of instability because you initially had a movement to the right and now you have a sudden movement to the left.
- ii. He agreed that in the case of very hard braking, stamping on the brake paddle would result in instability and a loss of control because you would suddenly go to the left and have to pull to the right and that would lead to a corkscrew motion.

- jj. He agreed with Mr Grobbelaar's statement to the effect that it is well known that braking immediately after a blow-out of a front tyre is extremely hazardous but qualified it to say that if you stamp on your brakes you are asking for trouble in other words you must handle the situation very carefully.
- kk. He stated that he had read books where it is more difficult to handle trucks and buses but it would depend on the steering system of the vehicle and how up to date it is whether it has power-assisted steering or an anti-lock braking system that would prevent the wheels sliding for instance, it makes the vehicle more stable and you get a higher friction co-efficient through ABS.
- ll. Mr Grobbelaar stated that it would be most appropriate for the driver to concentrate his efforts on keeping the bus under control while avoiding braking. He disagreed saying that the driver should have braked. He stated that it was a natural reaction to a hazard to lift your foot off the accelerator. Your hands and feet do different things.
- mm. He was also unsure of what Grobbelaar meant by bucking, shaking and pulling. The tracks left as they appear in photo 1 do not appear to be consistent with bucking and shaking or pulling but appear to go pretty straight until the second dot and then it starts to swerve away. It does not seem to him that the driver had great trouble controlling the wheel because it goes absolutely straight. In his opinion it would be easier to control a bus where there is a deflated tyre at lower speeds as opposed to higher speeds because the forces acting then on the bus is smaller.
- nn. He persisted under cross examination that it is an absolute must that a person must brake stating that in general if anything goes wrong with a car you can try to stop as soon as possible. A braking action is a very natural thing to do and the danger for an inexperienced driver is to overdo it. According to him in a situation such as the present he would slow the vehicle down and try to keep it on the road.
- oo. He was asked whether it would be unreasonable if the driver decides when he realizes he has a blow-out on his front wheel that he is not touching on his brakes but just going to try and keep going in a straight line until the vehicle comes to a standstill. His response was that he would definitely keep his speed down and brake.

- pp. He agreed that in his calculation he had failed to take into account the steering of the vehicle and the wheel that had been deflated or blown out, that is, a corkscrew motion etc. that is at what rate this driver could have applied his brakes without inducing corkscrew motion.
- qq. He stated he could not calculate how far the pedal must be pressed down to ensure that it does not go out of control, you would need to do that experimentally by conducting braking tests.
- rr. It was put to him that Mr Grobbelaar has done experiments on buses in comparable situations where he had started off with a flat tyre to get an idea of the amount of pull on the steering wheel whereas professor Dreyer had never done such an experiment. He agreed with Mr Grobbelaar that initially it would have been more appropriate for a driver to apply a co-efficient of .1 or .2 rather than .4.
- ss. According to him the driver should increase the co-efficient all the time touching the brakes and slowly increasing his braking keeping the car under control. An experienced driver with 5 seconds could definitely start braking and he could start slowly increase his braking until he can bring the bus to a stop although he cannot say exactly at what point he should have exercised what kind of braking on the road.
- tt. It was put to him that the buckling of the flat wheel could give feedback to the steering in the hands of the driver and that this is what Mr Grobbelaar refers to as the shaking and bucking of the steering wheel that the driver would feel and it would cause the vehicle to bump up and down.
- uu. His response was that he does not know how much would be felt at the steering wheel because it depends on the steering system of the bus but it is possible that they could have been some movement of the steering wheel but he does not know how much. The shock absorbers would dampen the up and down motion of the wheel.
- vv. Under re-examination he confirmed that since the bus was travelling on an incline it would help the braking action of the bus. He was told that this bus was equipped with ABS and EBS electronic braking systems as well.
- ww. That concluded the Plaintiffs case.

