

IN THE HIGH COURT OF KWAZULU-NATAL, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

CASE NO. 8541/2008

In the matter between:

A SCROOBY

PLAINTIFF

and

UMZIMKULU PLANTERS

DEFENDANT

J U D G M E N T

BALTON J

[1] The plaintiff sued the defendants for damages to the plaintiff's motor vehicle in an amount of R380 511,53, interest and costs. The matter proceeded on liability only.

[2] A first and second third party were joined in the proceedings. The parties agreed that the matter will proceed between the plaintiff and defendant only and that the costs for the third party application will follow in the outcome of this case.

[3] It is common cause or not in dispute between the parties that:

- (i) On 20 December 2006, a collision occurred at the N2 highway near Ezinqoleni, Harding, between the plaintiff's motor vehicle, DMH958EC, a white 8-ton rigid truck 2006 model FAW13160 FL ("the FAW truck"), driven by L Lugwali, and the defendant's vehicle, NT 6301, a 1997

model Mercedes Benz 2535 Power Liner truck, with two trailers NPS 54914 and NPS 54915 ("the Mercedes Benz truck"), driven by W M Shangase.

- (ii) Prior to the collision the FAW truck was travelling in a southerly direction towards Port Shepstone and the Mercedes Benz truck was travelling in a northerly direction towards Harding.
- (iii) The Mercedes Benz truck's trailers were carrying metal pressings for lawn mower bodies.
- (iv) The road surface was wet at the time of the collision.
- (v) Both the drivers who were acting within the cause and scope of their employment with the plaintiff and the defendant, respectively died as a result of the collision.
- (vi) Both vehicles were damaged beyond economical repair.

[4] The plaintiff alleges in its particulars of claim that the driver of the Mercedes Benz truck was negligent, *inter alia*, in that he changed lanes into the path of the oncoming FAW truck when it was not safe to do so.

[5] In the plea the defendant alleges that:

- (i) The driver of the FAW truck was negligent, *inter alia*, in that he caused or allowed his vehicle to encroach upon the incorrect side of the road and into the path of travel of the Mercedes Benz truck.
- (ii) He failed to keep his motor vehicle under proper control and thereby allowed it to encroach upon the incorrect side of the road and into the

path of travel of the FAW truck.

[6] In the counter-claim the defendant alleges that the plaintiff's driver was the sole cause of the collision and that the defendant suffered damages in an amount of R217 200,00.

[7] Wilma Badenhorst, a road accident reconstruction specialist, compiled a report¹ and testified on behalf of the plaintiff. Mr Gibb compiled an accident reconstruction and tachograph analysis report² and testified on behalf of the defendant.

[8] From the photographs, Badenhorst and Gibb's evidence, it is not in dispute:

(a) The FAW truck:

- (i) Sustained contact damage to its right front corner and side.
- (ii) Sheet metal and vehicle engine parts located at the right front and side experienced rearwards and inwards displacement.
- (iii) The right front corner of the low bin of the FAW truck sustained contact damage. The cab portion suffered right to left displacement relative to its lower bin portion. The right front rim and tyre became separated from its drum.

(b) The Mercedes Benz truck was damaged as follows:

1 Page 48 – 97 of Exhibit B.

2 Page 11 – 15 of Exhibit B.

- (i) The mid front, right front and front right hand side show extensive contact damage. The contact damage started in the vicinity of the mid front and extended toward and around the right front corner and down the front of the right hand side. Sheet metal and vehicle engine parts, situated at the right front and side experienced rearwards and sideways displacement in a left to right manner (that is outwards displacement).
- (ii) The cab as a whole experienced rearwards, as well as outwards displacement relative to its chassis. The right front door became lodged around the right front corner of its front first semi-trailer after it was ripped off.
- (iii) The rear panel of the front semi-trailer came into contact with the front panel of the rear semi-trailer.
- (iv) The front portion of the front semi-trailer twisted in a left to right direction relative to its rear portion. As a result of the impact the Mercedes Benz truck experienced a clockwise rotation around its fifth wheel.

