

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

CASE NO. 3163/2010

In the matter between:

CHARLES WALLIE MCALISTER

PLAINTIFF

and

WAVELENGTHS 1188 C C

FIRST DEFENDANT

LEONARD THEMBA MAZEKA

SECOND DEFENDANT

JUDGMENT Delivered on 29 May 2012

SWAIN J

[1] The evidence presents two mutually destructive versions of how a collision occurred between a Volvo motor vehicle and an International horse, towing two trailers in a traffic circle in Pietermaritzburg, KwaZulu-Natal.

[2] It is common cause:

[2.1] That the collision took place within the confines of the

traffic circle, more commonly known as the Chatterton Road circle.

[2.2] That the truck entered the traffic circle from Armitage Road, having travelled from the direction of the Liberty Mall.

[2.3] That after the collision, the position of the vehicles was as depicted on the photographs appearing at page 30 of Exhibit "A".

[2.4] That the plaintiff was driving the Volvo motor vehicle and the second defendant was driving the truck, in the course and scope of his employment with the first defendant.

[3] I am only asked to determine the issue of liability at this stage and I accordingly made an order in terms of Rule 33 (4) separating the issues of liability and quantum at the outset of the hearing.

[4] At the outset it is appropriate to note the correct approach, when a court is faced with two mutually destructive versions.

It is clear that "where there are two mutually destructive versions the plaintiff can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not, the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities

favours the plaintiff, then the Court will accept his version as being probably true. If however, the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false"

National Employers General Insurance v Jagers

1984 (4) SA 437 (E) at 440 D – G

"It is only where a consideration of the probabilities fails to indicate where the truth probably lies, that recourse is had to an estimate of relative credibility apart from the probabilities".

Jagers supra at 441 A

[5] The evidence of the plaintiff was that he had been watching his son playing rugby at St. Charles College and left at approximately 09h40 to travel to his father's home in Chase Valley. The route he followed was by entering the N3 highway at the New England Road onramp, travelling along the N3 until he reached the Liberty Mall offramp, where he turned off and followed the road to the Chatterton Road traffic circle. He said he had chosen not to travel through town to his destination, because it was a Saturday morning and he believed there would be heavy traffic in the centre of town. By reference to an aerial photograph of the intersection (Exhibit "B") he indicated with an "X" and an arrow the direction in which he approached the traffic circle. He said he was in the left hand lane of the two lanes of traffic, available for vehicles to access the traffic circle. He had to stop at the entrance to the traffic circle, to allow

vehicles travelling in the circle to pass. At this stage he observed the vehicle driven by the second defendant, travelling behind his vehicle in the right hand lane. He described the vehicle as a large pantechnicon towing a flat bed trailer which was not loaded. As he pulled off to enter the circle, he was unable to say where the truck was because when he had last seen it, it was some way behind him. He then proceeded to travel around the circle in the outer lane, and when opposite the Chatterton Road entrance, at a point he marked "Y" on Exhibit "B", he felt an impact which he sensed was on the right hand side of the vehicle, near the front before the driver's door. He said he "sensed" the impact because it happened quickly and his vehicle was turned around sideways by the impact. He did not see the impact and the next thing his vehicle was in front of the truck. The position of the vehicles after the accident, was as depicted on the photographs appearing at page 30 of Exhibit "A". He marked this point as "Z" on Exhibit "B". After the collision he spoke to the second defendant, whilst the second defendant was seated inside the cab of the truck. He asked second defendant what he thought he was doing. Second defendant replied that he was travelling to the Town Bush Valley exit of the circle, which the plaintiff marked on Exhibit "B" with an "A". The second defendant, according to the plaintiff, added that, "did he not realise that the truck needed two lanes to turn?" which was the end of the conversation.

[6] When cross-examined he said that he did not notice whether the second defendant had entered the circle, at the same time as he did and did not notice the truck in the circle with him. He agreed that

on his version the second defendant must have been travelling in the inside lane of the circle, whilst he was travelling in the outer lane. He said he was not able to pin-point the exact location of the collision, but it was between points “Y” and “Z” on Exhibit “B”. He was unable to accurately estimate the distance his vehicle was pushed by the truck. When he was travelling around the circle there were other vehicles in the circle, but not close to his vehicle. When he entered the circle there were no vehicles travelling on his right hand side.