9 The Defendant's first witness was the driver, the First Defendant, **Vuyani Vincent Nyingwa**. His testimony was briefly as follows:-

- a) He has a code 14 license which entitles him to drive heavy articulated vehicles
- b) He was not the driver from Cape Town to Beaufort West.
- c) He was asleep at that time having driven to Cape Town from Beaufort West the previous night.
- d) He took over in Beaufort West.
- e) The accident occurred approximately 65 km out of Beaufort West on the road between Beaufort West and Aberdeen.
- f) The right front wheel on the bus got a puncture and he became aware of it when he heard a sound like a gunshot and the steering wheel could not control the bus.
- g) He could feel some negative pulls on the steering wheel, it was pulling him "that way and that way, the bus was dancing and jiving all over the road and he could not control it.
- h) He demonstrated that the steering wheel moved in a clockwise and then in an anti clockwise direction.
- i) His body was not moving because he had his safety belt on. It was only his arms that were moving and the bus was jumping up and down and inclined to lie on the side of it.
- j) He could not control it, it was driving all over the road and then it slanted to the right side and pulled him strongly to the right and he tried to turn it to the left but it continued to drive to the right and it hit the rock surface.
- k) He stated that in the first instance he did not press the brakes because he knew that if he applied brakes a bus will pull you to a point right outside the road because he was told by his company that if a bus had a wheel problem like a puncture never touch the brakes because that will cause more problems.
- l) He had 4 tyre bursts, the bus hit against the side of the road on one occasion but there were no other serious accidents.
- m) He did not brake to stop the bus he controlled the bus using the steering wheel only, on these occasions.

- n) He knew what a tyre burst sounded like and on the previous occasion he was travelling at 60 to 70 km per hour and it was raining when he hit the side of the road just outside town.
- o) He knew that when he hears the noise he and his passengers and the bus are in danger and that he must bring it to a stop safely and that it is better for him to be travelling slowly rather than very fast with a burst tyre.
- p) He slept in the bus from about 2 – 3 am that morning until they got to Beaufort West.
- q) He stated that according to his experience if you press the brakes the bus will definitely leave the road but concedes that he had never pressed the brakes before when he had a blowout but he had seen such situations on the road where the driver would put on the brakes and the bus would pull out of the road immediately.
- r) On several occasions they were accidents caused by a tyre and invariably it is when the driver had pressed his brakes.
- s) He accepted that he did not know how fast those drivers were going or how hard the driver braked.
- t) He agreed that he managed keeping the vehicle under control for quite a long distance. He was unsure whether if he had braked and slowed down immediately the vehicle would have stopped pointing straight down the road because he would not be sure of the pressure he was exerting on the brake pedal in the midst of such a problematic situation because he may put on a lot of pressure and the bus will pull outside the road.
- u) And all the other occasions he was involved in such situations he came out on top of the situation because he did not apply brakes.
- v) He conceded that it was easier to control a vehicle at a lower speed and that is a good reason to slow down.
- w) He indicated that he would first get the vehicle under control and when then he is sure that it is completely under his control then he would start to use the brake system to bring the vehicle to a stop.
- x) He did do that on this occasion but he did it very late when the bus had already reached the ditch he only braked when the bus had already reached the ditch.

- y) He accepted that he saw that just using the steering wheel was not working and he did apply brakes but it was too late.
 - z) He conceded that he knew that it would be safer to slow the vehicle down but he applied brakes late and the bus had already entered the ditch.
 - aa) That concluded his testimony.
- 10 The Defendants' next witness was Mr Grobbelaar's whose testimony briefly was to the effect was that:-
- a) He is a mechanical engineer with almost 26 years of experience in accident reconstruction.
 - b) He used photographs pertaining to this accident and visited the scene and took measurements. He saw the marks that the police made on the scene depicting where the tyre marks commenced and where the debris ended.
 - c) He testified inter alia that the bus has a front wheel drive which as a result of the additional resistance caused by the blow out would cause the wheel to pull to the right.
 - d) According to him the axle of the bus is horizontal under normal circumstances with both sides touching the surface however when there is a tyre burst the right edge is closer to the road surface and exerts greater force which is shifted to the outside of the tyre increasing the force and distance and pulls to the right and this is why front wheel tyre bursts is so dangerous.
 - e) According to him the whole steering system is impacted upon by the tyre burst including the steering wheel which he has to counter by pulling to the left which would be difficult considering the speed and load. He had done a test at low speed in an empty bus and he had to turn the steering wheel 80 to 90 degrees before the vehicle would steer in a straight line, this was an old Putco Bus approximately 10 years ago.
 - f) According to him it is incorrect to brake when you have a blow out because the vehicle will then steer dramatically in the other direction.
 - g) If the brakes are applied slowly there is minor effect whereas hard braking will have a greater effect and a co-efficient of 0.4 will be harsh braking resulting in