[9] Both Badenhorst and Gibb were unable to deduce the speed at which the vehicles were travelling and agree that the first contact was between the right front of the two vehicles.

[10] It is common cause that there are brake marks of approximately 19 metres on the Mercedes Benz's truck lane of travel.

[11] The issue for determination is which driver caused the collision.

[12] Badenhorst testified that her observations are based on the damage to the vehicles, the road marks and the photographs. She did an inspection-in-loco on 15 January 2007. Tyre collision scrape marks and road scars were still visible. The skid marks were no longer visible.

[13] Badenhorst stated that:

- (i) Due to the damage to the FAW truck she was able to determine the direction of the force and impact.
- (ii) The Mercedes Benz truck was heavier than the FAW truck and the collision had a greater effect on the FAW truck.

[14] Badenhorst stated that the final rest positions of the vehicles as she noted from the accident report form, are:

- (i) The FAW truck came to rest mainly off the road surface on the eastern side of the road with its front facing in the original direction of travel. The rear portion of the FAW truck came to rest on or against an uphill embankment.
- (ii) During the site inspection, marks on the gravel/grass surface of the embankment on the eastern side of the road, confirmed the final rest position of the FAW truck as indicated in the accident report form.
- (iii) The Mercedes Benz truck came to rest with its front portion on the southbound lane, that is in the FAW truck's lane of travel.

[15] She concluded that:

- (i) The physical evidence on the road in the form of tyre and scrape marks, indicate that the area of impact was in the FAW truck's lane of travel.
- (ii) When considering the location and orientation of the FAW truck's marks, it is clear that the FAW truck was pushed back by the Mercedes Benz truck.
- (iii) Considering the angle between the two vehicles and the marks on the road surface, it is clear that the Mercedes Benz truck drifted/moved over into the FAW truck's lane of travel.
- (iv) The driver of the FAW truck would not have been able to avoid the collision due to the geometric design of the road and the limited space available.

[16] In cross-examination she confirmed that the scrape marks on the road were a few millimetres deep and were caused by force of the metal surface on the road. The marks were made by extreme forces, it could not have been caused by dragging. Exhibit C indicates that the white cement patch is in line with the skid marks. The marks were caused by the FAW truck being pushed by great force or impact.

[17] She was unable to say whether the FAW truck pushed the Mercedes Benz truck door backwards and onto the trailer, because the right rear portion of the cab of the Mercedes Benz truck came into contact with the front of the FAW truck.

[18] Mr Gibb testified that:

- (i) He attended the scene of the accident on 20 December 2006.
- (ii) The Mercedes Benz truck was in a lay-bye on the north eastern side of the road facing Port Shepstone after the collision.
- (iii) The South African Police ("the SAP") made paint marks on the road indicating the final position of the tyres of the Mercedes Benz truck. The marks around the tyres of the rear trailer of the Mercedes Benz truck were in the left lane with the right wheel to the left of the centre of the line.
- (iv) The rear tyres of the front trailer of the Mercedes Benz truck were slightly more to the right, but mainly in the Harding bound lane.
- (v) The right rear side tyres of the Mercedes Benz truck appeared to be on the centre line with a circle and an "X" painted on the Port Shepstone bound lane to the right of the yellow line. The SAP usually indicates the point of impact with a circle and an "X".
- (vi) The road was wet and covered with cement in order to absorb oil spillage and it was difficult to find further marks. Tyre impact marks were obscured by the cement on the road surface.
- (vii) He does not agree with the SAP's deduction and presumes that the "X" was made close to the right front of the Mercedes Benz truck.
- (viii) On 21 December 2006, he was given photographs taken soon after the collision. He states two single brake marks of 19 metres long can be seen to the rear of the paint marks made by the SAP when positioning

the rear trailer's tyres of the Mercedes Benz truck after the collision.