[7] The second defendant said that he was driving an International truck, towing two trailers, which were not loaded, travelling from his place of employment at Cato Ridge to Sappi at Howick, to fetch a load. He travelled along the N3 intending to travel along it to Howick. When he was near the Church Street off-ramp from the N3, he was phoned by his boss to tell him he must return to Cato Ridge, to fetch some documents. He accordingly left the N3 at the Liberty Mall off-ramp, with the intention of returning to Cato Ridge. He was then phoned by his boss to say he must not return, as he would come to the second defendant. By reference to an aerial photograph, Exhibit “C” of the circle, he marked the spot where he entered the circle as “X1” and where the collision occurred as “X2”. He entered the circle via the left lane proceeding into the outer lane of the circle. When asked by Mr. de Wet S C, who appeared for the defendants, whether there were any vehicles in the right hand lane, when he entered into the left lane, he replied in the affirmative. When asked by Mr. de Wet how many vehicles there were he said he only remembered a vehicle in front of him and not on his right hand side. When he was again

asked by Mr. de Wet whether there were vehicles on his right hand side or whether he did not remember this, he said there were, but he could not remember how many. The second defendant said he never changed lanes within the circle because he wanted to keep to the left. He saw a vehicle but he did not recall whether it was a Volvo. When he saw this vehicle it was at the point "X3" which he marked on Exhibit "C". At this stage his vehicle was at point "X4", which he marked on Exhibit "C". He said at this stage the vehicle was far away. He initially said that he had seen the Volvo entering the circle because the road proceeded into the circle. When I asked him again whether he had seen it enter the circle, he said he had not because it was not visible. He said that where he was seated in the truck, which was a right hand drive and elevated, he could not see vehicles entering the circle from the left hand side. He could see vehicles in front, but to see vehicles next to the truck he had to use his outside mirrors. He saw the vehicle approaching, thinking that the vehicle was supposed to stop. He then could not see it because it was on his left hand side, when he heard a noise from the front of the truck. He stopped the truck, looked in his mirrors and saw nothing so he proceeded. A vehicle approaching from the direction of the Showgrounds hooted at him and the driver pointed at the front of his truck. He stopped his truck and stood up in the cab and saw the plaintiff's vehicle in front of his truck, with the plaintiff inside it. He did not speak to the plaintiff, save that the plaintiff asked him after the collision to stop smoking because "they would be tested".

[8] When cross-examined and asked where he wished to exit the traffic circle, he indicated the Town Bush Valley Road with a point

marked "X5" on Exhibit "C". When he was asked why he then travelled in the outer lane, he replied it was because "the truck with the trailers, needed two lanes to turn". This was caused by the length of the truck and trailers. However, he denied ever saying this to the plaintiff after the collision. He stated it was necessary to travel in the outer lane, to negotiate the circle, otherwise the wheels of the trailer would travel over the centre island. He agreed, when I put it to him, that it was accordingly important to enter the circle in the left hand lane and if the circle was entered from the right hand lane, it would be necessary to turn into the left hand or outer lane, to negotiate the circle. He initially said that before the collision he was travelling at between 20 to 40 kilometres an hour, but when it was put to him that the distance between points "X1" (where he stopped) and point "X4" (where he was when he saw the plaintiff's vehicle) was a short distance, he revised his speed to between 10 to 20 kilometres per hour. He said that he believed the driver of the Volvo thought he would manage to enter the circle before him and agreed that his truck was visible to the plaintiff. He said that he had used the circle on a daily basis, as when he was in Victoria Road, he would turn into Chatterton Road and travel towards the traffic circle.

[9] What are the general probabilities against which the plaintiff's version must be weighed? Shorn of irrelevant details, the evidence reveals the following in respect of the two mutually destructive accounts, of how the collision occurred.

[10] On the plaintiff's version he entered the traffic circle at the same access point as the second defendant, and was travelling in the outer

line at the time of the collision. The truck of the second defendant was following him, before he entered the circle in the right hand approach lane. As he entered the circle he did not see where the second defendant's truck was. On the plaintiff's version, the second defendant must have entered the circle shortly after the plaintiff, with the plaintiff's vehicle alongside the cab of the second defendant, with the plaintiff's vehicle travelling in the outer lane and the second defendant's truck travelling in the inner lane. On the evidence of the second defendant, as he was on the right hand side of the truck, he would not have been able to see the plaintiff's vehicle in this position. The second defendant travelling in the inner lane would have been obliged to move into the outer lane, to negotiate the circle and if he did so at that moment, he would have collided with the right hand side of the plaintiff's vehicle, as described by the plaintiff, at a time when the plaintiff's vehicle was not visible to the second defendant.

[11] On the second defendant's version, the plaintiff must have seen the second defendant's truck approaching from the right hand side of the circle, as the plaintiff approached the circle down Chatterton Road. On the second defendant's version the plaintiff must have driven straight in front of his approaching truck, because he placed the point of collision, immediately adjacent to the entry of the left hand lane of Chatterton Road, into the circle.

[12] I regard it as grossly improbable that regard being had to the size of the second defendant's truck, the plaintiff would have

attempted to cut in front of it and enter the circle, in what can only be described as a suicidal manoeuvre. The second defendant's explanation that he believed the plaintiff thought he would manage to enter the circle before the second defendant, rings hollow when regard is had to the second defendant's evidence, that he did not see the plaintiff's vehicle enter the intersection, and the immediate proximity of the place where he placed the collision, to the point of entry from the direction he says the plaintiff approached.