- passengers hurtling forward and if there is no ABS this could result in the wheels locking.
- h) He agreed with Professor Dreyer that under normal circumstances the driver could have braked but in this case the driver was confronted with many inputs, the right front wheel cannot give you a 0,4 co-efficient, the bus is pulling to the right and the driver is trying to pull away with all his might, the tyre is folding up, the wheel is bouncing up and down to the chassis, the tyre is also causing a shaking of the bus, the bus has dropped to an angle.
 - i) All these factors play a drastic role because of all this movement of the bus underneath, you may not even be able to depress the brakes.
 - j) According to him the first thing to do is to get the vehicle under control, do not hit the brakes immediately because it changes the dynamics of the vehicle drastically. If you were to apply brakes it may be very gentle if you have a resistance of 0,15 apply braking of around 0,15 or else if you have more than 0,15 you would have a pull to the left.
 - k) According to him the driver had 5 seconds to brake, he would have to apply brakes gently.
 - l) To him it would be impossible to start below the average and increase above average to get to the average and because of the tyre burst it is highly improbable that you could achieve 0,4.
 - m) According to him the heavier buses are fitted with ABS and EBS that increase efficiency and safety and prevent skidding in a sudden stop.
 - n) He confirmed that his previous test was done on a Putco bus approximately 10 – 12 years ago and he did not use the brakes on that test so he did not test what the brakes would do.
 - o) He confirmed that the pull would be same because the steering geometry had not changed but the braking has.
 - p) He confirmed that he has not done the tests in terms of braking – EBS would distribute the braking to the rear where it is needed, it would try to balance between left and right and from front to back.

- q) The braking system is designed to get the vehicle to brake optimally, it optimizes safety.
- r) He however stated that the braking systems are not designed for burst tyre but for changes in road surfaces.
- s) There is no manual that says this would enhance your ability to control the bus if the tyre bursts or that it improves the stability of the bus if it is fitted with ABS.
- t) He conceded that theoretically applying gentle braking could stop the bus but it is difficult to apply gentle co-efficient when the driver is confronted with:
 - i) tyre pulling to right;
 - ii) bouncing up and down;
 - iii) steering wheel bucking up and down;
 - iv) he cannot sit, does not have his heel on the floor, the brake pedal bouncing up and down, impossible to balance it; and
 - v) regain control.
- u) There are too many things happening to the bus.
- v) He conceded that a bus is easier to control at a lower speed and that the consequences would be far less severe for the passengers at a lower speed or had the driver braked earlier before hitting the rock surface.
- w) He stated that people are generally taught not to brake but he cannot comment on how this vehicle would have braked.
- x) He re-iterated that theoretically braking would have brought the vehicle to a stop.
- y) According to him when there is a tyre burst the right front wheel would want to lock, would cause ABS to come into action and it would come into play if you tried to maintain 0,4 and balance the two out as the braking co-efficient would increase.
- z) According to him one would react faster to a visual stimulus than to a sound stimulus because with a visual stimulus you would see something immediately and know the threat whereas with an audible stimulus you have to interpret what it means and where it is coming from in order to identify the stimulus, what is happening so one would probably take longer with audible stimulus because you have to determine what it is and what you have to do with it.

- 11 That concluded his testimony and the Defendant's case.
- 12 The witnesses in this case were all reasonably good credible witnesses and there is no need to evaluate their testimony, as the issue here cannot be determined having recourse to the credibility of the witnesses.
- 13 There was no argument on the issue of whether or not there was a tyre burst and that the driver found himself in a situation that can be described as a sudden emergency. I accordingly accept that the driver's version is correct with regard to being faced with a sudden emergency problem of a sudden blow-out of his right front tyre.
- 14 The only issue accordingly is whether or not the driver's response to the sudden emergency constituted negligence as alleged by the Plaintiff or was in keeping with that of a reasonable driver with similar experience and expertise.
- 15 A brief examination of the testimony and the relevant legal position is necessary to determine whether or not the Plaintiff had discharged the onus resting upon him to establish negligence.
- 16 It has been conceded that the Plaintiff's expert is not a mechanical engineer and on his own version is not an expert on braking systems.
- 17 His testimony was nonetheless helpful and there appeared to be consensus in certain respects between his testimony and that of the Defendant's expert. Mr Grobbelaar who is a mechanical engineer and has a wealth of experience in accident reconstructions.
- 18 Both the Plaintiff and his brother were seated at the back of the vehicle and were not licensed drivers. They did not have sight of the speedometer and accordingly no reliance can be placed upon their testimony to the effect that the driver was speeding prior to the collision.
- 19 Professor Dreyer also was unable to provide any cogent reasons for his statement that the driver must have been speeding.
- 20 There is also no cogent evidence that the vehicle was overloaded or that the driver failed to keep a proper lookout, since a tyre burst was a sudden occurrence.
- 21 Mr Grobbelaar despite stating that the driver's decision not to brake in circumstances where there has been a tyre blow-out, nonetheless conceded:-