- (ix) In his opinion, if the defendant's driver was travelling at 80 km/h (22.2 metres per second) and as the accepted reaction by the CSIR in an emergency situation is 1.5 seconds, he would have travelled about 22.2×1.5 , that is 33 metres before braking, giving a total distance of over 50 metres from where he saw the FAW truck approaching on the "wrong side of the road".
- (x) The FAW truck must have travelled for quite some distance on the south bound lane with the driver making no attempt to move into his lane.
- (xi) The Mercedes Benz truck's driver saw the oncoming vehicle and applied brakes reducing the speed greatly but a violent collision occurred with the extreme right side of both the cabs. The trailers remained almost straight proving that the Mercedes Benz truck was knocked sideways into the northbound lane.
- (xii) Judging from the damage, and the fact that the Mercedes Benz truck had braked hard for at least 19 metres, the FAW truck must have been travelling exceedingly fast to cause the first trailer of the Mercedes Benz truck to bend in the middle and the rigid truck to almost disintegrate.
- (xiii) The police only marked the position of the vehicles after the collision and not where they were immediately prior to the impact.
- (xiv) The Mercedes Benz truck must have been facing towards Harding at the time of the impact.
- xv) Due to the impact force being very high on the right front of the FAW

truck's cab, the velocity would have been reduced almost instantly to zero.

- xvi) The left side of the vehicle would have continued to move and pivot in a clock wise direction. This would have resulted in the rear of the vehicle landing at an angle on the grass bank.
- xvii) The Mercedes Benz truck would also have pivoted on the fifth wheel and the combination having a slightly heavier mass than the loaded 8-tonner would probably have moved forward a few metres whilst having been knocked to the right. This would account for the front trailer landing slightly over the centre line but with the truck/tractor being knocked into the oncoming traffic lane.
- xviii) The driver of the FAW truck encroached into the path of the Mercedes Benz truck and a collision occurred.

[19] It is common cause that the brake marks are on the Mercedes Benz truck's side of the road. These veer slightly to the centre of the road. The question arises as to why would the Mercedes Benz truck have braked and moved to the centre of the lane.

[20] In Badenhorst's opinion the Mercedes Benz truck was in the incorrect lane of travel. The rotation caused the Mercedes Benz truck to rotate clockwise from the area of impact, further into its incorrect lane of travel. The FAW truck moved out of the road because of the rotation and impact. She agreed that the Mercedes Benz driver would have braked hard and thus locked his

wheels and in those circumstances the driver had lost control.

[21] In Gibb's opinion the Mercedes Benz truck was on its right path of travel because of the skid marks. The skid marks starts on its correct side of the road and veers slightly to the centre lane between the markings, close to where the collision occurred. The area of impact is in the cement area.

[22] Gibb stated that the FAW truck must have been in the incorrect lane of travel thus causing the Mercedes Benz truck to brake. He was unable to substantiate this view with any reliable evidence. He was further unable to say why the Mercedes Benz truck braked. He agreed that it was common cause that immediately after the accident the Mercedes Benz truck rotated to the right.

[23] This Court is unable to accept Gibb's view that the Mercedes Benz truck must have braked because the FAW truck was in its path of travel. There are endless possibilities as to what could have caused the Mercedes Benz to brake.

[24] The marks clearly indicate that the Mercedes Benz truck moved towards the centre line. By the time of first impact, the vehicles were in the FAW truck's path of travel as explained by Badenhorst.

[25] This Court accepts Badenhorst's conclusion based on all the available

evidence that the Mercedes Benz truck entered the FAW truck's path of travel. On the probabilities, especially when regard is had to the skid marks extending to the centre of the lane, then it can safely be concluded that the Mercedes Benz truck moved into the FAW truck's path of travel. The reason why it did so is unknown. The reliable evidence is that the Mercedes Benz truck moved into the FAW truck's path of travel. There is no evidence to gainsay this.

[26] This Court is accordingly satisfied that the accident was caused by the driver of the Mercedes Benz truck.

[27] The following order is made:

- (i) The driver of the Mercedes Benz truck caused the collision on 20 December 2006.

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DATES OF TRIAL:

24, 25 AND 26 AUGUST 2011

JUDGMENT HANDED DOWN ON:

6 FEBRUARY 2012