[13] The version of the plaintiff is supported by the evidence of the second defendant, which vividly illustrates the limited visibility and awareness the second defendant had of the movements of vehicles around his truck, as he negotiated the circle. The second defendant was initially unaware that a collision had even occurred and that the plaintiff's vehicle was located across the front of his truck. When he heard the noise of the collision, he stopped, checked his rear view mirrors, and then carried on. It was only when another motorist alerted him as to the presence of the plaintiff's vehicle that he stopped, stood up in the cab and saw the plaintiff's vehicle in front of his truck. This evidence lends support to the plaintiff's version, that the second defendant could not have seen his vehicle in the outer lane before colliding with it.

[14] I am accordingly satisfied that the probabilities of the case favour the plaintiff's version and that the plaintiff's version is probably true.

[15] I am also satisfied of the truth of the plaintiff's version by a number of other aspects of the evidence. I find it of significance that when the second defendant was asked by Mr. Ender, who appeared for the plaintiff, to explain why he was travelling in the outer lane of the circle and put it to him that if he wished to exit the circle up Town Bush Road, he should have been travelling in the inner lane, second defendant answered that "the truck with the trailers needed two lanes to turn". This was the same explanation that the plaintiff, maintained the second defendant offered to him, after the collision, when the second defendant said to plaintiff, "did he not realise that the truck needed two lanes to turn?" Although the second defendant denied saying this to the plaintiff, I am satisfied that the explanation offered by the second defendant, as to why it was necessary for him to negotiate the circle in the outer lane, in Court and to the plaintiff immediately after the accident, is too cogent to be dismissed as mere coincidence. In fact this explanation lies at the heart of how the accident occurred, dictated as it was by a need on the part of the second defendant to negotiate the circle in the outer lane, after having initially entered the circle on the inner lane.

[16] The second defendant did not make a good impression upon me when giving evidence. His answers to questions which demanded a simple "yes" or "no" were often drawn out and convoluted. He also vacillated in his answers to simple issues, examples being his variation in the speed he was travelling at, when faced with the

short distance between the spot where his vehicle was when he saw the plaintiff's vehicle and where he had stopped, before entering the circle. In addition, he had difficulty when giving evidence in chief, as to whether there were vehicles on his right hand side whilst travelling in the circle. I was also not impressed by his demeanour, which was dominated by a contrived abundance of confidence in his version of events. By contrast, I was impressed by the demeanour of the plaintiff, and that he was not prepared to speculate upon how the accident happened and only recounted what he recalled, when he could have embellished his evidence to explain where the truck was travelling in the circle, immediately before the collision.

[17] I am accordingly satisfied that the plaintiff's version of how the collision occurred is true and that the second defendant's version is false.

[18] On the plaintiff's version of events there was no negligence on his part, which contributed to the collision, and consequently the defendant's claim of contributory negligence on the part of the plaintiff must fail.

[19] Counsel did not address me on the issue of an award of costs at this stage of the proceedings. The plaintiff has been successful in establishing liability on the part of the defendants, to compensate him for any damages he may subsequently prove to have suffered. The

amount claimed is R120,034.88 and when this amount is finally determined, whether by way of agreement, or by order of this Court, there may be some argument that a costs order in favour of the plaintiff, should not be on the High Court scale. In the event that this issue requires further argument, the costs order which I intend to make will be provisional at this stage.

I accordingly make the following order:

- a) It is declared that the first and second defendants are liable, jointly and severally, the one paying the other to be absolved, to compensate the plaintiff for any damages he may subsequently prove to have suffered as a consequence of a collision which occurred on 09 July 2007.
- b) The first and second defendants are ordered to pay the plaintiff's costs to date jointly and severally, the one paying the other to be absolved, plus V A T.
- c) The first and second defendants are ordered to pay interest on the aforesaid costs of suit at the rate of 15.5% per annum *a tempore mora*, from the date of the taxing master's *allocatur*, to date of final payment.
- d) The order for costs in paragraphs (b) and (c) above, will be provisional for the period until 08 June 2012,

and, up to that date, the parties have leave to file and serve a notice, recording their intention to submit further argument on the question of costs. Thereafter and by arrangement with the Registrar the matter may be set down for further argument on the issue of costs. Failing such notification, the order for costs will become final on 09 June 2012.

K. SWAIN J

Appearances /

Appearances:

For the Plaintiff : Mr. G. Ender

Instructed by : Mellows & De Swardt
Co Venn Nemeth & Hart Inc.
Pietermaritzburg

For the 1st & 2nd Defendants: Mr. A. de Wet S C

Instructed by : Botha & Sutherland
C/o Weakley Greene Parau
Pietermaritzburg

Date of Hearing : 23 May 2012

Date of Filing of Judgment : 29 May 2012