- 21.1 That the vehicle would have been easier to control if the vehicle was slowed down.
 - 21.2 That had the driver commenced braking at a braking co-efficient of 0.15 this would have counteracted the effects of the deflated front tyre and kept the vehicle on a more or less straight path and brought the vehicle to a safe stop if he had braked gradually.
 - 21.3 That a collision at a lower speed would have reduced the force of the impact and possibly the consequences for the passengers.
- 22 The driver also conceded:-
- 22.1 That the vehicle would have been easier to control at a lower speed and that is a good reason to slow down.
 - 22.2 The driver further accepted that he saw that just using the steering was not working and he did apply brakes but it was too late. The bus had already entered the ditch.
 - 22.3 That he knew that it would be safer to slow the vehicle down but he applied brakes too late.
- 23 The driver had personal experience with blow-outs and accordingly knew what it sounded like. Mr Grobbelaar's theory with regard to it probably taking longer for a reasonable person to react to an audible stimulus accordingly would not apply to a reasonable driver in this driver's position who knew what it was when he heard the sounds as he had experienced it previously, so it was not unknown. He would be able to react a lot quicker than a driver who never experienced a blow-out previously in the circumstances and this factor may well mean that his visual perception reaction time would possibly be lesser than the 1.5 seconds or ought to be considering his previous experience.
- 24 In one of this driver's previous experiences with a blow-out, not applying brakes even at much lower speeds had resulted in a collision although not of this magnitude.
- 25 I accept that whether or not the driver made the correct election in the circumstances is not the inquiry but rather what a reasonable driver faced with the same situation would have done.

26 It is evident from the authorities that, in applying the reasonable person test to the conduct of a driver of a motor vehicle one does not use an ex post facto approach. The applicable test is how the reasonable person would have acted under the same specific conditions prevailing at the time of the accident – as experienced by the driver of the motor vehicle whose conduct is being scrutinized.

27 See in this regard:-

- Delictual liability¹
- Cooper v Armstrong²
- Steward v Bresler³
- Minister of Defence v African Guarantee and Indemnity Co Ltd⁴

28 A driver is permitted to make errors of judgment if a reasonable driver could have made the same error in the circumstances according to inter alia:-

- R v Du Toit⁵
- S v Marik⁶
- Griffiths v Netherlands Insurance Co of SA Ltd⁷

29 In **Brown v Hunt**⁸ it was held that:-

“In determining whether the actor is to be excused for an error of judgment in a (sudden) emergency, importance is to be attached to the fact that many activities require that those engaged in them shall have such natural aptitude or special training as to give them the ability to cope with those dangerous situations which are likely to arise in the course of such activities,”

30 In **RAF v Grobler**⁹ it was held:-

“when a person is confronted with a sudden emergency not of his own doing, it is wrong to examine meticulously the options taken by him to avoid the accident, in light of the after acquired knowledge, and to hold that because he took the wrong option, he was negligent the test is whether the Respondent’s conduct falls short of what a reasonable person would have done in the same circumstances.”

¹ (cooper at 91)

² (1939 OPD 140 at 148)

³ (1951 (3) SA 942 (c) at 950 H)

⁴ (1943 AD 141 at 150).

⁵ (1947 (3) SA 141 (A))

⁶ (1969 (2) SA 231 (N))

⁷ (1976 (4) SA 691 (A))

⁸ (1953 (2) SA 540 (A) at 546

⁹ (2007) JOL 20015 (SCA)

31 In **Signals Transport (Pty) Ltd v Catholic Diocese, Port Elizabeth**¹⁰ the court assessed a reasonable reaction time in a sudden emergency situation to be one and a half seconds.

32 In **Crossroads Distributions (Pty) Ltd t/a Jowells Transport v Peters and another**¹¹ Yekiso J held that the driver of a heavy commercial vehicle given the emergency situation, was not negligent. He applied the principle of sudden emergency which holds that when a driver encounters an unexpected emergency he cannot be found to be negligent if he chooses an option which, after the event, was proven to be wrong as long as such driver **takes the best possible course of action to avoid the collision.**

33 In **Madyosi and Another v Sa Eagle Insurance co. Ltd**¹²

“The trial judge, Comrie AJ, found that the driver was not negligent, for the following reasons¹³:-

“ There was no expert evidence that Mpendukana should have handled the emergency, when it arose, differently and in particular that he should have braked. Mpendukana held a public driver’s licence and he had received driving instruction from his employers. He testified, as I have mentioned, that if he had applied his brakes, the bus would have capsized. He could not apply his handbrake (which operated on the rear wheels) because that would meant removing one hand from the steering wheel, which in turn would have ensured a complete loss of control. He did not think of applying his foot brakes gently because there was pandemonium on the bus and his priority was to regain and retain control through the steering wheel.”

This finding was confirmed on appeal. Milne JA added:-

“It is a known fact that the bus left the road and overturned because the tyre burst. The bursting of the tyre is not a neutral fact in relation to the negligence pleaded by the appellants. It explains why the bus left the road and overturned. True, it is not by itself inconsistent with a negligent failure to maintain the tyre, but no such negligence was pleaded. Had the only evidence relating to negligence been that the bus left the road and overturned that would, in the absence of anything else, have justified an inference that the driver failed to keep the bus under proper control. The fact that the tyre burst, however, prevents that inference being drawn from the mere fact of the occurrence.””

¹⁰ (2005) JOL 15449 (C)

¹¹ (2004) JOL 13205 (c)

¹² (1989 (3) SA 178 C) confirmed on appeal 1990 (3) SA 445

¹³ CPD Judgment p 181

- 34 In this case one has to determine whether or not it can be said that the driver took the best possible course of action to avoid the collision.
- 35 Mr Grobbelaar's testimony to the effect that there was too much happening at the time for the driver to be able to apply the brakes appropriately does not appear to be borne out by the testimony of the driver who stated that the steering wheel was going from side to side as were his arms, he did not say anything about his legs lifting off the pedals or experiencing any bucking. He, from his testimony appears to have had time to consider his options and chose not to brake because of what he was told by his previous employer and what he had seen in respect of other accidents, **not** because he was unable to brake.
- 36 He initially made a choice not to brake and then when it was too late decided to brake.
- 37 Mr Grobbelaar's testimony appears to indicate that it was the best decision in the circumstances when dealing with a situation as was experienced by this driver.
- 38 He however conceded that the vehicle would have been easier to control at lower speeds and theoretically could have been stopped if the brakes were applied.
- 39 The driver did not state that there was pandemonium on the bus or that he lost control through the steering wheel. He merely stated that his arms were going from side to side whilst holding the steering wheel and moved to the right.
- 40 The driver was operating a bus which was equipped with a power steering, ABS and EBS braking.
- 41 The driver conceded that it would have been easier to operate the bus at lower speed and so did Mr Grobbelaar.
- 42 In my view a reasonable driver of the driver's years of experience would have considered slowing down, and accordingly the driver did not take the best possible course of action to avoid the collision which would have been taken by a reasonable driver of this driver's years of experience.
- 43 A reasonable driver travelling on an incline would have applied brakes even in a situation of a blow-out of a front tyre as in the circumstances of this case.
- 44 In this case the driver did apply brakes on his version but he applied it too late.

- 45 It is reasonable to expect that a reasonable experienced driver would not slam on the brakes in that situation but apply brakes gently to avoid the risk of a corkscrew motion or the steering turning and the available braking systems would also assist in balancing out the effect of the brakes.
- 46 There is accordingly a likelihood that if he had applied the brakes timeously he would have averted the collision or at least minimized the effect it had because he would have been travelling slower, or helped him to get the vehicle under control.
- 47 It is unlikely that the driver would have slammed on the brakes or there would have been an over-application of brakes in this case in circumstances where the driver was aware of risks of overturning caused by braking, accordingly a reasonable driver in his position would not have slammed his brakes but would have braked gently.
- 48 I would accept that his visual perception time of response would be the norm of 1.5 seconds; I am not inclined to accept, in the circumstances of this case, where the driver has experienced blow-outs previously, that it would take him longer to react as stated by Mr Grobbelaar. I am also not disposed to consider that it would be a shorter time as stated by Professor Dreyer because this opinion is not supported by any testing or authorities, although it is likely that it would have been less for someone who was aware of what the sound meant.
- 49 Even with the 1.5 seconds visualization, perception and re-action time, the chances of the vehicle being brought to a standstill prior to the collision with approximately 5 seconds to react by braking in the prevailing circumstances appears to be reasonable or at the very least the effects of the collision would have been minimized especially having regard to Mr Grobbelaar's concession and that of the driver.
- 50 I accept that the Plaintiff expert was not an expert in the field that he was called to testify in however the Defendant's expert accepted:-
- a) That the vehicle would have stopped earlier if brakes were applied earlier.
 - b) That the driver conceded that he applied brakes too late, so despite his training, he nonetheless wanted to apply brakes.
 - c) That neither expert had conducted tests on this particular bus which was a modern bus fitted with ABS, EBS and had power steering

- d) That there was no evidence that the vehicle was veering off the road from side to side and that the driver had other things to concern himself with and could not think of braking.

51 I am satisfied that the Plaintiff has established:-

- a) That the First Defendant failed to exercise proper control of the vehicle by failing to slow down sufficiently to bring the vehicle under control.
- b) That the First Defendant failed to brake timeously in circumstances where a reasonable prudent driver would have braked from the outset to bring the vehicle under control by slowing it down and eventually bringing it to a standstill.
- c) That the First Defendant's failure to do so was negligent in the prevailing circumstances as it fell short of what a reasonable driver would have done in the prevailing circumstances.

52 SUMMARY

- a) I re-iterate that having regard to the concessions made by both Mr Grobbelaar and the driver and taking due cognizance of the reasonable man test and the trite legal position in this regard I am of the view that a reasonable driver in the position of this driver would have applied brakes and accordingly the driver's failure to do so in the circumstances was negligent.
- b) There was also a concession by Mr Grobbelaar that the bus would have been easier to control at a lower speed.
- c) Accordingly the driver, if he had applied brakes, he would have been in a better position to bring the vehicle under control.
- d) A reasonable driver in the circumstances would have applied brakes and attempted to use the brakes as a means to assist in bringing the vehicle under control particularly in circumstances where the vehicle is equipped with ABS and EBS and power steering and was travelling on an incline.
- e) The Plaintiff has accordingly discharged the onus resting upon him to establish the negligence of the driver of the vehicle, on the grounds of failing to brake timeously and failing to keep the vehicle under control.

53 It appears from the Rule 37 minutes that it has been accepted that the First Defendant was employed by the Third Defendant and that the Third Defendant owned the bus.

54 It also appeared to be accepted that the accident was caused during the course and scope of the First Defendant's employment with the Third Defendant.

55 The Third Defendant is accordingly vicariously liable for the wrongdoing of the First Defendant.

56 I have accepted that Professor Dreyer although an esteemed and knowledgeable Applied Mathematician unfortunately lacks the expertise or specialized knowledge of the braking or steering systems of vehicles in general and of this bus in particular, as he is not a mechanical engineer.

57 I accordingly have to consider whether the costs of Professor Dreyer ought to be allowed in the circumstances of this case.

58 In **Gentiruco A G v Firestone SA (Pty) Ltd**¹⁴

"the true and practical test of the admissibility of the opinion of a skilled witness is whether or not the court can receive "appreciable help" from that witness on that particular issue"

59 In **Ruto Flour Mills Ltd v Adels**¹⁵ it was inter alia held that the opinion of an expert is received because and whenever his skill is greater than that of the court.

60 Professor Dreyer's testimony whilst useful and to an extent was supported by Mr Grobbelaar unfortunately due to his lack of expertise in this relevant field cannot be said to be of appreciable help to the court and accordingly an order that the Plaintiff be entitled to claim his costs cannot be made in the circumstances of this case.

61 ORDER

61.1 In the circumstances I make the following order:-

- i. The Third Defendant is held liable to compensate the Plaintiffs for their proven or agreed damages.
- ii. The Third Defendant is directed to pay to the Plaintiffs, the Plaintiff's costs of suit inclusive of the travelling and accommodation expenses of the Plaintiff Sisa

¹⁴ (1972 (1) SA 589 (A) 616 H

¹⁵ 1958 (4) SA 235 (T)

Zihlwele and his brother Luyolo Zihlwele who are declared to be necessary witnesses.

F. B. A DAWOOD
JUDGE OF THE HIGH COURT

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